41 Equal Employment in Hungarian Labour Law

Effective Principle or Uncertain Framework

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41.1 Introduction

To describe the principle of equal treatment and its importance for the legal professional is unnecessary, since as one of the fundamental legal principles[1] it has significance that extends beyond the criterion of equal employment posed in the title,[2] and if we examine the principle in the world of labour and social law, it is clear that we are speaking about a fundamental legal provision,[3] which can be classified as part of fundamental social rights[4] and it is a basis of free movement of workers.[5] Consequently, the exploration of the importance of this principle should not be left to the labour jurists exclusively, but it is true that in the law of the European Union[6] and in itemized international law[7] equal employment was and has been the starting point of analyzing this general legal principle.[8]

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The paper is part of the K117009 "*The requirement of equal opportunity employment in the framework of HR tendencies reflecting changing expectations in labour law*" research project, National Research, Development and Innovation Office, contract registration number K117009.

1 A. Somek, *Engineering Equality*, Oxford University Press, New York 2011, pp. 2-6.

2 J.J. Donohue, "Advocacy Versus Analysis in Assessing Employment Discrimination Law", in: C. McCrudden (Ed.), *Anti-Discrimination Law (2nd series)*, The Cromwell Press, Trowbridge 2004, pp. 132-135.

3 A. Ádám, "Az Alkotmánybíróság szerepe az emberi jogok védelmében", *Acta Humana*, Vol. 5, No. 15-16, 1994, pp. 62-64.

4 H. Rab, *A nyugdíjbiztosítási ellátások fenntarthatóságának jogi garanciái*, HVG-ORAC Lap- és Könyvkiadó Kft., Budapest 2012, pp. 144-150.

5 C. Tobler, *A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law*, Intersentia, Antwerp – Oxford 2005, p. 179.

6 C. Barnard, "The Future of Equality Law: Equality and Beyond", in: C. Barnard – S. Deakin – G.S. Morris (Eds.), *The Future of Labour Law*, Hart Publishing, Oxford – Portland Oregon 2004, pp. 213-215. and pp. 227-228.

7 See: S. Szemesi, *A diszkrimináció tilalma az Emberi Jogok Európai Bírósága gyakorlatában*, CompLex Kiadó Jogi és Üzleti Tartalomszolgáltató Kft., Budapest 2009, pp. 15-18.

8 T. Gyulavári, "Az egyenlő bánásmód elvének dogmatikai és gyakorlati jelentősége", in: Gy. Kiss (Ed.), *Az Európai Unió Munkajoga és a magyar munkajog a jogközelítés folyamatában*, Osiris Kiadó, Budapest 2001, pp. 57-83.

However, to describe its importance in detail is unnecessary, but it is worth mentioning that in spite of the "popularity" of this principle its legal background or its practical approach, which raises several questions in most of the cases, questions which cannot be answered unambiguously. The reason may be that the principle is complicated and diversified, but in my opinion it is worth examining such concrete examples which take into consideration the essence of the principle from both theoretical and practical aspects in the hope that the very essence of it can be understood. In order to undertake this examination I have chosen the regulation of one Member State, Hungary, while at the same time not ignoring the norms of the EU as milestones.

My hypothesis is bilateral, since on the one hand, I am examining the compliance of the present Hungarian regulation and the possible new interpretation of equal employment, namely, how the principle in its present form can ensure its original purpose, and how it supports the real legal protection of employees. On the other hand, viewing the same question from a distance, based on the collision of the regulation and practice I will make conclusions about the concrete regulatory environment. The study takes as a basis the specialities of the Hungarian regulation together with the level of harmonization EU directives.

Considering that the principle is embedded in EU law it is worth examining the present effective Hungarian regulation mainly because it is rather recent and may involve uncharted areas. On the other hand, it is old enough to be the subject of a professional discussion even if the relevant judicial practice is rather narrow at present.[9] To be correct, the prohibition of discrimination was not an emphatic area in labour law practice before 2012, neither was the practice coherent in every case.[10] These difficulties in analyzing may give more motivation on the following pages. Before the real interpretation it is important to emphasize that this study is mainly restricted to the framework in Article 12. § of Act I of 2012 on the Labour Code (hereinafter: LC), even if the Hungarian legal environment will also be mentioned later in a wider sense.

9 About fifty judgments of the Curia of Hungary – which form the official interpretation of the relevant rules – starting in 1992 – deal with the question of equal treatment and about twenty five of them are still in force and applicable nowadays.

10 See for example Judgment No. EBH 2015. M.24. of the Curia of Hungary on burden of proof in discrimination cases which focuses on a new viewpoint because the former judicial practice didn't highlight the importance of these special rules consequently.

41.2 How the Principle Is Embedded in Legal Regulation and What Aspects Are to Be Examined?

In my opinion the problems of equal employment hardly can be separated from the level of the general requirement of equal treatment,[11] since practically, equal treatment as a labour law requirement is a "branch specific", independent part of it.[12]

Besides the constitutional framework ensured by the Basic Law of Hungary,[13] it is important to mention two laws, since the LC act CXXV of 2003 on equal treatment and the promotion of equal opportunities (ETA) are normative and it leads to a special double anti-discriminative protective structure. ETA contains the basic concepts and the prohibition of discrimination in general and names its two main types: direct and indirect discrimination. It is typical of the law that though it prohibits all kinds of discrimination, it applies a positive approach according to the EU norms,[14] since it states in its preamble that all people have the right to live as persons with equal dignity.[15] It is also important because in the resolutions of the Constitutional Court the argument that the right to equality basically means the right to being treated with equal dignity has been strongly declared.[16]

In general it is true that the prohibition of discrimination,[17] a principle which is at present recognised in both the context of international and EU law and also in connection with employment,[18] is such a basic principle in labour law, the interpretation and correct

11 See the following judgments of the Curia of Hungary: Judgment No. EBH 2012. M.12., Judgment No. EBH 2155/2010., Judgment No. EBH 1629/2007., Judgment No. EBH 1980/2009., Judgment No. BH 74/2012. and Judgment No. BH 250/2008. On the basis of these judgments we can draw the conclusion that since the ETA entered into force in most of the cases the consistent judicial practice could hardly separate the general questions and requirements of equal treatment from the special rules of the LC but of course, this separation is not always necessary.

12 G. Halmai, "Az alapjogok helyzete Magyarországon 2005-ben", *Fundamentum*, Vol. 10, No. 1, 2006, pp. 163-181. and Resolution No. 45/2000. (XII. 8.) AB of the Hungarian Constitutional Court.

13 Art. XV of the Basic Law of Hungary states the general prohibition of discrimination.

14 Naturally, this approach can be criticized since in a way ensuring the principle of equal treatment bears weaker legal guarantees than the strict prohibition of discrimination, consequently, these two aspects could be placed in the Hungarian legal system. This deficiency is not typical only of Hungarian law, but is also the dominant approach in most European states as well. See: Zs. Kálmán – Gy. Könczei, *A Taigetosztól az esélyegyenlőségig*, Osiris Kiadó, Budapest 2002, pp. 140-141.

15 Z. Szente, "A pozitív megkülönböztetés problémái", *Fundamentum*, Vol. 10, No. 4, 2006, pp. 17-44.

16 K. Kovács, "Erős elv, gyenge jogvédelem", *Fundamentum*, Vol. 13, No. 4, 2009, pp. 29-48.

17 From a legal point of view discrimination means disadvantageous differentiation, with narrowing approach it is arbitrary disadvantageous differentiation. See: L. Román, "A jogegyenlőség és a diszkrimináció tilalma", in: A. Ádám (Ed.), *Az emberi jogok szabályozása az Alkotmányban*, Közgazdasági és Jogi Könyvkiadó, MTA Állam- és Jogtudományi Intézet, Budapest 1996, p. 195.

18 In connection with the most important international conventions declaring the requirements of equal treatment (or the prohibition of discrimination) see: Szemesi, pp. 15-18. Considering the theme of this paper it is necessary to refer to conventions relating to the principle of equal employment of the International Labour Organization (ILO): Convention No. 111 (on general prohibition of employment and occupation discrimination) and No. 156 (on workers with family responsibilities).

application of which is a serious task that is not eased even by the fact that its interpretation is not uniform in the Member States of the EU.[19] This fact really affects the mechanisms and directions of legislation and the judiciary in the Member States and Hungary is no exception. Although the principle in its present form[20] is rather recent in Hungarian law, the principle of equal treatment in labour law appeared in the regulation of Labour Code of 1967, and in the Labour Code of 1992 – at first – it received detailed regulation, and in the last two decades the direction of regulation has been harmonized with the actual expectations of the EU.[21]

Considering all the above, the aspects to be examined will be the following: first, I will analyze article 12. § of the LC in general while paying special attention to the framework nature of the rule and its connection to the ETA. The aim of the examination is to discover whether it is a proper solution to place this principle in the system of common rules of conduct, and to explore the possible risks of drafting the principle in judicial practice. Then I will specifically analyze paragraphs (2) and (3) which focus on the principle of equal pay for equal work and labour market aspects recently built in the quasi-concept of remuneration and the aspects of equality. In the last important part of the study I will try to answer the basic regulative questions in connection with the principle of equal treatment from the viewpoint of legal practice.

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19 Good examples of it are publications, statistics and reports published on the webpage www.equineteurope.org, since the institutions of Member States responsible for the protection of equal treatment have different practice in interpreting and enforcing e.g. equal pay. See: *Equal Pay for Equal Work and Work of Equal Value: The Experience of Equality Bodies*, www.equineteurope.org, www.equineteurope.org/IMG/pdf/equal_pay_report_publication_.pdf (30.05.2014.), Brussels 2013.

20 I mean the general framework law-nature of the ETA.

21 Para. (3) of Art. 18. § of act II of 1967 (Labour Code of 1967) stated that considering the establishment of employment relationship and rights and obligations relating to it one cannot be discriminated against because of gender, race, age, origin. The Labour Code of 1992 developed these rules and Art. 5. § broadened the circle of protected characteristics declaring that all types of discrimination are forbidden considering any circumstances which are not related to the employment relationship. Paragraph (1) declared the case of justified unequal treatment, and paragraph (2) similarly to the rules of today defined the burden of proof without the employee's obligation of presumption. Paragraphs (3) and (4) ensured the employees' promotion without discrimination and granting advantageous conditions. From 1st July 2001 the regulation was broadened and state of incapacity became a protected characteristic, and the concept of indirect discrimination and the employer's obligation for remedy were drafted. After the promulgation of ETA from 27th January 2004 the Labour Code of 1992 enforced the positive approach of ensuring equality, since it stated the principle of equal treatment. Compared to EU law the Labour Code of 1992 was also criticized in relation to this regulation: Cs. Lehoczkyné Kollonay, "Árnyak és árnyalatok az egyenlő bánásmód európai uniós elvének alkalmazása körül", *Fundamentum*, Vol. 2, No. 1-2, 1998, pp. 88-93. But considering the original concept of the Labour Code of 1992 the most serious criticism was its difficult transparency and difficult applicability as a consequence of it. See: B. Nacsa, "A munkahelyi diszkrimináció elleni jogvédelem problematikája Magyarországon", in: J. Koltay (Ed.), *A munkaügyi kapcsolatok rendszere és a munkavállalók helyzete*, MTA Közgazdaságtudományi Kutatóközpont, Budapest 2000, p. 198.

41.3 Framework Norm (LC) versus Framework Law (ETA)

In the following I will focus on the framework norm of the LC, which states conceptually that in connection with the employment relationship the principle of equal treatment must be strictly observed and remedying the consequences of any breach of this requirement may not result in any violation of, or harm to, the rights of other workers. The principle in its form can be classified as a common rule of conduct of labour law,[22] but it is special, since its real content and extent is defined by another law, and it raises the question of its labour law nature. It is important to add that I will concentrate mostly on article 12. § of the LC on the following pages, but the ETA will be involved, too, because the rules of prohibition of discrimination seem to be "one-sided" only on the basis of the LC.[23]

41.3.1 Equal Employment in the LC

The LC orders about the requirements of equal treatment as a fundamental principle among the common rules of conduct. It means that the principle of equal treatment is not a guideline exclusively which would be compulsory for the parties – the employer in this case – to fulfil under the scope of the employment contract, but also a practical regulation on which basis the addressee of the norm has to fulfil concrete and real obligations.

Article 12. § of point 6 of the LC disposes as framework norm the requirement of equal treatment, what shows that contrary to the previous LC the legislator tried to comprehend this principle in a unified structure and make it clearer and more easily applicable. In addition, the LC follows the positive approach of the ETA and in a concluding form makes a declaration about employment aspects of the principle of equal treatment. Although the LC does not say more about the fundamental principle than drafting its essence,[24] it gives details about the principle according to employment aspects exclusively, and at several points of the law we can find concrete regulations referring to this requirement. Examples of it are maternity leave,[25] the principle of equal treatment mentioned in several parts related to atypical employment,[26] and the employer's obligation to consult the works council prior to passing a decision in respect of any plans for actions and adopting regulations affecting a large number of employees in connection with measures implemented

22 T. Gyulavári (Ed.), *Munkajog* (second, revised edition), ELTE Eötvös Kiadó, Budapest 2013, 88-89.

23 It is true even if this paper is restricted to equal employment.

24 It would not be considered necessary, since the ETA led to the detailed rules of the principle of equal treatment – concepts, justification, burden of proof etc. – being regulated generally considering the special – emphasized – nature of some fields.

25 Art. 127 § of the LC.

26 Point d) of para. (2) of Art. 219. § and paragraph (3) of Art. 219. § regarding temporary agency workers.

with a view to enforcing the principle of equal treatment and for the promotion of equal opportunities.[27]

The regulation of the LC of 2012 – which entered into force on 1st July 2012[28] – did not bring a radical change[29] in the effective text of the norm,[30] which, of course, would be unnecessary because of the earlier explicated specialities of the regulation. It can be discussed how the spirit of these rules of the LC can influence the labour law practice and the interpretation in the future also referring to the ineffective regulation of 1992.[31] It is clear that among such requirements of the EU the guarantees of the effective legal protection have main priority,[32] which would be impossible without uniform, continuously developing legal protection.[33] Even though the development of Hungarian law of equality is permanent, it is important to criticize both the regulation and the legal interpretation.[34]

Considering that the ETA intends to itemize the principle, Paragraph (1) of Article 12. § of the LC declares the requirement of equal treatment as a framework. The requirement of equal treatment is an independent title in the common rules of conduct indicating that the idea and the essence of this principle are different from others. Article 12. § states that in relation to employment relationship, mainly in relation to remuneration, the requirement of equal treatment must be kept.[35] In case of committing a violation it must be remedied:

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27 Point m) of para. (2) of Art. 264. §.

28 Some parts of the law came into force only on 1st January 2013 (rules of derogation from the employment contract, records of vacation time, calculation of absentee pay).

29 Gy. Kenderes, "Gondolatok és felvetések az új Munka Törvénykönyve általános rendelkezéseihez és felelősségi szabályaihoz", *Gazdaság és Jog*, Vol. 17, No. 9, 2013, pp. 15-19.

30 It is important to add that the last version of the Labour Code of 1992 before the ETA's entry into force contained detailed norms of prohibition of discrimination, this way the lack of a general law on equal treatment could be compensated somehow. See: E. Vinnai, "A hátrányos megkülönböztetés tilalma Magyarországon az Európai Uniós csatlakozás tükrében", *Sectio Juridica et Politica Miskolc*, 2002, pp. 453-470.

31 It is important to add that according to Prugberger – Nádas the earlier regulation of the Labour Code of 1992 was more effective and more transparent because of the more concrete rules. See: T. Prugberger – Gy. Nádas, *Európai és magyar összehasonlító- és közszolgálati jog*, CompLex Kiadó, Budapest 2014, pp. 88-89. and pp. 90-91. At the same time it is clear that after the enforcement of the ETA, a model of regulation in which the Labour Code in detail or at least in greater detail discusses the prohibition of discrimination because of the concept of the ETA became unnecessary.

32 Its importance can be seen in the most significant directives, which deal with employment anti-discrimination: Directives 76/207/ECC and 2002/73/EC for its revision, 92/85/ECC, 1999/70/EC, 97/80/EC, 97/81/EC, 2000/78/EC, 2006/54/EC and 2008/104/EC.

33 The criterion of effective legal protection would not mean only the possibility of guaranteeing access to means of legal remedy, but the effective authority would examine the case, and if discrimination is stated, such legal consequences should be applied which are applicable for restoring the suffered disadvantage, and at the same time are preventive. It is not enough that the party who suffered should not receive real remedy because of the specialities of the given procedure; in my opinion during the procedure the interests of the victim of the discrimination must be kept in mind. See: B. Bodrogi, "Legal Standing – The Practical Experience of a Hungarian Organisation", *European Anti-Discrimination Law Review*, No. 5, 2007, pp. 23-24.

34 Mainly because of its special point of view.

35 Horváth calls attention to the fact that the present LC keeps the complex protective circle in spite of emphasizing the principle of equal pay. See: I. Horváth, "Az új Munka törvénykönyve I. rész", *Adó*, Vol.

this is the obligation of the Member States according to Directive 2000/78/EC,[36] which is one of the basic directives of equal employment. The Member States have to build and maintain such a structure of legal protection and enforcement that makes it possible that employees who suffer any kind of discrimination can have recourse to real, effective legal remedies.[37] At the same time according to Paragraph (1) this process cannot violate the rights of another employee, and it means that the fulfilment of equality between the employees cannot result in discrimination or any other type of violation.[38]

41.3.2 The Structure of the Principle

It seems to be solicitous to break the system of fundamental principles so conspicuous since the LC declares to bring employment relationships closer to civil law.[39] Consequently, the importance of fundamental principles – which can be traced back to civil law or are at least related to it – should be highlighted. Accordingly, an element of employment relationship – remuneration – receives too much emphasis which otherwise within a certain framework is a free object of the mutual consent of the parties. Though it is obvious that in relation to pay some guarantees are necessary – let's think of the protection of wages – I think to emphasize pay and name it as a special element of the requirement of equal treatment is rather arbitrary. It is important that this solution – which intends to protect the interests of the employees as effectively as possible – reflects a new aspect, behind which may be the fact that unlike the Constitution of 1949 the Basic Law does not cover on a constitutional level the principle of equal pay for equal work while Paragraph (2) of article 70/B. § of act XX of 1949 on the Constitution of the Hungarian Republic declares that everybody has the right to equal pay without any kind of discrimination.[40] In relation to

26, No. 3, 2012, pp. 94-104. I think we should agree with this standpoint anyway, but this kind of legal interpretation of the principle of equal pay for equal work is disputable.

36 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

37 Practically, this principle was definitely present in the first directives which came out in the middle of 1970s to reform generally the employment policy of the EU, firstly Paris Summit 1972 and Social Action Programme 1974. See about the regulation aspect of this question: J. Hajdú, "A szociális dimenzió fogalma és normatív szabályozásának fejlődése az Európai Unióban", *Európai Jog*, Vol. 11, No. 3, 2001, pp. 17-22. and in connection with their diversity: T. Gyulavári, "Egyenlők és egyenlőbbek (2. rész)", *Humán Szaldó*, Vol. 6, No. 3, 2009, pp. 79-82.

38 It cannot typically perform misuse of rights.

39 In relation to the basic conceptual changes see: T. Gyulavári – N. Hős, "The road to flexibility? Lessons from the new Hungarian Labour Code", *European Labour Law Journal*, Vol. 3, No. 4, 2012, pp. 252-269.

40 In my opinion this guaranteeing regulation had important role in ensuring employment equality in spite of the fact that this rule became empty because of the judicial practice of the Hungarian Constitutional Court, as Juhász states. It means that the Hungarian Constitutional Court declared general prohibition of discrimination in Art. 70/A. §of the Constitution as general principle covering the whole Hungarian legal

equal pay this approach can "substitute" the guarantee missing from the constitutional level. Dogmatically it is justified to presume that this is due to the fact that the definite legal declaration of the most important segment – equal pay for equal work or work of equal value – of the earlier relevant labour law regulation, is missing from the present LC.

According to the ministerial explanation of the present LC, remuneration has to be highlighted as a sphere of special regard within the framework of equal treatment because pay discrimination is the most common; furthermore equal pay for equal work is the most significant question of anti-discrimination in EU law.[41] I think these arguments are not ambiguous but this new approach stresses that the principle of equal pay for equal work plays a key-role in the whole labour law regulation. We cannot avoid the following question: is this special role real? I will try to find the answer in Chapter 4.

At the end of the day judging this problem is rather difficult: it is true that the legislator broadened the general principle with this solution, but left the regulation unchanged on merit. It is worth imagining a real life situation in which the right of given employee or group of employees to equality because of the differentiation of wages cannot be fulfilled. In such a case the court in judging the legal dispute has to focus on the differences in wages exclusively. If we accept that with this solution the questions relating to remuneration become an immanent part of the principle of equal treatment, the existence of a comparable situation[42] or the unjustified different pay itself can base employment discrimination, since the existence of comparable situation[43] results in the justification of cause-and-effect.[44] In this context it is not necessary for the violated party to justify a protected characteristic (gender, age, employment situation, religion, race, colour etc.), and articles 21-25. § of the ETA can play much greater role different from articles 8-14. § applied in both general and special sense.[45]

41.4 The "Lost" Equal Pay

According to the above described, Paragraph (2) of article 12. § defines the concept of pay because this concept has to be interpreted closely together with the principle of equal

system. See: G. Juhász, "A gazdasági és szociális jogok védelme az Alkotmányban és az Alaptörvényben", *Fundamentum*, Vol. 16, No. 1, 2012, p. 38.

41 Ministerial explanation of Bill No. T/4786. on the Labour Code, 103.

42 In connection with its practical appearance see: T. Gyulavári, "Egyenlők és egyenlőbbek (4. rész)", *Humán Szaldó*, Vol. 6, No. 5, 2009, pp. 135-137.

43 According to the commentary on the ETA comparability should be interpreted based on Directive 2000/78/EC, so in a broadening sense. At the same time its exact content depend on the actual establishment of facts. See: *Commentary on act CXXV of 2003*, CompLex Jogtár.

44 T. Gyulavári – Gy. Könczei, *Európai szociális jog*, Osiris Kiadó, Budapest 2000, pp. 72-76.

45 It must be added that naturally, when referring to Art. 21. §it is necessary to name a protected characteristic listed in Art. 8. § of the ETA.

treatment based on the legislator's will. Therefore the relevant rules focus on the guarantees protecting the employees' right to equal pay for equal work or work of equal value. Pay (wage) – for the purposes of Paragraph (1) – shall mean any remuneration provided directly or indirectly in cash or in kind, based on the employment relationship.

41.4.1 Meaning of "Pay"

I think this definition is synchronized with the standards both of the ILO and the very broad interpretation of the Court of Justice of the European Union (CJEU).[46] Such a concept is meant to protect the employees' rightful interests at a very high level.[47] Furthermore, this definition fits into the former Hungarian judicial practice, because judging the legal nature of some kind of benefit – whether it qualifies as pay or not – depends on the legal relationship within which framework it is paid and whether it is paid by the employer or by another person as counter-value of work.[48]

Commitment No. 384/2/2008. TT. sz. of the Equal Treatment Advisory Board gives some more details about pay because it is fundamental to clarify its application concerning equal employment.[49] This description is an addition to the norms of the LC.

The aforementioned concept of the LC is very similar to the concept of both the previous LC and the definition of the commitment; it contains only a few additions in content. It must be added that this definition can only be applied in connection to the general principle of equal employment, so I think this approach can lead to misunderstandings in legal interpretation when the courts apply this concept to labour issues other than employment discrimination.[50] The commitment mentions the applicability of the principle of equal pay for equal work regarding work done within the framework of civil law relationships but

46 In relation to the conceptual changes of the concept of pay see: J. Eichinger, "Equal Pay for Equal Work and Work of Equal Value", *EC Law on Equal Treatment between Women and Men in Practice – ERA Seminar*, Trier 9-10 November 2009, pp. 1-6.

47 See in the recent case-law of the CJEU: Judgment of 6 December 2012 C-124/11., C-125/11. and C-143/11. *Joint Cases Bundesrepublik Deutschland v. Karen Dittrich* (C-124/11) *and Robert Klinke* (C-125/11) *and Jörg-Detlef Müller v. Bundesrepublik Deutschland* (C-143/11) [2012], Judgment of 10 May 2011 C-147/08. *Jürgen Römer v. Freie und Hansestadt Hamburg* [2011], Judgment of 1 April 2008 C-267/06. *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen* [2008], Judgment of 21 July 2005 C-207/04. *Paolo Vergani v. Agenzia delle Entrate, Ufficio di Arona* [2005] ECR and Judgment of 8 June 2004 C-220/02. *Österreichischer Gewerkschaftsbund, Gewerkschaft der Privatangestellten v. Wirtschaftskammer Österreich* [2004].

48 According to Principal Judgment No. 251/2000 of the Curia of Hungary the employee's remuneration for work, independent from the name, in spite of the fact that the Labour Code does not state definitely the concept of pay.

49 See Judgment No. 251/2000 of the Curia of Hungary directing in the legal practice.

50 For example, when judging wage supplement or pension benefits.

if we apply the principle only to the concept defined in the LC, civil law relationships – for example, mandate – have to be excluded from this scope.[51]

Probably the legislator intends to guarantee the proper interpretation of pay, furthermore, the ministerial explanation states that one of the most important – maybe the most important – spheres of anti-discrimination is equal pay for equal work. This means that the extended concept of pay serves the need for effectively protecting the employees' rights.

Contrary to the above described several critical remarks have to be made in connection to both the definition itself and its role in the regulation. The Treaty on the Functioning of the European Union (TFEU) defines pay in relation to the principle of equal pay, too, as follows: "pay" means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer (Para. (2) of Art. 157).

I think this concept of pay is undoubtedly wider than the Hungarian one because it highlights separately the base and minimum wage; furthermore, "salary" – especially in the public sector – is also part of pay (the same applies for the Hungarian legal practice). It is important that pay must be paid only by the employer because it is not enough that the employee gets the given benefit in connection to the employment relationship or the actual working activity. It is reasonable because it is possible that the employee can get some kind of "pay" for their performance not from the employer and the form and measure of these kinds of benefits can vary to a great extent. Apparently, these "pays" also have to be counted concerning the definition of pay because they are based on the work performance of the employee but it would be inequitable if we accept that pay is equal between two employees if one of them gets some kind of "pay" from a third party but the other one doesn't. This way comparable situation could not be stated easily. So I think there are conceptual and practical aspects that make it impossible for these benefits to count as pay, so they have to be put aside when applying the principle of equal pay for equal work.

In my opinion it would be desirable for this to be stated in the Hungarian LC especially because the LC contains the following rule: employees may not accept and may not lay claim to any remuneration from third parties in connection with their activities performed as a part of the employment relationship without the employer's prior consent.[52] To sum up: the employer can prohibit accepting tips or gratuity. But if the employer allows the employee to accept such benefits the employee's wage cannot be decreased by their sum if the employee performs work in an employment relationship, because pay can only be contributed by the employer. In my opinion the previously mentioned norm has warranty

51 Though the sharp distinction is not necessarily justified, the definition of the LC in case of other legal relationships aiming at employment cannot be applied. In connection with this distinction see: T. Gyulavári, *A szürke állomány – Gazdaságilag függő munkavégzés a munkaviszony és az önfoglalkoztatás határán*, Pázmány Press, Budapest 2014, pp. 114-118.

52 Para. (2) of Art. 52. § of the LC.

significance related to the principle of equal pay for equal work. Finally, the international basics of pay have to be mentioned because pay is defined in international labour law as well. Namely, the ILO Convention No. 95. contains an even broader approach to pay.[53] Although this concept can be applied in legal practice I think it is worth thinking over whether forcing back pay discrimination would be possible by broadening the concept of pay stressing the importance of equal pay more unambiguously.

41.4.2 Criteria of Work of Equal Value

Following the conceptual questions, Paragraph (3) contains an open-ended list of the criteria defining the aspects of equal value,[54] but these circumstances are only the most important examples. The Hungarian legislator fulfils the obligation of EU law to create an objective system for comparing different kinds of work.[55] It is reasonable because the application of equal pay for work of equal value[56] requires proper analysis of comparable situations, which is focused on the equal value of the work performed. Based on these kinds of circumstances the equal or unequal vale of work can be examined according to merit.

I think that it is very important to connect this list to the practical interpretation of the principle of equal pay; furthermore, it plays a key-role because without these circumstances pay discrimination cannot be judged. In connection with pay it is essential to insert these main aspects into the law because remuneration is such a central and concrete issue of the employment relationship that it cannot be left without actual legal norms and these norms need to focus on work of equal value. Another reason for its importance can be the conceptual surplus of work of equal value compared to equal work,[57] and the latter concept was applied for a long time in the past. These aspects guarantee that the principle is interpreted not only as equal pay for equal work but for equal value as well because if this wasn't

53 It is interesting that the CJEU in several resolutions – for example Judgment of 8 June 2004 *C-220/02. Österreichischer Gewerkschaftsbund, Gewerkschaft der Privatangestellten v. Wirtschaftskammer Österreich* [2004] – refers to the ILO Convention No. 100, stating that it is the main source of minimal standards of the concept of pay. It should be added that these comments are rather explicated in the opinion of the Advocate General.

54 Practically, it is the same as Art. 142/A. § of the Labour Code of 1992, but not word by word; in the aspects of equal work the only difference is the appearance of labour market conditions.

55 E. Ellis, "The recent jurisprudence of the Court of Justice in the field of sex equality", *Common Market Law Review*, Vol. 37, No. 3, 2000, pp. 1403-1426.

56 Equal work means literally the same working activity, but in general work of equal value covers different kinds of work, which can be compared on the basis of some objective aspects. See: M. Oelz – S. Olney – M. Tomei, *Equal Pay – An introductory guide*, www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_216695.pdf (03.05.2014.), International Labour Organization, Genf 2013, p. 31.

57 Oelz – Olney – Tomei, pp. 29-36.

the case the legislator could have ignored this list. These criteria specify the requirement of comparability related to pay, which is a fundamental element of its application. In addition, I think these aspects can also be applied to cases such as working conditions, establishment and termination of employment relationship etc., because they can serve as a pattern for other types of employment discrimination. To be more precise, they can be referred to as attributes of work performed by different employees if they do not do the same tasks, or if they are – or would be – employed with a different scope of activity. Although this is a proper list, other aspects can be examined as well.

In my opinion Paragraph (3) of Article 12. § of the LC guarantees that in legal practice comparing different kinds of work is focused not on equal work but on work of equal value both in the practice of the Equal Treatment Authority and the labour courts. It should be added that this paragraph helps the employee referring to pay discrimination a lot because the employee has to establish the facts of the employment discrimination and to refer to disadvantage in pay would be almost impossible if the employee could not at least refer to these aspects. The employee is not aware of the details of the pay of their fellow worker in most cases so the LC needs to support the employee somehow.

Compared to the Labour Code of 1992 we can find a new aspect, namely the labour market conditions. Besides this, the following are the "classical" attributes of work of equal value: nature of the work performed, its quality and quantity, working conditions, the required vocational training, physical or intellectual efforts expended, experience, and responsibilities. In my opinion labour market aspects were inserted into the law based on the case-law of the CJEU; just think about the extended legal practice of age discrimination.[58] Labour market – in a broader sense employment policy – circumstances appear in these judgements as causes for justification in case of unequal treatment; at the end of the day these aspects can exempt the employer from discrimination. For example not every unequal treatment leads to discrimination if the legislator tries to raise working opportunities for younger people against the interests of older people. Therefore I think – following the ideas of the Directive 2000/78/EC – labour market aspects can be a significant cause for justification on the employer's side,[59] because they can refer to these labour market differ-

58 This is not only the aspect of questions of remuneration exclusively, but it has been part of EU legal practice for a long time. See for example: Judgment of 6 November 2012 C-286/12. *European Commission v. Hungary* [2012], Judgment of 5 July 2012 *C-141/11. Torsten Hörnfeldt v. Posten Meddelande AB* [2012], Judgment of 8 September 2011 C-297/10. and C-298/10. Joint Cases *Sabine Hennigs (C-297/10) v. Eisenbahn-Bundesamt and Land Berlin (C-298/10) v. Alexander Mai* [2011], Judgment of 21 July 2011 C-159/10. and C-160/10. Joint Cases *Gerhard Fuchs (C-159/10) and Peter Köhler (C-160/10) v. Land Hessen* [2011], Judgment of 13 September 2011 C-447/09. *Reinhard Prigge and Others v. Deutsche Lufthansa AG* [2011], Judgment of 10 October 2012 C-45/09. *Gisela Rosenbladt v. Oellerking Gebäudereinigungsges. mbH* [2010], Judgment of 12 January 2010 C-341/08. *Domnica Petersen v. Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe* [2010] and Judgment of 12 January 2010 C-229/08. *Colin Wolf v. Stadt Frankfurt am Main* [2010].

59 This way artificial balance is made between the prohibition of age discrimination and public interest, but keeping this balance is the task of the CJEU. See: L. Rodgers, "Labour Law and the "Public Interest": Dis-

ences – typically between regions – as rightful reasons for different pay for work of equal value, or even for equal work.[60] Contrary to the aforementioned, we do not have a thorough argument to assume that the legislator drew inspiration from the Directive 2000/78/EC because it seems that some practical considerations lead to the implementation of this aspect.[61] However, I still think that the logic of these rules is very similar because labour market aspects mean not only differences in regions; and it is still questionable how these aspects will have a role in judging work of equal value.[62]

It is arguable that the differences in pay based on the different regions could be claimed before labour courts independently because – although the principle of equal pay could be violated – in this case the basic economic and social differences could be put aside without any serious reason. This can be an additional argument for the strict and narrowing interpretation of the other situation as protected characteristic.[63] To sum up, it is reasonable to take this aspect into account but only if it is interpreted the same way as the "classical" requirements of equal value.

The final question should be the following: why do I call the principle of equal pay for equal work "lost" in the current LC? The answer is very simply because the strange position of both the principle and the concept of pay undoubtedly catch the eye. In my opinion the new structure of the principle leads to theoretical and practical uncertainty because all these rules only seemingly serve the effectiveness of equal pay. It rather seems that the legislator positions the principle and the concept together only to cover the lack of its constitutional guarantee[64] and to show its importance focusing on the international obligations.[65] But I think these rules are not coherent enough and their practical interpretation seems problematic, too. Although, paragraphs (2) and (3) of Article 12. § look like the quasi-explanation of the strange "special" approach of Paragraph (1).

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crimination and Beyond", *European Labour Law Journal*, Vol. 2, No. 4, 2011, pp. 302-303. and A. Baker, "A Tale of Two Projects: Emerging Tension Between Public and Private Aspects of Employment Discrimination Law", *International Journal of Comparative Labour Law and Industrial Relations*, Vol. 21, No. 4, 2005, pp. 591-627.

60 See: T. Gyulavári – A.K. Kádár, *A magyar antidiszkriminációs jog vázlata*, Bíbor Kiadó, Miskolc 2009, pp. 122-127.

61 See for example: Judgment No. EBH 1980/2009. of the Curia of Hungary.

62 See: Resolution No. 133/2014. of the Equal Treatment Authority. In this resolution labour market conditions are cited by the employer as grounds of justification based on para. (3) of Art. 12. § of the LC regarding the employee's sex, so it is interesting to think about the possibility of qualifying sex as a labour market condition.

63 See Judgment No. EBD 2014. M.22. of the Curia of Hungary defining the concept of other situation in a narrow circle focusing on the protected characteristic-like nature of the given situation or circumstance. The disadvantage itself cannot be qualified as protected characteristic.

64 See the already difference between Art. 70/B. § of the Constitution of the Hungarian Republic and Art. XV of the Basic Law of Hungary emphasized in Sub-Chapter 3.2.

65 Art. 157 of TFEU, Directive 2006/54/EC and ILO Convention No. 100, the latter was ratified by Hungary with act LVII of 2000.

41.5 In the Language of Practice – about the Special Legal Nature of the Principle of Equal Pay for Equal Work

In the last chapter I reviewed such actual questions that have emerged in Hungarian judicial practice the basis of which is the interpretation of Article 12. § of the LC. I would like to add that the following interpretation focuses only on the latest issues of judicial practice covering Article 12. § of the LC. On the one hand, other spheres of equal employment could be the subject of another paper, and on the other hand, the aim of this study is to answer the question whether the requirement of equal treatment as a basic principle of employment law can ensure effective protection for employees. It is inevitable to mention some issues of the ETA, but I will refer to them only at the proper place. I think equal pay needs to be analyzed through legal practice because of its importance – based on the legislator's will – and on its central role within the framework of the actual regulation of the LC.

In Chapters 3 and 4 the interpretation of the fundamental principle of equal pay for equal work, which is EU-conforming and flexible enough from the aspect employment law, was already described, so it will be the first question that shall now be examined. First of all, I would like to remark that considering several current resolutions of the Curia of Hungary this question is actual and disconcerting in light of the regulation of 2012. In connection with the principle, the main legal question is its legal nature and whether it can be referred to in employment law; on the one hand, there is a question whether it can be separated from the structure of the general principle of equal treatment regulated in the ETA, and on the other hand, supposing that in a labour law claim breach of the principle of equal pay for equal work appears as independent employment law claim – that is Article 12. § of the LC – in relation to the rules of the ETA the plaintiff has to name a protected characteristic besides disadvantageous remuneration, or whether it is enough to refer to the breach of equal employment on the basis of Paragraph (3) of Article 12. § of the LC.

Although the practice of the Equal Treatment Authority is uniform considering that an employee referring to breach of equal pay for equal work has to mark the protected characteristic as Article 8. § of the ETA on which basis the employee suffered discrimination,[66] but in a labour dispute to cite a protected characteristic is not necessary, and what is more, it is enough to refer to Article 12. § of the LC without attention to the ETA[67] even if this legal interpretation can be disputed in the light of a current judgment of the Curia of Hungary.[68] According to the first version it is enough to refer to the disadvantage and

66 See for example: Resolutions No. 242/2006. (sex), 700/2007. (state of health and motherhood), and 49/2013. (atypical employment status) of the Equal Treatment Authority.

67 See Judgment No. EBH 2014. M.8. of the Curia of Hungary.

68 See Judgment No. EBH 2014. M.19. of the Curia of Hungary.

employees in a comparable situation, but according to the second version the rules of probation of the ETA must be applied totally. In my opinion we can accept any of the two standpoints, but if the principle of equal treatment is regarded as an independent fundamental principle of labour law, the independent regulation is required to guarantee proper legal protection for the employee with easier enforceability.[69]

Secondly, relatively current judgments of the Curia of Hungary represent the two different above mentioned solutions: according to Judgment No. EBH 2014. M.19. the principle of equal pay must be applied within the system of the general requirement of equal treatment. It is clear that coexistence and conjunctive condition of breach of the principle of equal pay for equal work is a disadvantage for the employee and the presumption of any protected characteristic listed in Article 8. § of the ETA. The most important point of the judgment is that the principle of equal pay for work or work of equal value cannot be applied independently, because it can be interpreted and applied within the general requirements of equal treatment even if it is placed in the LC in an exclusive position. It means that it can be interpreted only on the basis of the rules of the ETA. The precondition of the violation of the principle is presuming any of the protected characteristics listed in Article 8. § of the ETA. Consequently, the Curia of Hungary states that protected characteristic is indispensable to the judicial statement of breach of the principle of equal pay for equal work, and interprets narrowly the rules following the term "especially" in Article 12. § of the LC and in relation to the general principle of equal treatment.

On the contrary, in light of the earlier decision of Judgment No. EBH 2014. M.8., the employer cannot assign different pay to the employees if the nature, quality quantity, working conditions, physical or intellectual efforts expended, and responsibilities are practically the same, even if some further circumstances exist like higher education or practical qualification, which the employer took into consideration. It is true that the Curia of Hungary in this judgment does not declare that the employee's claim on different remuneration as a consequence of breach of the principle of equal pay for equal work would be separated from the general principle of equal treatment, but we can come to the conclusion that existence of protected characteristic is not a condition of enforcement. In my opinion it is justified since the Curia of Hungary in its final conclusion does not even make a remark whether the plaintiff had protected characteristic and I think its explanation is not an obvious "yes" (she was a woman). Though the Curia of Hungary applied the special rules of probation of Article 19. § of the ETA, it seems that in case of breach of equal pay for equal work only its logic and structure were applied, and contrary to the

69 Naturally, this facilitation has two sides, since it is difficult to decide which is easier: the lack of protected characteristic to refer to para. (1) of Art. 12. § of the LC breach committed by the employer in a labour suit or to apply preferable rules of burden of proof if the ETA regarding the party violated their equality. In any case, the general drafting of the fundamental principle of labour law makes possible the different legal interpretations.

earlier described judgment the employee's presumption of coexistence of disadvantage and protected characteristic is not needed. Though this legal solution is very difficult to explain, in my opinion an explanation can be the special phenomenon that the LC states the principle of equal pay for equal work in the circle of equal treatment,[70] even if it is obvious that in case of discrimination of equal pay the ETA (point f) of Article 21. §) also must be applied. Naturally, from the viewpoint of employment law it is easier to explain this unique situation, since Paragraph (1) of Article 12. § of the LC does not declare extra requirements, so it can be interpreted that in case of an unjustified breach of the principle of equal pay labour claims cannot be enforced referring only to this rule, and therefore to presume protected characteristic is not necessary.

41.6 Concluding Remarks

Altogether it can be stated that the LC contains the principle of equal treatment as a fundamental principle and at the level of law the requirement of equal treatment is integrated in Hungarian labour law not leaving without attention the ETA, which ensures general regulative frameworks.

The problems of practical application of these two laws raise the question whether an employment regulation, which considering the prohibition of discrimination would contain partial rules, or at least regulations for specialities of labour law (similarly to the period of the LC of 1992 before the ETA came into force) would fulfil the EU and international obligations better. It is clear that with the effective ETA practically these further partial rules became superfluous. Furthermore, the ETA itself contains regulations with such content in Articles 21-22. § even if these norms are arguable. It is a very special situation that the principle of equal pay for equal work is declared twice in the regulation and it seems causeless. Altogether I think that it is unnecessary that the LC should contain further general norms regarding the general framework-type of the ETA. At the same time it is worth thinking over how difficult the interpretations are because of the complexity of such cases referring to the above mentioned legal issues. In spite of the double regulation, judging generates further difficulties (e.g. pay discrimination and the protected characteristic, discrimination in relation to termination of the employment relationship).

Summing up what was mentioned earlier: Article 12. § of the LC can be criticized, since to insert the principle of equal pay for equal work in the general clause of Paragraph (1) is unreasonable, and it would be better to leave the fundamental principle in an unchanged form, which would be really general while the prescription of equal pay – together with its complementary rules of Article 142/A. § of the previous LC of 1992 – should be inserted

70 Prugberger – Nádas, pp. 88-89. and pp. 90-91.

in the chapter about remuneration for work.[71] The same refers to the concept of pay, since dogmatically it is unnecessary to interpret it among the general rules of conduct, and to establish such a concept in the proper part of the LC, which would be a definition not only in relation to equal pay for equal work exclusively, since in this form parallel application of the concept of pay and wage may raise further practical problems.

Finally, I would like to turn attention to the fact that in most of the cases practical difficulties emerge not because of deficiency of law but because of the tension between the diverse (authoritative and judicial) interpretation of norms and different directions of legal practice. At the same time, the theoretical aspect of the discussed question is of high importance, and my aim was to emphasize that the principle of equal treatment is not only one of the fundamental principles of labour law but it is something more. It would be more convenient to regard this requirement in the social context of a general legal principle and human right and as its embodiment in practice because the means of labour law cannot be enough to apply it properly.

71 Practically, it would be Chapter XII entitled Remuneration for Work.