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## The current tendencies of the employment of older people in the European Union

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### Abstract

2012 was the year of the active elderly age and the solidarity between generations in the European Union. In spite of it the Member States either directly or indirectly try to restrict the possibilities of the employment of older people. All these raise problems in connection with the labour market and equal opportunities. The paper explores the regulation and practical contradictions, which in connection with age discrimination characterize the law of the EU. Old persons with considerable experiences should get stronger role and it is possible only by raising the level of equal treatment towards them.

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### 1. Introduction

The old – or rather older – people's role and situation in the society today is rather disputed and complicated. It has several reasons from among which – from the point of view of my topic – the facts in connection with employment will be discussed mainly but at the same time it is clear that the other facts could be separated only hardly from the economic-existential aspects of the question. So the older people's social situation, their social respect, state of health, their respect based on public consensus, and in general those facts that express that these persons have „lived more”, namely, they have much more experience; as a consequence of this they have different view of life and their world view is different than the younger ones. Within the frames of the European Union one of the aims of the labour and social legal regulation is to establish/identify and fulfil the requirements of the older people's labour legal protection with (also) regard to these facts in practice. However, all these are not sufficiently effective. This study of mine is written on the account that in the European Union 2012 was the European Year of the Active Old Age and Solidarity Between Generations.

### 2. About age discrimination in general

Within the frames of employment and occupation equality one of the most problematic fields is age discrimination without doubt, mainly because a clear practise for such cases does not exist or at least this practice is

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not necessarily consistent. In connection with the contempt of equal treatment in the cases of e.g. gender discrimination we „know” how the cases must (or should) be treated on the basis of the directive principles and practice but in the cases of the old – or the young in some cases – we cannot use a „key” by which the emerged problems in this subject matter could be solved uniformly and effectively.

The cause of this special feature can be seen as follows: examining age discrimination as a concept we can divide it into two parts since this discrimination may be emerged both because of somebody’s young or old age. Obviously, in the labour market of the European Union the latter group suffers more because of age discrimination and of course, the number of cases on discrimination against older employees is significantly higher. If we insist on the comparison mentioned above I’d like to turn attention to the important differences as follows.

Accidental gender discrimination also may touch the representatives of the stronger sex, and more severe such cases of damaged rights have come to light than cases of age discrimination against young people. So parallelism between them can be observed but the output is totally different regarding to the following facts. In the labour market female and male employees are rivals in a sense and a conflict of interests can be observed. This in parallel refers to and it is true for the groups of young and old employees and there are several facts in this formula because of which the two types of problems cannot be treated the same way. Let’s think that in a sense the young employees should be preferred at the employment, but the same cannot be said about the male employees in general. Though there are some similarities between the two fields, pure analogy cannot be applied for solving the specific discrimination cases.

### **3. What can the law do?**

This question – I really hope – is not a poetic one, since the only weapon in the employees’ hands is the thesaurus of legal methods, which defend the employees’ rights. Naturally, it does not mean that these regulations secure sufficiently efficient protection, but the older employees have to insist on these minimal requirements. In the following I will interpret the most important parts of the relevant Union regulation and the actual questions of the developing practice.

#### *3.1. The guarantees established in the Directive 2000/78/EC*

First of all I’d like to mention the directive, which can be defined as the „codex” of the prohibition of age discrimination, since this employment and occupation directive expresses the most important regulations. The directive itself was accepted on 27th November 2000 and according to the logic of the Union anti-discrimination law it does not contain only the older persons’ protection but also the general frames of the requirement of equal treatment applied during the employment in general. Two important things can be derived from this. One of them is that the directive is a so-called frame-regulation (framework), namely, its rules are declared in general, and its real content – its detailed rules – appears in the structure of the regulation by other legal aspects. On the other hand I’d like to turn attention to the definitely interesting legal solution according to which even if the directive composes in general, it also speaks about the prohibition of age discrimination and about the applicable exceptions in a special part, namely, it tends to fulfil the olds’ rights through a special double system.

Its explanation is not trivial: even if the old age is one of the personal features, which are defended by the directive, it has an emphatic role. I think this – in a sense – strange solution can be one of the reasons (at least indirectly) of the fact that in spite of the double defence the rights of the old employees are not defended at the necessary measure and way. It also must be added that the logic and philosophy of the regulation are in accordance with the employment directives of the year 2000 within the frames of which the protection of rights in connection with the older generation has gained an emphatic role, and this way the prohibition of age discrimination has become one of the most important employment priorities.

The directive realizes – in a favourable way – that this problem does not only mean to vindicate one working group’s (older generation) rights but also means a wider problematic area definitely regarding to social questions. So the standpoint reflects the view according to which the older persons’ social employment reintegration is an organic

part of the employment fulfilled on the basis of equal opportunities, and it also has an important role in shaping a real connection between the generations, in preserving basic social values, or in preserving the sustainable development of the economy.

The 2nd Article of the directive defines the concept of disadvantageous differentiation securing that the principles of basic regulations (implemental) would gain their proper rank. It is interesting to remark that several Member States define the concept of discrimination in a different way – e.g. the Hungarian law – and at the same time according to the practice of the courts of the Member States and authorities the concept of directive must contain these minimal differences. We speak about disadvantageous differentiation if the requirement of equal treatment is damaged regarding to the cited personal features – religion, belief/conviction, disability, age, and sexual orientation. So the directive does not define the exact concept of discrimination but it fixes that it means its direct and indirect form, too (they are defined exactly in the directive). It means that equal treatment against the employees is fulfilled if they do not suffer from any kind of discrimination during their employment.

According to this the directive – apart from the practice of the Member States in a sense – establishes that the existence of the direct discrimination is bound to the requirement of comparability and the adverse treatment. On the contrary the indirect form of it is defined that an apparently neutral provision, criterion or practice measure leads to such results against the employees that embodies discrimination. All this is of great importance because we can experience both of them in practice in connection with disadvantageous differentiation based on age.

It can be observed that the directive besides intending to supply general protection for special groups of employees, the protection is spread to all phases and features of the employment, namely besides the whole dynamism of the labour relationship the requirement of equal treatment must be achieved even before the establishing the labour relationship – typically during the job advertisement, competition, job interview – and in a sense this requirement may affect the period after the termination/forced termination of the labour relationship (the account between the parties, severance pay, questions of retirement). As a consequence of all these the older employees' legal protection must be fulfilled in a complex way.

It also must be added that the directive doesn't tell more about the protection on the merits. It fixes the frames within which the Member States must protect the employees' rights, and of course, it will be completed, made more precise and widened by the case law of the Court of Justice of the European Union, to be more exact, widened or reinterpreted in practice.

### 3.2. *The exceptions*

The regulation would not be perfect if the directive would not let diversities from the rather strict main principle. It is the basic feature of the equality law, since legal differentiation and advantage making are as important parts of the requirement of equal treatment as the requirement of treating the similar situations in the same way. However, some solicitude has emerged in connection with the regulation because these quasi-exceptional reasons are not quite unambiguous as well as their system causes many difficulties in practice. It was already mentioned earlier that the prohibition of age discrimination can be found in the directive independently but especially we can meet these regulations only in the circle of legal exceptions. It is true that the directive intends to declare more precisely and defines perfectly the cases that protect the older employees but at the same time the guarantees are weakened and some backdoors seem to be left open for the Member States and in some special cases for the employees, too.

It is a general rule – Article 2 Paragraph (2) b) i. – that differentiation is legal if the regulation, conditions or practice can be justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. This exception is the most obvious one because the legal aim itself may establish the legitimacy of the discrimination, even if objectivity, the criteria of conformance and necessity are required conjunctive. It is worthy to remark that the latter conditions have come from the Court's judging practice in similar subjects and is in accordance with some elements of gender anti-discrimination law. But we still have the problem because to define the concept of the legal aim is nearly impossible in spite of the fact that the Court itself tries to do it from case to case.

Paragraph (1) of Article 4 also defines the requirements of employment permissively since it declares that the Member States have possibilities to declare that those regulations and measurements on employment basis –

practically scope of duties, labour – regulation and measurement which otherwise are discriminative can be regarded legal. At the same time these requirements should be real and defining and legal aim and requirement must be in the background of the discrimination. It is interesting that this regulation is narrower than the above-mentioned exception because these variant possibilities should orientate to the employment requirements, namely it must be judged on the basis of the real features of the concerned scope of duties, job, and status.

The third legal regulation place where the directive disposes about this question is Article 6 Paragraph (1) and (2). It declares that differences of treatment on the grounds of age, which is objectively and reasonably justified by a legitimate aim within the frames of the national law, shall not constitute discrimination if the means of achieving that aim are appropriate and necessary. The directive names such aims as examples, which typically belong to this circle, so they may be aims of employment policy, social policy or labour market policies. I'd like to remark that in most cases both legal and illegal discrimination are realized along these aims typically. Later the directive names the circumstances and attributes which belong to this circle of cases, so difference can be made at establishing labour relationship, in case of dismissal, or remuneration, similarly job may be conditioned to a maximum age. The listing practically contains all the important elements of a labour relationship.

It can be learnt that the directive seemingly definitely regulates this form of discrimination, but the employees' legal protection seems to be incomplete at some points. The directive itself fixes that the dynamism and effectiveness of labour market and employment in general require the definite legitimating of certain discrimination cases, but in my opinion the definition is too wide, *ad absurdum* inaccurate. The aims which themselves are legal according to the directive may lead to employment discrimination easily, even if we take into consideration the further – typically conjunctive – restrictions. It can be stated that the rather liberal regulation – with all its positive features – is the main reason of the fact that several legal disputes are referred to the Court in Luxembourg.

#### **4. Are they really equal? Practical problems**

In most cases – Mangold-case, Hörnfeldt-case, European Commission v. Hungary-case, etc. – the first question is whether the various treatments for the old employees were discriminative or not, namely whether the directive in its intellectuality is less favourable or not. The Court has worked out several methods to balance this and it can be stated that the methods applied at other fields of the requirement of equal treatment can be used at these cases, too. So the Court examines first how the concerned measures or regulations affect the concerned worker's personal circumstances. We speak about personal circumstances regarding to her/his working conditions, labour conditions, way of labour, the execution of labour duties stated in the labour contract mainly, but even these aspects cannot be exclusive. That is the Court declared that an interpretation which would be bound only to the concerned employee's work, scope of duties would be too narrow, even if from these it could be judged that differentiation is negative, it is justified to do further examination. The circumstance how the concerned discrimination affects the employee's social situation, her/his reputation, human dignity, her/his social circumstances in general usually must be examined. It is true that these facts should be balanced at all forms of discrimination, but in my opinion concerning old people it is of high importance, let's think of the fact that the termination of the labour contract has close connection with the old person's entitlement to the retirement benefits (its type and measure).

Then the Court examines that in the case of existing discrimination whether it can be justified or not. At such cases it is the most important question, because according to the regulations of the directive if the Member State can justify one of the exceptions mentioned above an openly diverse treatment to the old person may be legal. The most difficult thing, which causes uncertainty, is that the Court has not got a homogeneous and effective standard concerning such cases, since the Member States have discretionary legal power concerning this question. Furthermore, it is solicitous that in a great number of cases legally „clearer” direct disadvantageous discrimination against the employees has emerged, but the Court has to examine the emergence of the indirect discrimination, though this test is much more complicated and the result can be reached much harder. In the latter case it is not unambiguous whether making difference has been fulfilled, since in a certain case a seemingly neutral regulation, measurement may be the base of the employees' discrimination. Taking into consideration that the group of old employees – without seemingly being homogeneous – is relatively easily defined, the Court tries to emphasize the

fact of discrimination and its real content as exactly as possible. The employment of older people is made harder to a significant extent by the fact that the directive can be interpreted that ad absurdum all discrimination which have social or labour market motivation may be legal. This statement may be extreme at first sight, but e.g. in the *European Commission v. Hungary* case the Court declares that basically that aim is legitimate which referring to the unified employment forms intend to unify the age of retirement even if it causes damage to a wide circle of employees in the Member State. Naturally, in the concrete case the regulation about the forced retirement of judges, prosecutors, and public notaries was illegal finally, but in my opinion serious contradictions can be observed between the legal interpretation in Luxembourg and the directive cited above. Namely, the directive came into existence – among other things – to assist older people's employment in such a wide circle as possible while the legal interpretation is often weak and instead of „taking away” from the exceptions expressed rather wide, it seems that logically it insists on the facts expressed in the directive, since it intends to define discrimination rather on the basis of the other concepts, typically by using the test of proportionality.

Finally, I'd like to remark that the Court should take into consideration the fundamental human rights more definitely in connection with this type of discrimination. On the one hand the right to equality and the illimitable right to human dignity are the base of the social structure and employment without discrimination, and on the other hand regarding to the old employees' legal protection one should not concentrate on employment, economic and social questions exclusively. Namely, the protection of fundamental human rights is often ignored and it is the reason why I think that the old employees' legal situation is not secure enough and as a consequence of this their situation at the labour market is rather disadvantageous. All these are experienced in spite of the fact that basically they have the right to be useful members of the society as long as possible and complete themselves during their life in such a way that in older age they should not feel that they are less than the younger ones.

## 5. Conclusion

The problem of employment and occupation discrimination is not a new phenomenon but referring to the development in the last centuries it cannot be regarded as a solved problem. On the contrary, as a consequence of changing forms of employment, the changes in the structure of the labour market, development of the society, economy, and culture and social politics several questions have come into light which were not in view earlier. On the one hand it is true that the gained experiences in the labour market during the long years as well as the fact itself that the concerned person „has seen a lot” namely, she/he is more experienced with other views that a beginners worth more and more. On the other hand the respect for older people is less and less and the opinions about their „utility” in the world of labour are different. It is inconceivable these days that the employers would make themselves independent of these outer influences, so it is clear that in the European Union the age discrimination does not seem to disappear but it is even getting stronger. That's exactly why I regard one of the most important tasks of the Union legislation and the Court the fact that after the year 2012 we could tell as many times as possible that a certain year was (also) the year of old people. I really hope it will cause real changes and development not only the variety of aims and theories to be achieved.

## References

- Barnard, C. (2006). *EC Employment Law*. (3rd ed.). Oxford: Oxford University Press, 398.
- Bercusson, B. (2009). *European Labour Law*. (2nd ed.). Cambridge: Cambridge University Press, 178-179.
- Gyulavári, T. & Könczei, Gy. (2000). *Európai szociális jog*. Budapest: Osiris Kiadó, 77-80.
- Schiek, D. (2002). A new framework on Equal Treatment of Persons in EC law? *European Law Journal*, 2, 290-314.
- Council Directive 2000/78/EC. Downloaded: [http://eur-lex.europa.eu/RECH\\_naturel.do](http://eur-lex.europa.eu/RECH_naturel.do), 11/03/2013.
- C-144/04 *Werner Mangold v Rüdiger Helm*, C-411/05 *Palacios de la Villa v Cortefiel Servicios SA*, C-341/08 *Dominica Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe*, C-45/09 *Gisela Rosenblatt v Oellerking GmbH*, C-141/11 *Torsten Hörnfeldt v Posten Meddelande AB*, C-286/12 *European Commission v Hungary*. Downloaded: [http://curia.europa.eu/jcms/jcms/j\\_6/](http://curia.europa.eu/jcms/jcms/j_6/), 03/02/2013.