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ARE OLDER WORKERS SECOND-CLASS? – THE CASE OF CROATIA AND HUNGARY

I. The law of the European Union on old age discrimination

1. Introduction

'Age' represents the most common ground of experienced discrimination under all grounds in the European Union. This was the major finding of a survey carried out by the European Commission.¹ As the survey shows the majority of Europeans – 58% of the answerers – had the feeling in 2009 that discrimination on the ground of age is widespread.² Interestingly, Hungary is at the top of the list with 79% of Hungarians saying that age discrimination is widespread in Hungary. Croatia is below the European average, as only 47% of the Croatians perceive that age discrimination is very or fairly widespread.³ When turning to the experience of age discrimination, 6% of EU citizens report that they have been discriminated against based on age.

Reasons for the high level of perceived and experienced age discrimination are twofold. First, discrimination based on age can hit everybody, i.e. everybody can suffer from this kind of discrimination either in young or in old age. The other significant reason is that European societies are ageing and the proportion of older people is constantly increasing in the society. This fact brings about serious economic difficulties, namely the increase of costs of social and pension insurances and slowing down the economic growth.

Therefore one of the main aims of the EU employment policy is to increase the employment rate of workers above 50 years and keep older workers in the labour market.⁴ The Council together with the governments of the Member States adopted a resolution on the employment of older workers setting measures how to keep them in the labour market.⁵ The 1999 guidelines of the European Employment Strategy set the main aims to promote

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¹ Special Eurobarometer 317, Report of the European Commission, Discrimination in the EU in 2009. p. 75.

² Ibid. p. 71.

³ Ibid. p. 72.

⁴ In European surveys and statistics persons between 55 and 64 years are considered as old workers.

⁵ Resolution of the Council and of the Representatives of the governments of the Member States meeting within the Council on the employment of older workers OJ [1995] C228/1.

active ageing and support older workers remaining in labour market.⁶ The Europe 2020 strategy set the target that in the EU 75% of the 20-64 year olds should be employed by 2020.⁷

2. Regulation of the European Union in a nutshell

First legally binding prohibition of discrimination based on age in the EU was included in the Directive 2000/78/EC.⁸ In 2000 two framework directives were adopted fighting against discrimination, directives 2000/43/EC⁹ and 2000/78/EC. Adoption of these directives clearly proves that the European Union has moved from a scattered view of equal treatment – when only some special fields were regulated - to a more comprehensive regulation.¹⁰

Special feature of the Directive 2000/78/EC is that its Article 6 allows the justification of different treatment on grounds of age. The directive makes a difference between discrimination and justifiable difference in treatment. Article 6 provides the opportunity for Member States to adopt a regulation that differences of treatment on ground of age shall not constitute discrimination. The regulation is bound on some conditions. Different treatment on ground of age can only be justified, if it is objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary. Possible legitimate aims can justify difference in treatment, but only employment policy aims are expressly listed.

The Court of Justice of the European Union (in the following: CJEU) stated that the prohibition of discrimination on ground of age must be regarded as a general principle of the law of the European Union and it was given specific expression by Directive 2000/78/EC in the field of employment and occupation.¹¹

⁶ Council Resolution of 22 February 1999 (OJ [1999] C69/2), para. 4.

⁷ See: http://ec.europa.eu/europe2020/pdf/targets_en.pdf 2012 has been designated by the European Commission the European Year for Active Ageing and Solidarity between Generations.

⁸ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Official Journal L 303, 02/12/2000 P. 0016 – 0022. Earlier documents did not expressly mention age, as a prohibited ground of different treatment. Non-discrimination legislation of the EU concentrated long-time mainly on equal treatment of men and women following the principle of equal pay for equal work for men and women declared in Art. 119. of the Treaty of Rome. See also later Art. 16 of Community Charter of the Fundamental Social Rights of Workers.

⁹ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Official Journal L 180 , 19/07/2000 P. 0022 – 0026.

¹⁰ Gy. Kiss, 'A Domnica Petersen ügy tanulságai a kor szerinti diszkrimináció versus igazolt nem egyenlő bánásmód körében – hazai összefüggésekkel,' *Pécsi Munkajogi Közlemények*, (2010/1.) p. 105. at p. 107.

¹¹ C-555/07, Seda Küçükdeveci v. Swedex GmbH & Co. KG, para 21.; Case C-297/10, Sabine Hennigs v Eisenbahn-Bundesamt and Case C-298/10, Land Berlin v Alexander Mai, both September 2011. para. 47.

The Charter of Fundamental Rights of the European Union¹² provides the major fundamental rights, inter alia social rights. First paragraph of Article 21 of the Charter prohibits any discrimination on the ground of age.

3. Judgments of the CJEU on old age discrimination

a) Fixed-term employment contracts for elder workers

The CJEU delivered several judgments on age discrimination in the last couple of years. In the following we will focus on the judgments dealing with discrimination of older workers. The decisions can be classified into three groups.

The first judgment on old age discrimination at all was the *Mangold case* in 2005¹³, which generated heated debate due to its statement on the direct effect of the principle of equal treatment¹⁴. In this case Mr. Mangold, then 56 years old, concluded an employment contract for six months without any objective reason for the short period of the contract. The contested German law declared that a fixed-term employment contract – unlike the standard rule – shall not require objective justification if, when starting the fixed-term employment relationship the employee has reached the age of 58 (later the age of 52).¹⁵ Objective of the German regulation was to promote the employment of older workers by evading the difficult termination procedure of an indefinite employment relationship. The CJEU declared that the rule had a legitimate, public-interest objective, namely to promote the vocational integration of unemployed older workers. However, such a legislation does not consider the structure of the labour market in question or the personal situation of the person concerned, therefore it must be considered to go beyond what is appropriate and necessary in order to attain the objective pursued.¹⁶ Fixed-term employment contracts can be only exceptional, since the stability of workplace is important element of the protection of workers. Therefore the German legislation contravened the directive. Similar problem arose in the *Lufthansa versus Kumpan case*.¹⁷

b) Compulsory retirement

¹² Charter of Fundamental Rights of the European Union, Official Journal of the European Communities, 2000/C 364/01. Since 1st December 2009 the Charter is legally binding in the EU apart from the UK and Poland.

¹³ C-144/04. *Werner Mangold v Rüdiger Helm*, 22 November 2005.

¹⁴ Special feature of the case was that at the time of the conclusion of Mr. Mangold's employment contract the deadline for the implementation of Directive 2000/78/EC has not yet expired.

¹⁵ The judgment had to be examined in the light of the Council Directive 1999/70/EC on fixed-term work. Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ 1999 L 175, p. 43).

¹⁶ *Mangold judgment* loc. cit. n. 13. paras. 64-65.

¹⁷ C-109/09, *Deutsche Lufthansa AG v Gertraud Kumpan*, 10 March 2011.

Key issue of age discrimination is the so-called “compulsory retirement”. “Compulsory retirement” or “forced retirement” means that the employment relationship ends automatically or can be terminated by the employer’s notice at the time when the worker reaches the retirement age and gets entitled to pension. The expression “compulsory retirement” indicates that the termination is forced by the employer. Workers in many cases wish to continue to work, either because their pension is not enough to live on it or simply because they like their job. From the worker’s point of view automatic termination of the employment relationship is a constraint. Main question is therefore, whether a clause in law, collective agreement or employment contract is justified, which provides that with the achievement of the retirement age and entitlement to pension the employment contract will end automatically.

Declared objective of such regulation is usually to decrease unemployment and support young workers to get a job. Background idea is that the termination of the employment relationship of elder workers will lead to the employment of young ones. In our opinion this idea is in general not true; it should be applied only in some branches, where the number of workers is limited by the state (see below: the Georgiev case and Fuchs & Köhler cases).

In the *Palacios case*¹⁸ the contested Spanish law allowed for the collective agreements to contain a clause, which authorises employers to terminate the employment relationship of workers who have got entitled for pension. The regulation aimed to lower unemployment through the termination of employment relationship of elder workers and making jobs for younger. The CJEU ruled that this regulation was compatible with the requirements of the Directive 2000/78/EC for two main reasons; first, the relevant legislation took account of the fact that the persons concerned are entitled to financial compensation by way of a retirement pension. This argument reiterates in every later judgments of the CJEU. Second, the Court considered that collective agreements guarantee considerable flexibility and they can take into account the specific features of the professions, jobs, sectors in the labour market.

In the *Age Concern case*¹⁹ the contested English regulation said that the dismissal of a person at or over the age of 65 is not unlawful, where the reason for dismissal is retirement. CJEU ruled that the regulation does not establish a mandatory scheme of automatic retirement and it is for the national court to determine whether and to what extent this provision is justified by legitimate aims and whether it is appropriate and necessary.

In the *Domnica Petersen case*²⁰ the German national legislation provided that admission to practise as a panel doctor expires at the end of the calendar quarter in which the panel doctor completes his 68th year. Two aims of this regulation were specified, namely first the

¹⁸ C-411/05, Félix Palacios de la Villa v Cortefiel Servicios SA, 16 October 2007.

¹⁹ C-388/07, The Queen, on the application of: The Incorporated Trustees of the National Council on Ageing (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform, 5 March 2009.

²⁰ C-341/08. Domnica Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe, 12. January 2010.

protection of health of patients, since the performance of dentists declines after a certain age. The CJEU ruled that in the light of this objective the measure lacks consistency because doctors outside the panel system can practise at any age. The rule consequently impairs the Directive. The second mentioned aim was to share out among the generations employment opportunities in the profession of panel dentist. A measure intended to promote the access of young people to the profession of dentist in the panel system may be regarded as a legitimate employment policy measure. The regulation complies with the Directive, when its aim was to support young doctors becoming panel dentist. It is for the national court to identify the real aim of the national legislation.

The *Rosenblatt judgment*²¹ is the most controversial of all such cases. Mrs Rosenblatt has cleaned part-time barracks 39 years long.²² She earned about 307,-Euro per month. Her employment ended, when she has reached her retirement age. Legal basis for the termination was a clause in a universally applicable collective agreement for the cleaning sector. Mrs. Rosenblatt contradicted the termination and wanted to continue to work as her pension was monthly 253,-€. The Court ruled that the clause in the collective agreement and the law which allowed this regulation are not discriminative as Mrs Rosenblatt had the same right as other workers to look for another job. In the Court's view the termination of an employment contract does not have the automatic effect of forcing the person concerned to withdraw definitively from the labour market and that provision does not establish a mandatory scheme of automatic retirement.²³ Therefore the means used to achieve the employment policy aims – clauses in collective agreements on automatic termination of employment contracts – are necessary and appropriate. In our opinion this is an extremely cynical reasoning. Mrs Rosenblatt's pension was obviously not enough to make ends meet and so not even the financial compensation reason can be effective. It is anyway debatable whether the general employment policy aim, namely the support of the employment of young workers would stand in the cleaning sector.

The CJEU recently examined two regulations on compulsory retirement applied for certain branches. The Court argued that in professions where the places are very limited, compulsory retirement age can help young workers to receive a job. In the *Georgiev case*²⁴ the Bulgarian Labour Code provided that the employer can terminate the employment contract of professors and lecturers by giving prior written notice to the employee, when the right to receive a retirement pension has been acquired and they reach the age of 65. The Court decided that this rules does not create discrimination. The posts for university

²¹ C-45/09. *Gisela Rosenblatt v Oellerking Gebäudereinigungsges. mbH*, 12 October 2010.

²² Her daily working time was two hours, weekly working time ten hours. It does not belong narrowly to the case, but for better understanding it is worth mentioning that the reason for Mrs. Rosenblatt's part-time was that she cared for her disabled child.

²³ "It does not deprive employees who have reached retirement age of protection from discrimination on grounds of age where they wish to continue to work and seek a new job." *Rosenblatt judgment*, op. cit. n. 21. para. 75.

²⁴ Joined cases C-250/09 and C-268/09, *Vasil Ivanov Georgiev v Tehnicheski universitet – Sofia, filial Plovdiv*, 18 November 2010.

professors are, in general, of a limited number. According to the Court, if the legislation pursues a legitimate aim, such as the delivery of quality teaching and the best possible allocation of posts for professors between the generations, then setting an age limit for professors can be an appropriate and necessary mean.²⁵

In the *Fuchs and Köhler case*²⁶ the applicants worked as state prosecutors until they reached the age of 65 in 2009, the age at which they had to retire. The declared aims of setting a retirement age were to establish an age structure that balances young and older civil servants in order to encourage the recruitment and promotion of young people, while at the same time seeking to provide a high-quality justice service.²⁷ All of these can constitute a legitimate aim of employment and labour market policy. In the face of budgetary constraints, the opportunity of creating new posts is limited. The Court drew the conclusion that age limit can be an appropriate and necessary mean, if those workers are entitled to a pension the level of which cannot be regarded as unreasonable.²⁸

c) Severance pay

Third problem on age discrimination getting before the CJEU was related to severance pay. In Denmark in the event of dismissal of a salaried employee who has been continuously employed in the same undertaking for 12, 15 or 18 years, the employer shall, on termination of the employment relationship, pay a sum to the employee corresponding to, respectively, one, two or three months salary as severance pay. This provision shall not apply if the employee is entitled to an old age pension on termination of the employment relationship. In the *Andersen judgment*²⁹ the government explained that the severance pay aimed to facilitate the move to new employment for older employees who have many years of service with the same employer. The measure supports workers who intend to continue to work but, because of their age, generally encounter more difficulties in finding new employment.³⁰ This aim is considered as legitimate. However, the measure may thus force workers to accept an old-age pension which is lower than the pension which they would be entitled to if they were to remain in employment for more years, leading to a significant reduction in their income in the long term. This provision causes anyway great financial losses for this group of people.³¹ Another major problem is that these people can exercise

²⁵ Georgiev case loc. cit. n. 24. para. 68. paras. 45-46.

²⁶ Joined cases C 159/10 and C 160/10, Gerhard Fuchs (C 159/10), Peter Köhler (C 160/10) v Land Hessen, 21 July 2011.

²⁷ Ibid. para. 50.

²⁸ Ibid. para. 66. The prosecutors got a full pension equivalent to approximately 72% of their final salary.

²⁹ C-499/08. Ingeniørforeningen i Danmark, acting on behalf of Ole Andersen, v Region Syddanmark, 12. October 2010.

³⁰ Ibid. para. 39.

³¹ Ibid. paras. 44-46.

their right to work with more difficulties.³² Therefore the CJEU decided that this measure goes beyond what is necessary to attain the social policy aims and cannot be justified.

II. The Hungarian regulation on old age discrimination

1. The regulation of equal treatment

The new Hungarian Constitution – which entered into force on 1.1.2012 – has a statement on equal treatment which applies only on the application of fundamental rights. Article XV. subsection (2) declares the following: Hungary guarantees the fundamental rights for everybody without any distinction, namely on the basis of race, colour, sex, disability, language, religion, political or other opinion, nationality or social background, asset, birth or other situation. Clear shortage of this rule is that the list of specified grounds of discrimination does not include age; however, it can be implied by the expression „other situation”.³³ The new Constitution is a setback compared with the old one³⁴ as it not only guaranteed the fundamental rights for everybody without any distinction, but also provided the legal consequences for violating this rule.³⁵

The Labour Code³⁶ only includes a short statement, namely in connection with employment relations the principle of equal treatment must be strictly observed. Similarly, the new Labour Code contains a short declaration emphasising particularly the principle of equal pay for equal work.³⁷

Detailed regulations contain the Act on Equal Treatment and Promotion of Equal Opportunities³⁸. The act has to be applied inter alia for the employment relationship, which is interpreted in a very broad way³⁹. Article 8 o) expressly states age as prohibited ground of discrimination. Every direct and indirect discrimination, harassment and reprisal on ground of age is prohibited in the employment relationship. Art. 22. (1) contains two exemptions on the general principle specified for the employment relationship. Difference in treatment does not constitute discrimination, if a) it is a proportional different treatment based on important and lawful conditions, justified by the feature or nature of the work, or b) the

³² Ibid. para. 45.

³³ The interest of older people is expressly mentioned in subsection (5) Article XV. It states that Hungary protects children, women, elder and disabled people with special actions. Nevertheless, this is a statement for the general protection of old people and not the declaration of equal treatment.

³⁴ Act XX of 1949, Constitution of the Hungarian Republic. It was completely rewritten after the collapse of the socialist system and was in force till the end of 2011.

³⁵ Art. 70/A. (2) states: The law seriously punish people's adverse treatment according to subsection 1.

³⁶ Act XXII of 1992. It will be abrogated at the end of June 2012.

³⁷ Art. 5 of the old Labour Code and Art. 12 of the new Labour Code (The new Labour Code – Act I. of 2012 will enter into force on 1 July 2012.).

³⁸ Act Nr. CXXV of 2003. (2003. évi CXXV. törvény az egyenlő bánásmódról és az esélyegyenlőség előmozdításáról).

³⁹ The act has to be applied for all forms of employment in both public and private sectors. Furthermore, it applies for other relationships which are directed to provide labour, e.g. contract for work.

different treatment is based on religious or other belief, national or ethnic affiliation, and it directly arises from the special nature of the employer's organisation and it is a proportional and real different treatment, justified by the content or nature of the activity concerned.

In 2012 there is a serious cutback concerning the procedural rules in case of the violation of the principle of equal treatment. The so-called Equal Treatment Authority is an independent organization set up by the government in 2004 for guaranteeing equal treatment⁴⁰. Until February 2012 the authority had the right on request or ex officio to make inquiries in order to state whether the principle of equal treatment was violated. Every natural and legal person had the right to bring a complaint to the authority alleging that she/he was discriminated against. On the basis of its inquiry the authority adopted a resolution, in which it could impose a fine for violating the principle of equal treatment.⁴¹ Vast majority of complaints received were related to labour.⁴² This right of the authority was cancelled from 2012 and recently it has only certain public rights.⁴³

Until 2012 the labour inspectorates had the right to control employers, whether they comply with the principle of equal treatment.⁴⁴ The control was extended on the preparation of the employment relationship, as well. Since 2012 the authorities do not have this right any more. With the abolishment of the main right of the Equal Treatment Authority and the labour inspectorates, workers discriminated against have the only possibility to sue their employers, which obviously is an expensive and long-lasting procedure.

2. The definition of pensioner in the Labour Code

The Labour Code gives a special definition of pensioner and makes a difference between two categories.⁴⁵ Under Art. 87/A. (1) a) an employee shall be recognised as a pensioner upon reaching the retirement age for old-age pension benefits prescribed by the Social Security Pension Benefits Act and if having the service time required to receive old-age pension. Interestingly, these workers have only entitlement for a pension, but they are still not pensioner. The workers have reached retirement age and have the necessary period of service, thus they can freely decide, whether they want to retire. It is a legal presumption to qualify them as pensioners, as they maybe do not want to retire, even if they are entitled. The second category of pensioners includes several forms of pension or benefit, e.g. early retirement pension, church-related pension, unemployment benefit, and invalidity benefit.

⁴⁰ Egyenlő Bánásmód Hatóság. See its homepage also in English: www.egyenlobanasmod.hu

⁴¹ To get compensation for the discrimination the victim has to sue the violator at court. The Authority only imposes fine.

⁴² See: Report of the activity of the Equal Treatment Authority in 2010 and on application of Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities

<http://www.egyenlobanasmod.hu/data/2010report.pdf>. p. 4.

⁴³ It can bring an action to the court to protect the rights of violated group of people. Furthermore, it has some information and consultation rights and the right to make a proposal for an act.

⁴⁴ Act Nr. LXXV. of 1996. on Labour Control (1995. évi LXXV. törvény a munkaügyi ellenőrzésről, 3. § (1) d).

⁴⁵ Art. 87/A. Labour Code. The same rule is contained in the new Labour Code, Art. 294. (1) g).

Common conditions of the qualification as pensioner in this category are that – beside of the early retirement – workers have to reach retirement age and apply for pension.

3. Special regulation for dismissal of pensioners

The Hungarian Labour Code includes three special rules for dismissal of pensioners. These provisions make it much easier to dismiss a pensioner and deprive this group of all kinds of protection against dismissal.

a) Ordinary dismissal without reason

In Hungary, if an employer wants to dismiss a worker, he has to specify the reason for it. There are three groups of reasons which can justify a dismissal. The law does not define directly the specific reasons or circumstances which can justify the termination, but specify three groups of reasons. The reason can be related to a) the skills of the workers; b) the behaviour of the worker in connection with the employment relationship; c) the operation of the employer.⁴⁶

The regulation contains an exemption for pensioners. The employer is not obliged to give reasons for the ordinary dismissal of an employee if he/she is a pensioner.⁴⁷ It is enough, if the employer just gives a notice on the termination of the employment relationship. This is an extremely easy way to dismiss a worker. The employer has discretionary power to decide whether he wants to dismiss the worker who gets pensioner and thus the worker has very limited possibilities to bring an action to the court against this notice.

b) No prohibition of dismissal

In certain cases the employer is not allowed to dismiss the employees. Article 90 (1) Labour Code declares that employers shall not terminate an employment relationship by ordinary dismissal during certain periods, e.g.: incapacity to work due to illness, the period of sick leave for the purpose of caring for a sick child; leave of absence without pay for nursing or for providing home care for a close relative, and so on. During these periods the employer is prohibited to dismiss a worker. If the employee is qualified as a pensioner, he does not enjoy this right, i.e. the employer can dismiss him at any time, even during sick leave.⁴⁸

The new Labour Code does not have the same regulation. The new Labour Code limits the kinds of protected periods, during which it is prohibited to terminate the employment relationship. Major change is that during sick leave it will be allowed to give notice of

⁴⁶ Art. 89. § (3) Labour Code.

⁴⁷ Art. 89. § (6) Labour Code. The new Labour Code maintains the same regulation in Art. 66. (9).

⁴⁸ Art. 90. § (3) Subsection (3) Labour Code provides that the restriction of dismissal laid down in Subsection (1) above shall not apply to the termination of an employee who is recognized as a pensioner [Art. 87/A (1)].

termination and the period of notice can start after the recovery and return of the worker. However, there will be no special regulation for pensioners any more.

c) No severance pay

The third special regulation shows similarities to the Danish case. According to Art. 95 Labour Code the employee is entitled to severance pay after three years of service if his employment relationship is terminated by ordinary dismissal or in consequence of the dissolution of the employer without succession. The sum of severance pay increases with the length of service. However, the employee is not entitled to severance pay if he/she is recognized as a pensioner on or before the date on which his/her employment is terminated.⁴⁹

In order to answer the question whether severance pay is in line with the principle of non-discrimination we have to clarify the function of this institution. To my opinion severance pay has two aims, namely to reward the worker's long-time loyalty to his employer and to create a reserve for the time of unemployment. In Denmark the aim of severance pay – according to the government's assumption – was to make workers the period between two jobs easier. However, the fact that in Denmark workers get entitled to severance pay only after 12 years of service is against this function of severance pay. This indicates that also loyalty was rewarded by the severance pay. In Hungary the regulation is different from the Danish one as workers get entitled to severance pay already after having three years of employment relationship.

The official reasoning of the Hungarian regulation is not clear, but indicates that real motivation was to support workers in the unemployment and thus severance pay serves mainly a social function. This social reason is not necessary in case of pensioners. The loyalty of workers is not mentioned in the reasoning. This strengthens the impression that the Hungarian regulation on severance pay has the same objective like the Danish one. This impression is definitely intensified by the fact that the right to severance pay is guaranteed after a shorter length of service than in Denmark. Common feature of the two systems is that workers cannot decide on the fact whether they want to receive severance pay and stay in the labour market or rather retire.⁵⁰ Consequently, in my opinion the Hungarian rule violates Art. 6 of the Directive 2000/78/EC and would not stand the examination of the CJEU. Art 77. (5) new Labour Code maintains this regulation.⁵¹

⁴⁹ Art. 95. (2) Labour Code.

⁵⁰ Workers belonging to the second group of pensioners defined in Art. 87/A. Labour Code and described under II. 2. can decide whether they apply for early retirement, other kinds of special pension, unemployment benefit, invalidity benefit or rather keep working.

⁵¹ For getting a more complete picture on the regulation we have to mention that workers being five years prior to getting entitled to pension enjoy a special dismissal protection and receive more severance pay. The reason for this is that they have more serious difficulties to find a new job.

4. Decision of the Hungarian Constitutional Court

The Hungarian Constitutional Court examined the constitutionality of the mentioned regulations – particularly the lack of reasoning in case of pensioners – in some decisions.⁵² The judgment from 2001 is particularly interesting.⁵³ The question was whether the lack of reasoning in case of ordinary dismissal of pensioners contravenes the prohibition of unequal treatment set in Art. 70/A. (2). The Constitutional Court ruled that the mentioned regulations comply with the principle of equal treatment.

The Constitutional Court's starting point was that the employer's right to dismiss workers is free and has no borders. It assumed that the main principle is free dismissal and there are only some exceptions of it. The rule that the employer has to give a reason for ordinary dismissal constitutes an additional protection and thus a positive discrimination. Therefore the exception for pensioners does not constitute negative discrimination, but only abolished the additional protection. Since the regulation does not create an adverse treatment, the Court does not need to examine, whether the different treatment complies with the principle of equal treatment. The explanation of the Constitutional Court does not refer to employment policy aims or the proportionality test of the CJEU. In my opinion the Court's reasoning is false and illogical, as according to the general rule the dismissal has to be explained, i.e. the reasons for the termination of the employment relationship have to be given for all workers apart from pensioners. In my opinion this is the general rule and there are only a few exceptions. This is not a positive discrimination, but the normal case.

5. Assessment of the Hungarian regulation

The CJEU judgments on old age discrimination clearly indicate that it is justified to treat older workers adversely concerning their termination of employment, if they get entitled to pension. As far as the Hungarian regulations are concerned as a general excuse Hungary could refer to employment policy aims, as objectives of the different treatment of older workers. Besides, the dismissed workers get a financial compensation, even if this is not in every case enough to live on it. Therefore in the light of the recent CJEU judgments, the regulation on ordinary dismissal without any reasoning and without complying with the general prohibition on dismissal is probably in line with the Directive 2000/78/EC and would stand the examination of the CJEU.

The special Hungarian legislation considers people pensioner, who receive invalidity benefit, unemployment benefit or early retirement pension. The involvement of these groups generates at least two major problems. Firstly, the adverse treatment of these groups is not bound to any labour market objectives. Secondly, their pension is too low to

⁵² Resolution of the Constitutional Court Nr. 44/B/1993. (44/B/1993. AB határozat), Resolution of the Constitutional Court Nr. 11/2001. (IV.12.) (11/2001. {IV.12.} AB határozat).

⁵³ In that time Art. 70/A. (2) of the earlier Constitution declared the principle of equal treatment.

make ends meet. However, following the reasoning of the Rosenblatt judgment, having financial compensation in form of some kind of pension can be an appropriate ground for the justification of the different treatment.

More controversial is the rule on severance pay. In my opinion this rule contravenes the Directive. The official reasoning of the Labour Code argues that in case of the termination of the employment relationship no social reason can explain to give severance pay for the worker, when she/he receives appropriate money by pension. However, in my opinion there is no real employment policy aim behind this regulation, therefore it cannot be justified. Furthermore, the contested Hungarian regulation is extremely similar to the Danish case found incompatible with the Directive 2000/78/EC in the Andersen judgment.

III. The Croatian regulation on old age discrimination

1. Introduction

Age discrimination is a topic that causes many debates in Croatia and witnesses noticeable contradictions. According to the research of 2010 conducted by the Institute of Social Sciences Ivo Pilar, in the opinion of the unemployed and employers, age discrimination is the most common form of discrimination and it is followed by discrimination based on disability and discrimination based on sex.⁵⁴ In accordance with such perception, empirical data on the incidence of discrimination identified by the aforementioned research prove that age discrimination, regardless of whether these are problems of discrimination in general, discrimination in the labour market, employment or workplace discrimination, affects the largest number of persons.⁵⁵ Nearly 20% of the unemployed believe that they did not get a job in the past year because of their age, 15% of the unemployed experienced direct discrimination in job interviews, since they were told that they were not suitable for the job because of their age, about 17% of unemployed persons experienced essentially the same unfair treatment in their workplaces, and almost 10% of respondents claimed that they were deprived of or denied promotion, better working conditions, training, equal pay and other benefits in their workplace because of their age.⁵⁶ Moreover, in all these cases, age discrimination was more commonly experienced in the group of unemployed persons aged 40 years or above than in the group of persons younger than 40.⁵⁷ Taking into account these data, additional concern arises from the fact that nearly 40% of employers and unemployed persons have never heard of the Anti-Discrimination Act, they are not familiar with other acts relating to discrimination in the labour market (70% of employers, 90% of unemployed

⁵⁴ R. Franc, I. Ferić, J. Maričić et al. *Raširenost i obilježja diskriminacije na hrvatskom tržištu rada, Izvješće na temelju ankete među nezaposlenim osobama i ankete među poslodavcima* [Prevalence and Characteristics of Discrimination in the Croatian Labour Market, The Report Based on a Survey among the Unemployed and Survey among Employers] Zagreb, Institut Društvenih znanosti Ivo Pilar, April 2010.

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ Ibid.

persons), and they do not even know which central national authority is responsible for combating all forms of discrimination (70% of employers, 80% of unemployed persons).⁵⁸ Although the above study included a relatively small number of respondents, it is a valid indicator of the relative incidence of discrimination that provides sufficient basis for further research. One should *pro futuro* also examine possible forms of multiple discrimination, i.e. forms of simultaneous discrimination based on age and/or sex, disability, sexual orientation, and national origin, since the obtained results could reflect a more complex picture and the complexity of a discrimination problem.⁵⁹

Age discrimination in Croatia has imposed a debate about a possible different treatment of older workers employed in the government and public sector, that are mostly protected by general and special acts and collective agreements, and older workers employed in the private sector and working for small employers to whom collective agreements do not apply. The situation is also interesting because of the specific features and structure of retirees, since there is discrimination against elderly people and on the other hand, according to the age structure, the smallest number of retirees has reached full retirement age. This is a consequence of an extremely high percentage of disability support pensions and Croatian Homeland War veterans' pensions from the nineties of the last century, the specific culture and aspirations of workers who are predominantly directed towards an early retirement.⁶⁰ Croatian legislation related to the fight against discrimination has been created and altered in good part through the influence of the process of harmonising national legislation with the *acquis communautaire*, satisfying the Copenhagen criteria and establishing the rule of law.

⁵⁸ Ibid.

⁵⁹ Cf. M. Vinković, "Spolna segregacija i tržište rada – hrvatski diskurs europskih trendova" [Sex Segregation and the Labour Market – Croatian Discourse of European Trends], in: I. Radačić and J. Vince Pallua, eds., *Ljudska prava žena, Razvoj na međunarodnoj i nacionalnoj razini 30 godina nakon usvajanja Konvencije UN-a o uklanjanju svih oblika diskriminacije žene* (Zagreb, Institut društvenih znanosti Ivo Pilar and Ured za ravnopravnost spolova Vlade Republike Hrvatske, 2010), p. 203.

⁶⁰ The average past service of old age pension, disability support pension, and dependents pension beneficiaries is 32, 24, and 27 years, respectively, whereas the average past service of all beneficiaries is 29 years. The share of retirees with 40 or more years of past service in the total number of retirees is only 11.54%. In 2009, the average old age pension was 17 years and 11 months, disability support pension 19 years and 2 months, and dependents pension 16 years and 8 months. Also in 2009, the average age of old age pension beneficiaries was 68 years and 11 months (women) and 71 years and 10 months (men), disability support pension beneficiaries 61 years and 5 months (women) and 61 years and 10 months (men). The largest number of retirees is between 65 and 69 years old (19.12%). We are also concerned about the ratio of the number of insured persons and the number of pension beneficiaries that was only 1.30:1 at the end of 2009 and it was the lowest ratio recorded in the Republic of Croatia. This ratio is even less favourable today. It has to be added that in Croatia there are nearly 70,000 pension beneficiaries whose right was determined in accordance with the Act on the Rights of Croatian Homeland War Veterans and their Family Members, and nearly 11,500 pension beneficiaries according to Pension Insurance Rights of Active Military Personnel and Authorised Official Persons. See Mirovinski vodič, VII(7) July 2010 at: http://www.mirovinsko.hr/UserDocsImages//publikacije/mirovinski_vodic/hzmo_Mirovinskivodic_br7_srpanj_2010.pdf (last accessed on 20 January 2012).

2. National Legislation on Equal Treatment

In Article 3, the Constitution of the Republic of Croatia⁶¹ promotes *freedom, equal rights, national and gender equality, peace-making, social justice, respect for human rights, inviolability of ownership, conservation of nature and the environment, the rule of law and a democratic multiparty system as the highest values of the constitutional order and the foundation for interpreting the Constitution*. The highest values *expressis verbis* do not mention age, but it is undoubtedly subsumed under the constitutional value of “*equal rights*”. Moreover, similarly to the Hungarian Constitution, age is not mentioned in Article 14, Chapter III Protection of human rights and fundamental freedoms of the Constitution which contains a general clause prohibiting discrimination, i.e. it guarantees that *all persons in the Republic of Croatia shall enjoy rights and freedoms, regardless of race, colour, gender, language, religion, political or other conviction, national or social origin, property, birth, education, social status or other characteristics*. The latter category, i.e. “other characteristics”, extends its application to make a distinction based on age. However, the Croatian Anti-Discrimination Act⁶², which together with the Gender Equality Act⁶³ and the Same Sex Cohabitation Act⁶⁴ makes the backbone of the Croatian anti-discrimination legislation and has the status of a constitutional act since it governs human rights and freedoms, explicitly states age as one of the seventeen legal grounds for the prohibition of discrimination.⁶⁵ Although it contains a “closed list” of legal grounds, a general clause from the Anti-Discrimination Act prohibiting discrimination encompasses a much wider area than the one regulated by secondary EU law, i.e. framework and individual directives. The reasons for such approach can be found in an attempt of instructional activities of the Croatian legislator that wants to refer to the possible extent of discrimination in everyday life, provide as effective protection as possible and prevent possible consequences of insufficient and often limited judicial interpretation. By numerous precisely and extensively defined legal grounds for the prohibition the legislator avoided the possibility that some cases depend solely on the legal and creative practice of national courts that would, in the case of a reduced number of legal grounds and different nomotechnical methodology, develop undoubtedly at a much slower pace.⁶⁶ In contrast to that, Article 19 TFEU (ex Article 13 TEC)

⁶¹ The Constitution of the Republic of Croatia, Official Gazette, Nos. 56/90, 135/97, 113/00, 28/01 and 76/10.

⁶² Anti-Discrimination Act, Official Gazette, No. 85/08.

⁶³ Gender Equality Act, Official Gazette, No. 82/08.

⁶⁴ Same Sex Cohabitation Act, Official Gazette, No. 116/03.

⁶⁵ The others are: race or ethnic affiliation or colour, gender, language, religion, political or other belief, national or social origin, property, trade union membership, education, social status, marital or family status, health condition, disability, genetic heritage, gender identity, expression or sexual orientation. See Article 1 of the Anti-Discrimination Act.

⁶⁶ See M. Vinković “Horizontalna harmonizacija hrvatskog (radnog) zakonodavstva – Kamo je nestala zabrana diskriminacije i zaštita majčinstva/roditeljstva?” [Horizontal Harmonisation of the Croatian (Labour) Legislation – Where has the prohibition of discrimination and protection of motherhood/parenthood gone?], in: I. Cvitanović, I. Gović, M. Kasunić Peris et al., *Novi Zakon o radu – Detaljni komentar novih odredaba* (Zagreb,

extends the competence of the Union only to the fight against discrimination based on sex, racial or ethnic origin, religion or belief, physical or mental impairment, and lately age and sexual orientation. A large number of legal grounds referring to the prohibition of discrimination makes the Croatian solution closest to the provision of Article 21 of the Charter of Fundamental Rights of the European Union that exemplifies a far longer list of legal grounds for the prohibition⁶⁷, and it got an entirely new legal treatment in the judicial system of the EU by the entry into force of the Lisbon Treaty. Its transition from a *soft law* source ends by a legal status equal to founding treaties, so that the Croatian legislator confirmed its insight into the implications that will be brought by the Lisbon changes.⁶⁸ In accordance with European standards, the Anti-Discrimination Act, defines both direct and indirect discrimination, harassment and sexual harassment, and goes a step further by defining segregation, albeit by means of an impotent definition, and qualified forms of discrimination: multiple – discrimination against a person on more than one ground; repeated – discrimination committed several times and continued – discrimination that lasted over a longer period of time or whose consequences are particularly harmful for the victim.⁶⁹ By its application, it is extended to the areas of work and employment, education, science and sports, social security (social welfare, pension and health insurance and unemployment insurance), health protection, judiciary and administration, access to goods, information and services, housing, membership and activities in trade unions, civil society organisations, political parties, or other organisations as well as access to participation in cultural and artistic creation.⁷⁰ The Act applies to the conduct of all state bodies, bodies of local and regional self-government units, legal persons vested with public authority and to the conduct of all legal and natural persons.⁷¹ Although it *expressis verbis* does not mention private employers, in the context of work and working conditions it especially refers to the following: the ability to perform independent and dependent activities, i.e. self-employment and occupation, including selection criteria, recruiting and promotion conditions, access to all types of vocational guidance, vocational training, personal improvement and retraining, access to goods and services and their provision, membership and activities in trade unions, civil society organisations, political parties, or other organisations as well as access to

Rosip 2010), p. 334; M. Vinković “New Croatian Anti-discrimination Legislation – Harmonisation with the Acquis or even more?”, in: K. Klima and G. G. Sander, eds., *Grund- und Menschenrechte in Europa*, Schriften zu Mittel- und Osteuropa in der Europäischen Integration, Band 10 (Hamburg, Verlag Dr. Kovač 2010), pp. 96-123.

⁶⁷ Article 21(1) “Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.”, Charter of Fundamental Rights of the European Union, OJ C 303, 27.12. 2007.

⁶⁸ Vinković, loc. cit. n. 66, p. 335.

⁶⁹ See Articles 2 – 6 of the Anti-Discrimination Act.

⁷⁰ See Article 8 of the Anti-Discrimination Act.

⁷¹ Ibid.

participation in cultural and artistic creation.⁷² Exclusion of unlawfulness in the world of work *inter alia* identifies in the case of positive measures, i.e. positive actions, when such a conduct is based upon *provisions of laws, subordinate regulations, programmes, measures or decisions with the aim to improve the status of ethnic, religious, language or other minorities or other groups of citizens or discriminated persons; in the case of granting of privileges to pregnant women, children, young people, older persons, persons with caring responsibilities who regularly fulfil their caring duties, and disabled persons with a view to their protection, when such a conduct is based on provisions of laws, subordinate regulations, programmes and measures; in relation to a particular job “when the nature of the job is such or the job is performed under such conditions that its characteristics related to any of the grounds for the prohibition of discrimination present an actual and decisive condition for performing that job, provided that the purpose to be achieved is justified and the condition appropriate”; in the case of “fixing minimum conditions of age and/or professional experience and/or level of education limit for access to a certain employment or for acquiring other advantages linked to employment when it is provided for in separate regulations”, and in the case of “fixing a suitable and appropriate maximum age as a reason for the termination of an employment and prescribing a certain age as a condition for acquiring the right to retirement”.*⁷³ We should also bear in mind the provision contained in Article 9 paragraph 2, point 5 on the exclusion of unlawfulness in relation to employment, entering into membership and acting in conformity with the canon and mission of a church and religious congregation entered into the Register of Religious Congregations of the Republic of Croatia, and any other public or private organisation which acts in conformity with the Constitution and laws. Namely, in the given cases, the law allows exclusion of unlawfulness if this is required by *“the religious doctrine, beliefs or objectives”*.

The Anti-Discrimination Act is extremely important in terms of the process as well, since it defines⁷⁴ the types of discrimination claims, including collective claims, specifies the burden of proof, and inaugurates the national central body responsible for the suppression of discrimination, i.e. the Ombudsman, who is also assisted by special Ombudsmen for Gender Equality, for People with Disabilities and for Children.

3. The Labour Act

⁷² Ibid.

⁷³ See Article 9 of the Anti-Discrimination Act.

⁷⁴ According to Professor Alan Uzelac, Article 17 introduces a new action for protection of the right to equal treatment. The individual anti-discrimination lawsuit comprises several anti-discrimination claims, i.e. Action for determination of discrimination (declaratory anti-discrimination claim); Action for prohibition of discrimination (prohibitive anti-discrimination claim); Action for the elimination of discrimination or its effects (restitutional anti-discrimination claim); Action for damages caused by discrimination (reparational anti-discrimination claim) and Action for the publication of determination of discrimination (publicational anti-discrimination claim). A. Uzelac “Proceedings before the Court”, in: A. Grgić, Ž. Potočnjak, S. Rodin et al. *A Guide to the Anti-Discrimination Act* (Zagreb, Government of the Republic of Croatia Office for Human Rights, 2009), p. 99.

As a consequence of horizontal harmonisation of national regulation and adoption of the Anti-Discrimination Act, the new Croatian Labour Act of 2009⁷⁵ no longer contains definitions of discrimination, harassment and sexual harassment. The Act contains only the basic obligation of the employer who employs twenty or more workers to adopt rules of procedure including provisions referring to the protection of dignity and the prohibition of discrimination if these issues are not regulated by the collective agreement.⁷⁶ In the context of equal treatment, provisions on equal salaries to women and men for equal work and for work of equal value are important⁷⁷, as well as on the procedure for the protection of workers' dignity including the protection by employers and specific employment rules.⁷⁸ The protection of older workers against discrimination as well as a series of legal protective provisions pertaining to the so-called protected groups of workers are nomotechnically divided into many chapters of the Labour Act. Moreover, a great number of protected categories of workers, whose employment contract either cannot be terminated or it is extremely difficult to terminate it (pregnant women, workers over 60, trade union representatives, employee council members, employee council member candidates, etc.) is considered to be a major stumbling block in the relations between employers' associations and the Government, an explicit form of inflexible Croatian labour legislation and a serious obstacle to foreign investments.⁷⁹ However, criticism of the rigidity of the Croatian labour legislation and a large number of protected groups should be viewed in the context of social circumstances in relation to adoption of regulations in the areas of labour and employment since Croatian independence in the nineties of the last century. Rigid legislation was actually a response to "wild" transformation and privatisation of state-owned companies in which workers needed protection from the newly introduced capitalism that did not show a human face in Croatia.

a) Compulsory retirement and old age workers

Unlike Hungarian legislation, the Croatian Labour Act contains no definition of retirees, but it lists *inter alia* the following legal grounds for termination of employment contracts: when the worker has turned 65 years of age and 15 years of employment service, unless otherwise agreed by the employer and the worker; an agreement between the worker and the employer; expiration of the period for which a fixed-duration employment contract has been concluded

⁷⁵ Labour Act, Official Gazette, Nos. 149/09, 61/11.

⁷⁶ Article 125(1) of the Labour Act.

⁷⁷ *Ibid.*, Article 89.

⁷⁸ *Ibid.*, Article 130.

⁷⁹ "Otpuštanje 27 tisuća ljudi viška stajalo bi nas 3.5 milijardi kuna, Nemoguća misija, Kako dati otkaz zaposleniku u državnoj upravi, 16 kategorija posebno zaštićenih koji ne mogu dobiti otkaz" ["The lay-off of 27,000 redundant people would cost us 3.5 billion kuna, Mission Impossible, How to fire a civil service employee, 16 categories of specially protected who cannot be fired"], *Jutarnji list*, daily newspaper, 11 February 2012, pp. 6-7.

and submission of a legally effective decision on retirement due to general inability to work.⁸⁰ The possibility that the worker who has turned 65 years of age and 15 years of employment service remains working if he/she reaches an agreement with his/her employer is of recent date and a consequence of filling legal gaps and providing opportunities for employers to retain older workers with special skills, experience and competence. The only exceptions are judicial officials (judges and state attorneys) and tenured full professors who may work up to the age of seventy on the basis of special regulations, and categories of workers protected by special acts (military personnel, police officers, employers with reduced years of service for retirement) who can meet conditions for an old age pension before the age of 65. Former parliamentary representatives and members of the Government had this possibility until recently, but the given Act was changed under public pressure, and, we believe, a conscious, yet publicly unarticulated criticism of the unconstitutionality of such act. The specificity of the Croatian legal system lies in the fact that retirees can put on hold their retirement and retiree status obtained under the tax laws and regulations in the field of pension insurance and join the labour market if the employer needs such persons. This work is mainly governed by fixed-term contracts and in practice we have no knowledge of legal disputes related to termination of the employment contract concluded after retirement. The specificity of labour legislation is also a protective clause obliging the employer to consult with the workers' council about termination of the employment contract of a worker older than 60. In case the workers' council opposes such termination, this may be replaced only by a judicial decision.⁸¹ However, in practice, private or privatised companies have addressed such issue by offering greater amounts of severance pays and signing an agreement terminating the employment contract, which only deepened the existing vicious circle. Although employers tried to bypass the law in relation to workers of the age of 60, and even younger, these persons have regularly burdened pension funds (early retirement) or unemployment insurance.

b) Severance pay

Severance pay provisions were also subject to modifications and criticism referring to the need for their reduction. Currently, the legal solution provides for severance pay in cases where an employer terminates a worker after two years of continuous uninterrupted service and provided termination does not take place due to worker's misconduct. Severance pay is determined on the basis of the length of prior continuous employment with that employer and must not be agreed upon or determined in an amount lower than one-third of the average monthly salary earned by the worker in a period of three months prior to the termination of the employment contract. Unless otherwise specified by the law, collective agreement, book of rules or employment contract, the aggregate amount of severance pay

⁸⁰ Article 104 of the Labour Act.

⁸¹ *Ibid.*, Article 150.

determined by the Act may not exceed six average monthly salaries earned by the worker in a period of three months preceding the termination of the employment contract. Diction of the norm would suggest that severance pay is paid only in the case of termination not conditioned by worker's misconduct, but not in other cases of the termination of employment contracts. However, in practice, under collective agreements, books of rules or employment contracts, severance payments are common when conditions for retirement are met, but the amount of severance payments is generally limited by the aforementioned statutory maximum.

It should be noted that workers employed by insolvent employers exercise their given legal rights with great difficulty, since payments of their material rights are often limited by regulations governing bankruptcy and difficult material conditions of such companies. Restructuring in transition has greatly influenced the loss of jobs occupied mostly by older workers, who find it extremely difficult now, unlike favourable conditions to retire some ten years ago, to return to employment.⁸² After the age of 65 less than one tenth of the Croatian population is economically active and these are mostly people with a low level of education who are self-employed in agriculture.⁸³ In conditions of a high unemployment rate the biggest problem yet seems to be a return to employment of middle-aged workers, since women over 40 and men over 45 are groups for which it is most difficult to get a job and that, if left without jobs, remain registered with the employment agency for the longest period of time.⁸⁴

IV. Concluding remarks

The paper tries to show the differences in the treatment of Hungarian and Croatian elderly workers in the light of secondary sources and relevant case law of the CJEU. The complexity of the phenomenon of age discrimination clearly indicates that by setting a maximum age for retirement, although in line with European and national regulations, the desired effects of higher employment of younger persons will not be achieved, but it will surely partly result in the loss of a competent, educated and skilled older workforce. Moreover, in circumstances in which the population of Europe is evidently getting old, early retirement, relatively small pensions, and especially big problems with re-employment of middle-aged persons in some Member States, have strengthened pressures on pension insurance systems, assistance for the unemployed and other forms of social benefits, creating thereby a national and European *circulum viciosus*. Due to specific professions, the question of old age must be considered and regulated heteronomously, and not homogenously, bearing in

⁸² T. Matković, "Tko što radi? Dob i rod kao odrednice položaja na tržištu rada u Hrvatskoj" ["Who does what? Age and Gender as Determinants of the Position on the Labour Market in Croatia"], 15(3) *Revija za socijalnu politiku* (2008), p. 493.

⁸³ *Ibid.*, p. 490.

⁸⁴ N. Kerovec, "Poteškoće u zapošljavanju osoba starije dobi" ["Difficulties in Employing Elderly Persons"], 8(3) *Revija za socijalnu politiku* (2001), p. 267.

mind harmonised definitions of discrimination in national legal systems of Member States and the present interpretations as to setting a maximum age for retirement in national systems as a possible form of direct discrimination.⁸⁵

⁸⁵ M. Sargeant, “Age Discrimination in the EU and the Framework Directive”, in: M. Sargeant, ed., *The Law on Age Discrimination in the EU* (The Netherlands, Kluwer Law International, 2008) p. 25.