



**5<sup>th</sup> Annual Legal Seminar**  
**European Labour Law Network**

**Labour Law in a Greying Labour Market**  
**- Challenges of Active Ageing -**

**Seminar Report**

**11 + 12 October 2012**

**Venue: Bel Air Hotel – The Hague / the Netherlands**

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This publication is financed by the European Community Programme for Employment and Social Solidarity (2007-2013). This programme was established to support the implementation of the objectives of the European Union in the employment and social affairs area, and thereby contribute to the achievement of the Europe 2020 Strategy goals in this field.

The seven-year Programme targets all stakeholders who can help shape the development of appropriate and effective employment and social legislation and policies, across the EU-27, EFTA and EU candidate and pre-candidate countries.

The Programme has six general objectives. These are:

- (1) to improve the knowledge and understanding of the situation prevailing in the Member States (and in other participating countries) through analysis, evaluation and close monitoring of policies;
  - (2) to support the development of statistical tools and methods and common indicators, where appropriate broken down by gender and age group, in the areas covered by the programme;
  - (3) to support and monitor the implementation of Community law, where applicable, and policy objectives in the Member States, and assess their effectiveness and impact;
  - (4) to promote networking, mutual learning, identification and dissemination of good practice and innovative approaches at EU level;
  - (5) to enhance the awareness of the stakeholders and the general public about the EU policies and objectives pursued under each of the policy sections;
  - (6) to boost the capacity of key EU networks to promote, support and further develop EU policies and objectives, where applicable.
- For more information see:

[http://ec.europa.eu/employment\\_social/progress/index\\_en.html](http://ec.europa.eu/employment_social/progress/index_en.html)

**The information contained in this publication does not necessarily reflect the position or opinion of the European Commission.**

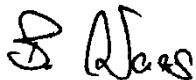
*Introductory Remarks*

*Dear Reader,*

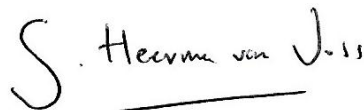
*Please, find herewith an account of the 5<sup>th</sup> Annual Legal Seminar of the European Labour Law Network (ELLN) that took place on 11 + 12 October 2012 in The Hague/the Netherlands.*

*This report consists of presentations, speeches and background documents as used during the Seminar as well as discussion notes of the working group discussions.*

*The content of the report is the sole responsibility of the ELLN.*



*Prof. Dr. Bernd Waas  
Professor of Civil, Labour and Comparative Law  
Goethe University Frankfurt, Germany  
Co-ordinator ELLN Network*



*Prof. Dr. Guus Heerma van Voss  
Professor of Labour and Social Security Law  
University of Leiden, the Netherlands  
Assisting Expert ELLN Network*

*November 2012*

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**PROGRAMME**

5th Annual Legal Seminar European Labour Law Network

**“Labour Law in a Greying Labour Market”  
– Challenges of Active Ageing –**

11 + 12 October, 2012

Venue: Bel Air Hotel – The Hague / the Netherlands

**Thursday 11 October 2012 – Moderator: Prof. G.J.J. Heerma van Voss, Co-organiser ELLN**

14.00 – 14.30	<b><i>Arrival of Participants</i></b> Registration and Refreshments
14.30 – 15.00	<b><i>Opening &amp; Welcome</i></b> <b>Prof. Guus HEERMA VAN VOSS</b> – Co-organiser ELLN, Leiden University, the Netherlands  <b>Mr. Armindo SILVA</b> – European Commission, Director of DG-EMPL.B Employment and Social Legislation, Social Dialogue, Brussels, Belgium
15.00 – 15.15	<b><i>General Introduction</i></b> <b>Mr. Steven TOBIN</b> – Head, Education Programme and Country Review, International Institute of Labour Studies of the ILO, Geneva, Switzerland
15.15 – 15.30	<b>Mr. Fritz VON NORDHEIM NIELSEN</b> - European Commission, Deputy Head of Unit EMPL.D.3. Active Ageing, Pensions, Healthcare and Social Services, Brussels, Belgium
15.30 – 16.00	<b><i>The Position of Older Workers in Labour Law</i></b> Keynote speech by <b>Prof. Ann NUMHAUSER-HENNING</b> – member Scientific Committee ELLN, Lund University, Sweden
16.00 – 16.30	Reflection by <b>Dr. Erika KOVÁCS</b> , Assistant Professor, Vienna University of Economics and Business, Austria
16.30 – 16.45	<b><i>Coffee Break</i></b>
16.45 – 18.00	<b><i>Working Group Discussions on “The Position of Older Workers in Labour Law”</i></b> <b>Rita CANAS DA SILVA</b> – ELLN, New University of Lisbon, Portugal <b>Anthony KERR</b> – ELLN, University College Dublin, Ireland <b>Jean-Luc PUTZ</b> – ELLN, Judge, Luxembourg, Luxembourg <b>Prof. Krassimira SREDKOVA</b> – ELLN, Sofia University, Bulgaria
19.30 – 22.00	<b><i>Aperitif &amp; Dinner at the Bel Air Hotel</i></b>

**Friday 12 October 2012 – Moderator: Prof. B. Waas, Coordinator ELLN**

08.45 – 09.00	<b>Registration</b>
09.00 – 09.30	<b>Age Discrimination, Retirement Conditions and Specific Labour Arrangements</b> Keynote speech by <b>Prof. Maria DO ROSÁRIO PALMA RAMALHO</b> , Faculty of Law, University of Lisbon, Portugal
09.30 – 10.00	Reflection by <b>Prof. Mark FREEDLAND FBA</b> , Professor Emeritus of Employment Law, University of Oxford, United Kingdom and member of the Executive Committee of the European Anti-discrimination Legal Network
10.00 – 11.15	<b>Working Group Discussions on "Age Discrimination, Retirement Conditions and Specific Labour Arrangements"</b> <b>Rita CANAS DA SILVA</b> – ELLN, New University of Lisbon, Portugal <b>Anthony KERR</b> – ELLN, University College Dublin, Ireland <b>Jean-Luc PUTZ</b> – ELLN, Judge, Luxembourg, Luxembourg <b>Prof. Krassimira SREDKOVA</b> – ELLN, Sofia University, Bulgaria
11.15 – 11.30	<b>Coffee Break</b>
11.30 – 12.00	<b>Young Versus Old or Intergenerational Solidarity?</b> Keynote speech by <b>Prof. Jean-Pierre LABORDE</b> – Professor at the University of Montesquieu-Bordeaux IV, Member of the Centre for Comparative Labour and Social Security Law, France
12.00 – 12.15	Reflection by <b>Mrs. Andrée DEBRULLE</b> , Legal Advisor research department of ACV-CSC, Brussels, Belgium
12.15 – 12.30	Reflection by <b>Mrs. Renate HORNUNG-DRAUS</b> , Managing Director, Confederation of German Employers' Associations (BDA), Berlin, Germany
12.30 – 13.30	<b>Lunch</b>
13.30 – 14.45	<b>Working Group Discussions On "Young Versus Old Or Intergenerational Solidarity?"</b> <b>Rita CANAS DA SILVA</b> – ELLN, New University of Lisbon, Portugal <b>Anthony KERR</b> – ELLN, University College Dublin, Ireland <b>Jean-Luc PUTZ</b> – ELLN, Judge, Luxembourg, Luxembourg <b>Prof. Krassimira SREDKOVA</b> – ELLN, Sofia University, Bulgaria
14.45 – 15.00	<b>Main Findings concerning Older Workers of the Evaluative Study on Part-time and Fixed-term Work Directives</b> <b>Dr. Tina WEBER</b> , Principal Researcher ICF GHK, United Kingdom
15.00 – 15.45	<b>Conclusions</b> <b>Prof. Catherine BARNARD</b> – member Scientific Committee ELLN, University of Cambridge, Trinity College, United Kingdom
15.45 – 16.00	<b>Closing</b> <b>Mrs. Muriel GUIN</b> – European Commission, Head of Unit DG-EMPL.B.2 Labour Law, Brussels, Belgium <b>Prof. Bernd WAAS</b> – Coordinator ELLN, Goethe University Frankfurt, Germany

## 1. General Summary and Conclusions of the Seminar

The European Labour Law Network (ELLN) was established in 2005. Its first activity started with the composition of a Study Group on a Restatement of European Labour Law. In December 2007 the ELLN acquired a second task as it was assigned a contract with the European Commission – Directorate General for Employment, Social Affairs and Equal Opportunities. Under this contract, the ELLN forms the European Network of legal experts in the field of Labour Law, dealing with both individual and collective rights/aspects (the Network). This Network advises the European Commission regarding developments of individual and collective labour law and consists of thirty legal National Experts (covering all European Members States and EEA countries), and a Scientific Committee of seven legal experts.

In 2012 the contract with the Commission was renewed.

In this framework, the Network organises every year a seminar with the aim to promote an open discussion on a specific topic between experts in the field of labour law, social partners and representatives from other organisations involved in labour law.

### Date & venue

This year the 5<sup>th</sup> ELLN Annual Legal Seminar was organised and took place on 11 and 12 October 2012 in The Hague/The Netherlands.

The venue chosen for the event was the Bel Air Hotel.

### Theme

The theme of this year's Seminar was **"Labour Law in a Greying Labour Market – Challenges of Active Ageing"**.

The objective of the seminar was to provide an overview of the rights that are enjoyed by elderly workers and to take stock of the challenges arising in the context of age discrimination and the fixing of retirement conditions. Furthermore, the question of "Young versus Old or Intergenerational solidarity" was explored.

This theme was elaborated during the Seminar by means of presentations and working group discussions.

### Programme

The seminar was spread over 1,5 days, starting in the afternoon of Thursday 11 October and continuing all day on Friday 12 October 2012.

The programme was divided into six main sessions:

- 1) General Introduction to the theme of the Seminar
- 2) The position of older workers in labour law
- 3) Age discrimination, retirement conditions and specific labour arrangements
- 4) Young versus old or intergenerational solidarity?
- 5) Main findings concerning older workers of the evaluative study on part-time and fixed-term work directives
- 6) Conclusions

Topics 2, 3 and 4 were introduced by a keynote speaker, and reflected upon by four other speakers; these three sessions were concluded by a working group discussion.

During the fifth section, the findings of a study, commissioned by the European Commission concerning older workers and the impact on part-time and fixed term directives were presented.

During the last sessions conclusions were drawn from all the presentations and discussions which had taken place.

### Speakers

In order to further develop the topics as mentioned above, both distinguished academic experts and practitioners were invited to introduce the programme sessions by giving either keynote speeches on the topic or reflections on these keynote speeches.

The first session was held by:

- **Mr. Steven TOBIN** – Head, Education Programme and Country Review, International Institute of Labour Studies of the ILO, Sweden
- **Mr. Fritz VON NORDHEIM NIELSEN** – European Commission, Deputy Head of Unit EMPL.D.3. Active Ageing, Pensions, Healthcare and Social Services, Belgium

The second session was introduced by:

- **Prof. Ann NUMHAUSER-HENNING** – Member Scientific Committee ELLN, Lund University, Sweden

A reflection was given by:

- **Dr. Erika KOVÁCS** – Assistant Professor, Vienna University of Economics and Business, Austria

The third session was introduced by:

- **Prof. Maria DO ROSÁRIO PALMA RAMALHO** – Faculty of Law, University of Lisbon, Portugal

A reflection was given by:

- **Prof. Mark FREEDLAND FBA** – Professor Emeritus of Employment Law, University of Oxford, United Kingdom and member of the Executive Committee of the European Anti-discrimination Legal Network

The fourth session was introduced by:

- **Prof. Jean-Pierre LABORDE** – Professor at the University of Montesquieu-Bordeaux IV and member of the Centre for Comparative Labour and Social Security Law, France

Reflections were given by:

- **Mrs. Andrée DEBRULLE** – Legal Advisor research department of ACV-CSC, Brussels, Belgium
- **Mrs. Renate HORNUNG-DRAUS** – Managing Director, Confederation of German Employers' Associations (BDA), Berlin, Germany

The fifth session was held by:

- **Dr. Tina WEBER** – Principal Researcher ICF GHK, United Kingdom

The concluding session was given by:

- **Prof. Catherine BARNARD** – Member Scientific Committee ELLN, University of Cambridge, Trinity College, United Kingdom

Some 155 people attended the seminar.



Apart from the speakers and members of the Network, delegates participated from the relevant Ministries in the Members States (22x), Social Partners (25x), representatives of the European Commission (6x), the ILO (1x) and other (academic) experts in the field of labour law (47x). In total 33 countries were represented.

### **Overall conclusions**

The discussion on the position of older workers in labour law was focused on several issues.

The pension norm differs from country to country. The general picture is that the retirement age is lifted. Some countries have already brought the pension age above 65, usually in a step-by-step approach. Some countries have introduced a flexible retirement age or made retirement voluntary.

Although most countries do not have specific rules for the employment rights of older workers, some have recently introduced specific rules. Examples are the request of the worker for adaption of the working place, facilities for part-time work, the introduction of a 'contract of the generation of tomorrow', In many countries this is settled in collective agreements rather than legislation.

With regard to employees who work above the retirement age, several countries have introduced reduced protection against dismissal, for instance by allowing more fixed-term contracts or setting aside priority rights as regards to seniority or reemployment.

Dismissal in case of sickness and reduced working capacity is possible in most countries, but only after a waiting period or (in some countries) after trying other solutions. Dismissal protection requirements have to be met.

Regarding age discrimination, the Framework Directive on Equal Treatment is usually transposed into national legislation, but not often invoked by employees. Explanations were given like unawareness, tradition, wide range for interpretation, specific settlements in collective agreements. In many countries younger workers are preferred by employers and older people have a difficult position in the labour market, mostly because of higher costs of their wages or social security contributions or fear for a higher absence due to illness.


In spite of its many limitations and exceptions, the participants judged that the principle of non-discrimination in relation to age is still of use. It makes the justification of age differences necessary and makes people rethink the need to maintain traditional distinctions because of age. Age is often considered as different from other discrimination grounds and still often accepted in society. It is also necessary to balance the rights of younger and older workers.

Regarding the position of 65+ workers, there are not many court decisions yet and it is often unclear whether they are entitled to the same conditions as workers under 65.

The issue of young versus old or intergenerational society was approached from different viewpoints. Employment policies for younger and older workers are often in conflict with each other. The intergenerational contract as developed in France was discussed as a possible means to conciliate both interests. However, participants from several other countries doubted whether the sympathetic idea would work in practice. Measures to promote lifelong learning are possible examples of rules that are of interest for both older and younger workers. With regard to older workers, training of new skills and adapting working conditions to their specific situation could improve their position. Measures to promote to continue working until or above the retirement age are often in conflict with still existing schemes for early retirement. Also specific measures for older workers, like additional holidays, may work counterproductive because they make these workers more expensive and less available.

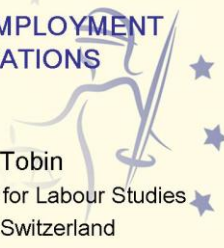
2. General Introduction

2.1 Introduction Presentation by Mr. Steven TOBIN




## AGEING AND EMPLOYMENT CONSIDERATIONS

Steven Tobin  
International Institute for Labour Studies  
ILO, Geneva, Switzerland

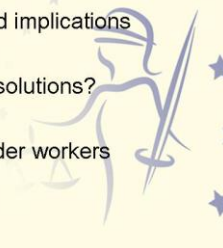


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### Outline

- Ageing: Challenges and implications
- What are the potential solutions?
- Way forward: role of older workers



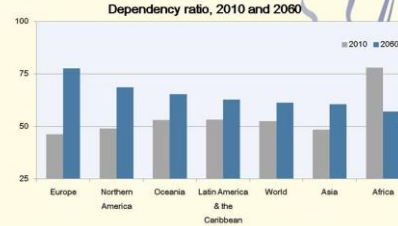
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### Global age structure is changing

- Rising life expectancy combined with lower fertility rates

Dependency ratio, 2010 and 2060




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### Implications of ageing

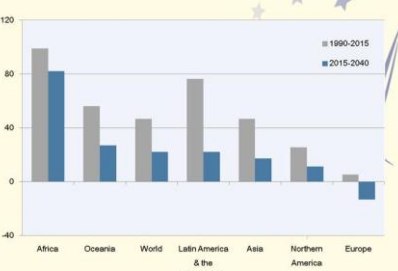
- Cost of public pensions
- Other fiscal considerations
- Lower savings
- Slower labour force growth




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### Slower labour force growth




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### Potential solutions to lower labour force growth

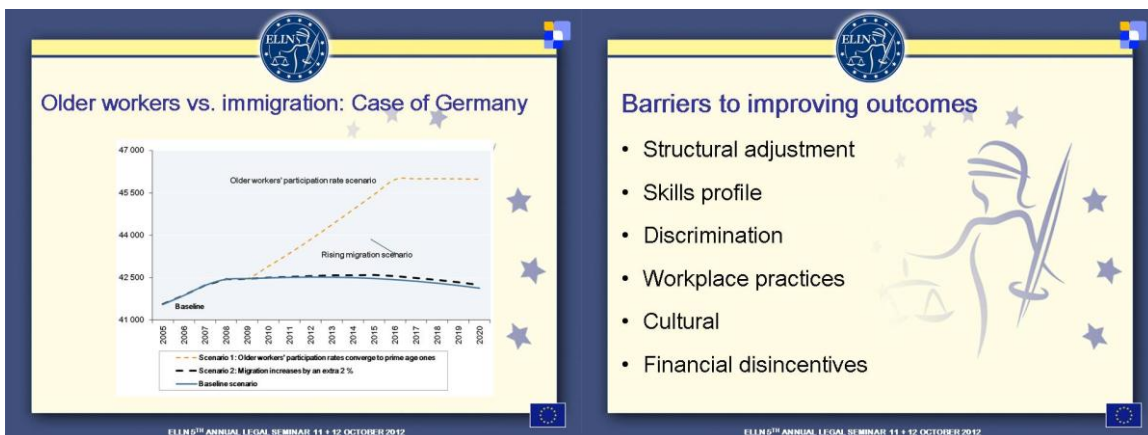
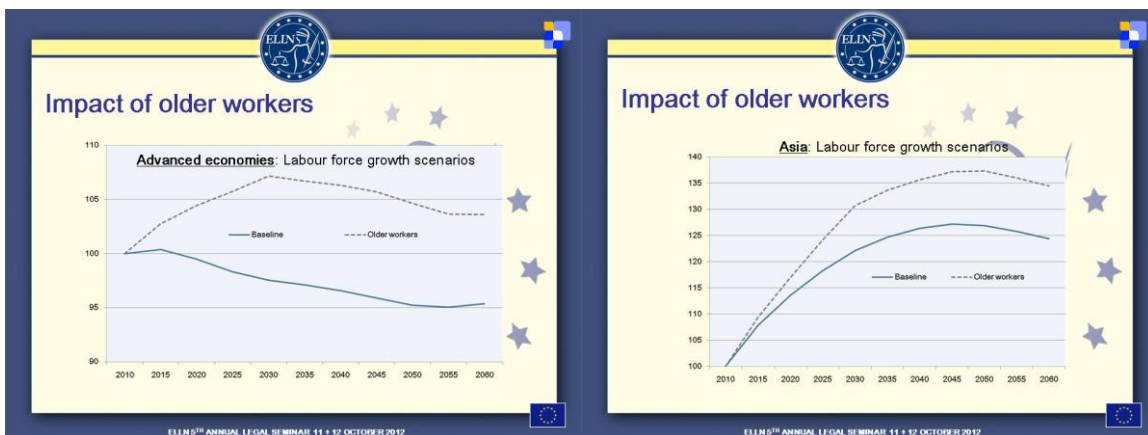
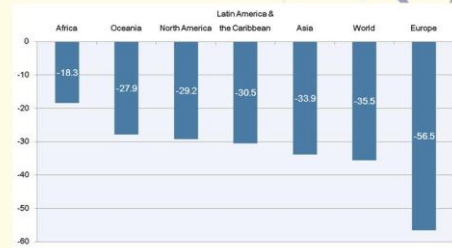
- Fertility
- Productivity gains
- Immigration
- Older workers



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Gap between participation rates of older workers aged 60-64 and 40-44 (percentage points), 2010



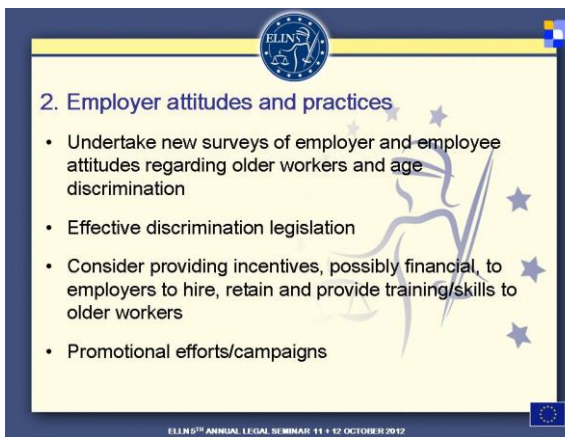
### Barriers to improving outcomes

- Structural adjustment
- Skills profile
- Discrimination
- Workplace practices
- Cultural
- Financial disincentives

- ### Way forward
1. Strengthen the employability of older, especially vulnerable, workers
  2. Set in motion workplace-based initiatives
  3. Provide more flexible work to retirement transitions and remove disincentives to continue working

### 1. Strengthen the employability of older workers

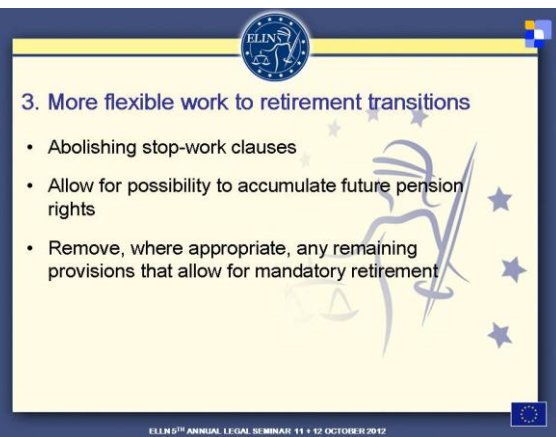
- Enhance current programming: tailor to challenge not group
- Preventative (rather than remedial) training and skill upgrading measures
- Combine improved employability of older workers with opportunities for regional economic development
- Combining active and passive support: lessons from the 1990s



**2. Employer attitudes and practices**

- Undertake new surveys of employer and employee attitudes regarding older workers and age discrimination
- Effective discrimination legislation
- Consider providing incentives, possibly financial, to employers to hire, retain and provide training/skills to older workers
- Promotional efforts/campaigns

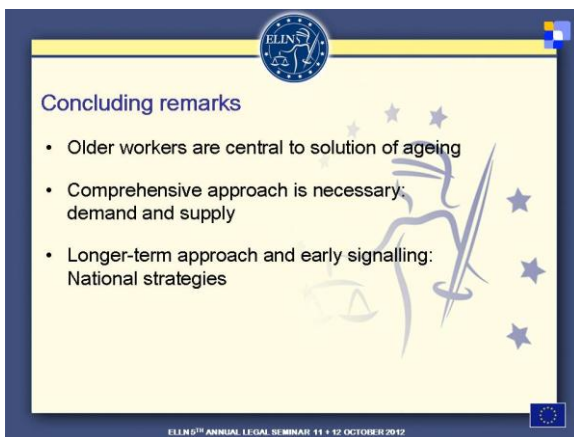
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**3. More flexible work to retirement transitions**

- Abolishing stop-work clauses
- Allow for possibility to accumulate future pension rights
- Remove, where appropriate, any remaining provisions that allow for mandatory retirement

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**Concluding remarks**

- Older workers are central to solution of ageing
- Comprehensive approach is necessary: demand and supply
- Longer-term approach and early signalling: National strategies

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2.2 Introduction Presentation by Mr. Fritz VON NORDHEIM NIELSEN



## Working & Retirement Practices in Changing Population Structures

Fritz von Nordheim Nielsen  
European Commission  
Deputy Head of Unit Active Ageing, Pensions,  
Healthcare and Social Services, Brussels


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## Contents

- How we arrived here
- Where we are
- Where we are heading
- What the EU is doing
- Linking Pensionable Age to Longevity
- Scenario for a Greying LM: Role of Lab Law

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### How we arrived here:

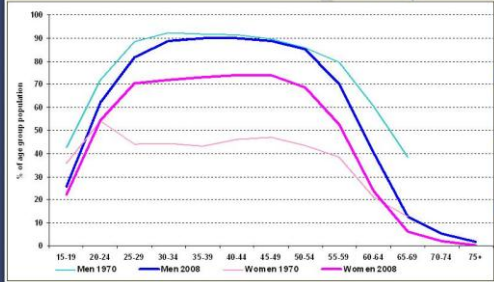
–The imbalancing of years in work and retirement 1960-2000

- Relative share of work in life / duration of working life reduced through combination of:
  - 4-5 years Later *Entry* (longer education & training)
  - 4-5 years Earlier *Exit* (longer retirement)
  - 5-6 years *Longevity* Growth (longer retirement)
- Was it individual preferences or policy conditioning that drove changes?

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### Employment rates by gender, EU15, 1970 & 2005



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### Pensions & Retirement Transformed

- Retirement: from waiting for death in dignity to a new lease on life (well-deserved otium)
- Pensions: from longevity protection to welfare right
- Fixing labour markets through early exit
- Early exit: from disability to employability motivated, from failure to leisure
- LM problem off-loaded to Social Protection & Pensionable / Retirement age Norm diluted
- Dialectics of pension and employment rights reinforced: gain one lose the other

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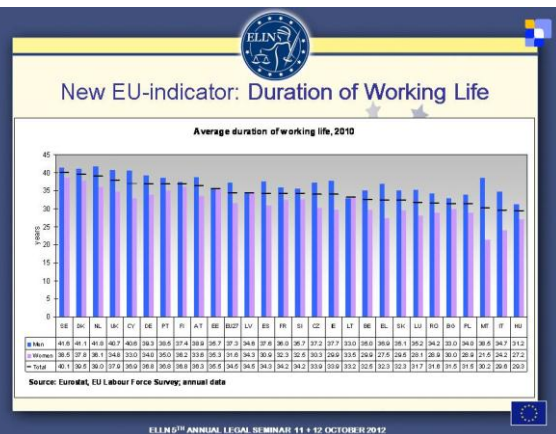
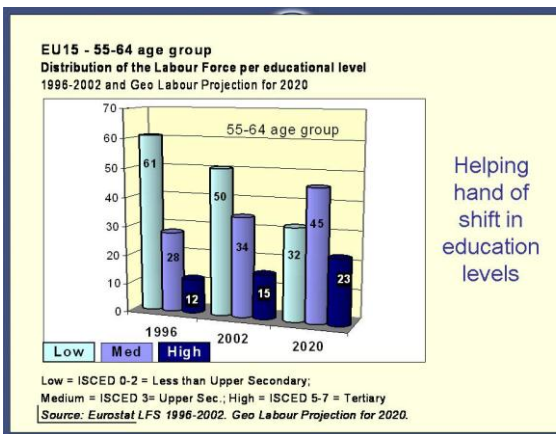
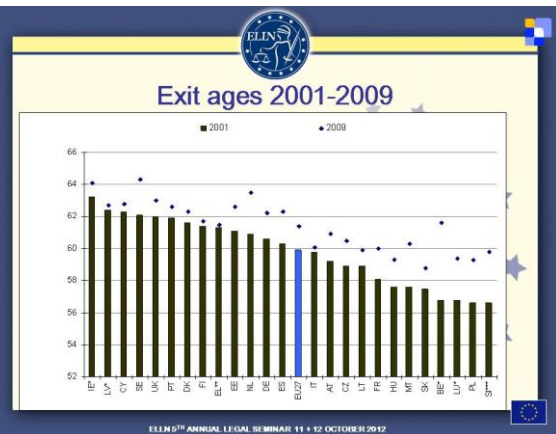
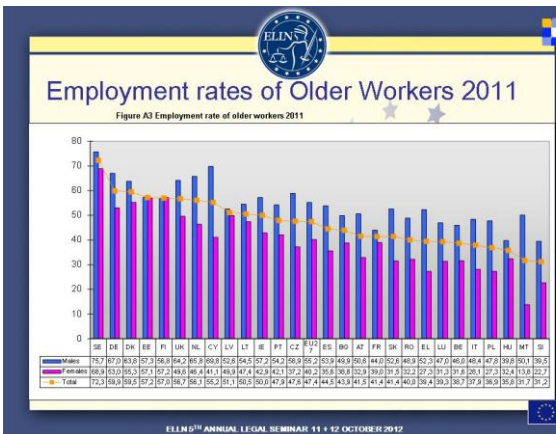
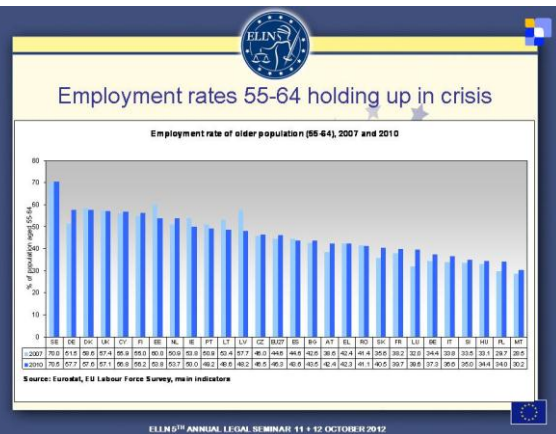
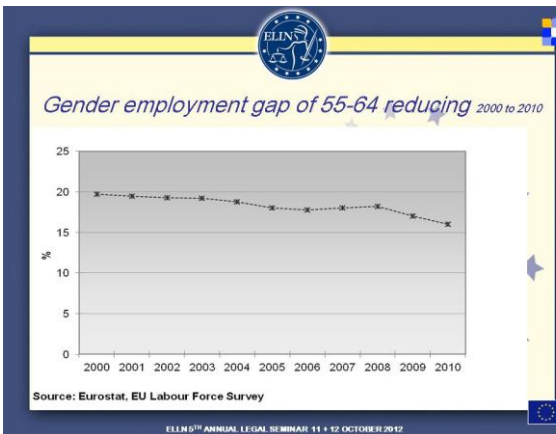
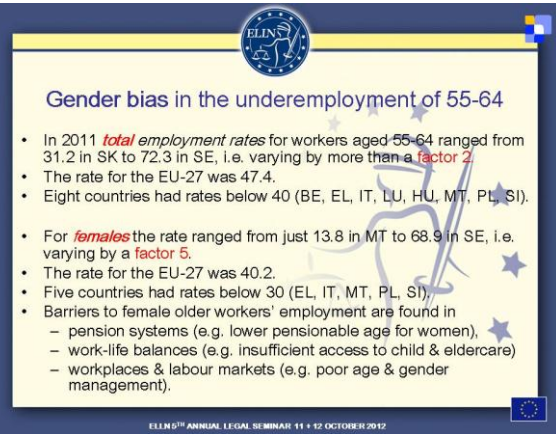
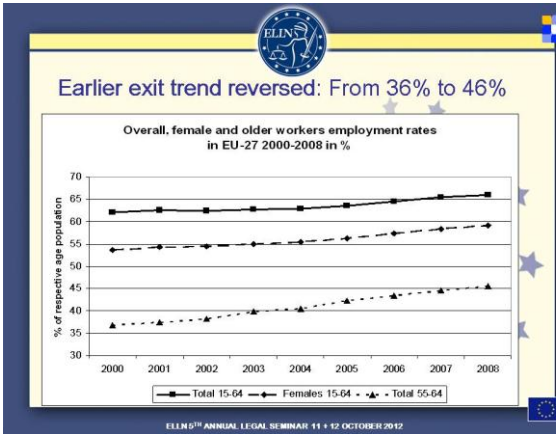


### Where we are:

Improvements amid continued imbalances 2000-2010



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**Average duration of working life - total**

Years

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
EU27	32.9	32.9	32.9	33.2	33.3	33.6	33.9	34.1	34.4	34.5	34.5
BE	39.2	39.5	39.7	39.9	39.5	39.4	39.5	39.9	39.9	39.9	39.9
BG	29.0	30.1	29.9	29.3	29.9	29.6	30.7	31.7	32.5	32.1	31.5
CZ	35.6	35.4	35.4	35.3	35.3	35.7	35.9	35.8	35.7	35.9	35.9
DK	39.3	39.0	38.5	38.4	38.9	39.0	39.5	39.6	40.0	40.0	39.5
DE	34.8	34.6	34.7	34.9	34.8	35.9	36.2	36.6	36.8	37.0	36.8
EE	33.2	33.0	32.6	34.2	34.0	34.1	35.2	35.1	35.9	35.8	35.5
EL	33.2	33.3	33.3	33.3	33.8	34.7	35.2	35.6	35.5	34.3	33.8
LU	31.6	31.0	31.2	31.4	31.8	31.7	31.9	31.8	31.9	32.2	32.3
ES	36.8	36.3	36.9	37.5	37.8	37.7	37.2	37.6	34.1	34.2	34.3
FR	31.9	31.8	32.1	32.7	32.8	33.1	33.2	33.5	33.7	34.1	34.2
IT	29.5	28.6	29.0	29.2	29.8	29.8	29.7	29.6	30.0	29.7	29.6
CY	34.1	35.1	35.2	35.9	36.1	35.7	36.0	36.5	36.4	36.8	36.9
LX	31.8	32.2	32.8	33.0	33.5	33.3	34.0	34.8	35.8	35.2	34.8
LT	33.6	32.9	32.7	34.2	32.7	32.0	31.6	31.7	32.3	33.1	33.2
LV	29.2	29.9	29.7	29.3	29.7	30.4	30.8	30.7	30.8	32.1	31.7
MT	31.8	32.2	32.8	33.0	33.5	33.3	34.0	34.8	35.8	35.2	34.8
PL	28.8	28.8	29.1	26.6	28.0	28.4	28.5	29.0	29.3	29.8	30.2
NL	35.5	35.1	35.7	35.9	37.2	37.5	38.0	38.7	39.4	39.8	39.0
AT	33.8	33.5	34.1	34.2	33.6	34.6	35.3	36.0	36.2	36.4	36.9
PT	31.1	31.4	30.7	30.5	30.3	30.6	30.2	30.2	30.6	31.0	31.5
RO	28.7	28.1	28.4	28.4	28.3	28.6	28.8	27.0	27.1	26.8	26.8
SI	36.0	35.3	32.2	32.0	31.9	31.2	31.8	31.8	31.6	31.5	31.6
SK	31.8	32.0	32.0	31.4	33.2	33.5	33.6	33.9	34.0	34.1	34.2
HR	32.1	32.6	32.2	32.5	32.6	32.3	32.1	32.0	32.3	32.3	32.3
FI	36.4	36.7	36.8	36.8	36.5	36.8	36.4	36.8	37.3	36.9	36.8
SE	36.8	38.3	38.4	38.5	38.4	38.9	39.4	39.8	40.0	39.8	40.1
UK	36.9	36.7	36.9	37.0	37.1	37.4	37.6	37.6	37.9	37.9	37.9

Source: Eurostat, EU Labour Force Survey

**Where we are heading: Scenarios 2010-2060**

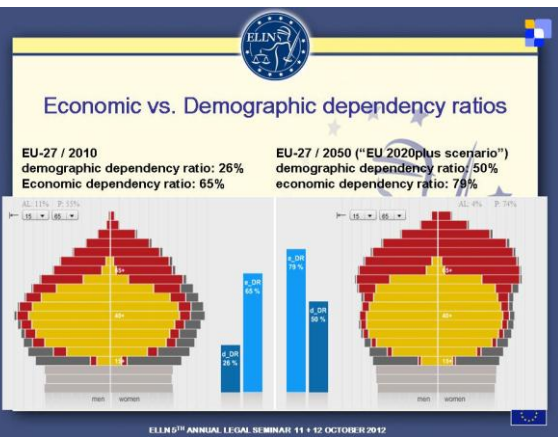
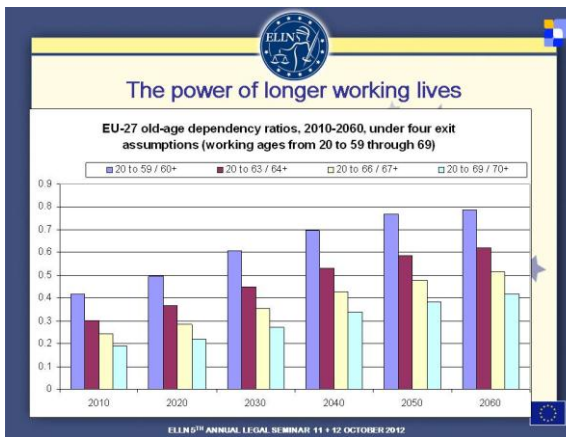
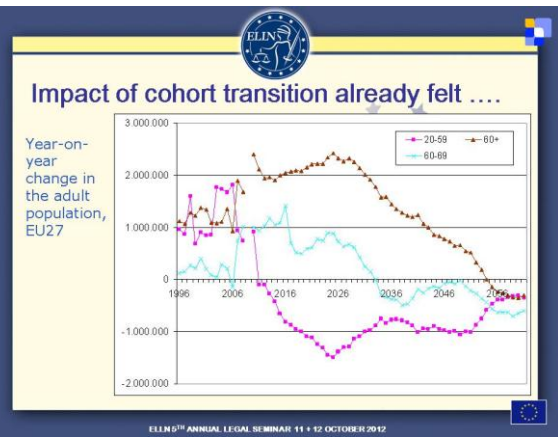
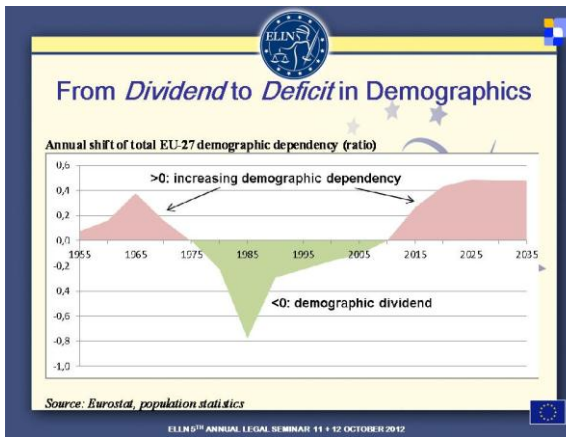
The **double** challenge:

- structural longevity growth of +6-7 years
- transition from baby-boomers to baby-busters

The end of the unique demographic dividend

Greying of the labour Market: only will 50+ grow

Demography not fate - But coping will depend on our ability to employ much larger share of 50-69 year olds



**Ageing Report scenario: Working life expansion**

	Men		Women	
	2010	2060	2010	2060
Employment rate of older workers (55-64)	54.5	66.7	38.6	60.3
Average entry age	21.6	21.6	23.6	23.6
Average exit age	62.5	64.3	61.7	63.8
Life expectancy at the time of withdrawal	18.9	22.7	22.7	26.0
% of adult life spent in retirement	31.7	34.7	37.4	39.9
Requested exit postponement in years (to keep % life spent in retirement constant)		2.0		1.3

**What the EU is doing: recent policy developments**

Reform wave & crisis breeds new initiatives:

- Green Paper on Pensions July 2010
- Joint EPC-SPC Report on Pensions Nov 2010
- Annual Growth Survey & Country Specific Recommendations on Pensions Jan-June 2011
- EY2012 on Active Ageing
- White Paper on Pensions Feb 2012
- AGS & CSRs on Pensions 2012
- Guidelines on Active Ageing
- Ageing Report & Pension Adequacy Report

### EPC & SPC Reflecting on Reforms

- Move from defined benefit to defined contribution implies pension outcomes contingent on ability of labour markets to deliver long unbroken careers
- Exclusive emphasis on fixing labour markets through work-incentives in pensions as key part of tax-benefit context

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### Pension Adequacy report: Key messages

- Sustainability advances through pension reforms achieved in **trade off** with adequacy
- **Adequacy advances contingent on people changing retirement and savings behaviour** – pension & retirement policies should promote such changes
- Current systems and reform trends put **women at disadvantage** - Major gender pension gap can only be closed by equal conditions for women in employment
- Ability of pensions to prevent **poverty** will impact on ability to achieve 20 mio poverty reduction
- Assessing pension adequacy require **taking access to free or subsidized services & resources into account**

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### National competence, but common concern at EU level

- ❑ EU has no powers to prescribe pension system design...
- ❑ ... or to establish a common EU-wide pension system to replace national schemes
- ❑ But pension reforms are recognised as crucial for the success of the Europe 2020 Strategy for smart, sustainable and inclusive growth...
- ❑ ... and for sustainable public finances in the context of reinforced economic governance.

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### Pensions in first AGS (Jan 2011)

- ❑ Key document starting annual EU policy coordination round ('European semester')
- ❑ Called for fiscal consolidation to be supported by pension reforms with a focus on ...
  - ❑ increasing the retirement age and **linking it to life expectancy**
  - ❑ reducing early retirement schemes, offering incentives to employ older workers and promoting life-long learning
  - ❑ supporting the development of complementary private savings

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### Messages reiterated a year later

- ❑ In the 2<sup>nd</sup> Annual Growth Survey (Nov. 2011):
  - ❑ emphasises twin goals of sustainability and adequacy
  - ❑ adds a new recommendation, i.e. to equalise pension ages for women and men
- ❑ In the Commission **White Paper An Agenda for Adequate, Safe and Sustainable Pensions** (Feb. 2012):
  - ❑ How to achieve a better balance between time spent in work and in retirement ...
  - ❑ ... and how to develop complementary retirement savings

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### Country Specific Recommendations on Pensions

- ❑ Pensions-related recommendation addressed to 16 countries (no MoUs: Greece, Portugal, Ireland, Romania)
- ❑ Focus mostly on **raising & linking** the retirement age
- ❑ Council treats Pen CSR under Macro-economic imbalances procedure – i.e. for ECOFIN
- ❑ Divergent pension ages seen as "asymmetry"

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### What CSRs recommend to MS

- ❑ Raise the statutory pension age and **link it to life expectancy** – 10 countries: *Belgium, Spain, Cyprus, Lithuania, Luxembourg, Malta, Austria, Slovenia, Slovakia, Finland*
- ❑ Restrict early labour market exit – 7 countries: *Belgium, Bulgaria, Czech Republic, Denmark (disability), Poland (special schemes), Slovenia, Finland*
- ❑ **Equalise pension ages for women and men** – 3 countries: *Bulgaria, Austria, Slovenia*
- ❑ Review indexation of benefits – 2 countries: *Slovakia, Slovenia*
- ❑ Enhance private savings – 4 countries: *Czech Republic, Latvia, Lithuania, Malta*

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### Guidelines on Active Ageing

#### 1st Pillar of Active Ageing: **Employment**

- ✓ Life-long learning.
- ✓ Healthy working conditions
- ✓ Age management strategies
- ✓ Employment services for older workers
- ✓ No age discrimination
- ✓ Employment-friendly tax / benefit systems
- ✓ Reconciliation of work and care

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### Linking the pensionable age to longevity

- Behavioural economics: individual motivation from economic incentives not sufficient
- Adjusting pension norm with narrative: "as we live longer we work longer" and reach "a better balance between years spent in work and retirement"
- Implicit: Working to higher ages becomes permanent agenda for the labour market

### Implicit agenda of linking

- Collective pension norm: it moves w. longevity
- Tabela turned: off-loading onto labour markets
- Fixing pensions through longer working lives
- Taking all adjustments in duration of working life
- Challenge moved to social partners
- Required: *Changes in age management* in work places and labour markets to encourage and enable women and men to work to higher ages

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### Scenario for a Greying Labour Market

- Pensionable age as Collective Norm or Individual preference?
- Pensions from social protection to income smoothing (from collective to individual responsibility) ?
- Working to a certain Income more than a certain Age?
- Auto-piloting as pension design ideal - not everyone learning to navigate his own retirement plane!
- Collective norm of a common retirement and pensionable age with collective social coverage!

### Scenario for a Greying Labour Market

- A two tier structure of facilitation: **Working *Until*** and **Working *After*** the Pensionable Age: The emergence of a secondary labour market for End-of-Career-Jobs
- The labour law that could serve a labour market for end-of-career-jobs:
  - Retiring from 1st into 2nd career Japanese style: from permanent to fixed term contracts, from seniority to productivity based pay
  - Transition year of Rights-opportunities-duties to be defined by pension norm as indicated by the pensionable age and rise with that
  - Overcoming paradoxes of protection / seniority pay – more retention but no hiring of OW – more pay but no job

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## Thank you

*Monitor EU activities on these web pages:*

- Europe 2020 Strategy:  
[http://ec.europa.eu/europe2020/index\\_en.htm](http://ec.europa.eu/europe2020/index_en.htm)
- Pensions White Paper and follow-up  
<http://ec.europa.eu/social/main.jsp?catId=752&langId=en>
- Pension Adequacy in the EU 2010-2050  
<http://ec.europa.eu/social/JobServlet?docId=7805&langId=en>

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### 3. Keynote Presentations and Reflections

#### 3.1 Keynote presentation by Prof. Ann NUMHAUSER-HENNING

**Labour Law in a Greying Labour Market**  
– in Need of a Reconceptualisation of Work and Pension Norms ? –  
*On the Position of Older Workers in Labour Law*  
Prof. Dr. Ann Numhauser-Henning  
Lund University, Sweden

**1. Introduction**

- A strategy of active ageing  
the 2012 Year of Active Ageing  
Europe 2020  
Employment Guidelines
- ... to counteract the demographic shift ...  
increased dependent ratio
- ... for economic and human rights reasons
- ... and resulting in increased labour market participation for healthy elders living an active and independent life

**1. Introduction**

1. Introduction
2. Greying Labour Market ...
  - 2.1 How to make people work until pensionable age
  - 2.2 How to make people work beyond pensionable age
  - 2.3 How to facilitate access to employment
3. ... a Normative Challenge
  - 3.1 questioning pension norms
  - 3.2 and non-discrimination rules
  - 3.3 reconceptualising work
  - 3.4 at the risk of weakening Labour Law from within

**2.1 Work until pensionable age**

- Average labour market exit age in EU 27 was 61.4 years in 2009
- Working conditions have hitherto tended to 'marginalise' the older workers ...
- as have negative stereotypes of older workers and their abilities.
- But - reality changes
- and individual conditions are known to be more important than chronological age

**2.1 Work until pensionable age**

- Adequate working environment regulation is mainly in place...
- but we need to focus more on 'healthy ageing' and also on how to make a longer working-life attractive to the individual
- The basic conditions for a preserved work capability is the same for older workers as for the young: a safe economy, good health, good social network on the job and outside, meaningful employment, influence on the job, a reasonable workload, and, opportunities to make use of your capabilities and to learn new.
- Adaption for older workers are still scarce – age management

**2.1 Work until pensionable age**

- Employment protection devices
- Seniority wage-setting
- Occupational Pension Schemes
- Life-long learning
- Age discrimination
- Social benefits and taxation

### 2.2 Work beyond pensionable age

- Pensionable age – which, if any?
- Is the opportunity there?  
Compulsory retirement  
Employment Protection
- Is there a will to go on working?  
Pension scheme design  
Other social benefits  
Improved life quality

**2. Greying Labour Market ...**

### 2.3 Access to employment

- Employment protection devices such as re-employment rights and ...
- Fixed-term work
- Non-discrimination
- Fiscal incentives

**2. Greying Labour Market ...**

### 3.1 Questioning pension norms

- 'There is a right and a duty to retire at a certain age', or
- 'There is a right and a duty to work on according to your abilities', and
- 'to retire is a personal/individual choice'

**3 ... a Normative Challenge**

### 3.2 and non-discrimination rules

- An effective ban on age-discrimination, or,
- A rule open for vast exceptions
- And elitist in character?

**3 ... a Normative Challenge**

### 3.3 Reconceptualising Work

- 'The devoted worker', or,
- 'Quality work' adapted to the individual worker and the human scale in a life-span perspective
- Promoting decent and attractive work for all?

**3 ... a Normative Challenge**

### 3.4 at the risk of weakening Labour Law from within

- Omitting compulsory retirement and
- Reconceptualising work
- May threaten current employment protection and 'quality work' from within
- Can general demands on decent work, equal treatment and – eventually – reasonable accommodation suffice to contravene this?


**3 ... a Normative Challenge**

## Thank you for your attention!



[www.jur.lu.se/elderlaw](http://www.jur.lu.se/elderlaw)


3.2 Reflection by Dr. Erika KOVÁCS




### The position of older workers in labour law

*- A reflection -*

**Dr. Erika Kovács**  
Assistant Professor  
Vienna University of Economics and Business, Austria



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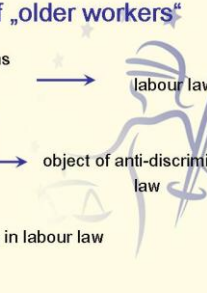


### Meaning of „older workers“


1. economic considerations → labour law
2. anti-discrimination law → object of anti-discrimination law

Vulnerable group of workers → object of anti-discrimination law

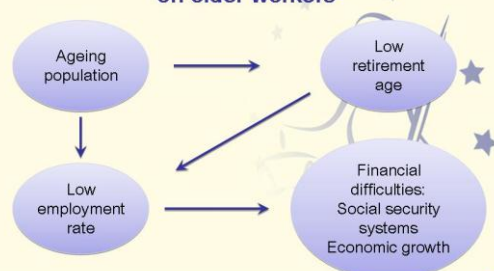
Lower and upper age limits in labour law




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### Factors influencing regulation of labour law on older workers

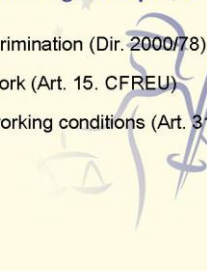


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### The fundamental rights aspects

- Prohibition of age discrimination (Dir. 2000/78)
- Right to (engage in) work (Art. 15. CFREU)
- Right to fair and just working conditions (Art. 31 CFREU)




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### Objectives in the regulation of the employment of older workers

Keep older workers in the labour market  
AND  
Comply with the fundamental rights

Do the provisions in labour law regarding older workers fulfil these requirements?




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### Prohibition of age discrimination

- Overriding principle
- Dual content: Human rights roots, but economic goal
- Late acceptance in the Member States

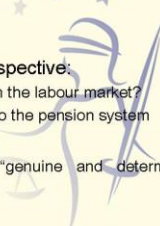


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### Compulsory retirement

- (un)declared objectives
- Doubts from an economic perspective:
  - Is there any positive effect on the labour market?
  - Shift of the financial burden to the pension system
- Special cases:
  - Art. 4. (1) Dir. 2000/78 – "genuine and determining occupational requirement"
  - Public sector




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### Compulsory retirement

**Concerns regarding the fundamental rights of workers:**

- Right to work
- The role of work in life
- Retirement: Social right or obligation?
- Amount of pension: Dignity or poverty in old age?
- The risk of multiple discrimination



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### Compulsory retirement

**Future expectations:**

- Time for change?
- Alternative options?
- CJEU: pending case of the Hungarian judges and state advocates (C-286/12.)



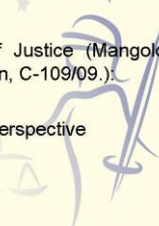
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### Fixed-term employment contracts

The case-law of the Court of Justice (Mangold, C-144/04. and Lufthansa v Kumpan, C-109/09.)

- From the fundamental rights perspective
- From an economic view




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### Payments at the end of the employment relationship

1. **Severance pay**  
Danish rule (12 y) – Hungarian rule (3 y)
2. **Differences in the „social plan“**  
the Odar case (C-152/11.)




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### Positive measures / Affirmative actions

1. **Longer notice period**
2. **Stricter employment protection legislation**




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### Positive measures / Affirmative actions

3. **Age-related wages or bonuses**  
Hennigs case (C-297/10.)  
„professional experience“, „length of service“
4. **Longer holiday**



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## 3.3 Keynote presentation by Prof. Maria DO ROSÁRIO PALMA RAMALHO

**Age discrimination, retirement conditions and specific labour arrangements**

Prof. Doctor Maria do Rosário Palma Ramalho  
Faculty of Law  
University of Lisbon, Portugal

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**Summary**

- General remarks and key concepts of Dir. 2000/78/EC: the inspiration of the Directive in gender discrimination directives
- Age discrimination among other sources of discrimination in Dir. 2000/78: the accrued difficulties of non-discrimination principle when applied to age
- The formal transposition of the Directive into national Law, in relation to age discrimination *vis a vis* the different practices of the Member States in key issues related to age discrimination
- The role of the ECJ
- Closing remarks

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**General remarks regarding Dir. 2000/78: the inspiration in gender directives**

- The discrimination concepts are the same
- The protective rules of the Directive largely reflect the European *acquis* in the area on gender equality
- Some of the exceptions to non-discrimination principle (Article 2 No. 5, and Article 4 No. 1) are also inspired in derogations admitted in relation to gender equality principle

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**Conclusion on this topic**

- The link between gender discrimination and other grounds of discrimination in EU Law justifies that the interpretation of Dir. 2000/78 should follow the directions of the ECJ when applying the equivalent provisions in relation to gender discrimination
- However, this is not always the case in relation to age discrimination

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**Age discrimination among other sources of discrimination in Dir. 2000/78: the weakness of the principle when applied to age**

In relation to age, the principle is weaker because it is subjected to more exceptions:


- General derogations related to the requirements of specific activities, to public safety, health or the protection of rights, and specific areas (Art. 2 No. 2 b), and No. 5, Art. 3 Nos. 2 and 3, and Art. 4 No. 1)
- Specific derogations (Art. 6)

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**Different treatment related to age in employment area (Art. 6 No. 1)**

- Special conditions in access to employment, training, working conditions, pay and dismissal, to favour young workers, old workers and workers with care responsibilities;
- Minimum or maximum age requirements to have access to an employment or promotion

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### Justification of the different treatment related to age in employment area

Different treatment is justified if, under national law, it pursues a «legitimate objective», including objectives related to employment policy, labour market or professional training policies, and provided the means chosen to pursue the objective are «appropriate and necessary»


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### Conclusions to this point

- Non-discrimination principle in relation to age is weaker than on other grounds, since it largely complies with situations where different treatment on the grounds of age is justified
- The implementation of the principle at national level largely depends upon the MS, since Article 6 refers the criteria for admissible discrimination to the national level


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### The practices of the MS in key issues related to age discrimination

- Specific age conditions to protect certain categories of workers (young and/or old)
- Promotion of the recruitment of young, old or unemployed workers
- Lower level of protection regarding dismissal (older workers)
- Minimum age for access to employment, higher than the general one for some activities
- Maximum age for recruitment in some activities
- Maximum age to keep working
- Measures for enlarging the period of active life


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### Conclusions on this topic

- MS make extensive use of all the exceptions to the non-discrimination principle in relation to age with no control by the EU
- The measures at national level can get into conflict with one another and that there is no consistent strategy but rather a fluctuation on the goals pursued

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### The role of the ECJ

The ECJ was called upon to deal with two types of problems:

- Problems related to the non-implementation (or to the bad implementation) of the non-discrimination principle by the MS
- The allowed discriminatory practices in relation to age


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### The ECJ and the question of lack or deficient transposition of the Directive

- The principle of non-discrimination on the ground of age relies directly on the Treaty and in the common traditions of the MS, so it can be called upon immediately (*Mangold, Küçükdeveci*)


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### ECJ and the allowed discriminatory practices

- Direct discriminatory practices solely based on age are not allowed (*Mangold, Küçükdeveci* or *David Hütter*)
- In cases related to Art. 4 No. 1 or Art. 2 No. 5), the ECJ's interpretation of the requests tends to be strict (*Petersen, Prigge*)
- In cases related to Art. 6 (*Hütter, Palacios de la Villa*), the Court recognizes the difference of treatment as a policy of the MS, avoiding to appreciate the ground for discrimination in itself

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### Conclusions on this topic

- It is possible to control age discriminatory practices when they are based on objective criteria, related to the professional activity or to external but well defined requirements (like public safety, security or health)
- On the contrary, the open-ended and national-basis criteria of Article 6 (e.g. employment policies) seem to be impossible to assess by the Court

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**Closing remarks**


- Non-discrimination principle in relation to age is weaker than on other grounds, since it formally complies with more admissible discriminatory practices
- The practical implementation of the principle depends largely upon the MS
- This structural weakness will carry on, because the admissible discriminatory practices under Article 6 are rather difficult to assess by the ECJ.

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## 3.4 Reflection by Prof. Mark FREEDLAND

 <p><b>Age discrimination, retirement conditions and specific labour arrangements</b></p> <p><i>- A reflection -</i></p> <p><b>Prof. Mark Freedland FBA</b> University of Oxford, UK and Expert Member of the European Anti-Discrimination Legal Network</p> <p><small>ELIN 5<sup>th</sup> ANNUAL LEGAL SEMINAR 11 + 12 OCTOBER 2012</small></p>	 <p><b>1. Directive 2000/78/EC General remarks and key concepts</b></p> <ul style="list-style-type: none"> <li>• Prof do Rosário has given us a very interesting keynote paper, which gives us an excellent starting point for reflections on the way that Directive 2000/78/EC has been designed and implemented, especially with regard to national legal regimes for workers' retirement.</li> </ul> <p><small>ELIN 5<sup>th</sup> ANNUAL LEGAL SEMINAR 11 + 12 OCTOBER 2012</small></p>
 <p><b>1. Directive 2000/78/EC General remarks and key concepts</b></p> <ul style="list-style-type: none"> <li>• Her central argument was that it was useful to think about Directive 2000/78 as having been very largely inspired and shaped by the previous history of EU measures concerning gender equality and sex discrimination. I agree with this argument and think that it does indeed give us particular starting points for thinking about the history and future evolution of age discrimination law as embodied in the Directive, with particular reference to regimes for retirement.</li> </ul> <p><small>ELIN 5<sup>th</sup> ANNUAL LEGAL SEMINAR 11 + 12 OCTOBER 2012</small></p>	 <p><b>1. Directive 2000/78/EC General remarks and key concepts</b></p> <ul style="list-style-type: none"> <li>• In this paper, I will refer to Professor do Rosário's central argument about the crucial shaping influence of gender discrimination law as the 'gender equality template (GET)' argument. I will suggest that the casting of Directive 2000/78 in the mould of the gender equality template has had some important positive effects upon age discrimination law, but that it has also had some more negative and conceptually constricting effects, especially in the context of retirement regimes. I will identify these more difficult consequences as the problem of the 'weak version effect (WVE)'.</li> </ul> <p><small>ELIN 5<sup>th</sup> ANNUAL LEGAL SEMINAR 11 + 12 OCTOBER 2012</small></p>
 <p><b>1. Directive 2000/78/EC General remarks and key concepts</b></p> <ul style="list-style-type: none"> <li>• I will then go on to suggest that the problem of the 'weak version effect' could usefully be remedied, or at least could be more effectively addressed, if the basic 'gender equality template' for EU age discrimination law were moderated or supplemented by a more overtly labour market regulatory approach with regard to retirement regimes, which I shall designate as the 'flexible working approach (FWA)'.</li> </ul> <p><small>ELIN 5<sup>th</sup> ANNUAL LEGAL SEMINAR 11 + 12 OCTOBER 2012</small></p>	 <p><b>1. Directive 2000/78/EC General remarks and key concepts</b></p> <ul style="list-style-type: none"> <li>• I will develop these arguments in a way which follows the three stages of Prof do Rosário's paper, namely by looking firstly at the legislative architecture of Directive 2000/78 itself, secondly at the implementation of the Directive in the Member States, and thirdly at the relevant case-law of the ECJ.</li> </ul> <p><small>ELIN 5<sup>th</sup> ANNUAL LEGAL SEMINAR 11 + 12 OCTOBER 2012</small></p>



### 1. Directive 2000/78/EC General remarks and key concepts


- I have one further reflection to offer at the level of general remarks and key concepts. Prof do Rosário's introduction to her paper hints at this, but I think it is quite useful to make the point explicitly. We seem to find in general, and we certainly find in the context of European employment law, that legal regulation for age equality or against age discrimination seems to be less rigorous and exacting than legal regulation for other kinds of equality or against other kinds of discrimination, such as in particular legal regulation for gender equality or against sex discrimination.



### 1. Directive 2000/78/EC General remarks and key concepts


- Various explanations are possible for this phenomenon. One main line of explanation consists in a widely held perception that age discrimination is a less extreme social evil than other kinds of discrimination, perhaps because ageing or being of a particular age at a particular time is in a sense a universal condition for all persons in the course of their lifetime, rather than the characteristic of a special group or minority of persons, so that to that extent, differential treatment on the ground of age can be regarded as less invidious, or as less of an affront to the dignity of the individual.

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### 1. Directive 2000/78/EC General remarks and key concepts


- That is, however, a rather questionable perception, and it might therefore be preferable to explain the apparently greater tolerance of age discrimination as compared with other kinds of discrimination by saying that the structures, which determine the treatment of, on the one hand, young people approaching or entering the labour market and, on the other hand, older people approaching their leaving of the labour market, are regarded as so much the province of Member States that there is special resistance to their regulation at European Union level.



### 2. The age discrimination provisions of Directive 2000/78 - legislative design


- Prof do Rosário's argument powerfully exposes the way in which what I designate as the 'weak version effect' is built into the legislative design of the age discrimination provisions of Directive 2000/78.
- She shows how the age discrimination provisions of the Directive, like its provisions concerning sexual orientation, disability, and religion or belief, basically follow the gender equality template, but how, in the case of age discrimination, that template is then modified by the addition of a further provision which softens the impact of the previous ones.

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### 2. The age discrimination provisions of Directive 2000/78 - legislative design


- That is to say, the gender equality template is followed by firstly identifying the core concept of age discrimination as the dual one of non-justifiable direct discrimination (Art 2.1, 2.2(a)) coupled with indirect discrimination which may be justified on a proportionality test (Art 2.1., 2.2(b)), and by then enabling Member States to build in their own qualifying provisions for the recognition of 'genuine and determining occupational requirements' which, subject to a requirement of proportionality, will legitimate differences in treatment which would otherwise amount to unlawful discrimination (Art 4).



### 2. The age discrimination provisions of Directive 2000/78 - legislative design


- However, as Prof do Rosário rightly emphasizes, that already quite elaborate apparatus of provision, built into the gender equality template, for justification, on a proportionality basis, of practices which would otherwise constitute unlawful discrimination, is in the case of age discrimination supplemented by a further set of provisions for proportionality justification of a large, and indeed ultimately open-ended, set of practices for the special treatment of younger and older workers - this is the famous Article 6.

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### 2. The age discrimination provisions of Directive 2000/78 - legislative design

- This is a crucial feature of legislative design. We might take the view that, in the hypothetical, and indeed counter-factual, case in which there had been enacted a special Directive concerning age discrimination alone, not necessarily based on the gender equality template, it would have contained no fewer provisions for justification or derogation, and this would have been regarded, relatively uncontroversially, as representing the only basis upon which consensus could have been achieved for an EU measure on this topic.



### 2. The age discrimination provisions of Directive 2000/78 - legislative design

- However, in the actual circumstances in which the age discrimination measure formed part of a package based on the gender equality template, this meant that the provisions of Article 6 stood out as a particular 'softening' of the treatment of age discrimination, thus making the age discrimination appear simply as divergent from the standard template and as an especially weak version of it. The remainder of my reflections are directed towards considering how that construct has operated, and how it might be ameliorated, with reference to the implementation of the measure in the Member States, and the case-law of the ECJ on that topic.

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 <h2>2. The age discrimination provisions of Directive 2000/78 - legislative design</h2> <ul style="list-style-type: none"> <li>My argument here is that, while it is quite correct and important to regard the age discrimination legislation of Directive 2000/78 as a 'weak version' of the standard anti-discrimination legislation based on the gender equality template, we can usefully move beyond that critique, especially with regard to the regulation of retirement, and try to think constructively about the best way for EU law to regulate Member State retirement regimes in the interests of an enlightened vision of age equality for older workers.</li> </ul>  <p><small>ELIN 5<sup>th</sup> ANNUAL LEGAL SEMINAR 11 + 12 OCTOBER 2012</small></p>	 <h2>2. The age discrimination provisions of Directive 2000/78 - legislative design</h2> <ul style="list-style-type: none"> <li>I will suggest that the realisation of that objective would have to consist in something more sophisticated and nuanced than a simple strengthening or hardening of age discrimination legislation so that it would more closely approximate to the gender equality template - that alone would not suffice and might even be counter-productive in some respects.</li> <li>I will develop that idea in relation to the national implementation of the age discrimination provisions of Directive 2000/78, and in relation to the role and relevant case-law of the ECJ.</li> </ul>  <p><small>ELIN 5<sup>th</sup> ANNUAL LEGAL SEMINAR 11 + 12 OCTOBER 2012</small></p>
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### 3. The age discrimination provisions of 2000/78 - national implementation

- Prof do Rosário has made the very useful observation that, while all MSs have at some point formally declared themselves to be in compliance with the age discrimination provisions of 2000/78, they have nevertheless very often continued to maintain discriminatory practices, especially with regard to retirement, largely by relying upon the derogations authorised by Article 6.1.

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### 3. The age discrimination provisions of 2000/78 - national implementation

- In particular, she rightly notes that many MSs continue to maintain 'measures lowering the regular protection against dismissal or other forms of termination of the labour contract, directed mostly at elderly workers'. Declan O'Dempsey and Anna Beale have very usefully charted the position in detail in this respect in their July 2011 report on Age and Employment. They reveal a still wide variety of regimes with regard to employers' freedom to impose a mandatory retirement age upon their workers.

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### 3. The age discrimination provisions of 2000/78 - national implementation

- I want to suggest that the ideal response to this diversity might not consist simply in a more rigorous proscription of employer-imposed mandatory retirement at any particular age. I will focus upon the very interesting case of what has happened to employer-imposed mandatory retirement in the UK.

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### 3. The age discrimination provisions of 2000/78 - national implementation

- Before 2006, UK employment law enabled employers to impose mandatory retirement ages of 65 or even less. Between 2006 and 2011, employers were enabled to impose mandatory retirement ages of 65 or more subject to an employee's right to consideration of requests to continue working beyond such a mandatory retirement age. This was known as the 'default retirement age' system.

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### 3. The age discrimination provisions of 2000/78 - national implementation

- From 2011 onwards, the general authorisation of employer-imposed mandatory retirement ages, even of 65 or more, was abolished (although employers may still be able individually to justify their own particular imposition of a mandatory retirement age). An orthodox approach might claim this as straightforward advance towards the elimination of age discrimination.

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### 3. The age discrimination provisions of 2000/78 - national implementation

- However, I want to argue that this may not be quite as obvious as it might appear. There seem to me to be grounds for arguing that the 'default retirement age' regime may turn out to have been more protective of the interests and dignity of older workers than the succeeding, ostensibly less discriminatory, regime. I conclude by trying to substantiate this argument in relation to the role and relevant case-law of the ECJ.

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### 4. The age discrimination provisions of 2000/78 - the role of the ECJ

- My argument, about the particular problems, for the age equality regulation of retirement regimes, of the 'weak version' approach to the formulation of the age discrimination provisions of 2000/78, applies to relevant case-law of the ECJ in the following way. The ECJ had demonstrated in the *Mangold* decision that it was very prepared to take a robust approach to age discrimination - too robust indeed for some critics. However, in its application of 2000/78 and in particular Article 6 to retirement regimes, the ECJ has been significantly deferential to national regimes, for example in the *Palacios* and *Age Concern* cases.

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### 4. The age discrimination provisions of 2000/78 - the role of the ECJ

- Many proponents of age equality regard this as representing an insufficiently rigorous approach to the problems of age discrimination which are built into retirement regimes. I incline to the view that the difficulty is rather that the casting of the age equality provisions of 2000/78 in the form of a 'weak version' of the gender equality template constrains the ECJ into an approach which is insufficiently nuanced and constructive. In my concluding reflection, I shall seek to open a discussion of what a more holistic approach might consist of and how it might be implemented.

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**5. The age discrimination provisions of 2000/78 - Concluding Reflection**

- My concluding suggestion is that the functioning of the age equality provisions of 2000/78 might be ameliorated, in its application to retirement regimes and to employment regimes for older workers more generally if a rather different template from the existing one were constructed and applied. This I suggest would be one which was not so much directed towards the elimination of discrimination on the model which is imposed by the 'gender equality template' as towards the construction of flexible yet underlyingly protective retirement regimes for older workers.

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**5. The age discrimination provisions of 2000/78 - Concluding Reflection**

- The devising and application of such a model is a complex and sophisticated exercise, involving above all the reconciliation of labour market opportunity for older workers with, firstly, the labour market opportunities of younger workers, and secondly, the protection of the older workers themselves from undue pressure to work for longer than their health and well-being will allow. The articulation of such a framework seems to me to be the very task and duty of workshops or seminars such as the present one.

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## 3.5 Keynote presentation by Prof. Jean-Pierre LABORDE

**YOUNG VERSUS OLD OR INTERGENERATIONAL SOLIDARITY**

Prof. Jean-Pierre Laborde  
University of Montesquieu-Bordeaux IV  
Member of the Centre for Comparative Labour and Social Security Law  
(UMR CNRS - University n° 5114)

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**INTRODUCTION 1**

- Great complexity of the issue of age and generations in work relations
- Example: Lowering the retirement age, which can be seen as a measure of intergenerational solidarity as well as one that favours older workers to the detriment of younger ones

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**INTRODUCTION 2**

- Preventing and stopping the age struggle (I)
- Favouring age cooperation (II)
- Surpassing the age issue (III)

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**I / PREVENTING AND STOPPING THE AGE STRUGGLE**

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**I. 1 Young versus old or opposition median ages / young and old**


- Young versus old, an often simplistic presentation
- Managing age in France seems to have consisted of opposing the median ages (25-49 years) very present on the labour market to younger (16-25 years) and older workers (55-65 years) more or less kept at a distance
- For older workers, one of the lowest rates of employment in Europe (44.4%)

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**I.2. Preventing and sanctioning discrimination**


- 1.2.1. The struggle against negative discrimination
  - In EU law
  - In internal French law
- 1.2.2. 'Positive discrimination' measures in favour of young people
  - Measures in favour of young people in the presidential programme of François Hollande  
Creating 'future jobs'
  - Measures in favour of seniors
  - 'Mixed' measures


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### I.2.1.1. In EU law


- Directive No. 2000/78/CE of 27 November 2000, establishing a general framework in favour of equality of treatment on labour issues, notably prohibiting age discrimination
- According to Article 6 of the Directive, the differences in age-related treatment must be reasonably and objectively justified by a legitimate objective. Moreover, the means used must be appropriate and necessary
- The care of favouring access to employment for seniors may constitute a legitimate objective, at least when the provision in question is not founded on the sole and unique consideration of age






### I.2.1.2. In internal French law

- Article L. 1132-1 of the French labour code
- Struggle against direct as well as indirect discrimination
- Provisions concerning lightening the burden of proof for discrimination
- Struggle against discrimination affecting young workers and against discrimination affecting older workers





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### I.2.2.1. Measures in favour of young people


- Particularly concerning young people without any basic training or professional training
- One of the main objectives of President François Hollande
- Current project on 'future jobs'






### I.2.2.2. Measures in favour of older workers

- 'Senior' fixed-term employment contract




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### I.2.2.3 'Mixed' measures

- Measures in favour of young people as well as old people






## II / FAVOURING AGE COOPERATION





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### II.1. The provisions already in force


- A learning contract, alternating theoretical and practical training
- The apprentice is placed under the responsibility of an apprentice master who could be the employer or another employee (Articles L. 6223-5 to L. 6223-8 of the Labour code)
- Importance and influence of the German example



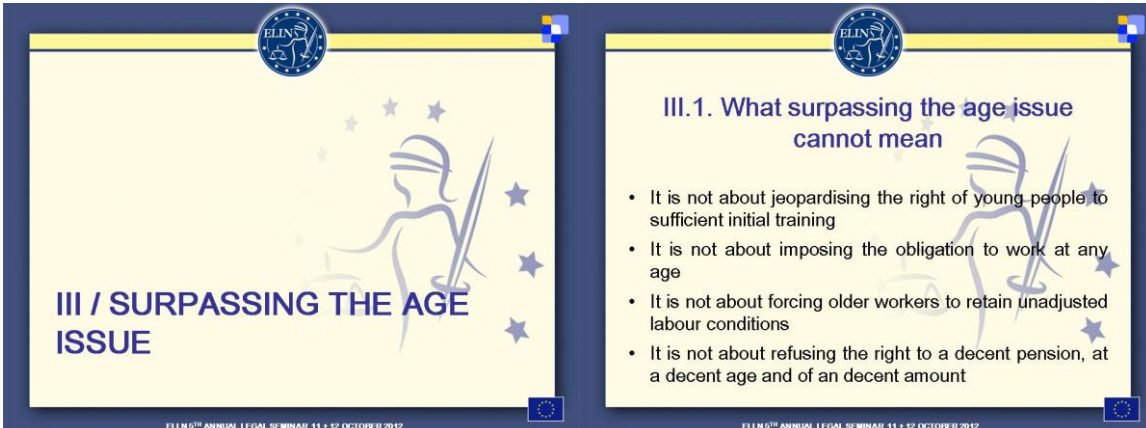


### II.2. The professional security scheme

- One of the main elements of the presidential programme of François Hollande
- Should enter into force at the start of 2013
- This contract would allow linking a retained older worker (above 55 years or of 57 years) until they take their pension with hiring a young worker (under 25 years)
- Transmission of the older worker's experience and know-how to the younger worker
- Reducing fiscal and social costs weighing down on the company
- Start of the negotiations on this provision this autumn
- Distinction between companies with more than 300 employees (negotiations expected for a collective agreement) and companies with less than 300 employees (individual agreements)



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III / SURPASSING THE AGE ISSUE

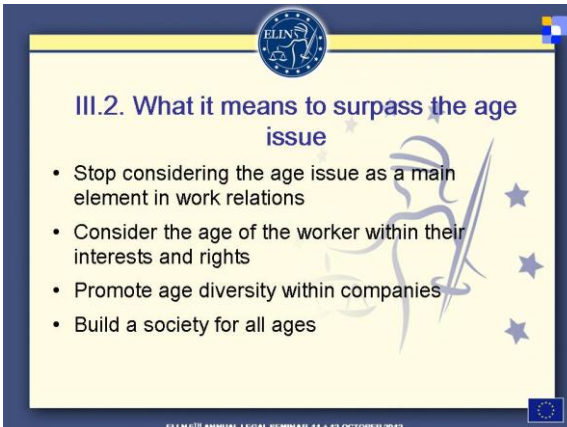
III.1. What surpassing the age issue cannot mean

- It is not about jeopardising the right of young people to sufficient initial training
- It is not about imposing the obligation to work at any age
- It is not about forcing older workers to retain unadjusted labour conditions
- It is not about refusing the right to a decent pension, at a decent age and of a decent amount

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III.2. What it means to surpass the age issue

- Stop considering the age issue as a main element in work relations
- Consider the age of the worker within their interests and rights
- Promote age diversity within companies
- Build a society for all ages

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## 3.6 Reflection by Mrs. Andrée DEBRULLE



## Young versus Old or Intergenerational Solidarity

*réflexion sur la note du professeur Laborde.*

**Andrée Debrulle**  
Legal advisor, ACV-CSC, Brussels,  
Belgium

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### Plan de l'exposé.

- Les défis posés par le vieillissement au travail ne sont pas neufs et se sont posés de tout temps dès qu'un taux de chômage trop élevé a été détecté.
- Une dimension nouvelle, à savoir celle du vieillissement démographique, impose de se poser la question de la soutenabilité des dépenses sociales, face à un taux d'activité trop bas des travailleurs vieillissants.

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### Plan de l'exposé.

- La gouvernance économique développée par l'UE en réponse à la crise financière et économique pose en outre la question de la réduction des dépenses budgétaires liées aux prestations sociales sollicitées pour répondre aux questions démographiques.
- Le Professeur Laborde pose trois axes dans sa réflexion : la solidarité comme moteur de la politique, empêcher la lutte des âges, le dépassement de la lutte des âges, dans un contexte marqué par l'interdiction de se servir de l'âge comme critère...

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### 1. La solidarité entre les générations comme outil politique en Belgique.

- La CCT n° 17 du CNT comme mesure d'emploi.
- La critique économique contre la pertinence de l'argument de solidarité.
- La flexibilité imposée plus que proposée aux jeunes, accroît le sentiment du « conflit ».

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### 2. Empêcher la lutte des âges...

- C'est l'objectif du pacte de solidarité entre les générations de 2005.
- Un plan conçu pour développer l'embauche des jeunes, la stimulation du vieillissement actif et le renforcement d'une sécurité sociale forte et viable.
- Il veut aussi changer l'approche des acteurs : les travailleurs sont stimulés à rester actifs plus longtemps et les employeurs à garder leurs travailleurs âgés plus longtemps, voire à en engager.
- Entraîner un changement des mentalités.
- Et mettre la qualité du travail à l'ordre du jour.

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### Dépasser la problématique des âges : comment ?

- Evaluation du pacte des générations : réponses volontaristes insuffisantes, seuls les volets qui touchent les travailleurs ont été exécutés et sanctionnés.
- Pour les syndicats belges et la CES, une politique de fin de carrière doit s'intégrer dans une vaste politique de carrière englobant toutes les générations. Ceci renvoie à la question de la formation pour tous et à la question de la qualité du travail dans les politiques de gestion des ressources humaines, de même qu'à la prise en compte de la pénibilité de certains travaux.

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**Des outils pour aider à dépasser le conflit des âges.**

- Une recommandation des partenaires sociaux belges: R 20 de 2008 qui permettait déjà de penser en terme de gestion prévisionnelle des âges et des compétences.
- Fonds de l'expérience professionnelle.
- -> succès relatif mais les secteurs qui s'impliquent développent des solutions utiles pour dépasser le conflit.

**Nouveauté pour 2013 : CCT n°104 du CNT.**

- Elle contient l'obligation pour les employeurs de conclure avec les travailleurs, des plans pour l'emploi selon les 6 axes suivants :
- 1<sup>o</sup> la sélection et l'engagement de nouveaux travailleurs;
- 2<sup>o</sup> le développement des compétences et des qualifications des travailleurs, y compris l'accès aux formations;
- 3<sup>o</sup> le développement de carrière et l'accompagnement de carrière au sein de l'entreprise;
- 4<sup>o</sup> les possibilités d'obtenir via mutation interne une fonction adaptée à l'évolution des facultés et des compétences du travailleurs;
- 5<sup>o</sup> les possibilités d'adapter le temps de travail et les conditions de travail;
- La limite est que traiter un seul axe est suffisant , sur demande des entreprises : pas une politique de gestion de carrière qui exigerait d'aborder tous les thèmes à la fois.


**MERCI DE VOTRE ATTENTION**

### 3.7 Reflection by Mrs. Renate HORNUNG-DRAUS

#### Keynote messages

- Age cannot be treated purely from a "non-discrimination"-perspective as can and showed gender or sexual orientation.
- In the social policy tradition of continental Europe, discrimination is only one small aspect of a vaster and much more complex social policy issue linked to the theme of aging.
- The purely "non-discrimination" approach stemming from the Anglo-Saxon tradition which was adopted in Directive 2000/78/EC, might lead to social disadvantages for older employees. E.g. the introduction of retirement age was a substantial social progress in European history. Concentration on the discrimination principle alone does not do justice to this issue.
- Situation today:
  - 1) Demography: longer life expectancy and low birth rate in most countries
  - 2) Societal situation: employment as main factor for social integration – new problem of social exclusion of retired people
  - 3) Biological and health situation: people live longer in good health, but there are very diverging paths of individual evolution
- The regulatory framework must therefore be reconsidered in four dimensions:
  - 1) Economically: social security and tax systems are not sustainable – we must redefine the balance between active and inactive, but huge differences in EU-culture concerning retirement age
  - 2) Social: create social inclusion through employment and participation in the labour market
  - 3) Shortage of labour can be addressed by extending work life span
  - 4) For blue collar physically strenuous work individual capacity to work longer can be increased by an age-based work place organisation
- Companies are already aware of this situation and promote age diversity in their teams, but employees also must be willing to work longer.
- The legal and contractual framework must take into consideration the diverging individual evolution – flexibility is needed on both sides: workers must be protected, but companies must also have the right to determine an employment contract after a defined retirement age – which of course needs to be adapted. Need to rethink employment protection models: differentiated approach needed for older workers.
- Adaptations needed in social security and tax systems to create flexible forms beyond the retirement age: more incentives to work longer as for instance in the Scandinavian countries, while negative incentives must be abolished. The seniority principle must also be reconsidered.


**3.8 Main Findings of the Evaluative Study on Part-time and Fixed-term Work Directives, Dr. Tina WEBER**



### Main findings concerning older workers of the evaluative study on part-time and fixed-term work directives

**Dr. Tina Weber**  
Principal Researcher ICF GHK, United Kingdom


ELIN 5<sup>th</sup> ANNUAL LEGAL SEMINAR 11 + 12 OCTOBER 2012



### Aims of evaluative study

- Aim: to assess to what extent the current EU legislation on part-time and fixed-term has been/is able to meet the requirements of an evolving EU labour market; to identify remaining problems; and develop recommendations on how the identified problems could be remedied
- Objectives:
  - Analysis of the transposition, implementation and legal impact of the two Directives
  - Review of trends related to part-time and fixed-term work
  - Analysis of socio-economic impacts (including on new entrants and older workers)


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### Part-time and fixed-term work among older workers: Why does it matter?

- Demographic trends showing ageing population
  - Increase in dependency ratios
  - Need to extend working lives
  - Increase in statutory retirement ages
  - Flexible working towards age of retirement an important way to help achieve this – but need to consider impact on pensions and standard of living in retirement


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### Overall goals of Directives

Part-time	Fixed-term
<ul style="list-style-type: none"> <li>• Removal of discrimination</li> <li>• Improvement of quality of part-time work</li> <li>• Facilitate part-time work on a voluntary basis</li> </ul>	<ul style="list-style-type: none"> <li>• Removal of discrimination</li> <li>• Improvement of quality through application of principle of non-discrimination</li> <li>• Framework to prevent abuse</li> </ul>


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### Legal issues relating to part-time and fixed term work for older workers

- On the whole labour law provisions apply to all
- Provisions that allow the conclusion of fixed-term contracts for older workers without objective reasons/fewer restrictions.
- Restrictive access of older workers to part-time work schemes on the basis of the number of years worked full-time prior to deciding to work part-time.
- Transfer of older workers (at pre-retirement age) to reduced working hours and pay without employee's consultation/consent.
- Negative impacts of part-time working on social contribution records

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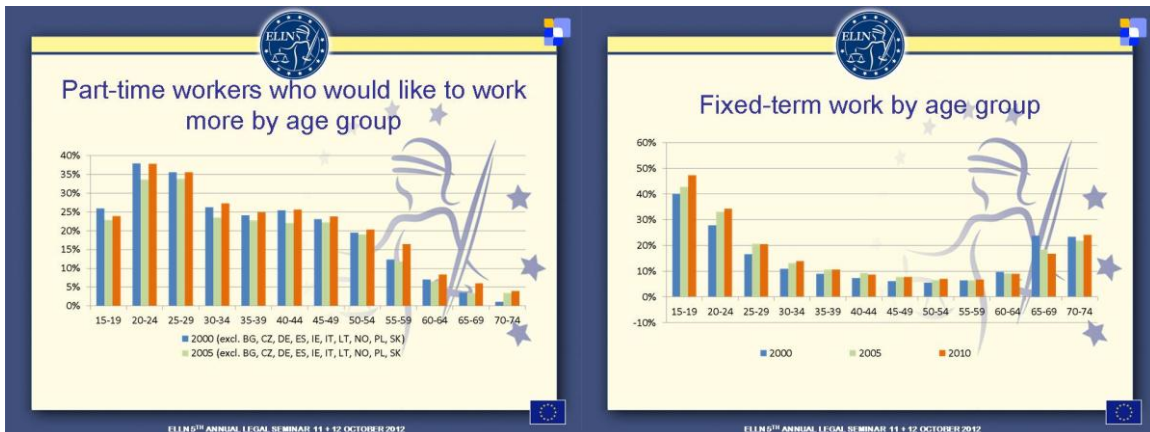
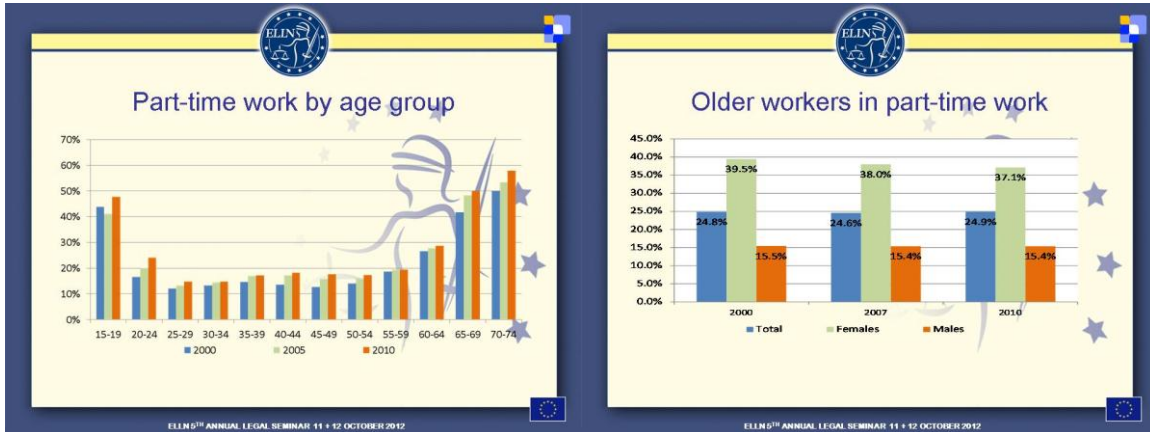


### Part-time working among older workers

- Individuals over 65 most likely to work part-time
- After those aged 15-19, workers over 60 most likely to work part-time (28% in 2010)
- As in the workforce in general, female older workers more likely to work part-time
- This age group less likely to want to work longer hours, but some significant increase in 2010 for 55-59 age group

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MAIN FINDINGS OF THE EVALUATIVE STUDY ON PART-TIME AND FIXED-TERM WORK DIRECTIVES



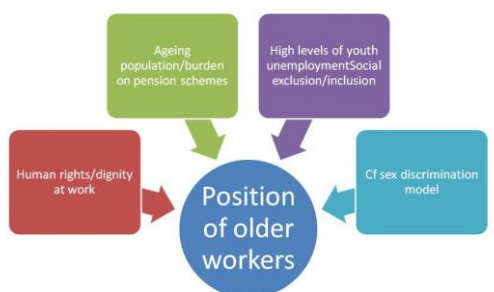
**Have goals been reached and what does it mean for older workers?**

- Non-discrimination in part-time and fixed-term work: generally, legally yes, but some significant variation in implementation (in line with Directive)
- Improved quality?
- Promotion of voluntary part-time?
- Do active ageing strategies require greater improvements (e.g. access to training, better working conditions)?
- Can this be achieved through legislation?
- Must understand and consider strong link with pensions, social security, wider EPL and ALMP framework

4. Conclusions

4.1 Presentation by Prof. Catherine BARNARD

<p><b>Conclusions</b></p> <p>Catherine Barnard Trinity College Cambridge</p>	<p><b>Summary of the discussion</b></p>
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<p><b>The tensions</b></p> 	<p><b>Current position</b></p> <div style="border: 1px solid gray; padding: 5px; margin-bottom: 10px;"> <p><b>Employment (law)</b></p> <ul style="list-style-type: none"> <li>• Mandatory retirement age (not increased in line with ageing population)</li> <li>• Exclusion of older workers from certain employment protection</li> <li>• Seniority based pay scales</li> </ul> </div> <div style="border: 1px solid gray; padding: 5px;"> <p><b>Social security/Pension</b></p> <ul style="list-style-type: none"> <li>• From invalidity benefit to welfare benefit</li> <li>• State and/or occupational pension</li> <li>• Serious funding crisis – exacerbated by application of Solvency II regulations</li> <li>• Lost generation of non-contributors</li> <li>• Work or pension</li> </ul> </div>
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<p><b>Imaginative solutions I?</b></p> <div style="border: 1px solid gray; padding: 5px;"> <p><b>Employment law</b></p> <ul style="list-style-type: none"> <li>• No retirement age</li> <li>• Working to a certain income rather than a certain age?</li> <li>• Flexible use of EJA</li> <li>• Labour law serving a labour market for end of career jobs eg greater use of fixed term contracts, from seniority to productivity based pay?</li> <li>• Greater part-time work?</li> <li>• Contrat de génération</li> <li>• Flexible retirement/parallels with family friendly policies</li> <li>• Duty of reasonable accommodation</li> </ul> </div>	<p><b>Imaginative solutions II</b></p> <div style="border: 1px solid gray; padding: 5px;"> <p><b>Social security/pensions</b></p> <ul style="list-style-type: none"> <li>• Flexible pension age/work and pension/revision of the view of pensions from social protection to income smoothing</li> <li>• Move from defined benefit to defined contribution schemes?</li> <li>• Tax incentives for savings for pensions</li> <li>• Raising statutory pension age and linking it to life expectancy</li> <li>• BUT impact of eg working part-time in years prior to receipt of pension may affect level of pension unless eg career average scheme</li> </ul> </div>
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## CONCLUSIONS

## A move towards a holistic approach?

### UK legal regime

2006-11

- Statutory DRA introduced by SI 2006/1031 and then EqA 2010
- Duty to consider procedure
- No unfair dismissal claim
- No age discrimination claim

2011-

- No statutory DRA (repealed by SI 2011/1069)
- Employees can work for as long as they are able/ willing
- Employers liable for unfair dismissal and age discrimination claims (NB average tribunal award in claims of unfair dismissal is £8,924, average award for age discrimination is £30,289)
- Objective justification/EJRA

### UK legal regime: consequences

- No statutory default retirement age
- How to retire people?
  - Voluntary retirement
  - Financial incentives to leave
  - Drop dead
  - Performance management
  - Employer justified retirement age (EJRA)

### Performance management

- Advantage:
  - in keeping with the aims of the legislation
  - least risky option
- Disadvantage:
  - onerous performance management
  - Problem of dealing with somewhat underperforming staff
  - Lack of dignity in exit
  - Bad industrial relations
  - Get it wrong and face claims for unfair dismissal and age discrimination
  - Get it right and still face legal claims

### A (parochial) case study



### A university in the Fens....

- University level
  - Academic and academic-related officers have a retirement age of 67
  - Other staff (including 'unestablished' academic and academic-related staff) have a retirement age of 65
  - Mix of national (USS) and local pension schemes
- College level
  - Fellows have a retirement age of 67 (long serving fellows have rights (eg dining, paid teaching) after retirement)
  - Staff have a retirement age of 65
  - College controlled pension scheme

### University in the Fens (cont'd)

- University level
  - Established academic and academic-related staff
    - Low turnover in many departments
    - De facto recruitment freeze
    - Appraisal practices differ across departments
    - Issues of academic freedom (right to freedom of expression and research)
  - Other staff ('assistant staff' and unestablished academic staff)
    - Turnover reflects national average
- College level
  - Academic staff
    - Low turnover in many subjects
  - Non-academic staff
    - Low turnover
  - Little or no appraisal

### Dealing with the change in law

- Concerns
  - Ageing workforce (cf Harvard tenured faculty where more over 70s than under 40s)
  - Blocking opportunities for new entrants?
  - Promotion blocking?
  - Disproportionate admin burden falling on the middle tiers
  - The 'awkward squad': Canadian and US experience
- Desire to maintain EJRA

CONCLUSIONS

<h3 style="text-align: center;">The process: college level</h3> <ul style="list-style-type: none"> <li>• Two working groups set up             <ul style="list-style-type: none"> <li>– Staff: with 1 academic, 2 senior administrators and two employee representatives (no recognised TU)</li> <li>– Fellows: 5 fellows including senior bursar; whole fellowship consulted by individual letter</li> </ul> </li> <li>• Employee reps talked to all staff in each department to ascertain their views (2 meetings)</li> <li>• These fed back into working group discussion (5 meetings)</li> <li>• Two meetings with the whole staff body and the senior college administrator</li> <li>• Staff surveyed on their views</li> </ul>	<h3 style="text-align: center;">Result of staff survey</h3> <p style="text-align: center;">Do you wish the college to retain a DRA?</p> <table border="1"> <caption>Do you wish the college to retain a DRA?</caption> <thead> <tr> <th>Response</th> <th>Percentage (approx.)</th> </tr> </thead> <tbody> <tr> <td>no</td> <td>15%</td> </tr> <tr> <td>yes</td> <td>85%</td> </tr> </tbody> </table>	Response	Percentage (approx.)	no	15%	yes	85%
Response	Percentage (approx.)						
no	15%						
yes	85%						

<h3 style="text-align: center;">Staff survey (cont'd)</h3> <p style="text-align: center;">What should the DRA be?</p> <table border="1"> <caption>What should the DRA be?</caption> <thead> <tr> <th>Age</th> <th>Percentage (approx.)</th> </tr> </thead> <tbody> <tr> <td>65</td> <td>55%</td> </tr> <tr> <td>67</td> <td>25%</td> </tr> <tr> <td>70</td> <td>20%</td> </tr> </tbody> </table>	Age	Percentage (approx.)	65	55%	67	25%	70	20%	<h3 style="text-align: center;">Staff survey (cont'd)</h3> <p style="text-align: center;">Staff views on pension age</p> <table border="1"> <caption>Staff views on pension age</caption> <thead> <tr> <th>Age</th> <th>Percentage (approx.)</th> </tr> </thead> <tbody> <tr> <td>65</td> <td>75%</td> </tr> <tr> <td>67</td> <td>15%</td> </tr> <tr> <td>70</td> <td>10%</td> </tr> </tbody> </table>	Age	Percentage (approx.)	65	75%	67	15%	70	10%
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<h3 style="text-align: center;">The process: university level</h3> <ul style="list-style-type: none"> <li>• Working group set up</li> <li>• Consultation with other universities especially the other place</li> <li>• Discussion with trade unions (recognised for administrative, technical and clerical grades, but not for academics)</li> <li>• Discussion paper published</li> <li>• Roadshows round the university</li> </ul>	<h3 style="text-align: center;">The process: data collection</h3> <ul style="list-style-type: none"> <li>• Age profile of existing staff</li> <li>• Age profile of applicants</li> <li>• Diversity statistics (sex and race)</li> <li>• Turnover statistics</li> </ul>
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## CONCLUSIONS

## Conclusions

- College level
  - Age 67 retirement age to be retained for academics
  - Retirement age to be raised for staff to 67 but pensionable age to be kept at 65
  - Combined with improved duty to consider procedure
  - Regular reviews
  - To be checked by (paid) legal advisers
- University level
  - Academic and academic-related officers: age 67 to be retained; some new posts for over 67s ('directors of research') – working until/working after
  - Other staff: retirement age to be abolished

## Justification and proportionality

- Justification
  - Inter-generational fairness/ career progression/ innovation
  - Preservation of academic autonomy and freedom
  - Succession planning
  - Dignity on exit/collegiality (good employer model)
  - Equality and diversity
- Proportionality of the *policy as a whole*
  - Good process
  - Duty to consider procedure + guidance published in advance
  - Regular reviews of policy

## Concerns

- Lack of statutory cover
- Can an employer rely on CJEU's case law?
- How does proportionality work in practice?
  - Flexibility for individual cases but
    - Treat every group of staff differently (bad IR)
    - Treat every group of staff the same (good IR)
  - Other universities responding differently
  - Stricter test when employer is defendant
- Remedies – will good effort be rewarded?
- Practical problems eg senior 67 year old professor forced to retire, lab assistant carries on?
- Is an EJRA sustainable on (i) HR (ii) legal grounds?

## 5. Working Group Discussion Reports: Session 1- The Position of Older Workers in Labour Law

### 5.1 Discussion questions

#### Working Group on 'The Position of Older Workers in Labour Law' Thursday 11 October: 16.45 – 18.00 hrs.

Questions to be discussed:

1. Do sickness and reduced working capacity amount to just cause for dismissal in your country?
2. What special rules apply in your country, if any, on the access to fixed-term and part-time employment for older workers?
3. What would you say is the pension norm in your country? Are there plans for changing it?
4. Is there a right to reemployment of older workers, in case of redundancies, when the employer hires again?
5. Does labour law in your country allow for special arrangements regarding work organisation, working time and leave for older workers?

### 5.2 Working Group Discussion Reports

#### 5.2.1 Working group 1 chaired by Prof. Krassimira SREDKOVA

The main idea during the discussion was that old age is neither a privilege nor a disadvantage at work. The position of older workers depends on economical, legislative, social and psychological factors.

#### 1. Do sickness and reduced working capacity amount to just cause for dismissal in your country?

In **Malta, Slovenia and Ireland** a sick employee can be dismissed, when there is no healing. In **Portugal, Germany and Slovakia**, it is not possible to dismiss a person because of sickness. But a long lasting sickness can cause a dismissal and chronically sick persons may expect that, too.

#### 2. What special rules apply in your country, if any, on the access to fixed-term and part-time employment for older workers?

In **Portugal and Slovenia** there are no special rules except regarding part-time employment. If an employee reaches the pension age in **Portugal or Sweden** he or she can continue working via a part-time employment contract. In **Sweden**, part-time employment is being practiced when an employee is reaching the age of 67. But in general, a Swedish employee does not have to work longer than the age of 61, but of course working until the age of 67 has a positive effect on the amount of pension. These procedures encourage employees to stick to their job and it is of course an economic decision.

In **Malta**, employers who are hiring older employees are supported by the state. It is already established, but it is not fully developed yet. Generally speaking, it is still very difficult to hire older people. This affects women most. The reason of this is that women are often leaving the labour market around the age of 33 because of raising children. Reintroducing women around the age of 40 is then (nearly) impossible and that is the reason why women are often more affected by their age than men.

### 3. What would you say is the pension norm in your country? Are there plans for changing it?

All members of the working group stated that the average pension age will increase.

In **Malta** for instance, employees are allowed to continue with their work although they reached the pension age. Nevertheless, better tax rates should be established.

In **Austria**, developments are made to adjust the pension age. The problem is that Austrian employees are trying to work as much and as hard as possible because they want to earn enough money as soon as possible. Often, they are trying to work until the age of 40 before they expect any pension rate. A better work-life balance is often the ideal goal. So they will not be interested in any extension of pension age.

Other countries have extended their pension age, too. **Germany** for instance, extends its pension age step by step until the age of 67. This adjustment will take a couple of years until it is fully established and in use. In this way German society should get a better feeling and acceptance for such developments. But there is another country which developed a plan extending people's working lives by raising the retirement age. 20 years ago, **Sweden** already changed its pension age and it works very well. People's working life is more flexible especially in the public sector (between the ages of 61 and 67). There are more part-time jobs and it is up to each employee working full time or not.

In **Ireland** the pension age raised, too. Now, an employee's working life is going to find an end at the age of 66. **All working group members** stated that there are often performance problems of employees at a certain age, especially when they have to do physical work. An **Irish** employee is also allowed to stop working at an earlier stage but this has economic consequences and less pension will be paid by the state. People do not want to work until they die and they are afraid of these economic consequences and diminishing work performance.

**Slovakia's** and **Bulgaria's** pension system is changing very often, especially when a new government was elected. In these countries pension systems can change every four years or even every four months. It depends on the political situation.

### 4. Is there a right to reemployment of older workers, in case of redundancies, when the employer hires again?

All represented countries like **Germany, Ireland, Sweden, Bulgaria** or **Austria** stated that there is no right to reemployment of older workers in case of redundancies. It is not even planned.

### 5. Does labour law in your country allow for special arrangements regarding work organisation, working time and leave for older workers?

There are special arrangements in collective agreements for better working conditions. **All represented countries** stated that they are already existing or being planned.

The problem is that there are no further amendments and developments.

Older employees need to be protected. Several societies just forget that older employees had a long working life and made significant contributions to their country.

### 5.2.2 Working group 2 chaired by Rita CANAS DA SILVA

As a general theme, the working group discussion was focused on the position of older workers in labour law and on two main questions: **1) How to make employees continue to work until and beyond their pensionable age?** And **2) How should we facilitate access to employment for older employees?** These topics were the basis for the discussion carried out in relation to the following five questions:

#### 1. Do illness and reduced working capacity amount to just cause for dismissal in your country?

The precise scope of this question was highlighted: referring to the termination of the employment contract, older employees are more likely to be affected by sickness and/or reduced working capacity. In this regard, various practices were reported. From the discussion therein held it was clear that it is frequent to differentiate *termination on grounds of normal ageing* from *termination on grounds of sickness* and *termination justified by a decrease of productivity in general*.

In the **Netherlands, Portugal, Slovenia** and **Sweden** it was reported that sickness (by itself) does not constitute a valid ground for termination of the employment contract and the employer frequently has the obligation to place the temporarily sick employee into a suitable job. There is a general preference to evaluate whether the employee absent on grounds of sickness is *permanently incapable* of performing his/her functions and only in such a case may the employment contract be validly terminated. Given this framework, it might be difficult to relate ageing and termination of the employment contract on grounds of sickness. Specifically in **Portugal**, it was explained that long-term absence due to sickness of the employee suspends the employment contract in case of temporary incapacity – the contractual bond is kept and the employer has the duty to maintain the labour post. Although there is no express provision stating the maximum time of absence allowed, after an extended period it is possible to conclude that the *temporary incapacity* should be considered as a *permanent incapacity* (given the long period of inactivity and reduced probabilities of health improving *versus* the employer's interest in the employee's future and eventual return). Should this be the case, the contract is deemed to be automatically frustrated – this being applicable regardless of the employee's age. In relation to **Dutch** law, it was pointed out that the employee is considered permanently ill after two years of illness: in the **Netherlands** the contract shall not be terminated during these first two years and for such a period the employer shall pay 70% of the employee's salary. It seems, however, that due to this measure employers hesitate to hire older individuals.

Nevertheless, most participants recognised that it is in fact possible that older employees, although 'apt' to work, are somewhat less effective and rapid. And in several Member States it is admissible to dismiss the employee if he/she does not perform according to the required standards (regardless of age). It was, however, stated that it might be very difficult to produce the evidence thereof. Therefore, employers often prefer to dismiss employees on economic grounds since this might be a more expeditious way to terminate the employment contract (as indicated by **Italy** and **France**). Nevertheless, it was also noted that in such cases (i.e. termination on economic grounds) seniority rules often play a relevant role in protecting older employees. **France** stated that for many decades the retirement age was set at 60 and therefore most people have planned their careers up till that age and do not intend to work longer. On the other hand, older individuals are indeed often not wanted in the work market due negative stereotypes. As pointed out, in practice, dismissal rules are not that important since employers always find a way to dismiss older employees, namely on economic grounds. Concerning the connection between (old) age and reduced working capacity, **Italy** observed that this relates to productivity of the employee and thus it is not an objective ground of dismissal but rather a subjective one since it is the employer who has to prove that the employee does not reach the required work level. Specifically in **Portugal**, a ground for termination is based on the employee's failure to adapt (*'dismissal for unsuitability'*). However, the termination of the employment contract always depends upon several requirements and the simple decrease in productivity related to age is not a valid ground for termination.

## 2. What special rules apply in your country, if any, on the access to fixed-term and part-time employment for older workers?

It was highlighted that special provisions on fixed-term contracts for older employees are frequently foreseen as flexible ways of contracting. The **Czech Republic, Greece, Slovakia** and **Slovenia** do not have special rules on fixed-term contracts for older employees. **France, Portugal, Russia** and **Sweden** do have special provisions in these cases. In **France** a senior labour contract for people from 57 years old was introduced a few years ago. It was reported that this contract included specific rules, was very flexible and made it possible to hire and fire those employees very easily. But at the end, it was highlighted that this contract does not work and hardly anyone employs older employees by these means (it is normally understood that older employees are more expensive and less productive and this fact seems not to have been overcome by flexible ways of recruiting). The fact that the fixed-term contracts furthermore apply to those of a certain age provoked great discussion within the working group regarding age discrimination and the *Mangold* case. In **Russia**, the issue is controversial and important. The Russian Court stated that there is no discrimination regarding fixed-term employment contracts for people who reached the pensionable age since they are entitled to additional income. However, pensions are often very low in Russia. In **Sweden**, it is possible to conclude fixed-term contracts for an unlimited period of time with people aged 67 and above. It was also pointed out that in **Portugal**, retirement is voluntary at the age of 65 (save in the civil service), but it constitutes a cause of frustration of the employment contract. As an exception, the contract of employment might continue afterwards if the employer allows the employee to remain in service 30 days after retirement. Should this be the case, the employment contract is converted, by law, into a 6-month fixed-term employment contract, there being no maximum number of renewals or a maximum total duration. Employers are then free to terminate the fixed-term contract by serving a 60-day prior notice. The same regime is applicable when the employee reaches the age of 70, despite not being retired.

Part-time contracts were regarded not as a means of promoting new contracts with older individuals but as an efficient way of ensuring quality time for older employees and thus making it more attractive for them to remain at work longer. In this regard, **Slovenian** law provides the right to ask for part-time work for people who have reached the pensionable age.

## 3. What would you say is the pension norm in your country? Are there plans for changing it?

This topic addresses when employees shall leave working life. It was stressed that in this regard a change of mind set might determine a change of the pension norm from the statement that *“there is a right and a duty to retire at a certain age”* (which seems still to prevail) to *“there is a right and a duty to work according to each ones abilities”*. It was pointed out that most OECD countries have, since 2009, started to rise or plan to rise the retirement age – thus replacing the previous trend of the last decades of lowering the retirement age and incentivising pre-retirement arrangements. Although the intergenerational argument that *“older people must stand down to make room for young ones”* seems to prevail, it was acknowledged to be increasingly questionable whether older employees should leave the labour market to make room for younger ones.

From the working group discussion it was clear that the countries have very different and complex pension norms. Such complexity makes it rather difficult to assess commonalities and differences in such a short analysis. For example, in **Portugal**, retirement is voluntary (save for the civil service) at the age of 65 (for both men and women), depending upon other requirements. Nevertheless, a rise of the retirement age up to 67 has been discussed. In the public sector, the Government announced in October 2012 that the age of retirement will rise from 63.5 to 65 years in 2013.

Although flexible arrangements might play a relevant role (e.g., through the adoption of voluntary retirement mechanisms instead of compulsory retirement schemes), these changes, by themselves, do not suffice. Reference was made to the Swedish situation and to a note included in the keynote paper under discussion: in **Sweden** *“more than 10 years after the major pension reform (which eliminated a set*

*pensionable age and make it very economically awarding to postpone retirement), it is still the general norm to retire at the age of 65 - about 70% of those born in 1942 retired at exactly the age of 65*<sup>1</sup>. It was also highlighted that most people in **Slovenia** wait until they fulfil all requirements and retire as soon as possible. However, this year, due to austerity measures, the mandatory retirement age was reintroduced for the public sector. The reintroduced rule gave rise to a discussion on its lawfulness, since the Slovenian Constitutional Court had earlier decided that the mandatory retirement age was discriminatory. The case is now before the Constitutional Court waiting for assessment. In **Italy**, the flexible pension age was introduced to encourage people to stay in the labour market, allowing people to retire from ages 57 to 65. Nevertheless, it is important that employees are willing to stay at work for a longer period and that there are incentives for that.

#### **4. Is there a right to reemployment of older workers, in case of redundancies, when the employer hires again?**

Such a right facilitates re-employment of older employees, but seems not to be frequent. Nevertheless, older employees are often protected at an earlier stage – since the selection criteria might protect employees with increased seniority (often linked to increased age). In this particular case, a specific situation was reported by **Portugal**. As part of the austerity measures and in order to provide for more flexibility for employers, in August 2012 Portugal eliminated the need to follow a statutory order of dismissal in cases of extinction of work position due to economic grounds (which formerly protected employees with increased seniority). In **Sweden** there is a right to reemployment only for 9 months for older employees. There is a reemployment obligation when the employee has worked for a certain amount of time (one year) but other requirements apply: not only age but also seniority plays a relevant role. In **Latvia** there is no legislation on reemployment but when the crisis started it was used in several cases with the trade unions where redundancies were made. Reemployment agreements were then used as a means of negotiation. In the **Netherlands**, there is a general time period of six months for reemployment after termination for economic reasons. In **France** the employer has the obligation to rehire someone within one year but this proves to be ineffective in what refers to older employees, given prevalence of negative stereotypes against these individuals.

#### **5. Does labour law in your country allow for special arrangements regarding work organisation, working time and leave for older workers?**

It was acknowledged that if it is important to increase the age employees leave working life, relevant adjustments need to be introduced in the work environment in order to make it more attractive and of higher quality (especially concerning working time arrangements). It was, however, reported that in most cases a good work/life balance has been focused on other vulnerable individuals but not the elderly. All the countries stated that there are no specific provisions in this regard. However, in **Italy** there seems to be a general rule which applies to all employees regardless of their age by which an employee may ask for the adaptation of the working place according to his own specific need. In **Iceland** special arrangements for older employees are only included in collective agreements. The **Netherlands** pointed out that this is something to be regulated by employers, employees and unions. Finally, in **France**, proposals are being analysed in order to provide for a better accommodation of work/time balance at a later stage of working life.

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<sup>1</sup> P. 14, fn. 36.

### 5.2.3 Working group 3 chaired by Jean-Luc PUTZ

#### 1. Do sickness and reduced working capacity amount to just cause for dismissal in your country?

In general sickness and reduced working capacity amount to just cause for dismissal in the Member States, as is indicated by participants from **Greece, Hungary, Iceland, Italy, Latvia, Lithuania, Luxembourg, the Netherlands and Poland**. However, there are different requirements that need to be taken into account. To a certain extent these requirements offer dismissal protection for the employee who is ill or whose working capacity is reduced. In case of illness, for example, a certain period of time needs to have elapsed before the employee can be dismissed (indicated by **Italy, Hungary, Lithuania, Poland, the Netherlands**). Sometimes, during that period the employer is responsible for the reintegration of the employee (the **Netherlands**). After the elapse of the period, sickness could be a valid ground for dismissal. In case of reduced working capacity the employer is often obliged to either find other employment the employee is capable to do or to adapt the working circumstances to the situation of the employee (indicated by **Greece, Italy, Lithuania, Hungary**), in which case dismissal is considered as a *ultimo remedium*.

Although in none of these countries age is an issue with respect to these dismissal grounds, age is sometimes reason for different treatment. In **Poland** for instance the remuneration of the severance payment is shorter when it involves an employee over the age of 50. This rule is introduced as a positive action measure for older employees, as employers might be more likely to hire an older employee if it is cheaper to dismiss them in case of sickness. For more or less the same reason, the **Netherlands** is considering to introduce legislation that reduces the waiting period of dismissal for employees who are over the age of 65. The current retirement age in **Greece** in itself is not a determinant element, however, it is part of the personal circumstances the employer has to take into account. In that sense it is a positive factor since it includes the fact that the employer has to take into consideration that older employees are less productive than younger employees and therefore has to adapt to the capability of the older worker.

#### 2. What special rules apply in your country, if any, on the access to fixed-term and part-time employment for older workers?

The participants from **France** and **Luxembourg** indicated that there are no special rules on the use of fixed-term contracts for older workers. Specific rules on fixed term work can be found though in **Romania, Finland** and the **UK**. In **Romania** the use of fixed term contracts is limited since there needs to be a specific reason for the use thereof (e.g. a change of the amount of work) and the use is submitted to certain requirements. A fixed term contract can be used in case the employee is entitled to retirement within five years. In **Finland** the rules for fixed-term work do not apply to workers who are 65+. In the **UK** fixed-term contracts are used for pre-retirement. These contracts are currently debated as possibly being discriminatory with respect to younger workers.

**France** indicated that there are also no specific rules on part-time work based on age. Special rules on part-time employment are found in the **UK** and **Italy**. The special rules in **Italy** allow on-call work for workers over the age of 55, however, these rules are not so effective in practice yet. In the **UK** the specific rules are the results of the existence of a flexible retirement scheme, however, there are hardly used in practice; only when the employees are aware of the existence of such a scheme. More generally the UK government is reviewing the rules on flexible forms of work, including that of part-time work, which are now mostly available for parents but possibly could be extended to all workers. Upon a question of the Chair the other participants of the working group indicated that in their countries there are no similar flexible retirement schemes.

### 3. What would you say is the pension norm in your country? Are there plans for changing it?

It seems that a mandatory pension age can be found in different countries, including **Luxembourg** (65) and **Poland** (60 years for women and 65 years for men, and under reform to become 67 years for men and women). Other participants indicated that within their country there is no mandatory retirement age, however, there is an age that sort of sets a norm. In **Austria** the age of 65 is custom, whereas in the **Netherlands** this is set by the state's pension age (65, but to change to 67 years), allowing the employer to dismiss the employee when they agree upon it. In **France** it is also set by pension entitlements. Three different ages can be distinguished in this respect: 62 (used to be 60) is the pensionable age; 67 is the age for the highest norm of pension; and 70 is the age that allows the employer to impose retirement on the employee. No norms are set in **Latvia** where the decision to retire is up to the employee. That it is up to the employee to decide has been ruled by the Latvian Constitutional Court, which considered that the pension is too low to force an employee to rely upon it. Furthermore, there is (in certain sectors) a lack of employees, which makes it desirable that older employees stay active on the labour market. Also no norms are set in the **UK**, however, there is a discussion going on to rise the age for entitlement to state pensions from the age of 65 to 66 or even 67 by 2020. Furthermore, the **UK** participant indicated that the discussion is going on whether a mandatory retirement age is in accordance with Article 6(1) Directive 2000/78, since this is agreed upon in some collective agreements. More generally considerations have been posed that the need for a mandatory retirement age may be dependent on the dismissal protection legislation.

As far as reforms are concerned, the following participants have indicated that the retirement age is to be changed or just changed, which is in all cases a rise of that age: **France, Italy, Poland, Portugal, the Netherlands**, and the **UK**. **Luxembourg** and the **Netherlands** have indicated that the reform also includes incentives in order to make it more attractive for older workers to stay active on the labour market or for employers to hire them.

Although retirement ages have been set or follow a certain norm, in practice the average retirement age seems to be lower due to different early retirement schemes. This is for instance the case in **Poland** (62) and **France** (61). Another reason for a lower average retirement age has to do with the fact that employers might be reluctant to hire older workers (indicated by **France** and the **Netherlands**).

### 4. Is there a right to reemployment of older workers, in case of redundancies, when the employer hires again?

In **France, Lithuania, Luxembourg** and **Poland** the right of reemployment is independent of age. In **Latvia** older employees enjoy extra protection in case of redundancies due to which they are not dismissed and have no need for special rights in this respect. As far as rules on reemployment do exist, these are different for the public and private sector. Whereas in the public sector the employer is obliged to re-engagement, the private employer is only bound by the system of last-in-first-out (lifo). Age plays thus an indirect role with respect to redundancies, as the lifo-rule is based on seniority.

### 5. Does labour law in your country allow for special arrangements regarding work organisation, working time and leave for older workers?

The first part of the discussion is general and deals with the question whether older workers need more holidays, since this is on the one hand indicated as discriminatory and on the other hand as a positive measure to keep workers longer active on the labour market. As far as cases have been ruled on extra leave days for older workers (in **Germany** and the **Netherlands**) the tendency is that it is discriminatory and is to be repaired to the level of those that are not discriminated, thus those that do not get extra leave days (the **Netherlands**). Furthermore, it is considered that there is no scientific proof that it is needed; neither for 30 or 40 year olds as was the situation in the **German** case or 55 year olds. Hence, for as far as it might be



needed, for instance for those over the age of 60, it might also be desired for other reasons, like care responsibilities of younger workers.

Although hardly any rules can be found in national laws (**Lithuania** might be an exception with an increase of holidays of one day per five years of employment with the same employer), there are various specific rules in collective agreements (**Luxembourg**), recommendations of social partners (**Belgium**) or general agreements of social partners (the **Netherlands**) that aim to keep older workers longer active, for instance with granting extra leave days or giving them lighter tasks. In other countries, like **Italy**, there are specific rules; however, they are not related to age, but to specific medical situations that need special arrangements in working conditions. Indirectly this applies to older workers mainly. In **Finland** the employers are preparing special programmes, however, the legal status is problematic as they may be considered to be discriminatory.

#### 5.2.4 Working group 4 chaired by Anthony KERR

There was an open discussion within the working group.

The group's work in this session focussed on how labour law can help in making people work until pensionable age; in making people work beyond pensionable age; and in facilitating access to employment for older workers.

Apart from **Portugal**, where it was asserted that sickness does not amount to just cause for dismissal, the group accepted that sickness and reduced working capacity could amount to just cause for dismissal. In **Belgium** for instance, employees can be dismissed after six month of sick leave with no regard to their age but extended sick leave periods for older employees in the public sector do exist.

No specific rules applying on the access to fixed-term and part-time employment for older workers was reported. The 'pension norm' varied from country to country. In some countries and also in **France** the pension age had increased from 60 to 62. In other countries like **Sweden** there was no compulsory retirement before the age of 67. In **Portugal** it was asserted that there was no retirement age and there were restrictions on an employer's ability to dismiss workers between the ages of 65 and 70. **Poland** reported that, because of the reduction in pension benefits, it was expected that older workers would seek to stay in the labour market beyond the standard retirement age and on the other hand, the **Czech Republic** reported that Czech employees are trying to leave their working place as soon as possible and that the Czech society is not that much interested in an extended pension age.

## 6. Working Group Discussion Reports: Session 2- Age Discrimination, Retirement Conditions and Specific Labour Arrangements

### 6.1 Discussion questions

#### Working Group on 'Age Discrimination, Retirement Conditions and Specific Labour Arrangements' Friday 12 October: 10.00 – 11.15 hrs.

Questions to be discussed:

1. In relation to your Member State, do you think that national practices regarding the treatment of older workers are in compliance with EU Law? What are in your view the main problems in the implementation of Directive 2000/78 in your country as for age discrimination?
2. In your Member State, is the interpretation of the condition for admissible discriminatory treatment of older workers, related to «employment policies» (Art. 6 No. 1 of Directive 2000/78) made in a strict or in broad way? Do you think that a more strict interpretation of this condition is possible and by what means?
3. In your opinion, given its many limitations and exemptions, is the principle of non-discrimination in relation to age still of any use? And, if yes, in what sense?
4. What are your experiences concerning the prohibition of age discrimination in employment situations in relation to people 65+? Are their applications treated in the same way as the ones of younger applicants?

### 6.2 Working Group Discussion Reports

#### 6.2.1 Working group 1 chaired by Prof. Krassimira SREDKOVA

There was an open discussion within the working group.

The working group members agreed that age discrimination is a problem like any other discrimination. In accordance with gender discrimination, age discrimination problems are playing a bigger role and are not nearly solved like age discrimination problems.

Older employees are usually dismissed first and young, attractive people are preferred, although discrimination on the base of age is prohibited in all the EU Member States.

In **Malta**, most employees are not claiming anything when they are discriminated because of their age. Older people are often ashamed and they are often not aware of existing rules which are already established and very well prepared. All working group members confirmed the existence of rules against age discrimination but they are not really in use. In **Germany**, it is same as in other countries. The laws are in place but the content is very abstract and there is a wide range for interpretation. But in addition, there are often collective agreements and special arrangements for older people, especially regarding wage issues.

It must be stressed that older people are not welcome at the labour market and governments and other public bodies are now faced with reality. Employers prefer younger people and older people are not hired any more.

Job advertisements are often addressed to the younger generation. The expressions “being part of a young team” or “junior/senior position” are indicating hidden discrimination.

Employers avoid gender discrimination but age discrimination is still a reality.

The current protection of older employees is not enough. There is no special law within dismissal protection. Legislation is requested to change this problem.

In addition, the working group members stated that it is a prejudice that older employees are more on sick leave than employees from a younger generation. **Dutch** and **German** statistics showed that older employees are less absent than employees of our younger generation. But long-term sick leave and early retirement are present in the older generation and that is the difference between these two groups. Age discrimination of older women is also a matter which should be discussed in public debates. Employers often prefer young and attractive women than women from the older generation.

Another fact is that older employees are producing more costs. Higher age protection could cause some problems because of the employers’ fears of costs. But employers need to face that older employees are important for their company even though older people are earning more than youngsters. They are often high educated and they have a lot of work experience.

## 6.2.2 Working group 2 chaired by Rita CANAS DA SILVA

### 1. In relation to your Member State, do you think that national practices regarding the treatment of older workers are in compliance with EU Law? What are in your view the main problems in the implementation of Directive 2000/78 in your country as for age discrimination?

Ageism is frequently pointed out as the most common form of discrimination, entailing a significant obstacle to increased participation of older individuals in the labour market. In this regard, since Member States frequently make use of the allowed exceptions to the non-discrimination principle, different practices subsist at national level. The working group acknowledged that the protection granted to *age* appears as somewhat *weaker* than the one affected to other non-discrimination criteria, since, frequently, differential treatment on grounds of age is deemed to be justified: discrimination rules on grounds of age can be admitted not only in the light of the exercise of specific professional activities (as foreseen in Article 4 of the Directive, applicable not only to age but to all discriminatory factors), but also in the specific situations indicated in Article 6. And, in this regard, practical implementation of the principle largely depends upon Member States' national practices in a wide variety of areas (such as providing for special working conditions for certain categories of employees, facilitating recruitment or reducing the level of protection for special age groups).

In general, it was recognised that it is mainly up to Member States to decide and construe the criteria of '*legitimate objectives*' (related to employment policy, labour market or professional training policies), thus making it very difficult for the ECJ to assess the conformity of the adopted measures with the vague and general criteria set up in the Directive (Article 6). In this regard some specific examples were presented by the participants. In light of the ECJ case law, provisions that have been included for a long time in labour legislation might now need to be re-assessed. In **Portugal**, there are valid grounds to sustain the proportionality of the automatic conversion of an indefinite employment contract into a fixed-term one when an employee reaches the age of 70, but this assessment (i.e. conformity with the Directive of provisions scattered in labour legislation) appears as a recent topic of analyses. **Belgium** and **Italy** stated minor difficulties in relation to age discrimination. In **Belgium**, there is a specific problem related to white and blue collars workers, since the minimum level of remuneration in collective bargaining agreements is, in certain cases, linked to age. From a different view, seniority rules, although related to experience, might entail a distinction on the basis of age, but the ECJ seems to confirm the compatibility of such rules with the Directive. In **Italy**, it was pointed out that employment policies support younger as well as older employees and these guidelines often come into conflict with each other. It was, nevertheless, restated that these intersections might not be properly solved by the ECJ, nor at the EU level, since some scope of decision has to be left to Member States.

### 2. In your Member State, is the interpretation of the condition for admissible discriminatory treatment of older workers, related to «employment policies» (Art. 6 No. 1 of Directive 2000/78) made in a strict or in broad way? Do you think that a more strict interpretation of this condition is possible and by what means?

In this regard, the summary presented by Prof. do Rosário Palma Ramalho was noted: "*practical implementation of the principle at national level largely depends upon the Member States' (MS) interpretation of the criteria of «legitimate objectives» (...)*", given the fact that Article 6 expressly refers to those criteria at the national level"<sup>2</sup>.

<sup>2</sup> Key-note speech, p. 5.

Concerning Article 4, the ECJ takes a direct position on the alleged motive for the differential treatment (whether the motive is legitimate or means proportional – e.g. *Prigge* and *Wolf* cases). In contrast, regarding Article 6, the ECJ seems to accept that the employment policy that justifies the differential treatment on grounds of age lies within the competence of the Member States: the open-ended and national-oriented criteria included therein turn the Court assessment into a very difficult task. In this context, **Austria, France, Slovenia** and the **UK** agreed that, given its wide scope, Article 6 is difficult to scrutinise. In practice, the interpretation of the exceptions foreseen in this provision may vary significantly.

In reference to this provision, it was pointed-out that the ‘*employment policies*’ that justify such measures cannot (and, in fact, should not be) deeply assessed by the ECJ. Nevertheless, some participants argued that the interpretation should be stricter than it is now and that in this regard the role of the ECJ and of national courts should be strengthened in specific aspects: for example, evidence should be made in tighter terms.

Within the scope of Article 6, it was also noted that ECJ case law seems to follow a different approach in what relates, on one side, to retirement and termination rules and, on the other, to all other employment provisions (e.g. reduction of the employment protection at a certain age). In the first case, the ECJ seems to follow a more flexible test (e.g. *Palacios* and *Rosenbladt*), in contrast with other situations, where a tighter test seems to be followed (such as in *Mangold* or *Kücükdeveci*). It was also reported that in **France** age appears as a subsidiary argument in dismissal cases in lower courts. **Austria** pointed out that employers can invoke labour market policies in light of the provisions included in collective agreements.

**3. In your opinion, given its many limitations and exemptions, is the principle of non-discrimination in relation to age still of any use? And, if yes, in what sense?**

**Austria, Greece, the Netherlands, Portugal, Slovenia** and the **UK** agreed that despite all exceptions, the principle of non-discrimination on grounds of age is useful and valuable, especially in what concerns tackling negative stereotypes against older individuals. The **Netherlands** pointed out that the prohibition of age discrimination helps in overcoming the barriers of employing older people. **Austria** stated that despite various exceptions, the non-discrimination principle on grounds of age requires justifying the use of such exceptions and derogations and that appears to be extremely valuable: it gets us all questioning whether and why we should differentiate on the basis of age, imposing a justification of age-related policies. According to the **UK** the principle of non-discrimination is relevant in order to avoid practices previously in force which are now unquestionably unacceptable: the prohibition of age discrimination plays a relevant role in reducing ageism, premature dismissal of older employees and other detrimental decisions in the workplace. Nevertheless, in this regard, **Slovenia** stressed that although the discussion is often focused on older employees, age discrimination relates to young people as well as to the elderly, playing a relevant role at all ages. Accordingly, collective agreements or legislation should provide for different layers of employment protection, adequate to each age category – different legal status in accordance to the age-scale and each age group’s specific needs.

**Greece** pointed out, however, that given the current economic crisis, age discrimination does not appear to be a priority: given the high rates of unemployment the most important issue is to assure employment and to maintain/create labour posts, rather than analyse how to retain employees in the labour market until a later age. The high unemployment rates of Greece, Spain and Portugal flag the importance of saving labour posts and of creating new employment, regardless of the individual’s age.

**4. What are your experiences concerning the prohibition of age discrimination in employment situations in relation to people 65+? Are their applications treated in the same way as the ones of younger applicants?**

The working group agreed that applicants are being considered 'older' at an increasingly younger age, which is especially dramatic in an economic crisis. An employee of 45 years old is frequently considered as an 'old' employee (as indicated by **Portugal**). Member States are, therefore, aware that discriminatory practices exist towards increasingly younger employees and this fact should be addressed.

It was however, pointed out that the category of 'old employees' is a very wide one, and includes employees in very different situations and status: while some do need increased protection, others do not require specific concern. Some are entitled to adequate pensions, while others need to continue to work in order to be economically sustainable. It is therefore perhaps more correct to make reference to 'vulnerable' employees (in what concerns to age and discriminatory practices), rather than to 'young' or 'older' employees. In short, concerning the wide group of 'old' employees there are different layers and policies to take into account. Employees from different age categories may have different requirements from those employees who reach pensionable age (indicated by **Austria**).

**Italy** also mentioned the need to have incentives for employers to keep their employees and that employment policy should remain an exception to the age discrimination principle. Finally, **France, Italy** and **Portugal** agreed that improvement of skills and adequate life-long training should be introduced: employers should have specific obligations in this regard, throughout all of their employees' working lives.

### 6.2.3 Working group 3 chaired by Jean-Luc PUTZ

**1. In relation to your Member State, do you think that national practices regarding the treatment of older workers are in compliance with EU Law? What are in your view the main problems in the implementation of Directive 2000/78 in your country as for age discrimination?**

Most of the participants indicate that some practices in their country may be in conflict with Directive 2000/78, but also that most of these practices have justifications that may stand the test of the ECJ. Most of these problems are identified with respect of dismissal protection legislation. In **Italy** for instance there might be a justification problem with collective dismissal in which situation the employer is allowed to selection workers based on the fact that they approach the retirement age. In **France** the factor age has to be taken into account, however, this is for reasons of the labour market situation of older workers, meaning that they enjoy more protection. This could be unjustifiable, since young workers also face problems on the labour market. In **Austria** a practice is developed that employers try to dismiss workers at the age of 49, because from 50 onwards workers enjoy more protection. When it is taken into account that these workers face serious problems in finding new employment, as they not only enjoy more dismissal protection, but also are more expensive due to the seniority principle enshrined in the wage-system, it is unlikely that this practice can be justified.

Further considerations in relation to these questions relate to the application of a mandatory retirement age. In particular the case of the **UK** is discussed, where a mandatory retirement age is abolished by law, but introduced in certain agreements, for instance the agreement of the University of Oxford. Justifications for a mandatory retirement age are found in arguments of intergenerational solidarity (older workers leave the labour market to make way for younger workers) and dignity as a way out of the labour market. Both are arguments that have been accepted by the Supreme Court as legitimate aim that justifies the discrimination. In these situations also the chosen age is to be justified though. However, the question remains whether the ECJ will accept this too. In response to the argument of dignity, the Dutch participant notes that this is exactly the reason why it is still custom in the **Netherlands** to retire (voluntary) at the age of 65 when the employer is actually not willing to continue the employment relation. Would the employee not agree with the retirement, the employer will find a way to dismiss the employee, mostly based on non-function as the employee may have become slower.

Another example of practice that may stand the justification test of the ECJ comes from **Greece**. In case of a collective redundancy only a certain percentage of the workforce can be over the age of 65. As such this rule is considered to be a positive measure providing extra protection for older workers that is justified by their difficult labour market situation.

**2. In your Member State, is the interpretation for the condition for admissible discriminatory treatment of older workers, related to “employment policies” (Art. 6(1) Directive 2000/78) made in a strict or broad way. Do you think that a strict interpretation of this condition is possible and by what means?**

The general conclusion with respect to this question is that the participants are not aware of such provisions within their systems. For as far as measures exist, these provide either a simplification of the rules or offer more protection. In that sense there is apparently no fixed, single solution.

**3. In your opinion, given its many limitations and exemptions, is the principle of non-discrimination in relation to age still of any use? And, if yes, in what sense?**

The general sense is that the principle of non-discrimination in relation to age is still of use, however, at the same time it is acknowledged that age differs from other discrimination grounds and that it is therefore justified that it is treated differently. Furthermore it is argued that different treatment based on age often



seems to be accepted by society, hence, in many cases it is not even perceived as discrimination (indicated by **Ireland, Luxembourg, the Netherlands, Romania**). Something that in itself is considered as somewhat awkward when many of the used arguments have not been proven, for instance the intergenerational argument that older workers leaving the labour market make way for younger workers. Although this may only be the situation when viewed on macro-level, because on micro-level, thus within a certain company, this may very well work. The example is given of a law firm in the **UK** that applied a policy to dismiss senior lawyers when they reached the age of 64, in order to create career opportunities for junior lawyers. The dismissed senior was then offered a position as consultant in which role they guide the juniors in their careers. According to the **Italian** and **Romanian** participants, this practice of accepting justifications without supporting evidence, which is also applied by the ECJ, weakens this right. In their national systems it is a constitutional right that need more justification than is currently accepted by the ECJ. Another general remark arguing that age as discrimination ground differs from the others is the fact that not many cases on age discrimination are brought before the ECJ and national courts. Which is directly nuanced with the remark that this also may have to do with the fact that there are many justification options and that there is just a small chance of winning such a case.

More specific arguments for different treatment of age as non-discrimination ground concern the fact that age-based rules affect both young and old and those justifications therefore need to be carefully balanced (**Denmark** and **Luxembourg**). Another aspect of age is that it can either form discrimination with justification (often disadvantage for the protected) or it forms a positive action (to achieve a certain result for the protected). A distinction, according to the **Italian** participants, needs to be made carefully and consciously.

Other more specific arguments that have been brought forward indicate why the principle of non-discrimination in relation to age is still of use. In **Lithuania** for example employees may not be dismissed based on old age, unless the employee is entitled to pension. In **Denmark** age as non-discrimination ground is not only of importance in case of retirement, but also an important issue in redundancy (as selection criterion).

#### **4. What are your experiences concerning the prohibition of age discrimination in employment situations in relation to people 65+? Are there applications treated in the same way as the ones of younger applicants?**

**Austria** and **Luxembourg** indicate that not many workers over the age of 65 are still active in the labour market. As far as they would like to work, it is very difficult for workers over the age of 65 to get a job. In the **Netherlands** it is also difficult to stay employed after 65 because of a lack of legislation creating uncertainty about the rights and obligations. Another issue raised by the Dutch participant is the fact that many people of 65+ are happy to retire at the age of 65, indicating that the problem is a relatively small one. In **Italy** the problem of working after the age of 65 seems also a minor issue, since it affects mainly people in top positions that enjoy certain privileges. However, in some sectors, where there is a shortage of workers, measures are undertaken to make it more attractive and easy for workers to stay employed. This is for instance the case in **Finland** where they have a shortage of nurses. In order to keep them active also after the age of 65 they are employed on part-time contracts.

#### 6.2.4 Working group 4 chaired by Anthony KERR

There was an open discussion within the working group.

The group's work in this session was to reflect on the main problems in the implementation of Directive 2000/78/EC for age discrimination. The group did not dissent from the description of age discrimination as being the most prevalent form of discrimination in Europe. Especially **Denmark, Norway, Finland, Cyprus, the Netherlands** and the **Czech Republic** agreed that 'ageism' was a significant barrier to increasing the participation of older workers in the labour market.

It was pointed out that in **Norway** the retirement age is negotiated between employers and trade unions. In **Denmark** the Equality Agency monitors all discrimination cases with regard to the implementation of the Directive. **Cyprus** stressed that the Commission and the Member States had to consider the difference between a right and an obligation to retire. Much more empirical research needed to be undertaken. Many participants indicated that they were expecting to gain more experience from the Commission regarding this issue.

In the **Czech Republic** for instance, changes within the labour code regarding age discrimination and the non-discrimination principle are pretty new and universities and other public bodies are requested to publish more scientific literature.

## **7. Working group discussion reports: Session 3 – Young Versus Old or Intergenerational Solidarity?**

### **7.1 Discussion questions**

#### **Working Group on ‘Young Versus Old or Intergenerational Solidarity?’**

**Friday 12 October: 13.30 – 14.45 hrs.**

Questions to be discussed:

1. Is it possible to conceive and to implement employment policies which would be globally in favour both of younger and of older workers?
2. Is there a discrepancy or even a contradiction between the policies of managing better working conditions for old age workers and policies of lowering the retirement age?
3. Does your labour law code provide for contractual arrangements similar to the ones planned in France on the intergenerational contract or to the existing ones in France for seniors (+57)?
4. Are there important links between discriminations on the ground of age and discriminations on other grounds and especially with those on the ground of gender?

### **7.2 Working group discussion report**

#### **7.2.1 Working group 1 chaired by Prof. Krassimira SREDKOVA**

There was an open discussion within the working group.

All participants stated that there are often no work place replacements after retirement.

But sometimes, pensioners continue their work via fixed-term contracts without any career advancement opportunities. That is very dissatisfying, especially for younger employees with fixed-term contracts. Both groups are not able to reach higher job positions and younger employees are missing an adequate pension at the end of their working life.

**All working group members** stated that adequate pensions are very important. Reducing dismissal protection for economic reasons will be the wrong way.

Another problem was identified relative to guest workers because they do not have the same pension entitlements than locals. It is important to integrate these people, too.

Immigrants and guest workers should have the same terms and conditions as locals. Sometimes, immigrants and guest workers do not have any social insurance, because they were working without any contracts and/or official permission which is much cheaper for employers and their companies because of missing social insurance contributions.

Early retirement will not be a solution because this would cause low pensions. The employer's duty is to save work places for older employees as long as possible by creating good working conditions. But this has an effect on work places of the younger generation. Older employees would occupy these work places and keeping them at work would have an indirect effect on the unemployment rate of the younger generation.

It must be stressed that almost every state expects old-age provision from each employee but that is nearly impossible because of existing low-income markets. People in the low-income markets spend most of their money meeting basic needs.

The key elements of human security are economic developments and universal education.

We need to find a balance between human rights and economic developments. The European Union needs to find a global answer to these questions and issues. This process should give priority to the meeting of human needs and the fulfilment of basic human rights.

The principle of life-long education and training as the key to the strategic objective of social cohesion, active citizenship, personal and professional developments, adaptability and employability will be the right way.

## 7.2.2 Working group 2 chaired by Rita CANAS DA SILVA

### 1. Is it possible to conceive and to implement employment policies which would be globally in favour both of younger and of older workers?

The working group acknowledged:

- *Firstly*: employment policies for young and old employees are often in conflict. For example: (a) it is frequently argued that mandatory retirement at a certain age *promotes employment amongst younger workers*, but results, nevertheless, in *unemployment for older workers*; (b) lowering the retirement age might be seen as a way of *facilitating the hiring of young people*. However, it will *increase the social burden for future generations*.

- *Secondly*: as a rule, employment policies protect, alternatively, young or older employees, but usually not both at the same time. Different measures are included in favour of *young people* (by favouring their access to employment), while others are provided to benefit *older individuals* (as, for e.g., by facilitating the entry into force of a term employment contract with someone over a specific age in order to promote their employability – as in *Mangold*). It all seems to depend upon the employment policy to be carried out by each Member State, at a specific time.

In this context, a different approach was, however, suggested: *age* is not so much a problem as it is *vulnerability*. Instead of looking at the chronological age of individuals (and, namely, to the contrast between *young* versus *old* and all consequential intergenerational conflicts), one should look for the *vulnerable* individuals, who lack protection: the question should therefore be changed from ‘*which chronological age should be protected and in which terms?*’ into ‘*where is the disadvantage?*’. In fact, according to this perspective, maybe we should forget *age* all together (as indicated by the **UK**).

The impact of measures that might promote employment of young or older employees by reducing the level of protection granted to such categories raised a discussion on the efficiency of *flexicurity* policies. **Austria** pointed out that employers look for flexibility both in the beginning and at the end of the employment contract. However, *flexicurity* has still a different meaning amongst Member States, depending upon the level of employment protection and of the malleability already foreseen in each country. And some countries are now facing the downside effect of *flexibility*, since successful results depend upon a healthy Social Security scheme.

### 2. Is there a discrepancy or even a contradiction between the policies of managing better working conditions for old age workers and policies of lowering the retirement age?

In contrast to other discriminatory criteria (e.g. such as race, gender or nationality), *age* – as an identity element of each individual and given that each person is supposed to pass through all ages – appears as a more difficult factor to scrutinise (namely, concerning the selection of the age groups to be confronted). Providing for *better working conditions for older employees* is usually considered as part of the measures conceived to tackle *early abandonment* of employment. For this reason, the working group understood that improving/adapting the work environment taking into account the age of older employees appears to be more in line with a *rise* (rather than with a *decrease*) of the retirement age – i.e. as an incentive to continue to work until a later date.

In short, adequate working environment and postponement of retirement age shall be conceived as two pieces of the same puzzle. It seems, nevertheless, that, in practice, most Member States do not intersect these two elements yet. The working group noted that if better working conditions (including, in particular, long-life training) and pension norms are not in line, nothing will happen. Older employees require

appropriate rules, since they are not able to work in the same way as when they were younger. Thus, employment and labour rules need to accommodate these situations, taking into careful consideration fiscal and economic benefits. It was, nevertheless, once again pointed out that equally relevant (or even more important) than retaining older employees in their current labour posts is to create employment (more/new labour posts) for these categories. And this comes up as an essential factor, since the level of employment frequently does not suffice.

### **3. Does your labour law code provide for contractual arrangements similar to the ones planned in France on the intergenerational contract or to the existing ones in France for seniors (+57)?**

According to the keynote paper under discussion, special attention should be given to the recent **French** proposal of implementing professional security schemes at companies linking the employer, an employee over the age 55 and another under the age of 30, by way of exemptions (social and fiscal costs), allowing a senior employee at the end of his/her career to transmit his/her experience and know-how to a young new hire in some sort of win-win situation. This is presented as a solution that although addressed mostly to the youth (i.e. in order to tackle the high unemployment rate amongst young individuals) would not sacrifice older employees. Most participants agreed, however, that although the intergenerational contract sounds like a perfect idea, serious doubts remain in what concerns its practicability.

The idea to pass experiences to younger employees sounds good, but it seems like blue sky thinking and might not work in case of lack of incentives. The proposal needs to be clarified in order to be understood how it will work and to assess whether it will be efficient (as pointed out by **France**). It is, nevertheless, questionable whether older employees are the best possible tutors in so far as they are not necessarily the ones who best master the most advanced techniques (as previously stressed out in the keynote speech). In **Austria** similar regulations were used to get older people out of jobs in a socially agreeable way and not really to get young people in their place so the attitude towards the elderly did not really change.

At this point, the discussion turned into the relevance of seniority rules in Labour Law and whether such provisions should be viewed as an efficient way of providing for additional protection for older employees – without necessarily putting at stake labour posts of younger employees (for e.g. seniority rules as a criteria for severance payment). In **Latvia**, the employers seem to be in favour of the seniority's rationale and conceive it as a way of attracting older employees. According to a very different perspective, in **Austria**, seniority rules determine that when an employee ends an employment relationship and enters into a new contract with a different employer, the employee's previous seniority is transferred to his/her new employer, within the same branch of activity. This seems to have a negative impact on older employees' re-employment (normally the ones with increased seniority), since their minimum wages are higher than the ones of younger employees – and they all compete in the same labour market. Even though they might have more experience they are often thought as less efficient. Seniority rules, might, in accordance to this perspective, disincentivise older employees' re-engagement in new contracts.

In **Italy**, the importance of seniority schemes is contra productive to job evaluation based on productivity. Therefore, employers are pushed to invest in the flexible part of wages and encouraged to reduce its fixed amount.

### **4. Are there important links between discriminations on the ground of age and discriminations on other grounds and especially with those on the ground of gender?**

In this regard, two elements were pointed-out: 1) Dir. 2000/78/EC benefited considerably from previous developments in the EU law in the area of gender discrimination; 2) the relationship between age discrimination and gender discrimination is frequent and penalises in most cases women.

This seems to be the case in countries where part-time work plays a relevant role in employment – if women appear as a prevalent group amongst part-time employees, they are penalised at a later age, as a result of general pension formulas. In **Greece** the connection between age and gender discrimination is shown by its case law. Retirement rules state that an employee who meets the legal conditions for retirement can exit employment by resigning or being dismissed. In either case the employee receives a certain severance amount. This rule has been considered to be in compliance with the Framework Directive, since it pursues a legitimate aim. The connection with gender arises from the fact that the law provides for different pension age limits for men and women. Since women reach age limits first, they have fewer chances to remain in active employment for a longer period, when compared to men – which clearly intersects *age* and *gender discrimination*.

### 7.2.3 Working group 3 chaired by Jean-Luc PUTZ

#### 1. Is it possible to conceive and to implement employment policies which would be globally in favour both of younger and of older workers?

The **Belgium** participant argues that in particular lifelong learning policies as employment policy are aimed at both young and older workers. Although this affects younger and older workers positively, there is no direct link between the younger and older worker. Examples of such employment policies can be found though in **Luxembourg, France, Italy** and **Portugal**. In **Luxembourg** for instance an older worker can retire early if he/she is replaced by a younger worker ; this however is not frequently used in practice. In **France** and **Italy** special measures exist enabling the employer to dismiss an older worker if the replacement is a younger family member of that worker. In **France** it is discussed whether such practice is legal, however. In **Portugal** older workers (55+) are also replaced by younger workers in order to fight the high unemployment rates among young (35%). The older worker then becomes a coach of the younger worker.

#### 2. Is there a discrepancy or even a contradiction between the policies of managing better working conditions for old age workers and policies of lowering the retirement age?

During the discussion session a distinction was made between measures that aim to provide better working conditions for the individual worker, *i.e.* creating rights for older workers and those that are more general and aim to keep workers active in the labour market. In **Poland** for instance there is a tendency to increase the retirement age, however, there are many special schemes enabling early retirement, although the requirements therefore are becoming more restrictive. Since these specific schemes connect to specific jobs and individual employers are responsible for the execution thereof, these provide possibilities that could be considered as an individual right rather than a general policy. Another example comes from the **UK** where the employer is obliged to provide reasonable adjustments in case of disability or reduced working capacity that meets the individual situation of the worker. Reasonable includes the costs as well as the size of the company. Since disability and reduced working capacity are inherent to old age, this obligation could be considered as a right for better working conditions. More generally it is stressed that this policy is a result of the obligation for medical surveillance as foreseen in Article 14 of Directive 89/391 on Health and Safety (also mentioned by participants of **Italy** and **Belgium**).

Policies that are in the discussion considered to be more general in nature are for instance specific measures with respect to those that started to work very young (**France**), overtime and night work (**Belgium, France, Poland** and **the UK**), adjustment of working time (**Poland**) and extra holidays (**Poland**). The effectiveness of the latter two is discussed by a participant of the **Netherlands**, since a reduction of the working time or more holidays also have an aversive effect, since they may make the older workers more expensive than younger workers.

Lastly, the participant of the **Czech Republic** raises an issue that illustrates the tension in policies in this field. Due to the labour market situation the private sector provides in early retirement schemes for those who are unable to find new employment. This is considered as undesired as that would be contradictory to policies to encourage workers to stay active as long as possible, which are also known in the Czech situation. However, based on ILO Convention 158 it is also obliged to create possibilities of early retirement for those that are unable to find further employment, which is what these private schemes intent to meet.

#### 3. Does your labour law code provide for contractual arrangements similar to the ones planned in France on the intergenerational contract or to the existing ones in France for seniors (+57)?

No.



**4. Are there important links between discriminations on the ground of age and discriminations on other grounds and especially with those on the ground of gender?**

After some general considerations the conclusion of this working group is that age discrimination might be particularly susceptible for linking with other grounds of discrimination. These include gender, disability, atypical work forms (part-time work and fixed term work in particular) and possibly also members of trade unions as they are generally older workers. The consequence of linking with discrimination grounds should be multiple discrimination actions in which situation the strictest interpretation should be followed.

The linkage between age and disability seems a natural one, however, it also raises the question on the definition of 'disabled'. Does this also include health problems that are inherent to ageing? Also should a differentiation be made of the labour market resulting in a different treatment of sectors with specific work related illnesses?

The linkage age and atypical work affects young as well as older workers, as both are confronted with these forms of work and sometimes fall within other protection regimes.

The linkage between age and gender seems to cover many situations and in particular to affect women, both young and old. In this respect younger female workers are confronted with issues related to the reconciliation of work and private life, including career breaks when giving birth to children. Although in theory these problems are regulated and offer options, the practice is different and in some countries (example is given by a participant of **Italy**) still based on the traditional family-structures (man works; woman cares). As a result of this it is considered that women are confronted with pay-gaps and therefore also lower pensions, for instance because of a career break. Pay-gaps can also be the result of the fact that there are fewer women in top positions due the glass ceiling. Another gender-sensitive issue related to age is the fact that some jobs are 'looks' sensitive – *e.g.* modelling or presenting on TV – that are a result of customer demands and seem to be socially accepted forms of discrimination.

#### 7.2.4 Working group 4 chaired by Anthony KERR

There was an open discussion within the working group.

The group's work in this session was to reflect on the possibility to conceive and implement employment policies which would be in favour of both younger and older workers and on whether there is a contradiction between a policy of managing better working conditions for older workers and a policy of lowering the retirement age.

It was reported that there are similar contractual arrangements to the proposed 'Intergenerational Contract' in **France**. In **Belgium** for example such arrangements exist but are not appreciated by older workers. In **Cyprus** it was reported that older workers do not feel motivated and that the educational system might need to be changed to address this. In general, a flexibility of the system should be established, but without reducing the protection of rights and regulations.

The notion of quotas was discussed but with little enthusiasm for its introduction although it was reported that in **Portugal** quotas for disabled persons in the public sector were working well. In **Cyprus**, quotas for disabled persons were recently ruled unconstitutional where the disability arose during military service. The **Czech Republic** reported that it might be possible to introduce such a quota for older employees. **Norway**, however, was of the opinion that a quota system worked in changing people's views.

It was also pointed out that older workers are more expensive to employers than younger workers and that the differences in the social security system need to be combated.

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## 9. Annex

### 9.1 Keynote Papers

#### 9.1.1 Keynote Paper by Prof. Ann NUMHAUSER-HENNING

## **Labour Law in a Greying Labour Market – in Need of a Reconceptualisation of Work and Pension Norms**

*Prof. Dr. Ann Numhauser-Henning<sup>3</sup>  
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### 1. Introduction

The European Union declared 2012 as ‘The year of Active Ageing’<sup>4</sup> with the overall purpose to ‘promote active ageing and to better mobilize the potential of the rapidly growing population in their late 50s and above. Active ageing means creating better opportunities and working conditions for the participation of older workers in the labour market, combating social exclusion through fostering active participation in society and encouraging healthy ageing.’ These ambitions are also reflected in the ‘Europe 2020’ strategy<sup>5</sup> and the employment guidelines of 2010<sup>6</sup>. The EU 2020 Strategy thus focuses on meeting the challenge of promoting a healthy and active ageing population to achieve social cohesion and higher productivity. According to employment guidelines 7 and 8, Member States are urged to increase labour market participation of individuals 50 and older by introducing policies of active ageing based on new forms of work organisation and life-long learning. Guideline 10 underlines the importance of effective social security and integration policies to empower individuals and prevent social exclusion.

The rationale behind this strategy is the demographic shift resulting from an increasingly ageing population which challenges economic sustainability in terms of employment, pensions and health care systems, as well as overall social cohesion in terms of intergenerational solidarity.<sup>7</sup>

The period 2015-2035 will be crucial since the post-war generation (the ‘baby boom generation’) will reach pensionable age. Social sustainability requires increased labour market participation for healthy, elderly individuals who live an active and independent life. The 2012 Ageing Report presents a picture of the economic developments that could result from an ageing population in a ‘no-policy change’ scenario and details the expenditure projections covering pensions, health care, long-term care, education and unemployment transfers for all Member States. On average, age-related public expenditures are expected

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<sup>4</sup> Decision 940/2011/EU 14 September 2011 by the European Parliament and the Council, EUT L 246.

<sup>5</sup> COM (2010) 2020 final.

<sup>6</sup> Council decision 2010/707/EU of 21 October 2010, later extended to 2011, 2012, compare Council decision 2012/238/EU of 26 April 2012.

<sup>7</sup> See the 2012 Ageing Report, Economic and budgetary projections for the 27 EU Member States (2010-2060), as well as the 2009 report on ‘Intergenerational solidarity’.

to increase by 4.1% to around 29% of GDP, and public pension expenditure by 1.5% to nearly 13% of GDP by 2060. There is, however, a significant disparity across EU Member States. The overall scenario is that fertility rates are expected to rise slightly from 1.59 in 2010 to 1.71 in 2060<sup>8</sup>, whereas life expectancy during the same period will increase by about 8 years for men and 6.5 years for women. This, and continued but decelerating inward migration to the EU will result in a slight increase of the total EU population up to 2040, and decline thereafter. By 2060, the share of young people (0-14) will remain fairly constant while the group of those aged 15-64 will become considerably smaller (a reduction from 67% to 56%). Those aged 65 and above will represent a much larger share of the population (rising from 17% to 30%). The number of persons aged 80 and above will come close to the group of 0-14 year olds (rising from 5% to 12%). The economic dependency ratio (persons aged 65 or above relative to those aged 15-64) will thus double, shifting from four working age persons for every person over 65 to only two working age persons. Work participation rates are expected to increase significantly – most notably among workers aged 55-64 years and women – and unemployment rates are expected to decrease and converge with structural unemployment rates. Female employment and the employment rate of older workers are projected to reach a steady state as early as 2022 – thereafter, the ageing effect will dominate. Total factor productivity is assumed to converge into a long-term historical EU average of 1%. It is also anticipated that labour productivity growth will become the sole source of potential output growth in both the EU and the euro zone, starting to converge into a labour productivity growth rate of 1.5%.

There are thus considerable economic and instrumental interests behind the EU's ambitions to promote active ageing. The aspect of human rights also plays a role in this regard, as reflected in the Lisbon Treaty and its 'European Social Market Economy' as well as the EU Charter of Fundamental Rights Articles 21 and 25 on non-discrimination and the social inclusion of the elderly.

Increased labour market participation of people aged 55+ is only one aspect—albeit a very important one—of active ageing and is the main focus of this paper.<sup>9</sup> Life expectancy has risen over the years, yet at the same time, workers are increasingly leaving the labour market prematurely. The key issue from a working life perspective is thus (1) how to make people continue working until they reach pensionable age, (2) how to make people to work beyond their pensionable age, and (3) how to facilitate access to employment for older workers. This paper will address these issues. There is an obvious overlap with the other two key topics of this conference: 1) Age discrimination, retirement conditions and specific labour arrangements and 2) Intergenerational solidarity. The primary focus will therefore be on questions (1) and (3).

There are substantial as well as attitudinal obstacles to increased labour market participation of people aged 55+. The traditional approach to organising the labour market represents an impediment in many ways, both in terms of regulation and factual operation. Working life is traditionally restricted by rules on – more or less – compulsory retirement at a certain age related to public as well as occupational pension systems. However, the organisation of working life with its requirements in terms of productivity reflected in working environment conditions, working time arrangements and knowledge turnover has tended to marginalise older workers, including those who have not yet reached the normal pensionable age, thus creating long-term unemployment among people aged 55+ as well as costly pre-retirement schemes. These practices are accompanied by social norms that support the functioning of the system – some of which are discussed in this paper and referred to as 'pension norms' – as well as by discriminatory perceptions and behaviour on behalf of, among others, employers, which amounts to 'ageism'.<sup>10</sup>

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<sup>8</sup> A fertility rate of 2.1 is necessary for the population to reproduce itself!

<sup>9</sup> The other four out of five target areas are: (1) dignity, independence and influence, (2) social integration, (3) health related activities and (4) independent living.

<sup>10</sup> Ageism is basically a synonym for age discrimination and refers to beliefs, attitudes, norms and values to justify age-based prejudice, discrimination and subordination. It may be casual or systematic. Compare Nelson, T (ed.), *Ageism: Stereotyping and Prejudice against Older People*, MIT Press 2002.

Throughout this paper, I will thus discuss the legal position of older workers and potential workers in relation to the three main questions posed above and the normative challenges involved. The issue of non-discrimination on the grounds of age is, of course, relevant for all these aspects. So are pension norms – understood as general perceptions of when to leave working life. Pension norms are crucial for retirement behaviour and thus to the potential success of active ageing strategies. In Section 3 I will address this as well as non-discrimination as a means to promote the work-life balance and active ageing and the need to change the hitherto hegemonic perceptions of both productive work and workers to one that is more flexible with a life course-oriented view on work, but also the normative conflicts this may imply.

## **2. Greying Labour Market ...**

### **2.1 How to make people work until they reach pensionable age**

There is a significant disparity among EU Member States when it comes to labour market participation of older persons. This partly reflects differences in public and private pension schemes, but also country-specific economic structures and ‘the realities’ of working life in terms of productivity requirements and different types of ageism resulting in difficulties for older workers to both obtain and retain jobs. The ‘marginalisation’ of older workers differs considerably among countries and various branches of work, but the average age for leaving working life in all Member States is more or less far from the ‘normal’ pensionable age. According to the 2012 Ageing Report, the average labour market exit age in the EU-27 was 61.4 years in 2009 – and was slightly higher for men (61.8) than for women (61). Despite a tendency to work longer, the employment rate of persons aged 55-64 years in the EU-27 thus increased from 36.9% in 2000 to 46.0% in 2009, according to the EU Labour Force Survey, and access to early retirement schemes is, generally speaking, presumed to be considerably restricted in the future<sup>11</sup> – the predicted exit age for 2060 is still ‘only’ 64.3 years. Ensuring that people work until they reach the ‘normal’ pensionable age and thus preventing early retirement and other forms of premature ‘resigning’ is thus the most important objective to making active ageing a reality.<sup>12</sup>

Working conditions have thus hitherto tended to ‘marginalise’ older workers. Premature resigning is a consequence of physically demanding work, but also of a poor psycho-social environment and deficient work organisation, such as working time arrangements and access to life-long learning. In Sweden, as is the case in most countries, the risk of death is higher among fixed-term workers as compared to workers in permanent employment. This risk is also higher among low-skilled workers as compared to workers with a higher education.<sup>13</sup> People with low skills are more likely to have physically demanding and repetitive work with high levels of stress and little or no influence on the work. Older workers tend to be over-represented in all these categories, and there is also a clear gender bias to the detriment of women with regard to working conditions.

Existing negative stereotypes of older workers and their abilities are often based on ‘old truths’. Yet reality changes. Physical working conditions have improved. A service society entails other demands than an industrial society. Studies show that older people are becoming smarter in the sense that later generations are smarter than those hitherto. They are also more educated. Older people are also becoming increasingly healthier. There is thus, generally speaking, ‘room’ for a longer working life. And individual characteristics as well as specific working conditions are known to be of greater importance for the ability to work than chronological age as such.

*Work environment legislation* has gone from targeting physical conditions and preventing occupational diseases to covering the psycho-social elements of work. First, rules prohibiting vulnerable groups such as

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<sup>11</sup> 2012 Ageing Report, p. 39.

<sup>12</sup> Compare the conclusion of the Swedish Governmental ‘Pensionable Age Inquiry’, SOU 2012:28 *Längre liv längre arbetsliv*, p. 17.

<sup>13</sup> SOU 2012:28 p 112.



women and children from certain lines of work were introduced. Shortly thereafter, rules on both the duration of work and the work environment were elaborated with a view to both preventing occupational injuries and promoting health and safety more generally. Over time – and adapting to general labour market developments from an industrial to a service, information and knowledge society – the concept of working environment has broadened and along with it employers' obligations. The concept of a 'good working environment' now covers not only physical dangers, but work organisation, psychological risks or harassment from work colleagues as well. Regulations may also include a duty to adapt the working conditions to the individual, thus fostering the employees' health and personal as well as occupational development.

These developments and the broad notion of a (good) working environment is reflected in international instruments. Hence, the ILO Occupational Safety and Health Convention No. 155 from 1981 clearly states that the employer's health and safety policies must take the relationships between the material elements of work and the very persons who carry them out into account, adapting working time, organisation of work and work processes not only to the physical, but also to the mental capacities of the workers. Another important development is the concept of 'decent work' launched by the ILO in 1999. 'Decent work' encompasses four different elements: employment, social protection, workers' rights and social dialogue. The concept has both qualitative and quantitative components and applies to workers in a broad sense. It embraces safety at work and healthy working conditions as well as social security and income security.<sup>14</sup>

The developments described above are also reflected in EU policies. From an early stage, the European Economic Community took a global approach to the health and safety of workers. The European Coal and Steel Community introduced important initiatives as early as 1951 to improve health and safety, particularly in the coal mines of Europe, but also in other extractive industries. A first Community action programme covered the period 1978-82 and was followed by subsequent programmes.<sup>15</sup> The adoption of the Single European Act in 1987 provided an explicit foundation for the adoption of instruments on health and safety at work within the qualified majority voting rules. The Community Charter of the Fundamental Social Rights of Workers was adopted in 1989. Later developments from the Maastricht and Amsterdam Treaties to the Nice Treaty further consolidated these regulations and a growing number of instruments now exist, the most prominent being the Council Directive on the Safety and Health of Workers at Work.<sup>16</sup> Moreover, Articles 31 and 34 of the EU Charter of Fundamental Rights establish the individual's right to healthy working conditions and protection against industrial accidents through social insurance. Article 31 of the EU Charter of Fundamental Rights maintains that 'every worker has the right to working conditions which respect his or her health, safety and dignity'. In its Communication 'Improving quality and productivity at work: Community strategy 2007-2012 on health and safety at work', the Commission takes a broad perspective on health and safety at work and, in particular, identifies the ageing of the working population, equality between women and men as well as migration as important challenges. Finally, the activities of the European social partners cannot be disregarded, though I will not address them in detail here.

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<sup>14</sup> [www.ilo.org/global/about-the-ilo/decent-work-agenda/lang--en/index.htm](http://www.ilo.org/global/about-the-ilo/decent-work-agenda/lang--en/index.htm) accessed 08-27-2012.

<sup>15</sup> The first two action programmes resulted in a number of directives concerning specific occupational risks such as Directive 78/610/EEC on the approximation of the laws, regulations and administrative provisions of the Member States on the protection of the health of workers exposed to vinyl chloride monomer, Directive 80/1107/EEC on the protection of workers against risks related to exposure to chemical, physical and biological agents at work, Directive 82/605/EEC on the protection of workers from the risks related to exposure to metallic lead and its ionic compounds at work, Directive 83/477/EEC on the protection of workers from the risks related to exposure to asbestos at work and Directive 86/188/EEC on the protection of workers from the risks related to exposure to noise at work.

<sup>16</sup> OJ 1989 No. L 183/1.

Within this legal framework – and, of course, complementary national legislation – working conditions should and can be adapted to the needs of older workers. We need to focus more on ‘healthy ageing’ and also on how to make a longer working life more attractive for the individual. Not only physically demanding but also tedious and repetitive low-quality jobs cause premature exits from the labour market. And, as has already been mentioned above, there is the gender bias. Though it seems that there have been improvements in recent years as regards the physical work environment, the problems associated with the psycho-social environment have rather increased. This development has been particularly detrimental to women’s health.

The work capability of older workers is generally influenced by work experiences throughout working life. The basic conditions for maintaining a worker’s work capability are the same for older workers as for young ones: a safe economy, good health, good social network on the job and outside of work, meaningful employment, influence on the job, a reasonable workload and opportunities to make use of one’s capabilities and to acquire new ones.<sup>17</sup> Older workers tend to compensate a slower pace with higher motivation, more experience and better overall judgement as well as stronger loyalty with reference to their activities and less absence. Also, their ability to prioritise, their self-reflection and patience are under-evaluated capacities. Older workers may – this has not been fully proven – be more exposed though when it comes to very long working hours and ‘around-the-clock’ work organisation.

Whereas work is increasingly (though far from sufficiently) being adapted to the needs of certain groups in terms of work-family balance or accommodating the disabled, specific measures or adaptations for older workers are still relatively scarce. This is, however, not the case in Finland, where ambitious work programmes incorporate age management, are a response to the post-war baby boom and are based on a study of Professor Juhani Ilmarinen.<sup>18</sup> Ilmarinen concluded that action was necessary at the individual, organisational as well as societal level and that management is a key factor. The Finnish Institute of Occupational Health has been conducting management education in terms of *age* or *generation management* since the late 1990s. A recent report, however, reveals that 20% of employers worldwide implement a strategy to retain workers aged 50+.<sup>19</sup>

The *design of employment protection measures* is of particular significance with reference to premature resigning. The existence of seniority rules make older workers – who have longer periods of qualifying employment – less vulnerable to redundancy. In Sweden, people aged 60-64 years were only marginally affected by the financial crisis of 2008-2009 due to the applicable seniority rules.<sup>20</sup> It could be argued that such rules constitute indirect age discrimination. The Advocate General in the case *Kücükdevici* seemingly accepted such rules, however.<sup>21</sup> Other aspects of employment protection regulation may – as collectively bargained pre-retirement schemes often do – have other effects. To what extent sickness and reduced working capacity amounts to just cause for dismissal on personal grounds differs between the Member States.

Other aspects of the system such as seniority wage setting practices<sup>22</sup> and the design of occupational pension schemes tend to work to the detriment of active ageing. The Swedish ‘Pensionable Age Inquiry’

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<sup>17</sup> SOU 2012:28 p. 132.

<sup>18</sup> Juhani Ilmarinen, *Ageing workers in the European Union – Status and promotion of work ability, employability and employment*, Finnish Institute of Occupational Health, Ministry of Social Affairs and Health, Ministry of Labour, 2001.

<sup>19</sup> *Older workers recruiting and retention survey*, Global results, Manpower 2012.

<sup>20</sup> SOU 2012:28, p. 149.

<sup>21</sup> Case C-555/07, p. 43 in the Opinion.

<sup>22</sup> Compare, however, the CJEU case *Sabine Hennigs v. Eisenbahn-Bundesamt and Land Berlin* C-297/10, where a collective agreement determining the basic pay step for an employee upon appointment merely by

found that occupational pension schemes frequently include the possibility of pre-retirement (at the cost of the implied collectivity as well as tax subsidies) in situations of redundancy.<sup>23</sup> Moreover, the costs of occupational pension schemes for persons in their sixties were four times higher than those for 40-year olds, making employers more reluctant to employ older workers.<sup>24</sup> There is thus a need to modify the rules of both public and occupational pension schemes to purport a longer working life and reduce early retirement.

Older workers are also known to often be sidestepped when it comes to on-the-job competence development and even with regard to public competence development measures. Pension norms induce such behaviour. Such training must also be accessible and economically relevant for older workers.

*Ageism* has been said to be the most important obstacle preventing older persons from working longer.<sup>25</sup> As was already indicated, not only reality but also a lack of knowledge about the actual capabilities of older workers fosters ageism. Biologic age up to 70 or even older is a scientifically poor method of assessing the physical, psychological or social capability of an individual. Moreover, individual differences in terms of capability tend to increase with age. The prohibition of age discrimination, introduced by the Amsterdam Treaty and the 2000/78/EC Framework Directive, undoubtedly helps reduce ageism and decreases premature dismissal of older workers along with seniority rules. As is the case with sex discrimination, the most efficient way to come to terms with age discrimination is to increase the representation of the discriminated group, i.e., older workers, in the work places.

Not only working conditions and labour law, but complementary systems such as *taxation and social benefits* must be introduced as well to induce individuals to continue working.<sup>26</sup> Through the open method of coordination on social protection and social inclusion, the EU supports, monitors and assesses the implementation and impact of national reforms of retirement pensions and ensures the long-term sustainability of pension systems, including the provision of effective incentives for later retirement. EU strategies also promote voluntary work of older people.<sup>27</sup>

## 2.2 How to make people work beyond their pensionable age

First, if the issue addressed in this section is to make sense, it is a prerequisite for people to be working when they reach pensionable age, i.e., the issue discussed in Section 2.1.

What do we mean by pensionable age? Generally speaking, the age for retirement benefits within the public pension scheme (in place in all EU Member States!) is what we perceive as the ‘normal pensionable age’. (A full pension can, however, also be attained before such an indicated age in many systems, provided a certain number of qualifying working years have been accumulated!) In case no explicit age is specified, as is the case in the Swedish system, the pensionable age is usually - similar to the approach of the OECD - determined by the age at which the individual becomes entitled to guaranteed/basic pension benefits. When no such specific age has been determined, either, the pensionable age is – according to the OECD –

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reference to that employee’s age was found to be inconsistent with the 2000/78/EC Framework Directive on age discrimination.

<sup>23</sup> SOU 2012:28, p. 20.

<sup>24</sup> Ibid., p. 24.

<sup>25</sup> SOU 2012:28, p. 22.

<sup>26</sup> In the Swedish case, social reforms concerning sickness as well as unemployment benefits aimed to help reduce premature exits from the labour market considerably, SOU 2012:28, p. 90f. During the nineties, substantial restrictions were also introduced on the right to pre-retirement, *ibid.*, p. 148 f.

<sup>27</sup> Compare the Council Decision of 27 November 2009 on the European Year of Voluntary Activities Promoting Active Citizenship (2011), OJ L 017 of 22 January 2010.

related to average lifetime developments and some countries (Denmark, Greece) have already decided to link their pensionable age to lifetime developments.

The discourse on active ageing has hitherto primarily evolved around the question of what the ‘normal’ pensionable age needs to be for a future sustainable society. There undoubtedly is an economic and societal need for longer working lives and consequently, a raise in pensionable age is necessary as the dependency ratio increases with life expectancy. Unless we succeed in meeting these requirements, intergenerational solidarity will be put to the test and pensions are sure to decrease. If pensions decrease, we will face increasingly severe problems with poverty and social exclusion. It goes beyond the scope of this short paper, however, to discuss ‘the appropriate pensionable age’ as such – this is an issue which currently lies at the core of many delicate reform processes across Europe, leading to political strikes and upheaval, demonstrating that pension rights are not only perceived as social rights but as property rights in the form of postponed income as well. The focus of this paper is on the overall question whether a (more or less) set pensionable age should be established and whether this also implies the acceptance of compulsory retirement. We will return to discuss these issues from a normative perspective in Section 3.1 below.

One important question that needs to be considered if our objective is to ensure that people work beyond their pensionable age is to what extent they have the opportunity to do so. From a legal perspective, this relates to the crucial question whether compulsory retirement should be accepted despite the general ban on age discrimination.

EU law addresses these issues in Directive 2000/78/EC on the Framework of Equal Treatment<sup>28</sup> which deals with non-discrimination in working life on, among others, the grounds of age. The Directive does not include the general social welfare question of pensionable age – compare its Preamble 14. The issue of compulsory retirement at a certain age is, however, covered and has also been dealt with in a number of the CJEU’s judgments.<sup>29</sup> It must be noted that the Court, in principle, deems compulsory retirement practices to be age discrimination. However, the rather broadly stated exemption in the Directive’s Article 6.1 has resulted in a situation in which the CJEU seems to have accepted the concept of compulsory retirement – and hence an important component of the prevailing pension norm (compare Section 3.1 below). Such a practice must thus be legitimate in terms of employment policy, labour market and vocational training objectives and the means implemented to achieve that aim need to be appropriate and necessary. The legitimate aims for compulsory retirement which have so far been accepted by the CJEU are intergenerational fairness in terms of access to employment, prevention of humiliating forms of employment termination and a reasonable balance between the labour market and budgetary concerns. *Palacios de la Villa* seems to make the case that the legitimacy of compulsory retirement should be dependent on the existence of a ‘reasonable’ pension for individuals. The latter case *Rosenblatt*, however, demonstrates that there really is no room to scrutinise the actual level of pension benefits – the case concerned a part-time cleaner who received a fairly inadequate pension in absolute terms - but rather at system level. That the amount of retirement pension at stake cannot be taken into account at the individual level becomes even clearer in the *Hörfeldt* case.

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<sup>28</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ 2000 L 303, p. 16.

<sup>29</sup> See *Palacios de la Villa v. Cortefiel Servicios SA*, C-411/05, *Age Concern England v. Secretary of State for Business, Enterprise and Regulatory Reform*, C-388/07, *Rosenblatt v. Oellerking Gebäudereinigungsges mbH*, C-45/09, *Georgiev v. Technicheski Universitet, Sofia*, C-250/09 and C-268/09 and *Fuchs and Köhler v. Land Hessen*, C-159/10 and C-160/10. See also *Petersen v. Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe*, C-341/08, *Ole Andersen v. Region Syddanmark*, C-499/08, *Prigge v. Deutsche Luthansa AB*, C-447/09 and *Hörfeldt v. Posten Meddelande AB*, C-141/11.

*Rosenblatt* reflects the interesting relationship between compulsory retirement and access to employment in general. So does to a smaller extent *Hörnfeldt*. We will return to this issue in the next section.

Compulsory retirement entails abolishing employment protection at a certain age. The legitimacy of such practices is not only reflected in the CJEU's case law on compulsory retirement – national rules on reduced employment protection beyond 'normal pensionable age' are also known to exist. This is the case in Sweden, where an individual who is aged 67+ is deprived of – not just cause requirements in general – but of notice periods that are longer than one month, the protection of seniority rules and the right to re-employment. Whether this is acceptable for the CJEU remains to be seen.

A pension norm which implies that retirement reflects a personal choice on behalf of the individual requires the abolition of compulsory retirement. As already demonstrated in the CJEU's case law, compulsory retirement is closely related to employment protection measures. One accepted argument in favour of compulsory retirement is thus to avoid a practice in which the termination of working life is, as a general rule, based on the 'disqualification' of the older worker. An abolition of the rule of compulsory retirement also risks diminishing the worker's employment protection before he or she reaches retirement age. This has been widely debated, at least in Sweden.<sup>30</sup>

Finally, even if the obstacles mentioned above were eliminated, if the objective to ensure that people work beyond their pensionable age is to be met, older potential workers must be willing to do so. This, too, is an issue which is closely connected to the prevailing pension norms but also, of course, to the working conditions and the situation of the individual more generally.

Pension norms are thus reflected in both public and occupational pension schemes. The Swedish Pensionable Age Inquiry has found that pension scheme design in general represents a poverty trap for the group of workers with the lowest remuneration, making post-retirement work of little or no economic interest. There are also no incitements for workers with high wages aged 65+ to continue working since no occupational pension premiums are paid beyond this age. Moreover, not all occupational schemes allow working simultaneously with pension benefits.<sup>31</sup> Furthermore, social security benefits are generally not geared at supporting an individual's choice to continue working after retirement age. In Sweden, for example, sickness pay and unemployment benefits are not necessarily available to people beyond pensionable age, making the choice to continue working less appealing.

A key question in this context is, of course, whether a longer working life also implies an improved *quality of life* for the individual? This question is closely related to the one discussed in Section 2.1 about working conditions and the quality of work. For workers in low-quality and demanding jobs the non-economic reasons to continue working are few. But for the increasing number of older workers in less physically demanding and 'higher quality' jobs continued labour market participation may certainly positively influence both their health and cognitive capabilities, as well as their social life and quality of life in general. Prolonged work participation among older persons may well require – as was also discussed in Section 2.1 above – special arrangements, not only in physical terms but also in terms of work organisation, working time arrangements and specific provisions with regard to leave.

There are many reasons why individuals would want to work longer in this day and age, such as better health, higher education (and therefore good quality jobs), longer holidays, generous parental leave systems and longer education/late work entry. The desire for a longer working life may well be an expectation of modern elderly life – an opportunity to contribute one's experiences to society. If we want people to work beyond pensionable age, this must apply to the majority of workers.

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<sup>30</sup> Compare SOU 2012:28, Ch. 17.

<sup>31</sup> SOU 2012:28, p. 20.

### 2.3 How to facilitate access to employment for older workers

Once an older worker is laid off it is much more difficult for them to obtain a new employment. Older workers are also more frequently employed in flexible work arrangements, i.e., fixed-term work. This is especially true for those aged 65+. While as many as 75% of employed men and 87% of employed women in Sweden aged between 55-64 held a permanent position, only 25% of men and 35% of women aged between 65-74 did.<sup>32</sup> Persons aged 65+ also, to a great extent, work part-time.

As briefly mentioned in Section 2.2, employment protection measures are often designed to protect older workers. This is the case with seniority rules. Rules on the right to re-employment –as in Sweden – which require an employer to re-hire individuals who lost their jobs due to redundancy facilitate access to employment for older workers. In Sweden these rules, too, are designed as seniority rules – the individual with the longest qualifying employment period prior to being laid off is the first to be re-hired. Such rules undoubtedly support employment retention. It has been argued, however, that such rules instead work to the detriment of active ageing when it comes to the employment of older workers more generally.

In *Rosenbladt*, the Court, accepting compulsory retirement, explicitly referred to the employee in question as having the opportunity to seek new employment – even with her former employer – and her right to not be discriminated against in such a situation. The ban on age discrimination is, of course, an important measure when it comes to facilitating employment for older workers. The impact of long-established negative stereotypes about older workers and their ability to work should not be underestimated. In practice, differential treatment of employment applications from individuals aged 65-68+ is probably still commonplace in EU Member States. Hitherto, case law has also revealed that the practice of offering fixed-term employment contracts to individuals who have reached pensionable age is both frequent and acceptable.<sup>33</sup> In the early case *Mangold*<sup>34</sup>, however, fixed-term employment on the grounds alone that the employee had reached the age of 52 was ruled to be disproportionate. Furthermore, the EU Commission, which initiated an infringement process against Sweden for not implementing the Fixed-term Work Directive 99/70/EC,<sup>35</sup> criticised that the Swedish Employment Protection Act permitted successive fixed-term employment contracts for persons aged 67+ without any limitations.<sup>36</sup> This may formally contravene the Directive, but it is, in my opinion, difficult to understand what benefit can really be gained by restricting fixed-term employment to, for instance, two or three periods within one year.<sup>37</sup> It will surely not promote post-retirement employment and it is difficult to understand how precisely it will support the individual. The possibility of fixed-term employment contracts clearly facilitates employment – and not only of older workers.

Occupational scheme design, as indicated above, frequently makes it very expensive to employ (and retain) older workers.

Social security design is generally important as well when it comes to access to employment for older workers, as are specific fiscal incentives to this end. In Sweden – since 2007 – no social contributions, but only pension contributions (10,21%) are paid for those aged 65 or older. The amount of social contributions an employer has to pay when hiring long-term (6 months+) unemployed persons aged 55-64 are also lower, a reform which was introduced to promote the labour market integration of such individuals (*nystartsjobb*). These are only some examples of strategies frequently used throughout the EU and its Member States.

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<sup>32</sup> SOU 2012:28, p. 150 f.

<sup>33</sup> *Georgiev* as well as *Fuchs and Köhler*. See also *Hörnfeldt*.

<sup>34</sup> *Mangold* C-144/04.

<sup>35</sup> The Council's Directive 99/70/EC on the Framework Agreement on Fixed-term Work.

<sup>36</sup> Compare the Commission's MEMO/08/69, 31/01/2008.

<sup>37</sup> Compare again *Georgiev* and *Fuchs and Köhler*.

### 3. ...A Normative Challenge

#### 3.1 Questioning pension norms...

Pension norms in the sense of general perceptions on when to exit working life are evidently crucial to retirement behaviour. General societal perceptions on when it is time for a person to retire thus also play a crucial role for the potential success of active ageing policies which we are discussing here. The actually stipulated age requirements in different situations in relevant pension schemes can, of course, be said to be decisive for much of 'pension behaviour', but these schemes and how they interrelate with both other parts of the public sphere and the social security system, as well as with working life in general and labour law in particular influence our perceptions of what is acceptable, recommendable and to be expected when it comes to retirement.

Public pension schemes gradually developed as a complementary system to wage work. Pensions have evolved over 100 years from basically an invalidity benefit to a welfare benefit, covering a socially legitimate period of 'otium cum dignitate' at the end of the individual's working life. Life has become structured in three separate phases. The central part of life is 'active working life', which is decisive for an individual's living conditions both before and after this period. Children's living conditions are, to a great extent, determined by those of their economically active parents and a worker's 'afterlife' – the years following retirement – is also determined by the income earned during his or her active working years. Social and normative perceptions are developed around those factual circumstances. Children and young people are not supposed to work – they should receive an education for their future working life. Older people must and should not work. Pension benefits are a social right for all people above a certain age, regardless of their health and ability to work. This is a social good in welfare society, but to a considerable extent also a consequence of working life requirements in industrial society hitherto. The intergenerational argument that older people must stand down to make room for young ones is also prevalent.

Generally applicable pension schemes and the development that individuals are, in practice, being marginalised at an increasingly younger age, in parallel with increased longevity and better health has added to the normative perception of retirement – and even pre-retirement - as a welfare right. This has been a necessity, legitimising lay-offs at an early age.

According to this prevailing pension norm, there is '*a right and a duty to retire at a certain age*'. And should a worker be laid-off before reaching the normal pensionable age, this may well be conceived as a social good. These normative conceptions are a major challenge to contemporary society. Rising life expectancy combined with low birth rates implies a changing balance between younger and older people. The expected future dependency ratio and the need for long-term sustainable and adequate pensions make a 'greying labour market' a necessity. And the post-industrial and service society makes it increasingly realistic for people to work longer. Moreover, economists in general agree that there is no need for older workers to leave the labour market to make room for younger ones. The higher the number of people working, the higher the level of remuneration, which opens the door for increasing demand, production and, thus, employment.

The question now is what age is an appropriate pensionable age and must/should there even be a set pensionable age that is applicable for all. There is no obvious answer to this question. Of course, active ageing policies clearly state that pensionable age needs to be higher than the current level and should possibly also be more individualised. There are a number of rules in both labour law and complementary social security systems that work to contravene these objectives.

Should the prevailing pension norm be modified to assert that '*you have both a right and a duty to work according to your abilities*'? (Such a norm seems to be the predominant one in Japan.) And eventually '*to*

*retire is a personal/individual choice*? Retirement should reflect a personal choice rather than a social order. As has already been indicated, such a change will not come about easily.<sup>38</sup> At the same time, for this to happen, people will have to adopt a new attitude toward retirement. It thus requires the establishment of a more sustainable or 'good quality' working life throughout a worker's life, as well as opportunities for life-long learning for all, regardless of age. The currently prevailing pension norm contrasts with the view on work for people in the group of active working population aged 15-64. For those in that group, work is considered meaningful, not only in terms of economic remuneration and economic growth. It is considered imperative for individual independency, personal development and social integration as well as for personal self-esteem. It is obvious that these are qualities which are emphasised by the active ageing strategies referred to above – when most 65 year olds are healthy, well-educated and expected to live for at least another 20+ years. Cognitive capability can be considered part of a country's human capital and if dealt with properly, can contribute to both economic growth and to the reduction of the need for long-term health care. Yet, this attitude is far from that which is reflected in existing working life and social security regulations.

### 3.2 ... and non-discrimination rules

The prohibition of discrimination on the grounds of age is undoubtedly an important legal mechanism to promote active ageing in relation to all the three aspects dealt with here – to combat premature resigning, to make people to work beyond pensionable age and to facilitate the employment of older workers. The ban on age discrimination was introduced by EU through the 2000/78/EC Framework Directive covering age, among other issues.

However, equal treatment and non-discrimination as a legal strategy to come to terms with the marginalisation of workers aged 55+ may well turn out to be less successful than expected. It is true that the ban on discrimination may have had positive effects on making people work until they reach pensionable age. Differential treatment is thus not acceptable, for instance, as regards dismissals and other decisions at the workplace in general. And there are signs that seniority rules –to the advantage of older workers as a form of indirect discrimination – may well be acceptable under Union law. The broad scope for per se accepting discriminatory practices in employment policy, as well as labour market and vocational training objectives in accordance with Article 6.1 has, however, led to the CJEU accepting compulsory retirement to the detriment of ambitions to make people to work beyond pensionable age.

It can also be argued that the 'elitist' design of non-discrimination rules in general work to the detriment of older workers as the 'reference norms', representing the foundation of comparison in cases of alleged discrimination, are basically meritocratic. The non-hiring of an older applicant may well be defended by arguments about the more 'up-to-date' education of a younger comparator, while a dismissal may be defended by arguments about the older worker's ability to work and availability. Some of these problems could possibly be avoided by means of the requirement of 'pro-active' measures (compare reasonable accommodation) in relation to age as well. In my opinion, a preferable approach would be general obligations for the employer to individually adapt the working situation within the realm of work environment regulations.

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<sup>38</sup> In Sweden, more than ten years after the major pension reform (which eliminated a set pensionable age and made it very economically rewarding to postpone retirement), it is still the general norm to retire at the age of 65 – about 70% of those born in 1942 retired at exactly the age of 65. SOU 2012:28, p. 150.



### 3.3 ... reconceptualising work

This brings us to our third issue – the need for a reconceptualisation of work more generally. In relation to a greying labour market, the question is whether we should ‘work until the age of 75 or work till we drop’.<sup>39</sup>

Working life today requires workers to be more productive, well educated, lenient and flexible than ever. In new branches such as the IT world there is a romantic vision of enthusiastic employees working around the clock around eating at their desks in a state of total commitment to their activity. This ideal has hitherto mostly been discussed as being detrimental to the reconciliation of work and family life and other caring responsibilities.<sup>40</sup> It is, however, also not compatible with a working life well beyond pensionable age. Such a working life requires a reconceptualisation throughout working life as the quality of working conditions affect workers’ future ability to work. There is thus a need to change hitherto hegemonic perceptions of productive work and workers to a more flexible and life course-oriented view on work. ‘A greying labour market’ requires a more general reconceptualisation of productive work and ‘the good worker’. There are good – and economic - reasons to adapt the current perception of work and of a ‘good worker’ to the human scale from a lifespan perspective, if the traditional pattern of the three clear cut phases of life, pre-work life, work life and ‘after-life’, is to be replaced. Moreover, certain adaptations of working conditions to retain workers until and beyond retirement age may well ensure that workers generally contribute to creating more ‘qualitative work’.

Such a reorientation may – at least rhetorically - be said to be well underway in an international or EU setting. We have already touched upon the ILO concept of decent work. Developing this concept, the ILO states that ‘the primary goal of the ILO today is to promote opportunities for women and men to obtain decent and productive work, in conditions of freedom, equality, security and human dignity’. It is thus not only about an all-embracing concept of work, but about decent work *for all*.

Now, however, we need to make these things happen. The inclusion of new groups of workers such as women, the elderly and the disabled implies new challenges to the concept of occupational risk. Not only do the risks inherent in production means and processes or the organisation of work as such pose challenged, but so do acts from fellow workers (and customers, etc.) such as bullying and harassment due to increased diversity at the work place. To induce the individual to work until or well beyond retirement age, it is absolutely essential to ensure that working life is increasingly ‘high quality’ and individualised in order to maintain the ability of individuals to work throughout their working life and to make working more attractive at the individual level.

### 3.4 ... at the risk of weakening labour law from within

However, an adaption of pension norms and labour law in line with what has hitherto been argued – eliminating compulsory retirement and reconceptualising work – also imply threats. A pension norm which asserts that retirement reflects a personal choice on behalf of the individual thus requires the abolition of compulsory retirement. As has already been reflected in the CJEU’s case law (*Rosenbladt*), such a new practice is closely related to employment protection measures. One accepted argument in favour of compulsory retirement is thus to avoid a practice where working life termination, as a general rule, is based on the ‘disqualification’ of the older worker. Such an abolition also risks diminishing employment protection before actual retirement age is reached. If retirement practices are to become more diffuse or individualised, there is no possibility to uphold a practice such as that in Sweden where, as a general rule,

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<sup>39</sup> Compare ‘Jobba till 75 eller jobba som 17’, the title of a seminar by Kennet Abrahamsson at the Working Life 2012 Conference to be held in Stockholm on 17 October 2012.

<sup>40</sup> Compare Jenny Julén Votinius, On the Gendered Norm of Standard Employment in a Changing Labour Market, In: J.Fudge & R. Owens (eds.), *Precarious Work, Women and the New Economy: the Challenge to Legal Norms*, Hart, Oxford, 2006.

'normal ageing' does not compensate for just-cause dismissal, and incentives for age management may weaken. There may thus be a risk that setting no upper limit to employment will cause a decrease in the number of people aged 55+ who work, hence undermining both employment protection from within and 'good quality work'! Can general demands for decent work, equal treatment and – eventually - reasonable accommodation suffice to counter this risk?

*Prof. Dr. Ann Numhauser-Henning*  
*August 2012*

**9.1.2 Keynote Paper by Prof. Maria DO ROSÁRIO PALMA RAMALHO****Age discrimination, retirement conditions and specific labour arrangements:****The main trends in the application of Directive 2000/78/EU  
in the field of age discrimination**

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**Summary**

1. General remarks and key concepts of Directive 2000/78/EC: The inspiration of the Directive in gender discrimination directives;
2. Age discrimination among other sources of discrimination in Dir. 2000/78: The difficulties of applying the non-discrimination principle to age;
3. The formal transposition of the Directive into national law in relation to age discrimination and the different practices of the Member States on key issues related to age discrimination;
4. The role of the ECJ;
5. Closing remarks

**1. General remarks and key concepts of Directive 2000/78/EC: The inspiration of the Directive in gender discrimination directives**

I. Age has been formally recognised as a potential source of discrimination in Article 13 of the EC Treaty (as approved by the Amsterdam Treaty), among other sources of discrimination, such as sex, race and ethnic origin, religion or belief, disability or sexual orientation<sup>41</sup>. This provision was followed by Article 21 No. 1 of the ECFR, which explicitly prohibits discrimination on several grounds, including age.

Article 13 of the EC Treaty – which corresponds to Article 19 No. 1 of the TFEU, as approved by the Lisbon Treaty – represented the formal basis for the further development of the non-discrimination principle on other grounds than sex.

II. With reference to the area of employment, further developments were achieved with the introduction of Dir. 2000/78/EC of 27 November 2000. However, it is a known fact that this Directive benefited considerably from previous developments in EU law in the area of gender discrimination, going back to 1957 (Article 119 of the EEC Treaty). Several developments had been made in this area, especially since 1975, when Dir. 75/117/EEC of 10 February 1975 was issued on gender discrimination in pay, which

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<sup>41</sup> In fact, age was already mentioned in paragraph 24 of the Community Charter of the Fundamental Social Rights of Workers (1989), which recognised the right of older people to adequate retirement conditions, or, at the very least, to a minimum income and to social and medical assistance in old age. However, in this first reference no link was established between age and discrimination in the area of employment.

was soon followed by several other directives covering different areas of the principle of gender equality in relation to employment and social security<sup>42</sup>.

This inspiration of Dir. 2000/78 in gender equality law is evident in three ways:

- On the one hand, the Directive takes advantage of the concepts tested along the years in relation to gender discrimination tested, both in the directives as well as by the ECJ (with reference to notions like direct and indirect discrimination as well as harassment - Article 2 No. 2 a) and b) and No. 3<sup>43</sup>).
- On the other hand, the protective rules of the Directive largely reflect the European *acquis* in the area of gender equality, which was established over the years, often following tough negotiations. The similarities are evident not only with regard to the areas for which protection is granted, as defined in Article 3 (access to employment and promotion, professional orientation, working conditions including remuneration and dismissal, and professional affiliation<sup>44</sup>), but also with regard to the enforcement mechanisms (such as affirmative action, stipulated in Article 7<sup>45</sup>, or the reversal of the burden of proof rule established in Article 10<sup>46</sup>, among other rules).
- Finally, some of the derogations and exceptions to the non-discrimination principle, including on the grounds of age, introduced by the Directive (Article 2 No. 5, and Article 4 No. 1), are also inspired by some derogations introduced in relation to the principle of gender equality in several directives<sup>47</sup>.

In short, the concepts and rules that now look plain and simple in Directive 2000/78 in relation to non-discrimination in access to employment and in working conditions in large sense, are the final outcome of the long and often troubled evolution of gender equality law.

We highlight this impetus to arrive at a first conclusion about the issue at hand: The strong link between gender discrimination and other grounds of discrimination in EU law justifies the interpretation and the

<sup>42</sup> Dir. 76/207/EEC of 9 February 1976 on gender equality in access to employment, working conditions, promotions and professional training, modified by Dir. 2002/73/EC of 23 September 2002; Dir. 97/80/EC of 15 December 1997 on the burden of proof in actions related to gender discrimination. These Directives were replaced in 2006 by the recast Dir. 2006/54/EC of 5 July 2006. In the area of social security, the principle of gender equality was included in Dir. 79/7/EEC of 19 December 1978 (regarding statutory social security schemes) and by Dir. 86/378/EEC of 24 July 1986 (regarding occupational social security schemes), which was also replaced by Dir. 2006/54/EC. The principle of gender equality was also developed in relation to independent work by Dir. 86/613/EEC of 11 December 1986, later replaced by Dir. 2010/41/EU of 7 July 2010. Finally, the principle of gender equality is closely related with the Directives concerning the protection of pregnant women and new mothers at work (Dir. 92/85 of 19 October 1992) and with the Parental Leave Directive (Dir. 96/34/EC of 3 June 1996, replaced by Dir. 2010/18/EU of 8 March 2010).

<sup>43</sup> The notion of indirect discrimination was first established in Dir. 97/80/EC (Article 2 No. 1) and was included in Dir. 2002/73/EC of 23 September 2002 (Article 2 No. 2). The notion of harassment was introduced by Dir. 2002/73/EC of 23 September 2002 (Article No. 2 and 3).

<sup>44</sup> Protection against sex discrimination in these areas (except professional affiliation) was first established in Article 1 No. 1 of Dir. 76/207/EEC on gender equality in access to employment, promotions, training and working conditions.

<sup>45</sup> Affirmative actions were first introduced in Dir. 76/207/EEC (Article 2 No. 4), and included in Article 141 of the ECT with the Amsterdam Treaty.

<sup>46</sup> Specific rules on the burden of proof were first introduced in Dir. 97/80/EC (Article 4) on the shift of the burden of proof rules in actions related to sex discrimination.

<sup>47</sup> For instance, discriminatory practices in access to employment, whenever sex is a “determinant requirement”, due to the “nature of the activity or to the conditions in which the activity is to be performed” were included in Dir. 76/207 (Article 2 No. 2).

application of the provisions of Dir. 2000/78 to follow the directions of the ECJ when applying the equivalent provisions in relation to gender discrimination. However, this is not always the case and might not always be possible in relation to age discrimination, as we will see.

## **2. Age discrimination among other sources of discrimination in Dir. 2000/78: The accumulated difficulties of the non-discrimination principle when applied to age**

I. Our second topic deals with the position of age discrimination among other sources of discrimination addressed in Dir. 2000/78/EC. If the Directive is reviewed from this perspective, it becomes evident that the principle of non-discrimination, when applied to age, seems to be weaker than in relation to other sources of discrimination (perhaps with the exception of discrimination based on disability), because it is subjected to more specific derogations and exceptions.

In fact, when applied to age, non-discrimination rules can be excluded not only on the general grounds applicable to all discriminatory factors that relate to the requirements of specific professional activities (for instance, an activity in which age might be a determinant factor) or to reasons related to public safety, health or the protection of the rights of other persons, and in specific areas such as public social security schemes or nationality, as specified in Article 2 No. 2 b), in Article 2 No. 5, in Article 3 Nos. 2 and 3, and in Article 4 No. 1<sup>48</sup>, but also for the specific situations indicated in Article 6.

II. Differential treatment based on age is allowed in Article 6 for two areas:

- Employment area, including the imposition of special conditions in access to employment and training, as well as regards working conditions, including pay and dismissal, in order to protect or promote the professional integration of young workers, old workers and workers with care responsibilities; and including also the imposing of minimum or maximum age requirements for access to employment or promotion (Article 6 No. 1 a) b) c)). In these and in other employment-related situations (as this is an open-ended list), differential treatment is justified if, under national law, it pursues a “legitimate objective”, including objectives related to employment policy, labour market or professional training policies, and provided that the means used to pursue the objective are “appropriate and necessary” (Article 6, No.1).
- Occupational social security schemes, where the Directive allows the use of age in actuarial factors and the establishment of different age requirements to have access to those schemes or to the related pensions, provided that the age requirements do not result in sex discrimination (Article 6 No. 2).

III. The fact of Article 6 going along with the general limitations already imposed by Article 2 No. 2 b), and No. 5, Article 3 Nos. 2, 3 and 4, and Article 4 No. 1 of the Directive, allows us to make two conclusions.

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<sup>48</sup> Article 2 No. 2 b): This provision allows indirect discriminatory practices in relation to employment and professional activities, under the condition that the differential treatment entails a “legitimate objective” and that the means to achieve that objective “are adequate and necessary”); Article 2 No. 5: This provision allows direct discrimination practices which are justified based on the public interest in relation to certain professional activities, such as those related to public safety, health protection and the protection of the rights of third parties; Article 4 No. 1: This provision allows discriminatory practices in access to employment based on the specificity of the professional activity or on the conditions under which that activity is to be performed, provided that the discriminatory factor is an “essential and determinant requirement” and that the differential treatment pursues a “legitimate objective” through “proportional” means.

*The first conclusion is that the principle of non-discrimination in relation to age is weaker than non-discrimination on other grounds, since it largely complies with situations in which differential treatment on the grounds of age is considered justified.* In this same sense, Recital 25 to the Directive emphasises the need to distinguish between “discriminatory practices that should be forbidden” and “justified differential treatment namely for national employment or labour policies”, thus admitting an explicit compromise between the principle of non-discrimination and admissible discrimination in the case of age. In short, unlike in other situations, differential treatment on the grounds of age cannot be considered exceptional under Dir. 2000/78/EC.

*The second conclusion is that the practical implementation of the principle at national level largely depends upon the Member States’ (MS) interpretation of the criteria of “legitimate objectives” related to “employment policy, labour market or professional training policies”, given the fact that Article 6 expressly refers to those criteria at the national level.*

This last conclusion brings us to the next point of our presentation, intended to provide a brief overview on how the MS are complying with the Directive and what are still the more common practices in key issues related to age discrimination even after the adoption of the Directive.

### **3. The formal transposition of the Directive into national law in relation to age discrimination vis-à-vis the different practices of the Member States in key issues related to age discrimination**

I. At one point or another, all MS formally declared that Dir. 2000/78 had been adopted in relation to age or that their laws already complied with the Directive<sup>49</sup>.

Nevertheless, the more open and national-oriented system of European law in the field of age discrimination, resulting in Article 6 of Dir. 2000/78, alongside other derogations/exceptions of the Directive, allows for very different practices in several key issues for age discrimination to subsist at national level, namely in relation to employment.

II. In fact, the admissible discriminatory practices specified in Article 6 No. 1 of the Directive as well as other practices, are, to some extent, applied in all MS in most of the following areas<sup>50</sup>:

- With regard to *access to employment and working conditions*, specific conditions concerning age may be required to protect certain categories of workers (for instance, minimum working age for minors and more restrictions to the work of young persons, for safety reasons or for educational purposes; and a great variety of schemes regarding working conditions, working time and leave, which are meant to protect workers with care responsibilities).

<sup>49</sup> Nevertheless, the adoption of the Directive was slow and gave reason to infringement proceedings against several MS which failed to transpose the Directive into national law in due time or did not transpose it adequately. Most of these proceedings have now been closed. For more information on this topic, see the *Communication of the European Commission to the Council, the European Parliament, the Economic and Social Committee and the Regions Committee, on the implementation of Directive 2000/78/EC, of 27 November 2000, to establish a general framework regarding equal treatment in employment and professional activity [SEC (2008) 524]\*COM/2008/0225 final\*/.*, traced at [www.eur-Lex-52008DC0225-PT](http://www.eur-Lex-52008DC0225-PT).

<sup>50</sup> Our paper is largely based on information on the Member States included in the Report *Age and Employment* (2011), produced in the context of The *European Network of Legal Experts in the non-discrimination field* by D. O’DEMPSEY / A. BEALE, under the supervision of M. FREEDLAND, and published by the European Commission (DG Justice). The forthcoming information on the Member States is derived from the Report, which is also available on the Network’s website.

- Further in relation to *access to employment*, age is taken into consideration to promote the recruitment of young or of older workers and sometimes of long-term unemployed workers (for instance, fiscal or social security advantages granted to the employers, or the right to pay a lower salary when recruiting young or old persons, as well as specific cases of fixed-term contracts for young or old persons meant to facilitate their recruitment, especially in MS where a just cause for dismissal is required). In most MS, these measures are justified as positive actions of employment policy in the sense of Article 6 No. 1 a).
- *Measures lowering the regular level of protection against dismissal or other forms of termination of the labour contract, directed mostly at elderly workers* (for instance, mandatory retirement age or the possibility of unilateral dismissal at a certain age or changing the contract into a fixed-term contract, if the worker does not apply for retirement when he or she reaches retirement age). Here again, the measures tend to be justified as a necessary tool to achieve employment policies, namely the natural renewal of the labour force by employers and favouring young workers, supposedly because they cost less and are more receptive to technological changes.
- The *direct admission of a minimum age for access to employment*, which is higher than the minimum age generally established (in most MS, the minimum employment age is set at 16), is also very common in the majority of MS, either for specific professions or generally in the public sector. In this case, the derogation of the non-discrimination principle tends to be justified not only in Article 6 No. 1 b), but also in the specific nature of the activity or in reasons of public nature (e.g., applying either Article 4 No. 1 or Article 2 No. 2 b) i) or No. 5, or even Article 3 No. 4).
- The *direct admission of a maximum age for recruitment* in the sense of Article 6 No. 1 c), which is also common in professions linked to security or police forces (thus, under the provision of Article 2 No. 5), as well as in other cases where age can be considered a determinant factor (making use of Article 4 No. 1).
- The *admission of a maximum working age*, either in specific professional activities (for instance, pilots, doctors or professors, justified under the provision of Article 2 No. 5, for health, safety or protection reasons) or generally in the public sector (mandatory retirement at a certain age or after a certain length of service) or even by introducing a general mandatory retirement age), without an evident justification aside from the renewal of the labour force.
- On the contrary, *measures aiming to favour a smoother transition from work to retirement*, and which were relatively common in some MS several years ago (like the right to transform a full-time labour relationship into a part-time one after a certain age, or pre-retirement arrangements that combined social security allowance with some professional activity) and that were usually justified as tools to promote the natural replacement of the labour force, are seldom mentioned nowadays, due to the *tendency towards extending the period of active life*.

This *tendency towards extending the period of active life* deserves a closer look, because it seems to increasingly be at the core of MS policies on older workers and therefore directly deals with the key topic of this Seminar.

This new orientation, which is directly linked with increasing concerns over the financial sustainability of the public social security systems, explains the measures that have been adopted by some MS, such as the *increase in retirement age or the financial sanctioning of early retirement, as well as the suspension of previous pre-retirement arrangements programmes*. In fact, according to a recent survey of the OECD on the subject of retirement, half of the OECD countries have, since 2009, initiated or plan to raise the

retirement age, the tendency being to set that age at around 65 years, which means an average increase of 2.5 years for men and 4 years for women<sup>51</sup>. This trend replaces that of the last 50 years, which was to lower retirement age and facilitate precocious retirement and pre-retirement arrangements, despite the increase in life expectancy<sup>52 53</sup>.

III. The examples and trends presented point towards two main conclusions on this topic. The first conclusion relates directly to the implementation of Dir. 2000/78/EC in relation to age discrimination at the national level, while the second conclusion relates to the employment of older persons more generally.

With regard to the implementation of the Directive at national level, *it seems clear that the MS are extensively making use of all exceptions / derogations of the non-discrimination principle in relation to age discrimination, and that this use is not monitored by the EU at all*<sup>54</sup>. However, the extensive degree to which differential treatment with reference to age is permitted under the Directive and especially the fact that the conditions for that treatment widely rest on national standards raises doubts whether any monitoring of age discrimination practices is in fact possible or even desired by the EU.

More generally, the examples and trends on the key issues related to age and employment at national level mentioned above show that *the measures may conflict with one another and that there is no consistent strategy in this area, but rather a fluctuation of objectives being pursued*.

As regards the contradictions of the system in this area, it is clear that some of the practices regarding age and which are permissible under Article 6, may well conflict with one another. For instance, in order to promote the employment of young or of older workers, it is common to adopt measures that lower their level of protection, thus creating a differentiation in working conditions and facilitating dismissal, which, of course, leads to unemployment. In the same sense, measures like a mandatory retirement age or the possibility of the employer to terminate an employment contract when the employee reaches a certain age are often justified by the need to promote employment among younger workers. In short, both the differences of treatment as well as the positive actions permitted by the Directive could easily conflict with one another and create new discriminatory situations.

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<sup>51</sup> Eurostat data, updated on 22/06/2012 (accessed at [www.eurostat.com](http://www.eurostat.com)), show that the average age at which workers leave the labour market is 61,5 years in the EU (27 countries). France is the country in which workers leave the labour market earliest (around 60,2 years) and in the Netherlands, workers work longest (around 63,5 years of age).

<sup>52</sup> The OECD survey *Pensions at a Glance: Retirement Income Systems in OECD and G20 Countries (2011)*, available at [www.oecd.com](http://www.oecd.com). This survey indicates that most people had access to retirement 4 to 5 years before reaching normal retirement age between 2002 and 2007, which resulted in an average of 20,3 years and 24,5 of paid retirement years for men and women, respectively, when considering average life expectancy. In contrast, 18 OECD countries or the G20 have increased or plan to increase women's retirement age since 2009, and 14 intend to do the same with regard to men's retirement age.

<sup>53</sup> The OECD survey *Pensions at a Glance* also shows the direct relation between the issue of retirement age and the financial balance of social security systems and its impact on another range of measures that are currently being adopted by many countries, directly relating to the social security system, such as the transformation of social security systems from pay-as-you-go systems to pension-defined systems, and the promotion of complementary private schemes to the public social security scheme, such as professional and personal insurance schemes.

<sup>54</sup> Both the Report *Age and Employment* and the *Communication of the European Commission regarding the implementation of Directive 2000/78* mentioned above indicate that discriminatory practices regarding age, prior to the adoption of the Directive by the MS, persist in the law and in collective agreements and that national surveys on the various topics linked to discrimination need to still be carried out.



As to the strategy on age and employment, it seems clear that we have entered a period of transition: While one of the main objectives until a few years ago was to replace old workers with young ones and to favour early retirement, the MS are now inclined to keep older workers in the labour market longer, and this resulted in different policies and measures. This recent trend seems to be increasingly consistent and, this being the case, all other employment policies (for instance, the protection of younger workers or workers with care responsibilities) should, without prejudice, adapt to the protection of old workers. This, however, is a new challenge for the EU and the MS due to the contradictory effects of some measures, as stated above.

#### **4. The role of the ECJ: Changes in the classical approach of the Court by allowing a broad interpretation of admissible discriminatory practices at national level?**

I. Our last remarks directly concern the ECJ's jurisprudence in the area of age discrimination and we will explore whether the Court of Justice has contributed to diminishing or limiting the range of admissible differences in treatment in relation to age in Directive 2000/78/EU<sup>55</sup>.

The ECJ ruling in this area confirms that the major problems relating to discrimination of age lie in the interpretation of the exceptions and derogations to the principle stipulated in Dir. 2000/78. In fact, all cases the ECJ has been involved in deal with the permissible discriminatory practices, often combined with problems relating to the non-implementation (or inadequate implementation) of the non-discrimination principle in this area by the MS.

II. Where a *question of the lack or inadequacy arises in the transposition of the Directive*, the ruling of the ECJ has been very consistent in stating that the principle of non-discrimination on the grounds of age relies directly on the Treaty, and can therefore be invoked even when the MS has failed to implement Directive 2000/78. This reasoning was first expressed in the *Mangold* judgement<sup>56</sup> and has since been reiterated in several judgements that qualify this principle as a general principle of the EU, founded directly on the common traditions of the MS, and that the Directive merely complements or develops it at a secondary level, and which is applicable at national level, independently of further developments by way of a directive (in this sense, for instance, the *Kücükdeveci* case<sup>57</sup>).

This fundamental rights approach to the non-discrimination principle on the grounds of age is very significant, since it makes it possible to overcome the difficulties in the formal implementation of the principle at national level can thereby be overcome.

III. In contrast, *the ECJ is not as consistent when it is called upon to arbitrate the core question of permissible discriminatory practices under Dir. 2000/78, and seems to treat the questions related to Article 2 No. 5 and Article 4 No. 1, differently from those related to Article 6.*

In fact, the ECJ tends to reject direct discriminatory practices that are solely based on age. In this sense, in *Mangold*, the Court did not accept the change of the indefinite employment contract into a fixed-term one simply because the worker had reached the age of 52; in the same sense, in *Kücükdeveci*, the Court

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<sup>55</sup> Given this paper's limitation in terms of length, the following references to ECJ decisions are to be considered mere examples. All referred cases can be found at <http://curia.europa.eu/juri/document/document>.

<sup>56</sup> Case C-144/04 of 25 November 2005.

<sup>57</sup> Case C-555/07 of 19 January 2010.

qualified the refusal to count the working years before the worker turned 25 for the purpose of delaying dismissal, as discrimination; and finally, the same reasoning was applied in the *David Hütter* case<sup>58</sup>.

However, in judgements where Article 2 No. 5 and Article 4 No. 1 are invoked, the Court seems to follow a more strict interpretation of the justification for differential treatment due to age than in cases invoking Article 6. Some examples demonstrate this difference in approach:

- In judgements in which differential treatment due to age is based upon a criterion related to the professional activity itself (in the sense of Article 4 No. 1) or to external requirements associated with that activity relating to health, safety or the protection of rights of third parties in the sense of Article 2 No. 5 (for instance, the maximum seniority of air pilots, as determined in the *Richard Prigge* case<sup>59</sup>, or in the profession of dentists, as concluded in the *Petersen* case<sup>60</sup>, and in the case still pending of the *European Commission against Hungary* that the mandatory retirement age for judges and solicitors be set at 62 instead of 70, as a general rule<sup>61</sup>; and the admission of a maximum age for the recruitment of firemen, as determined in the *Wolf* case<sup>62</sup>), the Court took a direct position on the alleged motive for the differential treatment, discussing whether that motive was legitimate and a determinant request for the activity or profession in question, and whether the means to achieve it were justified and proportional.
- In contrast, in judgements which directly invoke Article 6, such as the *Felix Palacios de la Villa*<sup>63</sup>, *The Queen*<sup>64</sup>, or *David Hütter* cases, the Court recognised that the employment policy which justifies the differential treatment on the grounds of age lies within the competence of the MS, and thereby avoiding directly dealing with the grounds for discrimination itself.

These examples give rise to a conclusion: *It is only possible to monitor the permissible age discriminatory practices when these practices are based on objective criteria, are related to the given professional activity or to external but well defined requirements (like public safety, security or health)*. In those situations, the ECJ tends to rule in a strict way, not only because objective criteria are easier to assess, but also because the Court benefits from a long tradition of similar rulings based on similar requests as justified exceptions to gender equality in access to employment and in labour conditions.

On the contrary, *the open-ended and national-oriented criteria of Article 6 of Dir. 2000/78 seem to be impossible for the Court to evaluate.*

## 5. Closing remarks

This overview of the principle of non-discrimination in EU law and its implementation at national level allows us to end our review with three conclusions.

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<sup>58</sup> Case C-88/2008, of 18 June 2009. In this case, the Court decided that it was discriminatory not to take into account the professional experience of a worker before the age of 18 for the purpose of determining his professional level when entering the public service.

<sup>59</sup> Case C-449/2009 of 13 September 2011.

<sup>60</sup> Case C-341/2008 of 12 January 2010.

<sup>61</sup> Case C-286/2012, *European Commission against Hungary*, registered on 7 June 2012.

<sup>62</sup> Case C-229/208 of 12 January 2010.

<sup>63</sup> Case C-411/02005 of 16 July 2007.

<sup>64</sup> Case C-388/2007 of 5 March 2009.

The first conclusion is to confirm that the *non-discrimination principle in relation to age is weaker than non-discrimination on other grounds, since it formally complies with more situations where differential treatment on the grounds of age is considered justified than on other grounds.*

The second conclusion is that *the practical implementation of the principle at national level largely depends upon the MS and its interpretation of the criteria of “legitimate objectives” related to “employment policy, labour market or professional training policies”, since Article 6 expressly refers to those criteria at the national level and therefore tends to result in a considerable degree of divergence.*

Our third and final conclusion is that *this structural weakness of the non-discrimination principle in EU law will most likely not be resolved in the future, because the admissible discriminatory practices under Article 6 are rather difficult for the ECJ to evaluate.*

*Prof. Maria Do Rosário Palma Ramalho  
September 2012*

### 9.1.3 Keynote Paper by Prof. Jean-Pierre LABORDE

## **“Young versus old or intergenerational solidarity”**

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Work has always confused generations for better and for worse. Relations between generations at work in any case are as much a complex problem as their configuration can be radically different, according to one's point of view.

For example, lowering the retirement age can be seen as a show of solidarity between generations in so far as it allows the oldest employees to leave working life much earlier, while facilitating the hiring of young people. It is indeed the least we can say when presenting the situation, if we believe in the division of labour. However, inversely, people who do not believe in it will mainly emphasise that lowering the retirement age will increase social costs mostly weighing down on assets, particularly young assets. Therefore, what can be analysed as a true measure of solidarity can also be burdened with selfishness of the older generations.

The conclusion to be drawn is obviously not that one of the two analyses is absolutely false or that only one of the two is ideologically perverted. It is much more reasonable to believe that in matters of relations between generations at work, there is no solidarity measure per se or on the contrary, there is a corporative one, but actually, measures whose sense can profoundly change according to the way in which they are led and interpreted. In fact, this analysis should not be surprising as it is based on the extremely uncertain notion of generation, particularly from a legal point of view, at the same time as the complete reversibility of all provisions related to the age of workers who are part of an unquestionable social progress as much as a movement of unbearable discrimination. Moreover, this discrimination can go in all directions, as much to the detriment of young people than that of old people.

However, not everything has the same value and one must try to take into account as best possible the diversity of generations at work, as well as the diversity of their expectations. Of course, nothing is impossible as long as the first objective is to stop the age struggle (I). It is also true that this objective, as essential as it is, will remain unachieved if it does not allow one to arrive at true age cooperation. In this view, it could be useful to play on the methods of transmission between generations, which are susceptible to go from oppositional relations to ones of collaboration and common interest. It is in this spirit that one must undoubtedly understand François Hollande's proposal, then candidate for the presidency of the Republic, of implementing professional security schemes at companies, linking the employer, a worker over 55 and another under 30, by way of exemptions, allowing a senior worker at the end of their career to transmit their experience and know-how to a young new hire in some sort of win-win situation (II). Although this scheme is encouraging, one would still need to ponder whether it would not be time to start anticipating a real transcending of the issue of age at work, which would give it more meaning or reach that strictly necessary (III).

## **I / STOPPING THE AGE STRUGGLE**

### **I. 1 Young versus old or opposition median ages / young and old?**

One must admit that young versus old is often simplistic. Over the past decades of the 20<sup>th</sup> century ‘Managing age for the French’<sup>65</sup> seems to have consisted in actually opposing the median ages (25-49 years) very present on the labour market to the younger (16-25 years) and older workers (55-65 years) more or less kept at a distance, the first because of the difficulties of landing one’s first job, second because of a clear tendency of leaving the work force prematurely. In fact, these are surely the two major problems of the French labour market, which does seem closed to many young people aged 16 to 25 while at the other end of the age spectrum, the generation aged 55-65 has presented until recently one of the lowest rates of activity of Western Europe (around 36% only, however, in 2011, this rate was higher, reaching 44.4%). This means that discriminatory practices appear to play both against the youngest and the oldest, despite the fact that the labour law is very vigilant in the matter.

### **I.2. Preventing and sanctioning discrimination**

Legally, the struggle against discrimination is indeed very clearly declared in France, at least when it comes to what we traditionally call negative discrimination. On the other hand, one can occasionally find a few attempts at implementing positive discrimination in favour of particularly disadvantaged age categories.

#### **I.2.1. The struggle against negative discrimination**

What are the potential and actual victims of age discrimination? Surely, young people (in French labour law, the 16-25 years category), but even more today, increasingly ‘seniors’ (in French law, 55-65 years, but increasingly often with more consequences for the younger or immediately less younger categories, having a tendency to sometimes consider a worker above 45 as old).

##### **I.2.1.1. In European Union law**

The contribution of community law, which became European Union law, to the struggle against age discrimination is essential, especially but not only when it comes to older workers. In any case, the prohibition of age discrimination is a general principle of European Union law. This principle is made concrete by the directive n°2000/78/CE of 27 November 2000, establishing a general framework in favour of the equality of treatment on labour<sup>66</sup> and notably prohibiting age discrimination<sup>67</sup>. And if the Court of Justice of the European Union provides an energetic interpretation of these dispositions, the French courts have the same spirit and same perspective. Therefore, the French Supreme Court, social chamber has had the opportunity of reminding us that if, according to the directive of 27 November 2000, the differences in treatment according to age does not necessarily constitute discrimination, it must, always according to the directive Article 6, be reasonably and objectively justified by a legitimate objective and that the means to achieve this objective must be appropriate and necessary – Soc., 11 May 2010, D. 2010, Actu, 1357. Of course, the care of favouring access to employment or keeping older workers in their jobs may constitute such a legitimate motive, at least when the provision is not founded on the sole and unique consideration of age. (On this last reservation, refer to CJCE, 22 November 2005, Mangold c/ Helm, D. 2006, 557, n. Leclerc, RDT, 2006, 31, obs. Schmitt, 133, obs. Robin-Olivier.)

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<sup>65</sup> In this sense, Marchand O. and Salzberg L., ‘La gestion des âges à la française’ (‘Managing age the French way’), *Données sociales*, Paris, INSEE, 1996, pp. 165-173.

<sup>66</sup> Directive came into force on 2 December 2000, setting a transposition deadline until 2 December 2003.

<sup>67</sup> Other prohibited discrimination regard religion or beliefs, handicap and sexual orientation.

### **I.2.1.2. In internal French law**

Communicating entirely within the prescribed deadlines<sup>68</sup> of community law, internal French law makes age very explicitly one of the many criteria or distinctive traits of the person of the worker that is in principle forbidden to take into account as much for hiring as for termination of the work contract, as well as anything regarding the execution of the contract, discipline and working conditions. Article L. 1132-1 of the Labour Code is perfectly clear about this. Of course, and always under the influence of community law, this is also the case with direct discrimination as well as indirect discrimination, when the offending rule does not explicitly refer to age but actually affects a particular age category. Moreover, French law, always under the European influence, has lightened the burden of proof since it is enough nowadays for the person invoking it to establish the presence of elements suggesting discrimination, as the employer must then try and establish that this does not correspond to reality or that the criticised measures are objectively justified by a legitimate goal and that the means used are appropriate and necessary.

Of course, age discrimination does not only affect older workers; it could just as well affect young people. Moreover, one may think that an advanced age today is a particularly worrisome factor of vulnerability<sup>69</sup>. Surely, the very energetic sanctions of actual discrimination, civil and penal ones, may provide a feeling of confidence in the energy of the struggle against discrimination. However, everything in this matter demands vigilance since the courts do not always have the necessary lucidity to exam the means of defence of employers.

### **I.2.2. ‘Positive discrimination’ measures**

The expression ‘positive discrimination’ is not mentioned here in a precise technical sense. It means the provisions of access to employment for a certain age category.

#### **I.2.2.1. Measures in favour of young people**

The measures that we could call positive discrimination favouring access to employment for certain categories of the population have mainly concerned youth, particularly youth without training<sup>70</sup>. As we know, the presidential programme of François Hollande placed youth and youth employment at the forefront of his preoccupations. This is how the current government will implement a new work contract aimed at people aged 16 to 25 with little or no qualifications and without a diploma who live in sensitive urban areas or remote rural ones<sup>71</sup>. These ‘future jobs’, which could amount to 150,000, will be created by associations, territorial collectives or a few companies in job growth sectors (for example, in green and digital initiatives<sup>72</sup>). The State will finance 75% of the costs of these jobs at a cost of 1,5 billion euro.

#### **I.2.2.2. Measures in favour of seniors**

As for seniors, comparable provisions are increasingly rare, but not absent. Therefore, according to Article D. 1242-2 of the Labour Code, any employer can sign a so-called ‘senior’ work contract with a worker aged

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<sup>68</sup> We had to actually wait until the Law of 27 May 2008 for France to be completely in harmony with European directives, especially with the directive CE/78/2000 of 27 November 2000.

<sup>69</sup> It is a factor of vulnerability all the more dangerous and sometimes devious when keeping older workers from the labour market is quite often presented as a favourable measure while it is not expressly claimed by some of them...

<sup>70</sup> Today, almost 25% of job seekers in France are less than 25 years of age – *Le Nouvel Observateur*, 30 August to 5 September 2012, p. 64.

<sup>71</sup> It is even the first bill that should be discussed by the Parliament recalled in a special session in September 2012.

<sup>72</sup> J.-H. Lorenzi, in *Le Nouvel Observateur*, 30 August to 5 September 2012, p. 64. Jean-Hervé Lorenzi is Chair of Economics of Aging of the Université Paris Dauphine.

over 57 years, searching for a job for more than three months or with a worker on a professional security scheme<sup>73</sup>. This scheme has a fixed term of 18 months at the most, but it can be renewed once as long as its overall term does not exceed 36 months.

### **I.2.2.3. 'Mixed' measures**

It is also important to mention that some provisions of specific help to employment access regards older workers as much as young ones, oriented, at least indirectly, towards age cooperation.

## **II / FAVOURING AGE COOPERATION**

One must note that the intergenerational solidarity contract is not the only way of giving workers' age an important role in labour policies. There already exists a comparable measure such as tutoring, which has had mixed results (1). Nevertheless, the intergenerational solidarity contract has an essential role to play in age cooperation at work. However, it remains to be seen how this measure will actually be implemented, what kind of financing it will need and how effective it will actually be at companies in practice. The prognostics in the matter must also be more reserved, as it is not sure whether older employees are the best at transmitting the latest know-how. Here, we can see a very typical problem of any kind of transmission, which believes in the imbrications of generations (2).

### **II.1. The provisions already in force**

Even if it is not generally presented under the angle of cooperation between generations but rather more under one of alternating theoretical training and practice, the learning contract is in fact quite a convincing example. At a company, the apprentice is placed under the responsibility of an apprentice master who could be the employer or one or more employees, recognised by the Labour Code explicitly as a tutor (Articles L. 6223-5 to L. 6223-8). One must also note that the development of learning is one of the most often recommended measures by those who would like to significantly improve the training of young workers. The German example is therefore often presented as the way forward.

### **II.2. The professional security scheme**

This project is part of the major elements, if not the most talked about of François Hollande's programme during the presidential election campaign of 2012. It was echoed during the social conference held between the government and the social partners at the beginning of the summer 2012, when the President of the Republic made it known that he would make this project a reality at the beginning of 2013.

From the start, François Hollande has presented himself as attaching great importance to the situation of young people, wanting to place them at the centre of his programme. It is even more interesting to note that he did not, however, want to sacrifice the other age categories by favouring youth. Quite the contrary, it is within a perspective of age cooperation that he places his professional security scheme, which essentially consists of linking a temporarily retained older worker (above 55 years) upon hiring a young worker (below 30 years), the first transmitting to the second their experience and know-how. Of course, this provision will be encouraged by an exemption or a limitation of social and fiscal costs (according to what we currently know, there will be an exemption of social costs for a maximum duration of five years,

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<sup>73</sup> The intergenerational solidarity contract can be offered to employees threatened with economic redundancy.

fully for the contract of the young person and partially for the contract of the senior). In any event, a negotiation on the provision has been planned for September 2012.

On 4 September 2012, the government addressed a guidance note to the social partners determining the orientations to be followed in the negotiations on the future professional security scheme. The negotiation should be started as quickly as possible since it has been planned that after the ensuing agreement, the government will submit a bill to Parliament at the end of 2012, so that the provision can enter in force as early as possible in 2013. This provision will rely on a distinction between companies with at least 300 employees and those with less than 300 employees. For the first, it is a collective labour agreement that must be concluded while for the second, individualised professional security schemes will be offered and could be assigned by the company owner, the young hire and the senior worker. At major companies, the conclusion of such a collective agreement must enter into force before 30 September 2013 so that the company can benefit from the planned relief of contributions. At companies with less than 300 employees, a fixed amount will be paid for three years for young hires (16 to 25 years) with indefinite contracts, tutored by seniors aged 57 years or more and kept on the job until the age of retirement. Generally speaking, the government would like to pay particular attention to the consideration in the equality of men and women.

We see that the outlines of the provision are already quite clear and that the negotiation will mainly address the concrete implementation of measures. More precisely, some aspects of the provision deserve to be elaborated, especially the exact consistency of keeping the senior employed in the case of redundancies at the company or the occurrence of grounds for dismissal for personal reasons.

Regardless of its final configuration, it is undoubtedly best not wait too long for such a measure, as it probably will only reduce youth unemployment marginally. For the rest, it is quite doubtful that the transmission this provision aims for will be as simple as those who thought of it believe it is. Employees at the end of their careers are not necessarily the best possible tutors in so far as they are not necessarily the ones who best master the most advanced techniques. In fact, quite often these skills are in the hands of younger workers, better trained in terms of initial training as well as life-long training. Yet, at the same time, these younger workers are far from always having the necessary distance for tutoring responsibility. Some people have even mentioned not without irony that sometimes, younger workers often have a very good initial training and become the teachers of their older colleagues.

Certainly, this does not mean that the planned reform would be without interest or become absurd, but rather that it would gain to distance itself from an obviously simplistic view of the age issue.

### **III / SURPASSING THE AGE ISSUE**

#### **III.1. What surpassing the age issue cannot mean**

Does surpassing the age issue take away pertinence from the age issue? Must we consider for example that the issue of age does not have any more significance than nationality within the scope of work relations? Looking at the problem this way would be undoubtedly going too fast in the task and condemning it to being unrealistic. At least at the two extremes of its range, age is part of these realities that would be useless to ignore.

This is, first of all, the case with the younger age, which must remain the one of initial training. It is then also the case, at the other end of the scale of life, of the older age, which should give way to a decent retirement, organised sufficiently early so that those interested can effectively implement the right to rest and leisure. ‘The culture of labour law at any age’ must therefore not be understood as the obligation to



work at any age, not even as a strong incentive to work at any age. This would no doubt be a major social regression. On the other hand, it must mean, and it is already a lot, a clear opposition to ‘the culture of early exit from the labour force’, especially when it consists of removing older workers from the labour force by all means. (For these two ‘cultures’, refer to A.-M. Guillemard, *The Challenges of Age, Retirement, Employment, International Perspectives*, Armand Colin, Collection U, second edition, 2010, p. 35.)

Without advantage, a justified refusal of giving age a main role in the structuring of employment may not divert from the need to adapt work conditions wherever possible to older workers in order to provide ‘tenable’ and decent work, as well as particularly and especially ensure their training. And it would also be incorrect to claim, as a misunderstood struggle against discrimination, that the seniority of a worker, which also must not be mixed up purely and simply with their age, no longer plays a role in determining their remuneration. It remains entirely justified that on the job experience be recognised as such when it comes to salaries at a company.

### **III.2. What it means to surpass the age issue**

On the other hand, we need to eliminate this idea, dominating France for a long time, that solving labour problems mainly relies on getting seniors to leave the labour market, especially if their leave is more or less imposed on them. Surely, this idea can be dotted with some worry about the division of labour. However, besides reality and the practicability that a division of labour remains quite doubtful economically, jobs are generally not easily interchangeable, as shelving the older generations, even if it is naively inspired by the most commendable considerations, does carry major risks. The most efficient way of ensuring that these risks do not become reality is to stop considering the age issue as a main element in work relations. In other words, it is only proper to take into account the age of a worker when it is in their favour and for reasons undoubtedly justified within the larger scope of ‘an integrated management of diversity and synergy of ages’<sup>74</sup> and ‘a society for all ages’, according to the words of European Union institutions.

*Prof. Jean-Pierre Laborde*  
*September 2012*

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<sup>74</sup> A.-M. Guillemard, *The Challenges of Age, Retirement, Employment, Internationales Perspectives*, Armand Colin, Collection U, Paris, second edition, 2010, p. 309.