THE REGULATORY BACKGROUND OF AGE DISCRIMINATION

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Abstract

The aim of my research is to carry out a problem-focused examination of the employment law aspects of age-based discrimination, a topic less frequently addressed in Hungarian legal literature so far, thereby exploring the anomalies inherent in the legislation as well as the resulting practice. Such research can help in adapting effectively to the challenges posed by the demographic changes currently taking place in our society. The fight against discrimination requires, above all, a stable regulatory background, which I undertake to present in the framework of this paper. The majority of age-based anti-discrimination legislation are at supranational, primarily EU level; however, in the course of my analysis, naturally I will also deal with Hungarian legislation.

Keywords: *Age discrimination, European Union law, Hungarian Law, labour law, regulation.1.*

Introduction

Age as a protected characteristic has been a leading cause of discrimination throughout the past ten years in Hungary,[1] and it is the third most common cause of discrimination worldwide, following race and gender, and yet it receives very little attention,[2] especially in the literature in Hungary. The situation is well illustrated by the fact that while the Hungarian language versions of the words "racism" ("rasszizmus") and "sexism" ("szexizmus") used in relation to racial and gender-based discrimination are widely known and are even incorporated into everyday language, "ageism," the phrase describing age-based discrimination, only appeared with a considerable delay abroad, and its established Hungarian equivalent has not been created ever since, although the use of the term "aggizmus" has already been proposed in 2007.[3]

In the light of the statistical data mentioned above, there can be no question that an examination of the issue of age-based discrimination from the point of view of employment law is very topical, and effective legal action against it is necessary. At the same time, in my view, this issue will become increasingly cardinal in the near future in the field of employment law, as the current demographic changes will gradually redefine the age structure of European

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[1] Mária Neményi – Bence Ságvári – Katalin Tardos, A diszkrimináció személyes és társadalmi észlelése és az egyenlő bánásmóddal kapcsolatos jogtudatosság, Kutatási eredmények 2019, Egyenlő Bánásmód Hatóság, Budapest, 2019, p. 3., this document is available online at https://www.researchgate.net/publication/342833262_A_diszkriminacio_szemelyes_es_tarsadalmi_eszlelese_es_az_egyenlo_banasmoddal_kapcsolatos_jogtudatossag_Kutatasi_eredmenyek_2019 (last access: 24.03.2022).

[2] Mentioned in the preface by Nelson. – Todd D. Nelson, *Ageism – Stereotyping and Prejudice against Older Persons*, MIT Press, Cambridge, Massachussets 2002.

[3] See Mariann Pecze, *Aggizmus – sztereotípiák és előítéletek az idősekkel szemben*, "Educatio", vol. 2007/1, pp. 160-163.

societies, and the effects of these changes in terms of regulations will be perhaps most pronounced in the field of employment law.

By exposing the problem, I am seeking to ascertain whether the regulation in place can be regarded as appropriate and effective in the light of the relevant legal acts, given the established hypothesis that the more effective the regulatory framework is, the more it is capable of cushioning the disadvantageous aspects of the labour market situation, which primarily affects older people, and the better chances older people have in employment, and therefore, I mainly consider these factors as a measure of effectiveness. The main question is therefore whether the legislator can keep pace with, as well as respond to social and demographic processes and problems through adequate regulation, thus providing effective protection against age-based discrimination.

In order to find the answer, I will examine the relevant international and EU legal acts, as well as the products of Hungarian legislation, through the analysis of the relevant passages. Among the legislative provisions, particular attention will be paid to the "exemption clause", a special feature of Hungarian law,[4] which has been transposed from EU law,[5] although not with word-for-word accuracy. This specific rule, by giving the employer the possibility of exemption, creates additional tension, as well as a contradictory situation, as it makes the regulation flexible on the one hand and somewhat uncertain on the other hand. For this reason, the examination of the grounds for exemption is of cardinal importance from the point of view of the research, as the determination of the existence of equal treatment very much depends on it. Given the stratified, multi-level structure of the Hungarian regulation, I also intend to provide a comparative discussion of the individual provisions. I will conclude my paper with an analysis and comparison of the partial results of each section, and by formulating possible answers to the question raised and offering some possible *de lege ferenda* proposals.

In the following, I will move on to providing an outline of the regulatory system, presenting first the relevant international and then domestic legal acts, as well as highlighting their most important relevant provisions.

2. The international regulatory structure

The principle of equal treatment was first formulated in the framework of Convention No. 100 of the International Labour Organisation (ILO), on 29 July 1951. The aim of the Convention was to overcome the often significant pay gap between women and men. Expressly or tacitly, equal treatment to be enforced in the field of remuneration subsequently contributed to the development of the other areas of the principle of equal treatment, and therefore we can identify this as the first step.

The foundations laid down by the ILO have been taken further by the European Union in the area of equal rights for workers. The principle of equal treatment already appeared in the Treaty of Rome in 1957, in a sectoral form, specifically based on the requirement of equal pay, including the

[4] See: Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities (hereinafter: Equal Treatment Act), § 22.

[5] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Article 2 (2) and Article 4.

prohibition of discrimination on the grounds of sex.[6]

In the EU's legislative processes, the principle of equal treatment until the Treaty of Amsterdam meant only equality between women and men,[7] which clearly made it difficult to apply it in general in employment relationships. However, in connection with the substance of the principle, it should be noted that, despite the initial narrow approach, the Court of Justice of the European Union (hereinafter: CJEU) explained already at an early stage that, notwithstanding the particular nature of the principle of equal treatment, it would be regarded as a general requirement, which greatly facilitated the later revolution of the principle.

As regards discrimination on the grounds of age in particular, the EU's case law started with the Mangold ruling,[8] in 2005. The CJEU concluded in that ruling that "the principle of non-discrimination on grounds of age must thus be regarded as a general principle of Community law,"[9] and this has since become of the most dynamically developing areas of law.[10]

In the course of describing the relevant legal provisions, keeping the hierarchy of sources of law, I will start here, within the category of primary legislation, with a discussion of the relevant legal provisions of the Treaties, and specifically of the Treaty on the European Union (hereinafter: TEU) and the Treaty on the Functioning of the European Union (TFEU).

Within the scope of "Provisions Having General Application", the TFEU provides that "in all its activities, the Union shall aim to eliminate inequalities and to promote equality between men and women."[11] What is even more important, Article 19 of the TFEU states that the Council may take appropriate action to combat discrimination based on age.[12] Article 19 was incorporated into the TFEU by the Treaty of Amsterdam, and therefore, it was for a long time the first and only provision of primary legislation that explicitly mentioned the prohibition of discrimination on grounds of age.

Among primary sources of law, it is worth mentioning the Charter of Fundamental Rights of the European Union (hereinafter: Charter), Article 21 (1) of which states that any discrimination based on any ground, including age, shall be prohibited. Furthermore, under Article 21 (2) of the Charter, within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.

[6] Treaty of Rome, Part Three; Title III; Chapter 1; Article 119: "Each Member State shall, from the first stage, ensure and maintain the application of the principle of equal pay for equal work for men and women"; and Article 6 of the Convention on Social Policy: "Each Member State shall ensure the application of the principle of equal pay for equal work for men and women workers." – Márton Leó Zaccaria, *Az egyenlő bánásmód elvének érvényesülése a munkajog területén a magyar joggyakorlatban*, HVG-ORAC Lap- és Könyvkiadó Kft., Budapest, 2015, pp. 27-28.

[7] See Directives 75/117/EEC, 76/207/EEC, 79/7/EEC and 86/378/EEC.

[8] C-144/04. Werner Mangold v Rüdiger Helm, Judgment of the Court (Grand Chamber) of 22 November 2005. (ECLI:EU:C:2005:709).

[9] Point 75 of the judgment.

[10] Nikolett Hős, *Az általános jogelvek és az Alapjogi Charta szerepe az Európai Bíróság életkoron alapuló hátrányos megkülönböztetéssel kapcsolatos joggyakorlatában*, "Magyar Munkajog E-Folyóirat", vol. 2014/1, p. 50.

[11] Article 8 (former Article 3(2) of the EC Treaty).

[12] „Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.".

Since the entry into force of the Treaty of Lisbon, under which the Charter became binding,[13] references to various provisions of the Charter have increased in the case-law of the CJEU.[14] It should be added that even before the Charter became binding, the advocates-general and the judges already invoked certain provisions of the Charter in various cases. We could say that, by the time when the Charter became binding, reference to it in the interpretation of EU law has become, in essence, natural in the case-law of the CJEU. However, once the Treaty of Lisbon has made the Charter binding, this has brought noticeable changes in the CJEU's practice in cases concerning discrimination. It can be stated with certainty that the binding nature of the Charter has made the argument based on fundamental rights much more visible and stronger in the case-law.[15]

In connection with Community law, we can conclude that the primary legislation has few provisions on the requirement of equal treatment, and the relevant detailed rules are rather governed by secondary legislation, in particular by directives.[16] The directives lay down a general framework for the principle of equal treatment, thus defining the characteristics of the prohibition of discrimination, the concept of discrimination, as well as providing for the possibility of justifying differences of treatment in certain cases and for the burden of proof in the event of an infringement of the principle. However, it is important to point out that these directives primarily impose requirements on Member States, which must be complied with when transposing them and adopting national legislation as described in the directives. Thus, in disputes between individuals no direct reference can be made to the directives.[17]

Over the past decades, the European Union has gradually implemented and developed this principle, complemented by the practice of the CJEU and with the

[13] See Article 6(1): 'The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted in Strasbourg on 12 December 2007; this Charter shall have the same binding force as the Treaties.

[14] For an overview, see in particular: Sara Iglesias Sánchez, *The Court and the Charter: the impact of the entry into force of the Lisbon Treaty on the ECJ's approach to fundamental rights*, "Common Market Law Review", vol. 2012/49, pp. 1565-1612. and Gyula Berke, *Az Európai Unió Alapjogi Chartájának alkalmazása munkajogi (szociálpolitikai) ügyekben*, "Lex HR Munkajog", vol. 2013/11, pp. 8-14.

[15] Edit Duró, *A munkajog területén megvalósuló egyenlő bánásmód követelménye, valamint megsértésének módjai az Európai Bíróság és a magyar bírói gyakorlat tükrében*, "Debreceni Jogi Műhely", no. XI, vol. 2014/3-4.

[16] The most important among these are: Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, and Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC.

[17] Although the CJEU rejects the horizontal scope of directives, in case C-555/07 Seda Kücükdeveci v. Swedex GmbH & Co. KG, it has come closer to recognising such scope of the directive's provisions. The CJEU stated that the directive itself did not lay down the principle of equal treatment in the course of employment, but that the principle stems from various international agreements, the common constitutional traditions of the Member States, and further that Article 21 (1) of the Charter of Fundamental Rights of the European Union, now a binding legal act, also includes a general prohibition of age discrimination. – Ernő Várnay – Mónika Papp, Az Európai Unió joga, CompLex, Budapest 2010, p. 327.

resulting solutions in the Member States, and has often taken a different approach to achieving a consistent development. Within this framework, it is the task and responsibility of the Member States to continue to ensure equal treatment in the context of employment and, although these solutions may be quite diverse, they must in principle have an effect in the same direction, which is to build a system of protection of workers' rights, as effectively as possible, in the context of the prohibition of discrimination.[18] In the following, I will move on to the discussion of the solution of a specific Member State, i.e. the relevant Hungarian legislation.

3. The Hungarian tripartite structure

Domestic regulation follows and aims to comply with supranational, international and EU guidelines, based on the principle of the primacy of international and EU law. The structure of the regulation is essentially tripartite, in which the framework providing a protection of the basic rights is determined by the Fundamental Law (Constitution), the general requirements of conduct in the field of employment are laid down in Act I of 2012 on the Labour Code (hereinafter: Labour Code),[19] while the detailed rules are in the Hungarian antidiscriminatory law, Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities (hereinafter: Equal Treatment Act).[20] In the following, I will examine the relevant provisions of these three sources of Hungarian law.

3.1. The relevant provisions of the Fundamental Law

Article M) of the Fundamental Law provides that the economy of Hungary shall be based on work which creates value, and on freedom of enterprise, from which it also follows that the requirement of equal treatment is necessary for both of these to be achieved. The right to work and the freedom to enterprise are constitutional values, and at the same time secondary generation rights.

Article I of the Fundamental Law mentions respect for the inviolable and inalienable fundamental rights of humans, and accordingly, the right to equality unquestionably falls within that scope. Equality as a concept is used as a keyword in the world of work in many places; for example, we encounter this concept in connection with the principle of equal pay for equal work, equal opportunities plans. as well as the so-called "positive measures" aimed at promoting equal opportunities.

Article II of the Fundamental Law declares the inviolable right to human dignity and to life. Treatment with equal dignity cannot not be overlooked in the course of employment either, and it must be a guarantee that one's age, religious beliefs, sex, sexual orientation, disability, or other protected properties and characteristics listed in the Equal Treatment Act would not be grounds for discrimination against employees.

Article XV of the Fundamental Law provides that everyone shall be equal before

[18] Zaccaria, ibid. pp. 31-39.

[19] See § 12 of the Labour Code.

[20] On the multifaceted – or to borrow the phrase from Tamás Tarcsák, "curlicued" – nature of the Hungarian rules of equal treatment, see: Tamás Tercsák, Túlzott ambíciók. Megjegyzések az egyenlő bánásmód törvényi szabályozásához és munkajogi illeszkedéséhez, In: Lajos Pál (ed.), *Az egyenlő bánásmód szabályozásáról, A Magyar Munkajogi Társaság 2020. február 5-i vitaülésén elhangzott előadások, hozzászólások,* HVG-ORAC Lap- és Könyvkiadó Kft., Budapest, 2021. pp. 9-69.

the law, and every human being shall have legal capacity. Paragraph (2) provides an illustrative list of the characteristics on the basis of which discrimination most frequently occurs; however, it is not an exhaustive list of all the qualities,[21] situations, characteristics or situations in connection with which an individual or group of individuals may suffer negative discrimination.

Paragraph (5) provides for specific legal protection for certain social groups, including the elderly. It is essential to protect these groups in the area of employment since, as mentioned above, older employees, especially those over the age of 50, are more frequently and more easily excluded from the labour market because of their status and situation. It is therefore essential, in order to reintegrate protected groups into the labour market, to introduce such measures on the national level that encourage employers to hire and employ members of such groups with more favourable terms.

3.2. The main provisions of the Equal Treatment Act

The Equal Treatment Act is general anti-discrimination legislation the scope of which covers all areas of law and all protected characteristics. However, the provisions on the requirement of equal treatment laid down in specific legislation – e.g. in the Labour Code – must be applied in accordance with the provisions of the Equal Treatment Act.[22] This means that, in employment relationships falling under the scope of the Labour Code, the provisions of the Equal Treatment Act are also applicable in legal disputes relating to equal treatment.[23]

The scope of the Equal Treatment Act covers various forms of employment both under the Labour Code or the Civil Code, but there is a debate in the literature as to whether the weaker position of the employee that would justify protection also exists in the case of employment relationships subject to the Civil Code, such as agency or service contracts.[24]

In the various legal relationships aimed at the performance of work, direct negative discrimination, indirect negative discrimination, harassment, unlawful segregation or retribution constitute violations of the requirement of equal treatment, if they are are based on any of the protected characteristics laid down by law, on the part-time or fixed-term nature of the legal relationship, or the affiliation of the worker with a trade union or other advocacy organisation.

In addition to the above, it is important to discuss here also the rules of the unique system of evidence laid down by the Equal Treatment Act. In contrast with the general formula, in cases of discrimination, the burden of proof is reversed, or at least it is split, because under Section 19 of the Equal Treatment Act, it is sufficient for injured parties to show that they were likely to suffer a disadvantage and that they have some

[21] It also includes the concept of "other situations". – For the interpretation of the other situation, see: Szilvia Halmos, Az „egyéb helyzet" alapján történő diszkrimináció a foglalkoztatásban – a magyar gyakorlat elemzése az elmélet, a nemzetközi jog és az alkotmánybírósági gyakorlat tükrében. In: Márta Ábrahám (ed.), Mailáth György Tudományos Pályázat – Díjazott dolgozatok OBH, 2016, pp. 603-672., this document is available online at https://birosag.hu/sites/default/files/2018-08/mailath-2016_1.pdf (last access: 24.03.2022).

[22] See § 2 of the Equal Treatment Act.

[23] Zaccaria, ibid. pp. 57-59.

[24] Réka Bonnyai, *Az egyenlő bánásmód elve az Európai Unió jogrendszerében és a magyar jogrendszerben*, "Jogi Fórum Publikáció" September 2014, p. 38., this document is available online at https://www.jogiforum.hu/files/publikaciok/bonnyai_reka__az_egyenlo_banasmod_elve_az_eu_es_magyar_jogrendszerben%5bjogi_forum%5d.pdf (last access: 24.03.2022).

protected characteristic. Thus, it is for the other party to prove that the circumstances established by the injured party as likely do not exist, or that the requirement of equal treatment has been complied with, or that the other party was not obliged to comply with the requirement in the legal relationship concerned, i.e, there are some grounds of exemption in place from establishing the fact of discrimination.[25] Such grounds of exemption, and the specific exemption clause related to age will be discussed in more detail in a later part of this paper.

If the infringement has already occurred, the law also deals with the detailed description of the procedure that can be initiated in order to enforce a claim.[26] In this latter respect, in addition to the courts, the Equal Treatment Authority (hereinafter: EBA) also played a significant role. The EBA acted as an autonomous forum for legal remedies guaranteeing human dignity and the implementation of the principle of equal treatment. In this context, however, the most recent news is that, at its session held on 1 December 2020, the Parliament of Hungary adopted Act CXXVII of 2020 on the Amendment of Certain Acts with a view to a More Effective Enforcement of the Principle of Equal Treatment,[27] which primarily affected the EBA. Pursuant to the amendment, the EBA ceased to exist on 1 January 2021, and its tasks were taken over by the commissioner for fundamental rights. For the time being, it remains a question to what extent this change will be able to contribute to the more effective enforcement of the principle and to enhance the level of legal protection provided, as intended by the original legislative intention, but it will only be possible to answer this question at a later stage, in the light of practical experiences.

3.3. The regulation of the Labour Code

The Labour Code of Hungary contains provisions on the requirement of equal treatment on the level of basic principles, among the general rules of conduct, under point 6, in Section 12. Thus, the principle of equal treatment is not only a guiding principle under which the parties are required to act in the performance of an employment contract, but an obligation of principle and also at the same time a practical obligation, under which the party that is the subject of the provision has the burden to perform certain specific and substantial obligations.

The Labour Code follows the positive approach of the Equal Treatment Act, and provides a summary of the employment law aspect of the principle of equal treatment. However, beyond the essential wording of the basic principle, the Labour Code does not contain any further provisions,[28] but it further elaborates on the principle only according to the aspects related to the performance of work, i.e. in several points of the law there are specific provisions concerning this requirement.

In view of the fact that this principle is intended to be specified in the Equal Treatment Act, Section 12 (1) of the Labour Code lays down the requirement of equal treatment only as a framework provision. Pursuant to Section 12, in connection with employment relationships, such as the

[25] In this respect, see Curia opinion no. 4/2017. (XI.28.) KMK on certain aspects of employment lawsuits related to non-compliance with the requirement of equal treatment, as well as decision of principle no. EBH2015. M.24.

[26] See Charter 2 of the Equal Treatment Act.

[27] Promulgated in Magyar Közlöny (Official Gazette), vol. 2020, issue 268 (on 3 December 2020), pp. 8908-8913.

[28] As Zaccaria points out, this would not necessarily be justified, since, with the establishment of the Equal Treatment Act, the detailed rules of the principle of equal treatment were regulated in general terms. – Zaccaria, ibid. p. 69.

remuneration of work, the principle of equal treatment must be strictly observed. Section 12 (1) thus declares the most important obligation, namely the general obligation to observe the principle of equal treatment, while at the same time specifying one of its areas – the remuneration of work[29] – so that, in essence, the area of equal pay becomes a special case of the principle of equal treatment.[30]

In addition to remuneration, other provisions of the Labour Code are also worth mentioning, in particular, from the aspect of anti-discrimination efforts on the basis of age. Such age-related rules are found primarily in the context of termination of employment, and the common feature of these provisions is that they affect retired workers.[31] In the following, I provide a brief description of these relevant provisions.

First of all, in connection with the legal institution commonly referred to as "protected age", which is by definition a restriction on termination by dismissal,[32] since during this protected period – which is five years before reaching the retirement age – the employer may exercise the right of dismissal, but only with more difficulty in comparison with the general rules. An employer may only terminate the indefinite-term employment of a worker who is not yet past the retirement age by way of dismissal, with reference to the conduct of the worker, in accordance with Section 66 (4) and (5), if the employee, wilfully or by gross negligence, commits a grave violation of any substantive obligations arising from the employment relationship, or otherwise engages in conduct that would render the maintenance of the employment relationship impossible. The employment may also be terminated for reasons related to the employee's ability or the employer's operations. This is subject to the condition that at the workplace specified in the contract of employment[33] there is no other vacant position corresponding to the ability, qualifications or experience required for the job occupied by the employee, or that the employee rejects the offer for employment in that position.[34]

Another relevant provision is Section 66 (9) of the Labour Code, pursuant to which the employer is not required to give reasons for the dismissal if the indefinite-term employment of a retired worker is terminated. The absence of an obligation to provide reasons is based on the existential security of retired workers. If a retired worker's employment is terminated by dismissal, he or she will not be left without income, as the loss of the job does not mean the loss of the right to the pension payments. The fact that such cases are not discriminatory has been confirmed on several occasions in the legal practice in

[29] Zaccaria takes the view that it seems somewhat arbitrary to emphasise remuneration of work in this context, and he mentions that such an approach may also constitute a specific "replacement" of the lack of a constitutional guarantee. – Zaccaria, ibid. pp. 72-73.

[30] The reasons to the minister's legislative proposal no. T/4786 on the Labour Code, it is explained why it is necessary to highlight the area of remuneration as a special area. – Zaccaria, ibid. pp. 75-76., Reasons to the minister's legislative proposal no. T/4786. p. 103., this document is available online at http://www.parlament.hu/irom39/04786/04786.pdf (last access: 24.03.2022).

[31] Section 294 (1) of the Labour Code clarifies who falls within this category of persons.

[32] Bankó shares this view. – Zoltán Bankó, *A munkáltatói hatalom korlátai a munkaviszony megszüntetése során – a felmondási tilalmak és korlátozások a magyar munkajogban*, "Jura", vol 2015/2, pp. 5-11.

[33] Or, in the absence of the above, at the workplace where the employee customarily performs work. – See the Curia's decision no. EBH2016. M.29.

[34] In connection with the obligation to offer position, see the Curia's decisions no. EBH2017. M.6. and EBH2016. M.29.

Hungary.[35] Of course, the absence of an obligation to provide reasons does not affect the rules relating to written form; in other words, a notice of dismissal cannot be lawfully communicated orally to a retired employee either.

Finally, it is necessary to mention the Section 77 (5), point a) of the Labour Code, on the basis of which an employee shall not be entitled to receive severance pay if he or she is recognized as a retired worker at the time when the notice of dismissal is delivered or when the employer is terminated without a legal successor. The legal rationale for the absence of severance pay is based on the dual nature of the severance pay. On the one hand, severance pay fulfils a social function for employees, providing assistance during the transitional period after the end of secure income. Secondly, it rewards the employee's loyalty on the basis of the length of time spent with the employer. According to the reasons to the minister's legislative proposal "the Act excludes entitlement to severance pay for workers who have acquired the right for or already receive pension benefits. In those cases, the social reasons for the payment of the severance pay do not apply, since in each case the worker already receives adequate benefits."[36]

4. The "*differentia specifica*" of the regulation, the exemption clause

When examining the principle of equal treatment, it is necessary to address cases in which a breach of the principle is formally committed, but in the light of the conditions laid down in the legislation, it cannot be classified as an infringement of the principle of equal treatment. The areas in which a difference in treatment is accepted or expected are defined separately in both the EU directives and the Equal Treatment Act.

The difference in treatment may be based, on the one hand, a possibility and, on the other, on an obligation. The former includes: occupational requirements,[37] positive measures,[38] public security, measures necessary for the maintenance of public order, the prevention of criminal offences, the protection of health and the protection of the rights and freedoms of others,[39] as well as the case of objective justification.[40] The latter, in turn, includes the obligation of the Member States to take reasonable measures to accommodate the needs of persons with disabilities, as defined in Article 5 of Directive 2000/78/EC.

In the following, I will present the EU directive's rule of the exemption clause, and then analyse the provisions as transposed into national law.

4.1. The exemption clause in EU law

In the case law of the CJEU,[41] exemption under the Directive has been formulated on three different grounds: based on Article 2 (5), on Article 4 (1) and on Article 6 (1). In addition, a further requirement has also been established to the effect that a Member State's measure must be justified, appropriate and necessary in order to achieve the objectives set out in the

[35] See: Constitutional Court Decision no. 11/2001. (IV.12.) and the Curia's decision of principle no. EBH2019. M.14.
[36] A similar opinion was also adopted by the Constitutional Court in its Decision no. 600/B/2000.
[37] Article 4 of Directives 2000/43/EC and 2000/78/EC.
[38] Article 5 of Directive 2000/43/EC and Article 7 of Directive 2000/78/EC.
[39] Article 2 (5) of Directive 2000/78/EC.
[40] Article 6 of Directive 2000/78/EC.
[41] Based on case C-447/09. Reinhard Prigge and Others v Deutsche Lufthansa AG. Judgment of the Court (Grand Chamber) of 13 September 2011. (ECLI:EU:C:2011:573).

Directive. Furthermore, it can be established on the basis of the case law that an exemption may be provided for prior to the conclusion of the contract of employment (e.g. setting an upper age limit for persons who are higher), during the term of the employment contract (e.g. pay or leave according to age), and also after the employment contract (e.g. period of notice).[42]

However, in connection with age, Directive 2000/78 EC allows, in addition to the above, the justification for unequal treatment, which shows the specific place of discrimination on grounds of age among the other forms prohibited by the Directive. Accordingly, differences of treatment on the basis of age do not constitute discrimination if – within the context of national law – they are objectively and reasonably justified by a legitimate purpose, including employment policy, labour market and vocational training objectives, and if the means of achieving that purpose are appropriate and necessary.[43] By way of example[44], the Directive identifies three areas[45] where the difference of treatment may be justified and therefore an exemption may be possible.

However, the exact level of protection afforded by EU law and its interpretation of those grounds of exemption depend primarily on the proportionality test applied by the CJEU, and therefore the assessment of whether the application of the law is capable of providing effective protection against discrimination following a coherent interpretation of the law is possible only in the light of the relevant court rulings.[46]

4.2. The exemption clause of the Equal Treatment Act

Pursuant to Section 7 (2) of the Equal Treatment Act, the principle of equal treatment is not breached by such provisions where a) the provision restricts the fundamental right of the party suffering a disadvantage in an unavoidable case in order to enforce another fundamental right, provided that the restriction is suitable and proportionate for achieving the objective, or b) in cases not covered by point a), the restriction has a reasonable justification directly related to the legal relationship in question. However, in accordance with Subsection (3), in case of direct negative discrimination and unlawful segregation based on the characteristics referred to in Section 8, points b) to e) of the Equal Treatment Act, Subsection (2) cannot be applied, meaning that all these cases constitute a violation of the principle of equal treatment.[47]

Section 22 of the Act provides further rules concerning the exceptions, defining the cases under which the employee may be exempted from the obligation to apply equal treatment. Accordingly, the principle of equal treatment is not violated if the discrimination is proportional, justified by the characteristic or nature of the work and is based on all relevant and legitimate terms and conditions, or the discrimination arises directly from a religious or other ideological conviction, or national or ethnic origin, fundamentally determining the nature of the organisation, and it is proportional and

[42] Dúró, ibid.
[43] Article 6 (1).
[44] The fact is noted that the Directive uses the term "among others", thereby not excluding further cases either.
[45] Article 6 (1) a), b), and c) points.
[46] For an overview of this, see: Tamás Gyulavári, *Age discrimination: Recent case law of the European Court of Justice, "*ERA Forum", vol. 14, issue 3, pp. 377-389.
[47] Dúró, ibid.

justified by the nature of the employment activity or the conditions of its pursuit.[48]

While the Act sets out the objective of compliance with the Directive,[49] it can be seen that the exemption clause laid down by the Equal Treatment Act is rather incomplete in comparison with the provisions of the Directive; in other words, a verbatim, precise implementation has not been achieved[50], and the latter deficiency can be seen in the practice, an example of which was the forced retirement of Hungarian judges.[51] However, this inaccuracy of legal harmonisation is by no means a problem to be neglected, since it may seriously undermine the entire system of evidence and thereby the effectiveness of the enforcement of rights, and therefore, it would in any event be justified and recommended if the legislator corrected that anomaly.

5. Conclusions

The fundamental issues of age-based negative discrimination have already been examined in legal literature from several aspects, and as issues continuously in the forefront of attention, they require a new perspective in the academic discourse from time to time.[52] Age-based discrimination – either the version affecting young people, those at the start of their careers, or the more typical version affecting older persons – is a phenomenon on the labour market the existence of which would be a mistake to deny, but finding a solution to the problem is very difficult. I fully agree with the opinion of Rab and Zaccaria that the prohibition of discrimination on the grounds of age has gone far beyond both gender-based discrimination, which had served in recent years as its model, as well as its own body of rules.[53] For this reason, it is essential to analyse the body of legislation at hand, as well as the revision of individual provisions in the interest of eliminating the anomalies identified.

In the present paper, my aim was to outline the regulatory structure of age-based discrimination, presenting the most important legal provisions at both international and national levels. I fundamentally wanted to find answers to the questions whether, in the light of the relevant legal acts, the current regulations can be regarded as appropriate and effective; in other words, are they capable of reducing age-based discrimination, given the established hypothesis that the more effective the regulatory framework is, the more it is able to cushion the disadvantageous labour market situation, which primarily affects older people, and the

[48] Bonnyai also mentions a third case: "The third exception is the reference by the employer to the fact that positive discrimination is being applied, which is also supported by evidence." – Bonnyai, ibid. p. 40.

[49] Article 65 point g) of the Equal Treatment Act.

[50] For more details on the the shortcomings of legal harmonisation and the elements of the system of rules requiring "fine-tuning", see: Tamás Gyulavári, *Három évvel az antidiszkriminációs szabályozás reformja után*, "Esély", vol. 2007/3, pp. 3-35.

[51] The question was examined on several fronts, at domestic level the Constitutional Court (Decision no. 33/2012. (VII.17.), an on the international level the CJEU (European Commission v. Hungary) and the European Court of Human Rights (J.B. and Others against Hungary, Application no. 45434/12) also issued rulings.

[52] For a new approach to the issue based on a social perspective, see: Sára Hungler, A szociális partnerek szerepe az életkor szerinti diszkriminációval szembeni küzdelemben (The role of social partners in combating age-based discrimination). Online workshop, 22.07.2021, Short summary of the workshop is available online at https://jog.tk.hu/esemeny/2021/07/muhelyvita-hungler-eletkor-szerinti-diszkriminacio (last access: 24.03.2022).

[53] Henriett Rab – Márton Leó Zaccaria, *Elősegítheti-e a munkaerőpiaci egyensúlyt az életkori alapú diszkrimináció tilalma?*, "Miskolci Jogi Szemle", no. XII, vol. 2017/1, pp. 46-58.

better chances older people have in employment.

The body of law concerning age-based discrimination shows an extensive, multi-level, and detailed system of protection, which is essentially well defined. At the same time, particularly with regard to the exemption clause, it is striking that there are also several small "cracks" in the regulation, in the light of which its effectiveness is even more questionable. However, in my view, this efficiency cannot be judged purely on a theoretical level, but there is also a need to explore the case law, which has not been carried out in the context of the present work, especially in view to the constraints of space. A key area of analysis is the system of exemptions, as it defines the boundary on which the evaluation of discrimination fundamentally much depends. However, precisely what constitutes justified discrimination that is based on a professional condition, follows a legitimate purpose and is proportionate depends on the interpretative activity of those applying the law, whether they be Hungarian and EU bodies.

In the light of the foregoing, in my view, a clear answer to the question raised can only be given in the light of the case law, demonstrating thereby that legislation and practice form an integral whole with regard to anti-discrimination legislation. At the same time, it also follows from the above that the solution of the labour market problem that is mainly caused by age discrimination cannot be expected only from those applying the law, as it is essential to ensure that the body of provisions of constantly "maintained", the "cracks" and any other anomalies are eliminated, as an effective legal practice can only be guaranteed this way. Only such a productively operating system of protection can tackle the increasingly challenging problem of age-based employment discrimination.

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