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Can the prohibition of age discrimination balance the labour market?*

Speciality of the topic

The fundamental aspects of prohibition of age discrimination – its principles, special approach, general and special rules of justification – have been examined within the framework of juriprudence and they, as important questions, get into the focus of scientific discussion from different points of view from time to time. The aim of our paper is to introduce such a new viewpoint, nevertheless, we take base the current standard scientific and practical directions. Our starting point is that the prohibition of age discrimination – and in general the principle of equal treatment – is a fundamental regulator which would be able to influence the operation of the labour market, even though this artificial influence forced by the public side may result the limitation of the freedom of contract what is the legal due of the parties, and the ruling principles in employment relationship may be overshadowed.

Age discrimination – in relation to young age, entrants, or the more typical older age – is an undoubledly existing phenomenon in the labour market, but to find the solution to this problem is very difficult. In our opinion the prohibition of age discrimination in recent years has outgrown both gender discrimination as "template" and its own material of regulation, since the case-law of the Court of Justice of the European Union (hereinafter: CJEU) represents that the interpretation of Directive 2000/78/EC is not uniform,

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and it leaves space to manoeuvre at such an extent for both the Member States and the employers that the aspect of the question from the view of fundamental right, namely, the protection of human right to equality may be ignored easily. Altogether we should ask the following question: how can interests and requirements of the labour market make justified the differential treatment on grounds of age more flexible than the Directive rules? In our opinion this field is rather vulnerable, since e.g. in the case of gender discrimination practically beyond stereotypes it is difficult to justify the accepability of discrimination, but in similar cases of age discrimination this circle seems to be wider and difference is allowed, consequently, the protective aspects of fundamental human right are overshadowed.

The protection of the employees' right to equality as a requirement of fundamental right should be stated definitely, since the CJEU declared several times that basically,[1] the right of the employees to equality is a fundamental human right, since its ground can be found in unrestictable fundamental right to human dignity,[2] consequently, the discriminated person suffers disadvantage and it also means the infringement in the fundamental right to human dignity.[3] The general prohibition of discrimination and the protection against age discrimination have important role in the primary law of the European Union, since Article 15 of the Charter of Fundamental Rights of the European Union (hereinafter: CFREU) is about the right to freedem to choose an occupation and the right to engage in work,[4] and about the general prohibition of discrimination (Article 21) what is the basis of the principle, furthermore, Article 23 definitely names the basic principle of gender equality, in parallel, Article 25 states the protection of rights of older people, while Article 26 that of disabled persons. The importance of the CFREU is clear since on the ground of extension of its equality rights it can be seen that it regulates the prohibition of discrimination the most comprehensively and declares the rules ensuring equality,[5] which requirements naturally are also

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1 See in connection to right to human dignity regarding age discrimination: Hős N., *Az Európai Bíróság életkoron alapuló hátrányos megkülönböztetéssel kapcsolatos joggyakorlata, különös tekintettel az* arányossági *teszt alkalmazására*, Európai Jog, 2009, 9, 6, 40–51.

2 Halmai G., Polgári E., Sólyom P., Uitz R., Verman M., *Távol Európától*, Fundamentum, 2009, 13, 1, 89–108.

3 Ádám A., *Az Alkotmánybíróság szerepe az emberi jogok védelmében*, Acta Humana, 1994, 5, 15–16, 62-64.

4 Although this right also has its necessary limits. See: Kaufmann C., *Globalisation and Labour Rights – The Conflict Between Core Labour Rights and International Economic Law*, Hart Publishing, Oxford 2007, 19–28.

5 Uitz R., *The old wine and the new cask: The implications of the Charter of Fundamental Rights for European non-discrimination law*, European Anti-Discrimimation Law Review, 2013, 16, 24. Sen A., *Work and rights*, International Labour Review, 2000, 139, 2, 119–129.

essential requirements in relations to labour market and employment policy, what is the object of this paper.

Connections between the legal protection on grounds of age and labour market processes

Labour law is a regulative field directly affected by the labour market, so the expansion of economic processes are clearly seen. Before examining the problematics of employment age discrimination it is necessary to overview these kinds of influential tendencies[6] to evaluate the level and conformity of legal protection taking into consideration the aspects of both the principle of equal treatment and the market.[7]

This new role of labour law is closely related to the HR management approach of economics that employees are deemed as human capital, which hence attaches economic rationality to the protective attitude of labour law. In economics, human capital was also dilated with a sort of moral, ethical dimension. The Nobel-laureate economist Amartya Sen is a principal representative of this approach. Sen claimed that economic growth cannot be exclusively gauged by material and economic benchmarks, but other aspects that are beyond the economic indicators should be included among the factors that determine development, i.e. the opportunities of economic players should be widened. A central element of this is the power of human capital, the freedom of the people to act, which should be considered as an economic factor in the market.[8] For the reinforcement of human capital the labour and social law instruments should be considered, since they make up for the legal environment that determines the room for the actors of the labour market. On the one hand, it establishes the scope of action for the employer, on the other hand it specifies the guarantees that lend the employees protection. This brings us back again to the argument that the balance between labour law and social rights ensures the stable labour market functions, thus it is

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6 For the aspect of liability for damages see in details: Nádas Gy., *Miért és hogyan felelünk a munkaviszony esetében? Áttekintő gondolatok a munkajogi kárfelelősség célja és lehetséges módozatai körében*, Miskolci Jogi Szemle, 2014, 9, 1, 48–56.

7 See in details: Rab H., *A szociális jogok alkotmányos védelmének szerepe a megváltozott munkerőpiac keretei között*, in: Acta Universitatis Szegediensis Acta Juridica et Politica Tomus LXXIX. *Ünnepi kötet Dr. Cúcz Ottó Egyetemi Tanár 70. születésnapjára*, (editor in chief: Homoki-Nagy M., ed: Hajdú J.) Szeged 2016, 527–534., Rab H., Sipka P., *Are Social Rights Obstacles to Flexibility?*, Journal on Legal and Economic Issues of Central Europe, 2014, 5, 2, 44–49., Sipka P., *The Regulation of The Working Conditions as A Limit of Flexible Working – The Effects of The Green Paper Through The Example of Hungary*, Procedia Economics and Fianance, 2015, 23, 1515–1520.

8 Sen A., 119–129.

advisable to stick to this balance as the law develops. Sen suggests the holistic approach to the questions of economic opportunities, political freedom, social provisions, the guarantees of transparency and living standards. The joint availability of these will encourage the individual to participate in change and not to remain a passive beneficiary of allowances.[9] The guarantees of development thus become available.

To put it simple, the role of labour law elevates the questions of employment from the individual level to the general level of the community.[10] These general tendencies in labour law are based on the outcomes of the above mentioned quandaries and try to seek answers to the following question: what is the role of labour law in the employment trends that focus on economic growth? This issue must be addressed in this paper, because this encompasses the problem of the level of legal protection in employment affairs. The significance of Sen's theory based on economy is stressed by the fact that it elevates human capital and economic growth to basic law level and attributes a value to them that must be protected. Langille, based on Sen's theory, views human capital as the moral foundation of labour law's development.[11]

Based on Deakin's clusterization, it must be examined whether labour law is a regulatory instrument of the economy or a legal guarantee that checks the processes. Arthurs explicitly argues that labour law's focus should shift to areas outside legal regulation[12], thereby implying that it is the duty of law to provide the framework of guarantees. Yet, even contrasting, more conservative, continental approaches and attitudes – like Weiss' position, who argues that direct legislation is necessary in terms of labour law's objectives and methods[13] - acknowledge the need to refresh labour law in order to make regulatory iustruments more efficient[14]. Thus, as a summary it can be stated that those supporting the classic hard law are not against the renewal of labour law, but insist on creating the legal framework for the processes of the labour market, particularly for the interest of the employees, who are on the weaker end of a tilted relationship.

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9 Sen A., *A fejlődés mint szabadság*, Európa Könyvkiadó, Budapest 2003, 11.

10 Hepple argues similarly: „Labour law stems from the idea of the subordination of the individual worker to the capitalist enterprise…" Quoted by: Deakin S., Morris G.S., *Labour Law (5th edition).* Hart Publishing, Oxford and Portland, Oregon 2009, 1. See in original: Hepple B. (ed.), *The Making of Labour Law in Europe.* Mansell, London 1986, Introduction 11.

11 Langille B., *Labour Law's Theory of Justice*, in: Davidov G., Langille B. (eds.), *The Idea of Labour Law*, Oxford University Press, New York 2011, 112.

12 Arthurs H.W., *Labour Law after* Labour, Osgood CLPE Research Paper, 2011, 5, 12–29.

13 Weiss M., *Re-Inventing Labour* Law, in: Davidov G. – Langille B. (eds.), 43–57.

14 Howe J., *The Broad Idea of Labour* Law, in: Davidov G., Langille B. (eds.), 299–300.

The main question also can be formulated this way: does labour law play a direct regulatory role or should it only provide legal frameworks and guarantees for employment? In both cases, the guaranteeing position of labour law can be recognized, which can renew just as labour law itself. Bellace revisited the assessments of the right to work from a human rights stance in the light of the accords of international organizations and EU law, and pointed out that the interests of employers and employees are contrasting in this question.[15] It can therefore be deduced that the level of impact of the processes on the labour market repositions the regulatory role of labour law. The protection of employees justifies the notion that labour law should provide not only framework but guarantees. Moreover, it means the elevation of this, if the direct regulatory role of labour law is accepted. In contrast, in the position of the employers, who operate in an ever changing environment and are exposed to processes on the labour market, the recognition of fundamental rights is also dubious,[16] consequently they strive to reduce the regulatory role of labour law to a minimum.

The toolkits of human resources management (HRM) are based on the interests of the labour market primarily, so equal treatment – as a fundamental expectation – is pushed to the background. We think that even the case-law of employment age discrimination has not concluded such legal guarantees yet; therefore these opposites can hardly be balanced. The CJEU – according to the Directive 2000/78/EC – accepts the differential treatment based on age for the sake of the needs of the labour market and employment policy. Consequently, we cannot expect from the self-regulating mechanisms – within the framework of HRM – to lessen age discrimination in employment. If we expect this kind of legal protection to prevail in employment we need to think about such guarantees through fundamental right-like regulative methods.

Processes justifying the "necessity" of the phenomenon of age discrimination

The prohibition of age discrimination is fundamentally connected to general demographic and sociological questions and – as a consequence – to the operation and principles of pension systems. Therefore it is generally accepted that judging age discrimination is strongly affected by issues of labour market

[15] Bellace J., *Who Defines the Meaning of Human Rights at Work?*, in: Ales E., Senatori I. (eds.), *The Transnational Dimension of Labour Relations. A new order in the Making?*, Collana Fondanzione Marco Biagi, G. Giappichelli Editore, Torino 2013, 111–135.

[16] Bellace cites employers' concern with regard to the right to srike. See: Bellace J., 111–135.

processes and the structure of employment and these result a broader circle of justification than in the case of other protected characterisitics. We can presume that special justification rules based on different protected characteristics debase the level of general legal protection, so they are not common or typical in EU law; but there should be a significant exception in the case of age discrimination since paragraph (1) of article 6 of Directive 2000/78/EC contains such special rule related to age discrimination. It is a very important and relevant exception, which can be emphasized as an exception of the general rule regarding the prohibition of age discrimination.[17] This controversial phenomenon is highlighted by Sargeant and Schlachter as well.[18]

Referring to – among others – the two authors' above standpoint we highlight that the strict or liberal interpretation of the mentioned special exception is the issue, which defines the level of labour law protection for the potential victims of employment age discrimination. This justification rule – based on the requirements of objectivity, reasonability, appropriarity, necessity and a legitimate aim – practically extends the general anti-discrimination norms because on the one hand, it is very special in a sense that it is connected to the protected characteristic – it has to be applied only in case of age discrimination – and on the other hand the legislator of the EU itself marks the specific requirements for this kind of legal different treatment on grounds of age. Therefore, the rule itself is very special and the possibilities of justification are limited according to the possible legitimate aims – employment policy, labour market and vocational training objectives – which are very important according to the topic of this paper. But even Sargeant and Schlachter warns us that such legitimate aim can be almost anything because the regulation of the directive itself is focused on employment, so the Member States – and the employers – have to justify the differential treatment with such legitimate

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17 Gyulavári T., "*A kimentési szabályok harmonizációja: elveszett jelentés?*", *Csak a húszéveseké a világ? Az életkoron alapuló diszkrimináció tilalma a magyar és az uniós jogban* (Conference), Nemzetközi Tudományos Konferencia az Osztrák-Magyar Akció Alapítvány támogatásával és a Magyar Munkajogi Társaság szakmai támogatásával, Pázmány Péter Katolikus Egyetem Jog- és Államtudományi Kar, Budapest 11th December 2014.

18 Sargeant M., *Age Discrimination – Ageism in Employment and Service Provision*, Gower Publishing Limited, Farnham 2011, Sargeant M., *Gender Equality and the Pensions Acts 2007–2008.*, Industrial Law Journal, 2009, 38, 1, 143–148., Sargeant M., *Age Discrimination in Employment*, Gower Publishing, Aldershot 2006, Sargeant M., *For Diversity, Against Discrimination: the Contradictory Approach to Age Discrimination in Employment*, International Journal of Comparative Labour Law and Industrial Relations, 2005, 21, 4, 631–644, Schlachter M., *Mandatory Retirement and Age Discrimination under EU Law*, International Journal of Comparative Labour Law and Industrial Relations, 2011, 27, 3, 287–299, Schlachter M. (ed.), *The prohibition of age discrimination in labour relations*, Nomos Verlagsgesellschaft, Baden-Baden 2011.

aim. But we have to face the fact that the quasi "natural" age discrimination is based on the interests and needs of the employers typically and is so common in the labour market that even the CJEU is struggling to put it right because of the opposite interests of the labour market expectations and the pension systems. Legal protection is very uncertain in this regard and to annihilate differential treatment on grounds of age seems impossible without such legal guarantees.

Besides pension system the demographic parameters are one of the key factors. "Pension bomb"[19] is commonly emphasized and it consists of the demographic situation, primarily insenescence and the increasing of average age; and one of the possible sources of the latter, namely the developing level of health care benefits along with the increasing level of employment. Nowadays, we live in a transition period regarding pension systems because the average length of one's life is growing and the previously closely balanced rate between death and birth is decreasing, namely from 40–50 per-mille to 8–10 per-mille.[20]

In Europe age has significantly risen: in the last five decades the expected average age grew ten years.[21] The expected demographic situation in Hungary and in Europe is expected as follows, although it is only a short summary taking into consideration the paper's main topic. We have to count with the diminution of population and at the same time the growth of expected average age, which two pieces of data have to result the significant re-structuring of pensions and pension benefits. Life expectancy will grow – foreseeably – till 2050, which means that we have to take into account the continuous insenescence for a rather long time. The ageing of population is the basic process of demographic changes and we have to learn to live together with it and adapt to it.[22] The lessening of population is justified by the signifacnt drop of fertility in the EU; the average number of children in the 1960s was 2.5 and this number was 1.53 in 2000.[23] To say it in common language according to the average numbers in the EU four active people supports one retired person and in the middle of the 21st century this number will be only two.[24]

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19 Antal L., *Nyugdíjreform dilemmák – jövedelemelosztási arányok és makropénzügyi egyensúly,* Competitio, 2008, 7, 1, 8.

20 Augusztinovics M., *Népesség, foglalkoztatottság, nyugdíj*, Közgazdasági Szemle, 2005, 52, 5, 429.

21 *Európa Lakossága öregszik*, ILO Press, Munkaügyi Szemle, 2001, 4, 2, 42.

22 Hablicsek L., Pákozdi I., *Az elöregedő társadalom szociális kihívásai*, Esély, 2004, 15, 3, 88.

23 Hablicsek L., Pákozdi I., 92.

24 Marján A., *Az öregedés és az európai nyugdíjrendszerek*, Pénzügyi Szemle, 2008, 53, 1, 54.

Regarding the falling birth rate there are less pessimistic standpoints, e.g. Hablicsek states that the problems originate from societal-social causes, namely, the social structure has changed. From the last decades of the 20th century young couples postponed childbearing while the age group of middle aged at that time already gave birth the undertaken number of children. This concept can be sustained by the fact that compared to Hungary in the countries where this process has already placed; certain favorable trends can be seen: in Spain and Italy childbearing of women of 30s is significantly increasing.[25] According to this optimistic concept simply the single stages of life are postponed. Some English researchers also deny the existance of the "pension bomb", and it is substantiated by the statement that the reference numbers are incorrect. The ratio of employed and unemployed should be compared to, but not the ratio of people over 65 and employed.[26]

An important thing should be known about insenescence: it is rather cyclic, when a greater number of generation appears, the ratio of contributors increases. However, if this generation gets older, without the productivity of the next generation, the population gets old. As a consequence of the extension of lifetime not only old age becomes longer, but also every life stage. The evolution of the number of children referring to the extention of age pyramid also draws attention to the extension of young age. The limit of young age is extended as a result of schooling and longer education, and real adulthood starts later, so child bearing is postponed.[27] Altogether after the beginning of active carreer as consequence of average age and health changes active carrier gets longer. The gained years are spread in the whole life path. So decrease in productivity and improvement in mortality cannot be examined exclusively, in order to get a correct picture to calculate age-relation is necessary,[28] namely, the evaluation of ratio of people over retirement age and people under working age.

The researchers of the European Commission also stated that it is a problem that the ratio of age-relation is significantly getting worse. According to Réti the employment result in relation to the aging of the society may be that we cannot fill the growing active life stage with work, because as many people cannot be employed as would be necessary. It is clear that the processes of labour market are reciprocal to the effects of technical development.

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25 Szabó K., *„Alfák és béták" Vita a népesség, a foglalkoztatás és a nyugdíj összefüggéseiről*, Közgazdasági Szemle, 2005, 52, 5, 449.

26 Marján A., 60.

27 Hablicsek L., Pákozdi I., 93.

28 Gál R.I., *A nyugdíjrendszer elszigetelése a rövid távú politikai döntésektől*, Budapest, 2007. március 29, "Pension and Old Age" themed table 3 April 2007 http://nyugdij.magyarorszagholnap.hu/images/2._%C3%BCl%C3%A9s_2007.04.03._070403_03_Ciklusok_a_magyar_nyugd%CB%87jrndben.pdf [accessed:12.05.2009]

Measures to ease the effects of insenescence are connected to other target area of the European Union in the field of employment policy, to solve demographic crisis is possible only by combined strategy. At present in several cases the system of retirement urges one to retire with low retirement age, but on the other hand, staying in the active employment system[29] can be motivated by revaluation of the importance of the years before retirement (appreciating longer time in service, higher contribution in the years before retirement).[30]

Furthermore, there are special forms of employment – e.g. self-employers who seldom choose early retirement – which also decreases the number of pensioners, and regarding retirement there are differences on different educated levels, since the higher the education is the higher the age is when in general one retires. Some tendencies against keeping the older generation in work can be seen, of which the most interesting is the modern element of carreer planning and human resource management.

Employers do not find remunerative to educate the older generation and to place them into new positions. Firstly, it is dangerous that the invested human resource will not be rewarded, and secondly, older experts require higher pay, and thirdly, there are age-bound jobs. In the field of further work proper carreer planning should be regarded as new incentive element. In Xavier Sala-I Martin's opinion[31] the system of social security is applicable – and it may be its function – to leave out the employee who is outside the world of employment and unsuitable for efficient work in order to secure efficient productivity and economic development.

The essence of the current case-law of the CJEU – natural phenomenon in the labour market or a legal problem to be solved?

Finally, with introducing some current and in our opinion important judgments of the CJEU we summarise how the above discussed problems of fundamental right, labour law, labour market, pension benefits appear in legal practice, and whether special approaches can be the starting point of the necessary renewal of legal interpretation.

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[29] Galla V., *Az elöregedés – gazdasági megközelítésben, Gondolatok Spiezia Az elöregedő népesség című, az International Labour Review-ban megjelent cikke kapcsán*, Közgazdasági Szemle, 2005, 52, 4, 525.

[30] Galla V., 525.

[31] Martin S., *A positive Theory of Social Security,* Yale University, 1995, 1–3.

Judgment C-441/14[32] should be examined even if it may be more important from another point of view, since the CJEU analyses the regulations of Directive 2000/78/EC from the aspects of fundamental right together with the CFREU. According to the CJEU the employee's right to severance pay cannot depend on either the employee's right to pension or the employee's decision whether the employee would like to remain active in labour market after acquiring the right to pension. Namely, the CJEU interprets two important aspects in this judgment, which also arise in connection to the subject of this paper. On the one hand, the CJEU definitely seperates pension entitlement from severance pay as a mean of employment law, and they cannot substitute each other, consequently, the right to severance pay cannot be lost. On the other hand, regarding the fundamental right type of the prohibition of age discrimination, the CJEU came to the conclusion that it must be regarded a general principle of EU law,[33] and Article 21 of the CFREU also justifies that its fundamental right-like nature is of high importance. The CJEU stated that the reference to "economic rationality" cannot be implemented in the circle of justification rules.

In another, relatively new judgment – C-530/13[34] – the CJEU states that regarding periods of paid work the prohibition of age discrimination must prevail, namely, it is direct discrimination if regarding a circle of government employees the regulation of the Member State calculates all periods of paid work, but at the same time extends with years the necessary length of period of time for promotion. In this case the CJEU appreciates the aspect of labour market according to which it is not gratuitous advantage if someone worked before the age of 18, so in this case the legal protection of the two imperiled groups (the young and the old) are not seperated, since calculating period of paid work does not depend on age.[35]

It is worth mentioning that judgment C-529/13[36] regards the differential treatment applicable and proportionated means to reach legal aim in the labour market, which excludes the gained educating time before 18 from the time of periods funding right to pension. It may be a legitimate aim that the Member State intends to compensate the disadvantageous situation (in this regard) of the employees who studied for longer time than their colleagues.

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32 C-441/14. Dansk Industri (DI), agissant pour Ajos A/S v Sucession Karsten Eigil Rasmussen.

33 Point 22 of the judgment.

34 C-530/13. Leopold Schmitzer v Bundesministerin für Inneres.

35 See further: C-417/13. ÖBB Personenverkehr AG v Gotthard Starjakob.

36 C-529/13. Georg Felber v Bundesministerin für Unterricht, Kunst und Kultur.

The judgment confirms that[37] regarding the application of justification rules the Member States can consider in wide circle.[38] Consequently, the Member States can bring aspects of labour market and economy to the fore at the expense of the employees's essential interests in relation to the protection of equality.

In the judgment C-515/13[39] the CJEU, in relation to the right to severance pay, regards the circumstance that though at the termination the employee has the right to severance pay (if the employee worked for certain longer time for the employer), but this right can be excluded if the employee has the possibility to gain full old-age pension, a legitimate aim of employment policy. According to the standpoint of the CJEU one of the functions of severance pay serves older employees, since makes the period of looking for a new job easier, and on the other hand, according to the CJEU it is generally observed that the majority of employees choose the pension instead of further work.

A legitimate aim of employment policy is to define the upper age limt of becoming a policeman, but to state 30 years without exemption is not the proper means to reach the goal.[40] The CJEU regards this kind of age discrimination strictly, so this principle appears in the cases European Commission v Hungary[41] and Wolf.[42] These kinds of aims are legtimate, because physical or mental deficiencies may emerge when the employee gets older, and to avoid them may be a justified aim in the labour market.[43]

Though further judgments could be mentioned, but our goal was to interpret some typical cases in which the prohibition of age discrimination as a fundamental principle of EU law comes face to face with the circle of labour market, finally, economic efficiency and requirements. Though the CJEU recurrently tries to respect the above mentioned aspects – in the future the CFREU may play an important role in it, mainly on theoretical level – but the CJEU necessarily broadens and regards flexible the concept of legitimate employment policy and the aim of labour market. In our opinion the most important element of the Directive – and also of the regulation of

37 Point 30 of the judgment.

38 See primarily: C-501/12. Thomas Specht (C-501/12), Jens Schombera (C-502/12), Alexander Wieland (C-503/12), Uwe Schönefeld (C-504/12), Antje Wilke (C-505/12) and Gerd Schini (C-506/12) v Land Berlin and Rena Schmeel (C-540/12) and Ralf Schuster (C-541/12) v Bundesrepublik Deutschland.

39 C-515/13. Ingeniørforeningen i Danmark v Tekniq.

40 C-416/13. Mario Vital Pérez v Ayuntamiento de Oviedo.

41 C-286/12. European Commission v Hungary.

42 C-229/08. Colin Wolf v Stadt Frankfurt am Main.

43 C-447/09. Reinhard Prigge and Others v Deutsche Lufthansa AG.

the Member States – is the examination of the necessary means in order to reach the aim, even if these employment rules in reality are not co-ordinated with either the actual trends of labour law or the changes in the institution of pension systems.

On examining the judgments we can come to the conclusion that the CJEU regarding the legitimate aim balances less strictly the adequacy to the Directive rules, oppositely to the earlier mentioned further conditions, which are more difficult to conform in case of different age treatment. It seems – taking base the cited comprehensive sources of legal literature and the relevant case-law – to be a tendency that the CJEU definitely considers the fundamental right nature of the question and the fact that it is embedded in primary law, but the CJEU cannot and does not want to exclude from its legal practice the rationality of labour market – which in most of the cases gets in connection with pension – stating that to choose the proper means in order to reach aims of employment policy is the responsibility of the Member States.

Concluding remarks

One of the fundamental aspects of equal employment is the prohibition on grounds of age and in this regard the CJEU – with lots of judgments – necessarily act as the main interpretor of the rules of the Directive 2000/78/EC. Some different aspects can be seen in the case-law compared to the other protected caharcetristics and these specialities mean the essence of the legal side of age discrimination. The Directive states a general and a special case for justification therefore various options are available to treat people differently on grounds of age. These exceptions originate from the dependence of employment of the labour market and this is what we tried to show through the analysis in Chapter II focusing on the development of labour law correlating with the labour market processes. These processes are mostly economy-based and public intervention is needed because of the demographic matters and tendencies. Age discrimination and pension systems cannot be independent from each other because in the case of both the career starters and older employees the employer's interests are connected to the regulation based on the pension system focusing on pension benefits, employment benefits and protective labour law norms. This is why we tried to highlight all emphasized fields that can give answer to the main question. We think that the problematics of age discrimination in employment is emphatically defined by the labour market proceses and the number of cases – because of the changing situation in the labour market – is increasing. In our opinion the legal interpretation of the CJEU does not ensure proper legal protection

for the victims of age discrimination mostly because of the special justification rule of the Directive. According to this employment policy and labour market aspects can be legitimate aims in these cases and these solutions can easily be necessary and proportiante based on HRM methods more efficient for the employers. This kind of interpration can be comfort for the labour market but dangerous and discriminative for the employees at the same time. These principles lack the real legal protection for both younger and older employees. Furthermore, against the tendencies of pension policy – namely the efforts to increase the active age to stabilize pension systems – they do not provide enough protection either because the Directive practically legitimates the possible negative effects of these demographic and economic circumstances. We see the strengthening of the fundamental right protection as a potential solution, so respecting the human right aspect – by connecting the legislative principles to the practical solutions – even without concrete norms is advisable. Without this approach – and by continuing the present legal practice – the degradation of the legal protection against age discrimination is a real danger.

Abstract
Can the prohibition of age discrimination balance the labour market?

Exploring new directions in labour law has been a common topic for decades because finding new solutions to existing legal and economic problems is always needed. Both the labour market and its regulation are changing, so new ways are being sought regarding effectiveness. The traditional toolkit of labour law also carries some answers, for example, the direct connection to the toolkits of Human Resources Management (HRM) but these mostly non-legal instruments can lead to further contradictions related to the legal relationship of the employer and the employee. The analysis is focused on the requirement of equal treatment, especially on the prohibition of age discrimination. We think that the structure of the labour market is highly affected by the pension system because of the available social guarantees and all these legal and economic problems are connected to each other. The paper is based on both the Hungarian legal questions and some actual developments of the case law of the CJEU.
Key words: equal employment, HRM, labour law, labour market, social protection

Streszczenie
Czy zakaz dyskryminacji ze względu na wiek może zapewnić równowagę na rynku pracy?

Rynek pracy i jego regulacje nieustannie się zmieniają, dlatego w prawie pracy wciąż poszukuje się nowych rozwiązań zapewniających efektywność. Tradycyjne instrumenty prawa pracy przynoszą pewne odpowiedzi, np. odwołania do zasad Zarządzania zaso-

bami ludzkimi (HRM), ale te w większości niemające charakteru prawnego narzędzia mogą prowadzić do dalszych niezgodności w stosunku prawnym pracodawca–pracownik. Artykuł koncentruje się na wymogu równego traktowania w zatrudnieniu, w szczególności w zakresie zakazu dyskryminacji ze względu na wiek. Autorzy reprezentują stanowisko, że na strukturę rynku pracy znacząco wpływa system emerytalny. Artykuł opiera się zarówno na rozwiązaniach węgierskiego prawa pracy, jak i na zmianach w orzecznictwie Trybunału Sprawiedliwości Unii Europejskiej dotyczących zasady równego traktowania w zatrudnieniu.

Słowa kluczowe: zasada równego traktowania w zatrudnieniu, zarządzanie zasobami ludzkimi, prawo pracy, rynek pracy, ochrona społeczna