Introductory remarks:

The following Questionnaire deals with different topics of labour law, with a special focus on age discrimination. One of the main objectives of this questionnaire is, to obtain some impressions of the approach of national labour law systems regarding age discrimination. It is also important to keep in mind that there may be different provisions for different groups of employees for example civil servants and other persons working for government or public authorities under ordinary contracts of employment or farm laborers, persons working on board of ships or for religious communities or teachers. Exceptions or specific provisions regarding these groups should be mentioned. Statutory or other differences in treatment of men and women concerning age discrimination should also be mentioned.

1a. Generally, are there rules against age discrimination which have constitutional status? What do these rules say precisely, and how do they work at lower levels of law making?

Art. 8 sec. 2 of the Swiss Constitution provides that no person shall be discriminated against on the grounds of (young or old) age, among other factors. Art. 9 of the Constitution prohibits the State from treating people arbitrarily and provides that they must be treated in good faith (see also Art. 2 Civil Code for private matters). Other relevant provisions are Art. 27 Const.
(regarding free access to and participation in the economy), and Art. 35 Const. (regarding the implementation of the constitutional fundamental rights in the Swiss legal system). The national and cantonal statutes (a lower category than the Constitution) must conform to the constitutional guidelines (Art. 49 Const.).

1b. Which international agreements and conventions dealing with age discrimination has your country ratified?

Switzerland has not ratified any agreements/conventions dealing specifically with age discrimination. However, Switzerland has ratified the European Human Rights Convention, which prohibits discrimination of any kind, but does not explicitly state age as a factor, as well as the UNO-Convention regarding civil and political rights (“Pact II”), which in Art. 2 in conjunction with 26 prohibits any kind of discrimination, but does again not explicitly state age as a factor (see also Art. 25 lit. c Pact II regarding public service), and the UNO-Convention regarding economic, social and cultural rights (“Pact I”, which is generally non-self-executing), Art. 7 lit. c, which provides equal opportunities for everyone to ascend professionally, only taking into account seniority and ability. Switzerland has not ratified any ILO-Conventions dealing especially with (age) discrimination, but there is the Convention on discrimination in work and profession and the Convention on the prohibition and urgent measures for the elimination of the worst kinds of child labor; see also the ILO-Declaration on the fundamental rights and principles in the workplace, enacted in June 1998, especially Art. 2 lit. d on the elimination of discrimination in work and profession. Such declarations are binding for all members who have accepted the ILO-Constitution, even if they haven’t ratified the ILO-Conventions.

1c. What are the main sources of law against age discrimination?

Apart from the Constitution and international Conventions, the primary source of law is the Code of Obligations (CO), where most of the private labor law is codified (Art. 319 - 362 CO). Art. 336 ss. CO in particular provide protection against various forms of wrongful dismissal, for example on the grounds of certain personality traits, such as age.
In addition, there are federal, cantonal and communal public labor laws, the federal law regarding work in industry, commerce and trade (Arbeitsgesetz) and the corresponding labor law decrees. Art. 29-36a of the Labor Law provide safeguarding provisions for especially vulnerable employees, for example adolescents (Art. 29-32; employees up to 19 years of age / apprentices up to 20 years of age), pregnant and nursing women (Art. 33-35b) and others (Art. 36-36a). The legislator has not yet enacted protection for the “others”; what the Federal Council had in mind though was to enact provisions to protect handicapped and older employees. Therefore, there is no explicit protection for elderly workers in the Labor Law yet.

1d. Are collective agreements bound by these provisions?

Yes, in principle they have to conform to the boundaries set by superordinated law (Art. 49 Const.).

1e. Which groups are protected by these provisions, young employees, older employees or is it just forbidden to consider age as a decisive factor for working conditions?

Apart from those provisions that provide protection for a certain age group (like apprentices up to 20 years of age, see above), discrimination based on age (alone) is not permitted, whether old or young employees are affected.

2. Please specify, what are the criteria according to which it is determined that it is an unlawful age discrimination (i.e. relevancy of the age to the nature of the job)?

Unequal treatment is prohibited if it is directly or indirectly based solely (exclusively) on age, as this would constitute age discrimination. Any age boundaries, for example, must be based on grave and earnest reasons to be objectively justified. There is, however, an older decision by the Superior Court of the Canton of Zurich (dated Sept. 6, 1993; JAR 1995, p. 158-160) which
stated that it is permissible to dismiss an older employee because he is more expensive for the employer (because of social benefits and costs), and that it would also be permissible to dismiss an older employee because his deteriorating performance or his health. Those conditions, however, can often be a direct or indirect corollary of age. Therefore, we hold that this reasoning appears circular and ultimately incorrect: On one hand, under the new Constitution (see above), which prohibits direct and indirect discrimination (ageism among others) under Swiss law, and on the other hand because it violates Art. 336 CO and constitutes an abusive dismissal.

3. **Do you have provisions stating minimum or maximum age for hiring employees?**

Yes, the public labor law states a minimum age for hiring employees: As a principle, adolescents under the age 15 may not be employed (Art. 30 Labor Law). There are a few exceptions to this rule: adolescents over 13 years of age can run errands and do easy tasks (Art. 30 sec. 2 lit. a Labor Law); adolescents under 15 years of age can also be employed for artistic and athletic performances and in advertising (Art. 30 sec. 2 lit. b Labor Law); and the Cantons can grant exceptions for adolescents over 14 years of age under certain circumstances (Art. 30 sec. 3 Labor Law). Adolescents over 14 years of age are also allowed to work during school holidays (for less than half of the holiday, only on weekdays, for up to 8 hours per day and 40 hours per week, between 6 am and 20 pm, and with a resting period of 12 hours or more; Art. 53 Abs. 1 und 2 ArgV 1; see also Art. 31 Labor Law for further limits regarding overtime and times of day). There are other exceptions as well. There is, however, no minimum age for family businesses (Art. 4 sec. 1 Labor Law), i.e. for businesses where only family members are working.

There is no statutory maximum age for hiring employees in the Code of Obligations, but there is for civil servants and other persons working for government or public authorities (for example Art. 10 sec. 2a Federal Personnel Law [Bundespersonalgesetz]: regular retirement age).

4. **Do you have provisions stating minimum or maximum age for entering**
pension funds systems?

Yes, according to Art. 7 and 31 BVG the employees have to enter the pension fund system at 18 years of age at the earliest, as long as they earn more than CHF 18'990.-- annually (insurance against death and disability risks), and at the latest at 25 years of age (insurance against risks and contributions to the old age pension fund). The regular retirement age is 64 years for women and 65 years for men. One can enter the pension fund system until retirement age (Art. 31 BVG). The various pension funds are also allowed to enact other regulations that are more favorable for the associated workers (Art. 32 BVG).

5. Have you got collective regulations or statutory provisions, which give certain protections or certain allowances only if the employee has achieved a certain age? Describe them.

Art. 339b sec. 1 CO provides that if the employment contract of an over 50-year-old employee ends after 20 or more years with the same employer, the latter will owe him termination pay (“Abgangsentschädigung”). This has become rare since this payment will be subtracted from pension fund payments of the employer.

In addition, the number of vacation weeks the employee is entitled to depends on age. For apprentices and employees up to 20 years of age the employer has to grant 5 weeks off (Art. 329a sec. 1, 345a CO) instead of 4 weeks off for everyone else (Art. 329a sec. 1 CO), and for employees who are 30 years old or younger, one week without pay for cultural or out-reach youth work (Art. 329e CO).

Many generalized regulations for certain fields in the private sector and many Cantonal laws for state employees provide at least 5 week-vacations for employees over 50 years of age, but there is no such provision (yet) in the federal Code of Obligations, despite recent attempts.

6. Does the computation of wages depend on the age of the employee? Describe this.
Many employers use age and experience among other deciding factors to determine the employee’s salary; they are free to do so. These criteria are not per se discriminatory. The general equal treatment principle in labor law (see Art. 328 CO) only prohibits to arbitrarily put employees at a disadvantage without any objective, factual grounds.

7. **Does the duration of holiday or the pay during sickness depend on the age of the employee or on seniority or both?**

Duration of holiday: Yes, this depends on the age of the employee for employees under 20/30 years of age (see question 5). In addition, employers, labor organizations or Cantons can enact more favorable regulations for employees or for whole professional fields. For example, 14 out of 15 generally binding employment contracts approved by the Federal Council provide five or more weeks off for employees over 50 years of age, and § 13 of the Personnel Statute of the Canton of Basel for instance provides that employees over 50 or 60 years of age, respectively, are entitled to five or six weeks off annually, respectively.

Duration of sick pay: Yes, this depends on seniority (Art. 324a sec. 2 CO). As long as there are not any more favorable regulations (private sector or Cantonal laws) applicable, the employer has to pay the salary for three weeks if the employee has fallen ill (as long as the employee has worked for over three months or has an indefinite contract, Art. 324a sec. 1 CO) and from then on for an additional, appropriate period. There are different scales with different timeframes (Basel, Zurich, Bern scale) that are being used by the courts to substantiate the appropriate period (for example the Basel scale: first year after three months: three weeks’ sick pay, 2nd and 3rd year: two months, 4th to 10th year: three months, 11th to 15th year: four months, 16th to 20th year: five months, 21st year onward: six months.

8. **Are there any provisions for elder employees, which entitle them to a reduction of working hours? Describe them.**

Not generally, but the employers, labor organizations or Cantons are free to
enact such regulations.

9a. Is it allowed to terminate an employment relationship (dismiss), due to the employees age? If yes – which age?

Not generally as a sole reason (since this could be discriminatory), but the employers are otherwise free to dismiss employees as long as it is not an abusive dismissal (Art. 336 ss. CO).

9b. Is it allowed to terminate an employment relationship (dismiss), because the employee is entitled to get an old-age pension? If Yes – at which age?

Not if this were a direct or indirect discrimination; see also question 14, otherwise older employees are not per se protected from being (lawfully) dismissed (see also question 14); the parties are also generally free to stipulate that the contract will end at a certain age of the employee (e.g., the ordinary retirement age).

10. Have you got provisions in your labor law system, which have the purpose to promote the vocational integration of unemployed older employees or young employees and in order to do so weaken their statutory protection?
    For instance are there provisions which authorize the conclusion of fixed-term contracts of employment once the worker has reached a certain age?
    Do such provisions exist for certain groups of employees?

Not as a matter of federal law, but the employers are – within the boundaries shown in this report – free to do so (cf. Art. 19 CO).

11. Have you got provisions which give special statutory protection in order to prevent the termination of employment contracts of older or young employees?
Yes, for apprentices (Art. 346 CO); they can only be dismissed (after the trial months) for an important reason, for example if the employer lacks the necessary teaching skills (Art. 346 sec. 2 lit. a CO) or if the apprentice does not have the necessary physical or intellectual ability to finish the training program (Art. 346 sec. 2 lit. b CO).

In general, Art. 336 ss. CO and anti-discrimination laws are applicable (see above). There is no special statutory protection for older employees.

12. **What are the rules governing the burden of proof?**

The employee alleging that he or she was wrongfully dismissed only (directly or indirectly) because of his age has to bear the burden of proof (Art. 8 CC; OGer ZH, JAR 1995, S. 158, 159).

13. **Are there any administrative or criminal penalties? Please give details.**

No (there is just Art. 261bis Federal Criminal Law [StGB], prohibiting racial, ethnic or religious discrimination).

14. **What are the most common cases at court regarding age discrimination?**

Court cases dealing explicitly with the issue of age discrimination have been exceedingly rare so far.

In one case decided by the Superior Court of the Canton of Zurich on September 6, 1993, an employee sued his employer for having dismissed him wrongfully, only because of his age. The employee and the witnesses called failed to prove that his age was the only reason for the dismissal. The employer claimed that the dismissal was founded on restructuring reasons; since the employee was becoming more and more expensive, mostly due to higher statutory pension fund contributions (because of his age), the dismissal should not be viewed as wrongful. The court held that it had been permissible to dismiss the older employee because age was not the (only) reason. It ruled that the law did not per se prohibit dismissals of older employees, only if the dismissal was solely based on age. If the reason was only (or not at all) age-
related, such as weakening performance, higher wages, deteriorating health, the employer was free to dismiss the employee (JAR 1995, 158 ss.; see our critical remarks above, question 2).

Another case was decided by the Swiss Supreme Court on December 20, 2005. An employee with 44 years of service was dismissed by his employer about a year before reaching his planned retirement age after 45 years of service. The employee then sued the employer for abusive dismissal and claimed in essence the maximum indemnity of six monthly salaries. The previous instance (Court of Appeals, Canton of Berne) had dismissed the claim, citing the freedom of giving notice, because the employer supposedly had not proven that his age had been the deciding factor, and he had had a difficult relationship with a superior. The Supreme Court went on to reverse the decision and ruled that the employer had violated his duty of care towards his long-time employee: The employer had, when taking into account the fact that this employee spent his entire professional career with this employer and was very close to ordinary retirement age, an increased duty of care, and should have tried to find alternative solutions for the situation (i.e. continuation of employment until ordinary retirement age). Because the employer had not explored such options, the company had to pay the maximum penalty of six monthly salaries. However, the importance of this decision should not be overestimated: The situation was extraordinary and the Supreme Court explicitly held that the decision did not mean an interdiction of giving notice to elderly employees; in fact, the age issue was “not relevant for the result of the claim” (translated; BGE 132 III 115, 122). Therefore, lack of performance, misbehavior or restructuring remain valid reasons for lay-offs of elderly employees, as long as the employer does not, among other provisions, violate his or her duty of care (Art. 328 CO).

In another case the Supreme Court decided on October 31st, 2007 (case no. 4C.409/2006), an employee was given notice by an international company because of “individual limitations”, interfering with his job performance. The employee sued his employer of 31 years for wrongful termination, alleging he had been dismissed because of his age and for anti-Semitic reasons. The employer offered to pay him CHF 90’000.--. The following lawsuit then ensued over the question whether the employee had, through his American lawyer, rejected the offer. The Supreme Court held that, although his American lawyer
had tried to negotiate a bigger settlement because of the American Age Discrimination and Employment Act, he hadn’t in fact turned the offer down and therefore the employer had to pay the employee the offered severance pay. This decision therefore again did not have to rule on age discrimination itself. Another recent case the Supreme Court had to decide (BGE 133 I 259), dealt with the question of a “grey ceiling”, in casu the age limit for notaries in the Canton of Basel, which was set through legislation at 75 years of age. The Supreme Court upheld the law because it was based on valid factual concerns, not ageism (BGE 133 I 259, 265 s.). Lastly, the Supreme Court held on July 28, 2009, that the refusal to promote an executive employee of the State who had reached the age where he was entitled to a premature retirement was objectively justified and non-discriminatory (art. 8 sec. 2 Const.), if said refusal was rooted in the State’s interest to recapitalize the pension fund (which was organized according to the defined benefit plan principle, i.e. calculated from the salaries drawn in the last three years), and if the taken measure was only temporary (8C_169/2009, E. 4.2 ss.).

Final remarks: At the conference we also want to discuss the practical impact of age discrimination (How prevalent is age discrimination in your country? Are there any studies on this subject? Can you estimate the economic loss - if any - following age discrimination in your country, especially following the employment or non-employment (termination) of experienced elder workers?

As shown above, there are very few published court cases and almost no known cases dealing with age discrimination directly. In a shaken global economy, it is however certainly not unheard of to lay off more expensive employees (older people) as well as inexperienced (younger or less educated) employees, on the contrary, as the latest statistics of the unemployed show (see http://www.amstat.ch/infospc/public/archiv/200906_de.pdf; youth unemployment from 15 to 24 years of age is highest at the moment, and 70 percent higher than a year ago). Many employers are downsizing, especially in the current economic climate, by using the incentive of early retirement.
There are some research projects in Switzerland (see for example http://www.altersdiskriminierung.ch) which are still ongoing and should provide further socio-economic insights into this matter (a publication is forth-coming). In general though, age discrimination is not yet a well-researched topic here. In conclusion, age discrimination may well be more prevalent than expected from the amount of known legal battles, but is not (yet) as recognized or researched as, for example, gender discrimination.

29.08.2009 Dr. Matthias Stein-Wigger