Will the European Union Directive on Equal Treatment Fulfill Its Purpose of Combating Age Discrimination in Employment?

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I. Introduction

On November 27, 2000, the Council of the European Union adopted Council Directive 2000/78/EC (the Framework Directive) in an effort "to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment."[1] The provisions of this Directive, which apply only to employment, are modeled on those of Council Directive 2000/43/EC adopted in June 2000. It applies to racial and ethnic origin discrimination not only in employment, but also in the context of social protection, including social security and healthcare, social advantages and education and in the context of access to goods and services, including housing, which are available to the public.[2]

Article 18 of Directive 2000/78/EC (the Directive) mandates that "the laws, regulations and administrative provisions necessary to comply with" the Directive must have been adopted by each Member State by December 2, 2003.[3] "In order to take account of particular conditions" in the various EU countries, however, article 18 contains an exception that allows "an additional period of 3 years from 2 December 2003" to implement the provisions of this Directive on age and disability discrimination.[4] Although implementation of the Directive, sometimes referred to as transposition, so far has been uneven at best—and in many cases noncompliant—of the fifteen original EU Member States, Belgium, Germany,

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1. Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation, 2000 O.J. (L 303) 16, *available at* http://www.tcd.ie/Secretary/Policies/pdf/eudirect.pdf [hereinafter The Directive].

2. Council Directive 2000/43/EC of June 29, 2000, Implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin, art. 3, 2000 O.J. (L 180) 24, *available at* http://europa.eu.int/eur-lex/pri/en/oj/dat/2000/l_180/l_18020000719en00220026.pdf.

3. The Directive, *supra* note 1, at 21.

4. *Id.*

the Netherlands, Sweden, and the United Kingdom have informed the European Commission, as required by article 18, that they intend to take advantage of the three-year extension for the age ground.[5] The ten new Member States that joined the EU on May 1, 2002, "have all notified their measures of transposition for both the anti-discrimination Directives.[6] In addition to what is perceived by many to be ineffective implementation of the Directive by some Member States,[7] the Directive itself, while a laudable pan-European attempt at addressing the age discrimination in employment that has been entrenched in the social fabric of the EU Member States since at least the end of World War II, contains broad exceptions to its prohibitions that, unless specifically limited during transposition into national laws and/or subsequently interpreted quite narrowly by the courts of each Member State, have the potential to eviscerate its carefully crafted protections.

The American experience with the Age Discrimination in Employment Act (the ADEA) may be informative on this point. Enacted in 1967 and in effect since early 1968, the ADEA, whose purpose is "to promote the employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment,"[8] has yielded mixed results at best. While the most blatant forms of age discrimination that impacted the workplace at the time of the ADEA's enactment, such as mandatory age-based retirement and age limitations in hiring, have largely been eliminated, more subtle forms of age discrimination have since evolved and remain entrenched in the workplace. Additionally, the results of over thirty-five years of enforcement efforts reflect a judicial reluctance to enforce the ADEA as vigorously as Title VII of the Civil Rights Act of 1964, which is directed at employment discrimination based on race, color, religion, sex, or national origin and which served as the model for the ADEA's substantive prohibitions. Thus, in light of the American experience with the ADEA, unless the EU Member States take a more aggressive approach to implementation of the Directive, it will provide much less protection against age discrimination in employment than workers in the EU have a right to expect from the promise of its provisions.

II. Directive 2000/78/EC and Comparable ADEA Provisions

A. Purpose

Article 6 of the Treaty on European Union (the EC Treaty) emphasizes that the EU is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law. Paragraph (7) of the Preamble of the Framework Directive acknowledges that among the objectives of the EC Treaty is the development of "a coordinated European strategy for employment to promote a skilled, trained and adaptable workforce."[9] Paragraph (11) of the Directive warns that:

5. Memo/04/189, Brussels, July 19, 2004, Brackground note on procedures to enforce EU antidiscrimination law, *available at* http://www.europa.int/rapid/pressReleasesAction.do.

6. *Id.*

7. *See, e.g.*, Comments by AGE—the European Older People's Platform on the Transposition of Employment Directive, *Meeting of European Parliament Intergroup on Aging, Brussels* (Dec. 2, 2003), *available at* http://www.age-platform.org/EN/Download/HomeEN/December03/Comments_integrp_031119.pdf.

8. 29 U.S.C. § 621(b) (2004).

9. The Directive, *supra* note 1, at 16.

> Discrimination based on religion or belief, disability, age or sexual orientation may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons.[10]

While acknowledging in paragraph (8) a "need to pay particular attention to supporting older workers, in order to increase their participation in the labour force,"[11] paragraph (37), at the same time, states that "the objective of this Directive" is "the creation within the Community of a level playing-field as regards equality in employment and occupation."[12]

B. Operative Provisions of the Directive Regarding Age Discrimination and the Age Discrimination in Employment Act

Article 2 of the Framework Directive, titled "Concept of Discrimination", provides in the first section that "there shall be no direct or indirect discrimination whatsoever on" the four grounds covered by the Directive: religion or belief, disability, age, or sexual orientation.[13] It defines direct discrimination in section 2 to be "where one person is treated less favourably than another is, has been or would be treated in a comparable situation."[14] In this way, direct discrimination is analogous to the ADEA's concept of disparate treatment, which is "the most easily understood type of discrimination [as] [t]he employer simply treats some people less favorably than others because of their race, color, religion [or other protected characteristics]."[15]

Article 2 of the Directive also defines indirect discrimination, stating that it occurs "where an apparently neutral provision, criterion or practice would put persons having a particular . . . age . . . at a particular disadvantage compared with other persons" except where such "provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary."[16] Indirect discrimination is comparable to the American doctrine of disparate impact created by the U.S. Supreme Court in *Griggs v. Duke Power Co.*,[17] a race discrimination case brought under Title VII of the Civil Rights Act of 1964. Under U.S. law, however, even if the employer proves business necessity, roughly equivalent to the above-quoted exception, the victim can still prevail by showing that the same ends can be achieved by a less discriminatory alternative.

In contrast to the disparate treatment theory of age discrimination, the U.S. Supreme Court pointedly remarked in *Hazen Paper*, a disparate treatment case brought pursuant to the ADEA, that "we have never decided whether a disparate impact theory of liability is available under the ADEA."[18] As a result, at this writing, seven U.S. Circuit Courts of

10. *Id.* at 16–17.
11. *Id.* 16.
12. *Id.* 18.
13. *Id.*
14. *Id.*
15. Hazen Paper Co. v. Biggins, 507 U.S. 604, 609–610 (1993) (quoting International Board of Teamsters v. United States, 431 U.S. 324, 335–36 n.15 (1977) (citation omitted)) ("Disparate treatment, thus defined, captures the essence of what Congress sought to prohibit in the ADEA. It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age.").
16. The Directive, *supra* note 1, at 18.
17. Griggs v. Duke Power Co., 401 U.S. 424 (1971).
18. *Hazen Paper Co.*, 507 U.S. at 610.

Appeals have either held or strongly indicated that because of slight but purportedly significant differences in language between the ADEA and Title VII, as well as the long and unsavory history of racial discrimination in the U.S. and the perceived absence of a comparable record relating to age discrimination, disparate impact cases may not be brought under the ADEA. Thus, by expressly prohibiting both direct and indirect discrimination in employment on all four grounds, the Directive has taken a giant step ahead of U.S. age discrimination law.

The third section of article 2 prohibits harassment, which it defines as "when unwanted conduct related to any of the grounds (religion or belief, disability, age or sexual orientation) referred to in article 1 takes place with the purpose or effect of violating the dignity of a person and creating an intimidating, hostile, degrading, humiliating or offensive environment."[19] Although not explicitly prohibited by the ADEA, U.S. courts recognize causes of action under the ADEA for both harassment and hostile work environment.[20]

The fourth section of article 2 prohibits discrimination through an agent by proxy since "[a]n instruction to discriminate,"[21] on any of the prohibited grounds, is discrimination within the meaning of section 2. Thus, presumably both the principal who orders the discrimination and the agent who carries it out would be in violation of this provision.

The fifth section of article 2 provides an exception for national laws relating to public safety and health "and for the protection of the rights and freedoms of others."[22] While the ADEA does not expressly contain such a general public safety exception, several federal statutes that provide for maximum hiring ages and/or mandatory age-based retirement in certain occupations related to public safety have been held to be bona fide exceptions to the ADEA's general prohibition on age-based mandatory retirement.[23] For example, firefighters employed by the federal government are subject to mandatory retirement at age 55,[24] air traffic controllers at age 56,[25] and federal law enforcement officers must retire at age 57.[26] Similarly, the rule first promulgated by the predecessor of the Federal Aviation Administration in 1959, prohibiting anyone who has reached age sixty from piloting a commercial airliner, although not a mandatory retirement law, has been repeatedly upheld in the name of public safety.[27]

The first section of article 3 provides that the Directive "shall apply to all persons, as regards both public and private sectors, including public bodies in relation to": (1) access to employment including selection and recruiting; (2) access to vocational training; (3) working conditions, dismissals, and pay; and (4) membership in workers', employers', or professional organizations. The ADEA similarly enumerates the prohibited practices by employers, employment agencies, and labor organizations.[28] For instance, an employer may not discriminate against a person on the basis of age with respect to the "compensation,

19. The Directive, *supra* note 1, at 18–19.
20. HOWARD C. EGLIT, AGE DISCRIMINATION § 4.05 (2d ed. 1993).
21. The Directive, *supra* note 1, at 18–19.
22. *Id.*
23. *See* Orzel v. City of Wauwatosa Fire Dept., 697 F.2d 743 (7th Cir. 1983), *cert. denied*, 464 U.S. 992 (1983); Dungan v. Slater, 252 F.3d 670 (3d Cir. 2001), *cert. denied*, 534 U.S. 973 (2001).
24. 5 U.S.C. §§ 8335(b), 8425(b) (2004).
25. *See id.* §§ 8335(a), 8425(a).
26. *See id.* §§ 8335(b), 8425(b).
27. *See* Professional Pilots Fed'n v. FAA, 118 F.3d 758 (D.C. Cir. 1997), *cert. denied*, 523 U.S. 1117 (1998).
28. 29 U.S.C. § 623(a)-(c).

terms, conditions, or privileges of employment."[29] An employment agency may similarly not refuse to refer a person for employment based on that person's age.[30] A labor organization also cannot exclude or expel a person from membership based on age or act in any way that would deprive or limit that person with regard to employment opportunities.[31] Thus, since it applies to "all persons," the coverage of article 3 appears to be broader than that of the ADEA.[32]

Article 8 emphasizes that the Directive's provisions are the "[m]inimum requirements" that the Member States must adopt, but they "may introduce or maintain provisions which are more favorable to the protection of the principle of equal treatment."[33] Although there is no language in the ADEA suggesting that the individual states adopt laws banning age discrimination in employment, all fifty states have done so. These state laws accordingly supplement the ADEA and in many instances provide broader coverage and greater relief than the ADEA itself.

Article 9 requires Member States to "ensure that judicial and/or administrative procedures . . . for the enforcement of obligations under this Directive are available to all persons" to vindicate the rights established by national laws implementing the Directive.[34] A Member State apparently could satisfy its obligation under the Directive by providing a system limited to only administrative relief—with or without judicial appeal. Under the ADEA on the other hand, there is recourse to both administrative and judicial remedies as a person who wishes to seek judicial relief under the ADEA must first exhaust his or her administrative remedies with the Equal Employment Opportunity Commission (EEOC) and/or the state fair employment practices agency before filing a lawsuit.[35] Article 9 also requires Member States to "ensure that associations, organizations, or other legal entities" have the right to represent claimants in judicial or administrative proceedings to enforce such rights.[36] Alternatively, under the ADEA there is no provision for representation by an association or organization; however, a claimant may be represented by an attorney employed by such an entity so long as there is no conflict of interest between the entity and the claimant. Furthermore, the EEOC is authorized to file suits seeking relief for aggrieved persons under all of the federal antidiscrimination laws it is responsible for enforcing. While this power extends to the ADEA, the EEOC only utilizes it in a handful of cases each year due to severly limited resources. For example, during fiscal year 2003, the total number of discrimination charges filed with the EEOC was 81,293, including 20,248 charges alleging discrimination under the ADEA.[37] However, during that same period, the EEOC filed a total of 390 lawsuits, of which only 21 were brought under the ADEA.[38] Under the ADEA, commencement of a suit by the EEOC terminates the right of an individual to sue.[39] The

29. *See id.* § 623(a).
30. *See id.* § 623(b).
31. *See id.* § 623(c).
32. The Directive, *supra* note 1, at 19.
33. *Id.* at 20.
34. *Id.* at art. 8.
35. *See* 29 U.S.C. § 626(d).
36. *Id.* art. 9.
37. Preliminary EEOC Enforcement and Litigation Data for Fiscal Year 2003, Daily Lab. Rep. (BNA) No. 228, at E-1-E-2 (Nov. 26, 2003).
38. *Id.*
39. 29 U.S.C. § 626(c)(1).

ADEA also specifically provides that a person suing under the Act is entitled to a jury trial.[40] There is no such requirement under the Directive.

The remedies available under the ADEA are limited to back pay and benefits, front pay or reinstatement, and "liquidated damages" if the plaintiff proves that the violation was "willful."[41] Although there is no right under the ADEA to seek punitive or compensatory damages for noneconomic injuries such as emotional distress, some state age discrimination laws do provide for such relief. For example, the California Fair Employment and Housing Act (FEHA) provides for administrative relief in the form of actual damages including up to $150,000 for "nonpecuniary losses" as well as civil fines.[42] Furthermore, in a lawsuit filed under the FEHA, the court is authorized to award all forms of relief available that "will effectuate the purpose of" FEHA.[43]

In contrast, article 17 of the Directive, instead of providing specific remedies, leaves the determination of what relief to make available to aggrieved persons completely up to the Member States which are directed to "lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive."[44] Article 17 does state that any sanctions that are adopted "may comprise payment of compensation to the victim" without specifying what elements of damages might be included in such compensation or endorsing any other forms of relief.[45] Importantly, article 17 mandates that whatever sanctions a Member State does choose to adopt "must be effective, proportionate and dissuasive."[46]

Both the Directive and the ADEA address retaliation, a concept known in Europe and referred to in article 11 of the Directive as "victimization." Article 11 requires the Member States to provide measures "to protect employees against dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment."[47] While the protection against retaliation mandated by article 11 is narrowly limited to employees, the protection provided by the ADEA covers retaliation by employers against employees or applicants, by an employment agency against any individual, and by a labor organization against a member or applicant for membership.[48]

III. Article 4 and Article 6—A Minor Exception and a Potentially Major Problem

The first section of article 4 of the Directive allows Member States to except from the definition of discrimination a difference in treatment based on a characteristic related to one of the four grounds covered by article 1—religion or belief, disability, age or sexual orientation—where "such a characteristic constitutes a genuine and determining occupa-

40. *See id.* § 626(c)(2).
41. *See id.* § 626(b) (referring to the Fair Labor Standards Act, 29 U.S.C. § 216(b), which defines liquidated damages to mean doubling the back pay award).
42. CAL. GOV'T CODE § 12970(3) (2004).
43. *See id.* § 12965(c)(3).
44. The Directive, *supra* note 1, art. 17.
45. *Id.*
46. *Id.*
47. *Id.*
48. 29 U.S.C. § 623(d).

tional requirement, provided that the objective is legitimate and the requirement is proportionate."[49] This language is roughly equivalent to the ADEA's exception for "a bona fide occupational qualification reasonably necessary to the normal operation of the particular business,"[50] otherwise known as the BFOQ exception. The ADEA's BFOQ exception has caused few problems because it has been interpreted narrowly. To wit, outside the public safety arena, courts have not accepted it and, as a result, employers rarely attempt to invoke it.

On the rare occasions when an employer does invoke the BFOQ defense for an age-based practice citing safety considerations, the U.S. Supreme Court articulated a two-part inquiry to determine the validity of the exception. First, the employer "could establish that it had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all [persons over the age qualifications] would be unable to perform safely and efficiently the duties of the job."[51] Alternatively, the employer could successfully assert the BFOQ defense by showing that "age was a legitimate proxy for the safety-related job qualifications by proving that it is impossible or highly impracticable to deal with the older employees on an individualized basis."[52]

Where the safety of the public is not a consideration, the only situations that might arguably come within the BFOQ exception are where a producer of entertainment has a requirement for a young actor to play the part of a child, or where a clothing merchant recruits young models to advertise fashions for teenagers, for example. In reality, however, the actual requirement in such circumstances is for applicants having the appearance of being a certain age as opposed to actually being of that age.

The language of article 4 excepting differences in treatment based on a characteristic that "constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate" appears to be similarly narrow, given that paragraph (23) of the Preamble states that such a difference of treatment is justified in "very limited circumstances."[53] Interestingly, even though the first ground of discrimination listed in the Directive is religion or belief, section 2 of article 4 provides an exception for differences in treatment by churches and other religious organizations based on a person's religious belief where such belief "is a genuine, legitimate and justified occupational requirement," whatever that phrase may mean.[54] There is no exception for religious organizations on the other three grounds.

In contrast to the narrow exception of article 4, article 6, which applies only to age and not the other three grounds covered by article 1, is a very broad exception. Section 1 allows Member States to exempt "differences of treatment . . . if . . . 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." Section 1 also provides a non-exhaustive list of circumstances to which the exception applies, including:

49. *Id* arts. 1, 4.
50. *See id.* § 623(f)(1).
51. Western Airlines, Inc. v. Criswell, 472 U.S. 400, 414 (1985) (internal quotations and citations omitted).
52. *Id.*
53. The Directive, *supra* note 1, art. 4.
54. *Id.* art. 4 § 2.

> (a) the setting of special conditions on access to employment and vocational training . . . for young people, older workers . . . ; (b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment . . . ; [and] (c) the fixing of a maximum age for retirement which is based on the training requirements of the position question or the need for a reasonable period of employment before retirement.[55]

All three of these conditions violate the ADEA.

Paragraph (25) of the Preamble acknowledges that the purpose of article 6 is to provide flexibility depending on the differing circumstances in each of the Member States. Thus, "differences in treatment in connection with age may be justified under certain circumstances and therefore require specific provisions which may vary in accordance with the situation in Member States."[56] In that same Preamble paragraph, however, the drafters of the Directive also recognize the possibility that unless the Member States carefully define the limits of article 6, this exception could end up swallowing the rules against age discrimination. As a result, "[i]t is therefore essential to distinguish between differences in treatment which are justified, in particular by legitimate employment policy, labour market and vocational training objectives, and discrimination which must be prohibited."[57] How to make and enforce this critical distinction is wholly left up to the Member States.

IV. Overall Strengths and Weaknesses of the Directive and the ADEA

The major strength of the Directive is that it requires all twenty-five current EU Member States—the fifteen original Member States as well as the ten additional countries that became Member States on May 1, 2004—to implement prescribed minimum protections against discrimination on four grounds—religion or belief, disability, age, and sexual orientation—with the objective of "the creation within the Community of a level playing field as regards equality in employment and occupation."[58] Thus, all of the major European countries eventually should have laws prohibiting discrimination in employment by both public and private entities on the basis of age and the other three grounds. As discussed, article 8 emphasizes that the Directive's requirements are the minimum and the Member States are free to enact greater protections.

Unlike the ADEA, whose application is limited to people that are forty years of age and older,[59] the Directive specifies no age limits, so that Member States may choose whether or not to establish age limits in the implementation/transposition process. The broad application of the Directive is underlined by article 3, which specifies that it applies to "both the public and private sectors, including public bodies."[60] Alternatively, as originally enacted, the ADEA applied only to private entities though it was subsequently amended to govern both federal and state government employers, except for U.S. military personnel. With regard to the latter amendment, however, the U.S. Supreme Court recently has ruled that state governments are not liable under the ADEA in suits for money damages brought

55. *Id.* art. 6, § 1.
56. *Id.* art. 6.
57. *Id.*
58. *Id.* at 18.
59. 29 U.S.C. § 631(a).
60. The Directive, *supra* note 1, art 3.

by state employees—although injunctive relief is apparently still available as a remedy for state employees. The coverage of the Directive accordingly is broader than the ADEA both in terms of age and the entities and institutions to which it applies.

Another major strength of the Directive is that article 2 contains language stating explicitly that it applies to both direct and indirect discrimination. The ADEA, in comparison does not state explicitly that it prohibits age discrimination arising from disparate impact—the U.S. equivalent of indirect discrimination. The disparate impact theory, which involves "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity,"[61] was judicially adopted into federal antidiscrimination law by the U.S. Supreme Court in *Griggs v. Duke Power Co.*,[62] a race discrimination case brought pursuant to Title VII of the Civil Rights Act of 1964.[63] Since the substantive prohibitions of the ADEA "were derived *in haec verba* from Title VII,"[64] until the Court's 1993 decision in *Hazen Paper Co. v. Biggins*,[65] in which several Justices questioned the applicability of the disparate impact theory to suits under the ADEA, the lower courts assumed that it did apply.

Although *Hazen Paper* was a disparate treatment case—as evidenced by the majority's statement that "[d]isparate treatment . . . captures the essence of what Congress sought to prohibit in the ADEA"[66] and the doubts expressed about the applicability of the disparate impact theory to the ADEA by the three concurring Justices[67]—seven U.S. federal circuit courts have either held or strongly indicated a belief that the disparate impact theory does not apply to the ADEA, while three have held that it does.[68] Only the Fourth Circuit has not weighed in. The Supreme Court will address the issue this term in *Smith v. City of Jackson, Mississippi*.[69] Unless and until the Court decides otherwise, age discrimination claimants will continue to bear a significant disadvantage compared to claimants with race, color, religion, sex, or national origin discrimination claims arising under Title VII who may sue on both the disparate treatment and the disparate impact theories.

The most significant weakness of the Directive is clearly article 6, which applies only to the age ground. This provision, if adopted by the Member States in the transposition/implementation process, will likely generate more controversy and litigation than all of the other Articles of the Directive combined. Furthermore, resolution of the questions of when an age-based employment action is "objectively and reasonably justified by a legitimate aim" and whether "the means of achieving that aim are appropriate and necessary" and which aims are "legitimate" and which are not is likely to take a long time and will undoubtedly vary widely among the Member States.[70] The result of this process may be several

61. Hazen Paper Co. v. Biggins, 507 U.S. 604, 609 (1993).

62. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

63. 42 U.S.C. § 2000e-5 (2004).

64. Lorillard v. Pons, 434 U.S. 575, 584 (1978).

65. *Hazen Paper Co.*, 507 U.S. 604.

66. *Id.* at 610.

67. *Id.* at 618 (Kennedy, J., concurring) (emphasizing that "there are substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA").

68. *See* Smith v. City of Jackson, 351 F.3d 183 (5th Cir. 2003) (holding that disparate impact claims cannot be brought under the ADEA and including a listing of the courts that have reached the same conclusion or strongly indicated that they would do so with citations to the minority of circuits where ADEA disparate impact claims may still be brought).

69. 351 F.3d 183 (5th Cir. 2003), *cert. granted*, 124 S.Ct. 1724 (2004).

70. The Directive, *supra* note 1, art. 6.

distinct bodies of law as opposed to a uniform approach to the problem of age discrimination in employment. The flexibility inherent in Article 6 may thus jeopardize the achievement of the objective of the Directive "namely the creation within the Community of a level playing field as regards equality in employment and occupation."[71]

The Directive also fails to provide any guidance regarding what remedies might satisfy the requirements of article 17, stating only that the sanctions chosen by each Member State when a violation of the principle of equal treatment is found must be "effective, proportionate, and dissuasive," which leaves a great deal of room for variation from country to country.[72] On the other hand, although the remedies for age discrimination under the ADEA are somewhat limited, they are specifically spelled out to include "legal or equitable relief . . . including judgments compelling employment, reinstatement or promotion . . . unpaid wages or unpaid overtime compensation"[73] and "liquidated damages . . . in cases of willful violations."[74] Furthermore, by specifically exempting mandatory retirement laws from its coverage,[75] the Directive fails to address what is arguably *the* most contentious employment issue confronting the Member States.[76]

Additionally, the Directive provides no mechanism for dealing with outright non-compliance or mere foot-dragging by Member States in the implementation/transposition process. The failure to provide a means of forcing compliance with the transposition deadline established in the Racial Equality Directive,[77] which was enacted on July 29, 2000, has proven to be a serious obstacle to its implementation. Article 16 of the Directive mandates that "Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive by 19 July 2003."[78] Many Member States missed the deadline. Additionally, under the rules for implementing European legislation, Member States must inform the European Commission of the steps they have taken to integrate the provisions of a directive into national law. As of the July 19th deadline for implementation of the Racial Equality Directive, the Commission had not received a single notification of its complete transposition. On July 21, 2003, Anna Diamantopoulou, EU Employment and Social Affairs Commissioner, expressed disappointment at the Member States' inaction stating: "I am dismayed that most Member States have failed to integrate the Racial Equality Directive into national law. Let us not forget that this Directive was agreed unanimously by the Council three years ago."[79]

There was a similar result with the implementation of the Framework Directive as discussed in the next section. The failure of most of the fifteen original Member States to

71. *Id.* at 16.

72. *Id.* art. 17.

73. 29 U.S.C. § 626(b).

74. *See id.*

75. The Directive, *supra* note 1, preamble (14): "This Directive shall be without prejudice to national provisions laying down retirement ages."

76. *Id.* ¶ 14.

77. Council Directive 2000/43/EC of 29 June 2000 Implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin, 2000 O.J. (L 180) 22, *available at* http://europa.eu.int/eur-lex/pri/en/oj/dat/2000/l_180/l_18020000719en00220026.pdf.

78. The Directive, *supra* note 1, art. 16.

79. EU Employment and Social Affairs Commissioner Anna Diamantopoulou, Statement at the Opening Address of the Italian Presidency Conference on "Fighting Discrimination: From Theory to Practice" in Milan, Italy (July 21, 2003), *available at* http://europa.eu.int/comm/employment_social/fundamental_rights/pdf/events/ITPresidConfJuly03SpeechAD_en.pdf.

comply with the implementation/transposition deadlines established in these Directives seriously calls into question their resolve to squarely address pan-European discrimination.

Neither the ADEA nor the Directive addresses mandatory arbitration—an issue that has had a significant, adverse effect on the rights of age discrimination claimants as well as claimants under the other federal employment discrimination laws in the United States. Despite the myriad reasons offered by employment discrimination claimants to demonstrate the unfairness of particular arbitration agreements, all of the federal circuit courts of appeals that have addressed the issue have held that as a general matter it is not unlawful for an employer to require mandatory arbitration of employment claims, including discrimination claims, as a condition of employment.[80] These decisions coupled with the "liberal federal policy favoring arbitration agreements,"[81] make it very difficult for age discrimination claimants, as well as other employment discrimination claimants whose claims are subject to employer-imposed arbitration processes, to challenge even the most one-sided of these so-called agreements to arbitrate rather than litigate their claims. Thus, if mandatory arbitration of claims arising under the Directive becomes the rule in the Member States, such a development could undermine or essentially eviscerate the protections the European Parliament intended to confer on workers by adopting the Directive.

An extremely important issue for older workers that is addressed in detail by the ADEA but not at all by the Directive is the waiver of rights arising under the substantive provisions of the law. In settlements of age discrimination claims or when an employer offers an incentive for employee(s) to leave the work force, for example, the employer normally requires that the employee execute a release waiving his or her rights under the ADEA as an integral part of the bargain for receiving the benefit to be conferred. While ensuring the fairness of waivers requested in connection with all types of discrimination claims is an important legal consideration, it is especially so in the case of older workers who have been, *inter alia*, terminated, demoted, not promoted, or not hired because of age and who, due to age bias, are less likely to find another job, be promoted, or reinstated than their younger counterparts. Due to overreaching by employers in essentially compelling older workers who were uninformed about the important rights they were signing away in such situations, the ADEA was amended by the Older Workers' Benefit Protection Act of 1990 (the OWBPA) to require that any such waiver be "knowing and voluntary."[82] To satisfy this standard, a waiver must "at a minimum" meet all seven of the following conditions:

1. The waiver must be part of an agreement between the individual and the employer and must be written so that it is understandable to those eligible to sign it;
2. It must specifically refer to rights or claims arising under the ADEA;
3. It cannot operate prospectively, *i.e.*, it cannot waive rights that may arise after the date it is signed;
4. In exchange for the waiver, the employer must provide consideration (something of value) in addition to that to which the individual is already entitled;
5. The individual being asked to sign the waiver must be advised *in writing* to consult an attorney *before* signing it;

80. *See, e.g.*, EEOC v. Luce, Forward, Hamilton & Scripps, 345 F.3d 742 (9th Cir. 2003).
81. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).
82. 29 U.S.C. § 626(f)(1).

6. The individual must be given twenty one days in which to consider the agreement being offered; and
7. The agreement must allow a period of at least seven days after signing in which the individual can revoke it and must provide that it does not become effective until the revocation period has expired.[83]

It is true that section 1 of article 9 of the Directive provides that Member States must make "judicial and/or administrative procedures" available for the adjudication of claims arising under the laws adopted to implement the Directive, "including where they deem it appropriate conciliation procedures."[84] The Directive, however, does not set forth even vague guidelines, such as article 17's exhortation that sanctions must be "effective, proportionate and dissuasive," for the elective conciliation procedures, let alone specifying any constraints.[85] Therefore, even if a Member State chooses to make conciliation procedures available to claimants alleging discrimination on the four grounds covered by the Directive, there can be no assurance that those procedures will include the type of waiver protections important to age discrimination claimants or, for that matter, any waiver protections whatsoever. Like the country to country variations permitted regarding remedies and mandatory retirement provisions, the failure of the Directive to address the issue of waivers may compromise the goal of achieving a Community-wide level playing field on equality in employment and occupation.

Finally, there is the "additional period of 3 years from 2 December 2003, that is to say a total of 6 years" allowed by article 18 of the Directive for Member States to implement the provisions of the Directive on age and disability.[86] According to article 18, it was enacted to take account of particular conditions that may be unique to each Member State, likely having to do with the history of heretofore legal age-based employment policies, including mandatory retirement ages relating to publicly and privately funded pensions. Combined with the open-ended exception of article 6, which is applicable to age, this three-year delay may signal to the Member States that, although the effects of age discrimination in employment are at least as devastating to the affected individual as discrimination on the other grounds addressed by the Directive, age discrimination is somehow less important and consequently may be addressed with less vigilance than discrimination based on religion or sexual orientation. Such a result would be unfortunate to both the individual victims of age discrimination and to European society as a whole, whose stated aim is "putting into effect in the Member States the principle of equal treatment."[87]

V. Implementation of the Framework Directive

As indicated at the beginning of this article, the implementation of the Directive by Member States has been uneven and inconsistent. Only four Member States, Austria, France, Italy, and Ireland have reported full implementation although questions remain

83. *See id.* § 626(f)(1)(A)-(F) (there are additional requirements for waivers requested in connection with an exit incentive or other group termination program).
84. The Directive, *supra* note 1, art. 9, § 1.
85. *Id.* art. 17.
86. *Id.* art. 18.
87. *Id.* at 18.

regarding the effectiveness of the transposition in the first three. Denmark, Netherlands, Greece, Finland, Luxemburg, Spain, and Portugal are in various stages of achieving transposition although again, questions remain regarding the effectiveness of the implementation proposals.

On July 19, 2004, the European Commission announced that it has begun legal action in the form of "infringement proceedings" against Austria, Germany, Finland, Greece, Luxembourg, and Belgium for having failed to transpose fully the Framework Directive.[88] The Commission has also launced infringement proceedings against the first five named countries for failing to implement the Racial Equality Directive.[89] Infringement proceedings are the first step in a process that could ultimately lead to a referral to the European Court of Justice. Even though that court has no power to force Member States to implement the Directives, a judicial decision that any or all of them had failed to do so would be not only a national embarrassment for each non-complying country, but also a very public admission of failed progress by the EU as a whole toward the goal of a united, discrimination-free Europe.

Of the Member States, Ireland appears to have the most comprehensive approach to age discrimination as well as the political will to fully implement the Framework Directive's provisions on age. The primary reason for Ireland's success in full implementation is that it had previously enacted an effective anti-discrimination law addressing discrimination based on age and eight other grounds, not only in employment, but also in access to goods and services two years before the Directive was adopted.

The Irish Employment Equality Act of 1998 (the EEA) is a comprehensive statute that prohibits both direct[90] and indirect[91] discrimination in employment on the grounds of gender, marital status, family status, sexual orientation, religion, age, disability, race, and being "a member of the traveler community."[92] It applies to employers,[93] employment agencies,[94] and workers' and professional organizations,[95] and, until amended, to comply with the Framework Directive applied to people between the age of eighteen and sixty-five.[96] It prohibits both harassment[97] and victimization[98] and provides for both administrative and judicial remedies, including back pay, front pay, compensatory damages, and reinstatement, depending on the body to which the complaint is referred.[99] In summary, the EEA is both

88. Press Release, Commission goes to the European Court of Justice to Enforce EU Antidiscrimination Law, July 19, 2004, *available at* http://europa.eu.int/rapid/pressReleasesAction.do.

89. *Id.*

90. Employment Equality Act, No. 21, 1998 (Ir.), § 6(1) (providing that "[f]or the purposes of the Act, discrimination shall be taken to occur where, on any of the grounds in subsection (2) (in this Act referred to as 'the discriminatory grounds'), one person is treated less favourably than another is, has been or would be treated.").

91. *Id.* § 31(1)(a)-(d) (providing that [w]here a provision relating to employment . . . applies to all the employees or prospective employees of a particular employer . . . operates to the disadvantage of [one or more employees based on one of the nine discriminatory grounds and] cannot be justified as being reasonable in all circumstances of the case, . . . then . . . the employer shall be regarded as discriminating . . .).

92. *Id.* § 6(2)(a)-(i).

93. *Id.* § 8.

94. *Id.* § 11.

95. *Id.* § 13.

96. *Id.* § 6(3)(a)-(b).

97. *Id.* § 32.

98. *Id.* § 98.

99. *Id.* § 82 (defining the available remedies and establishing their limits).

more comprehensive and more detailed than either the Framework Directive or the ADEA. The Irish Parliament should have little trouble in bringing the EEA and its companion statute, the Equal Status Act of 2000, into full compliance with the Directive.

On the other hand, the Netherlands' Equal Treatment in Employment (Age Discrimination) Act (the Netherlands' Act), which became law on May 1, 2004,[100] and purports to implement the Framework Directive, is neither as comprehensive as the EEA nor as reflective of a lack of political will as the efforts of Germany, Greece, Portugal, and Luxembourg. Furthermore, the Netherlands' Act does not expressly incorporate the Directive's prohibition of direct and indirect discrimination. Instead, it defines discrimination as "discrimination on the grounds of age or on the grounds of other characteristics, or conduct that results in discrimination on the grounds of age."[101] This definition may or may not be construed to include indirect discrimination. In addition to discrimination as defined, the Netherlands' Act also prohibits both age-based harassment[102] and victimization[103] and apparently applies to all types of discriminators; there is, however, no provision similar to that of the Directive declaring that it applies to all persons. It specifies no age limits and covers a broad range of the terms and conditions of employment,[104] but in language similar to article 6 of the Directive, exempts conduct that "is otherwise objectively justified by a legitimate aim and the means used to achieve that aim are appropriate and necessary."[105] Regarding remedies, the Netherlands Act provides that termination of employment for discrimination or retaliation "shall be voidable;"[106] however, such terminations "shall not render the employer liable to pay damages."[107] Thus, it is at the least questionable whether reinstatement, the only available remedy for age discrimination under Dutch law, complies with the requirement of article 17 that sanctions for violation of the Framework Directive's provisions be "effective, proportionate, and dissuasive."

With the possible exception of Belgium, which, as indicated earlier has notified the Commission that it, like the UK and Sweden, will take the permitted additional time to implement the Directive as to the age ground, the efforts of the other Member States are much less comprehensive than those of Ireland and perhaps those of the Netherlands as well.

VI. Conclusion

In the Framework Directive, the Council of the European Union proposed a comprehensive approach to combating and eliminating employment discrimination on the grounds of religion or belief, disability, age and sexual orientation in the Member States. Given the long history of age-based employment policies across Europe, age discrimination will be the hardest of the four grounds covered by the Directive for the Member States to address

100. Since the transposition is six months beyond the December 2, 2003, deadline, the Netherlands has belatedly notified the Commission that it will use the extra three years as permitted by the Framework Directive. Memo04/189, Background note on procedures to enforce EU anti-discrimination law, July 19, 2004, *available at* http://europa.eu.int/comm/employment_social/news/2004/jul/memo_04_189_en.pdf.

101. Netherlands Equal Treatment in Employment (Age Discrimination) Act § 1.1.

102. *Id.* § 2.1–2.2.

103. *Id.* § 10.

104. *Id.* §§ 3–6.

105. *Id.* § 7.1(c).

106. *Id.* § 11.1–11.2.

107. *Id.* § 11.5.

effectively. The Framework Directive contains significant weaknesses that can be exploited by those states that lack the political will to act boldly to eliminate age discrimination. Given the uneven and disappointing record on implementation of both the Racial Equality Directive and the Framework Directive thus far, the prognosis for addressing effectively age discrimination in employment both by the current and new Member States any time soon is not encouraging.