Intergenerational Balance, Mandatory Retirement and Age Discrimination in Europe: How can the ECJ better support National Courts in Finding a Balance between the Generations?

By: Dr. Elaine Dewhurst[1]

Abstract

This paper addresses the rather vexed question of intergenerational balance, a balance which has become increasingly more difficult to achieve as a result of the impact of the financial crisis and the demographic crisis in Europe. More particularly, the paper examines the approach of European Union law to the issue of mandatory retirement, an approach which has generally left national courts with the difficult task of balancing the rights of older workers against the claims of younger workers within limited guidance from the ECJ as to how this can be achieved successfully. Through an analysis of the legislative and judicial approach of the European Union and through an examination of the empirical evidence relating to the impact of mandatory retirement policies on intergenerational balance, it is concluded that while the European Union's current approach is justifiable, more specific guidance should be given to national courts to assist them in determining this problematic question. Recommendations as to the scope and content of such guidance will be made.

Keywords: Employment Law; Age Discrimination; Intergenerational Balance; Mandatory Retirement

Introduction

> "And I would like to speak to the elders, to those who have spent their lifetime working in this region, and well, I would like them to show the way, that life must change; when it is time to retire, leave the labor force in order to provide jobs for your sons and daughters. That is what I ask you. The Government makes it possible for you to retire at age 55. Then retire, with one's head held high, proud of your worker's life. This is what we are going to ask you… This is the "contrat de solidarité" [an early retirement scheme available to the 55+ who quit their job]. That those who are the oldest, those who have worked, leave the labor force, release jobs so that everyone can have a job."[2]

> "In this respect a contentious issue that comes up in policy debates is the substitution of older for younger workers. It is often claimed that fewer jobs for older workers means more jobs for youth. This is based on the so-called "lump of labour" fallacy that there are a fixed number of jobs and workers are perfectly substitutable for each other. In practice, younger workers cannot easily substitute older workers - the evidence suggests that early retirement policies have not generated jobs for younger age groups. There is

---

[1] Dr. Elaine Dewhurst is a Lecturer in Employment Law at the University of Manchester. This research was completed during her time as a post-doctoral research fellow at the Max Planck Institute for Social Law and Social Policy, Munich. She would like to thank MaxNetAging and the Max Planck Institute for Demographic Research for funding this research on age discrimination.

[2] Mauroy, French Prime Minister in Lille, France (27th September 1981) quoted in Gaullier, *L'avenir à reculons: Chômage et retraite* (Paris, 1982), 230.

also evidence that across the OECD there is a positive correlation between changes in employment rates for younger and older people. [3]

The financial[4] and demographic[5] crises facing Europe present a unique challenge: how can the ever-increasing rates of youth unemployment be reconciled with a desire to prolong the working life of older workers? This particular issue has recently been the focus of discussion in the ECJ in a series of cases brought by older workers who are being subjected to mandatory retirement policies[6]. Faced by arguments that mandatory retirement policies are contrary to the provisions on age discrimination in Directive 2000/78 EC[7] ("the Directive"), the ECJ has had to consider whether the protection of youth employment prospects could amount to a legitimate aim that would justify discrimination on the grounds of age. The ECJ's response has been to repeatedly hold that Member States may have as a legitimate aim the creation of a balance between the generations (also variously referred to as "intergenerational balance", "intergenerational fairness" or "intergenerational equity")[8], that mandatory retirement policies may be a proportionate means of achieving this aim[9] and that it is for the national courts to make this determination in each individual case. However, the limited guidance given by the ECJ to national courts as to the manner in which they should make such determinations, including limited assistance as to the potential factors which they should consider has led to a situation where there could be potentially inconsistent interpretations of EU law both within Member States and between Member States. This could also lead to a situation in which mandatory retirement policies could be found to be proportionate in almost every case. This article focusses on how the ECJ can better support national courts in finding an appropriate balance between the generations in mandatory retirement cases.

This article begins by assessing the current economic and youth unemployment crises in Europe and the perceived conflict between these crises and the ever-present demographic challenges facing EU Member States. Secondly, the article analyses the legislative and judicial response of the EU to the issue of mandatory retirement and intergenerational balance, which is essentially an entirely flexible approach arguably necessitated by the economic, social and political nature of the issues involved. The article identifies two distinct categories of cases where mandatory retirement has been held to potentially constitute a proportionate means of achieving intergenerational balance: firstly, cases involving situations in which combatting youth unemployment in the general labour market is considered a legitimate aim ("the general labour market cases") and secondly, cases involving situations in

---

[3] Salazar-Xirinachs, Executive Director for Employment (ILO), "Promoting Longer Life and Ensuring Work Ability" at UNECE (United Nations Economic Commission for Europe) Ministerial Conference on Ageing, Vienna, Austria (2012), 9-10.

[4] European Commission, *Europe 2020: A Strategy for Smart, Sustainable and Inclusive Growth*, COM(2010) 2020, Brussels, 2010 available at http://ec.europa.eu/eu2020/pdf/COMPLET%20EN%20BARROSO%20%20%20007%20-%20Europe%202020%20-%20EN%20version.pdf (Accessed 17.10.2012).

[5] European Commission, *2009 Aging Report: Economic and Budgetary Projections for the EU-27 Member States (2008-2060)* (Luxembourg, 2009), 19.

[6] See for example Case C-411/05, *Palacios de la Villa* [2007] ECR I-08531; Case C-341/08, *Petersen* [2010] ECR I-00047; Case C-45/09, *Rosenbladt* [2010] ECR I-9391; Case C-268/09, *Georgiev* [2010] ECR I-11869; Joined Cases C-159/10 and C-160/10, *Fuchs and Köhler* [2011] ECR I-000 (judgment of the Court 21 July 2011); Case C-141/11 *Hörnfeldt* (judgment of the Court 5 July 2012) and Case C-286/12 *Commission v. Hungary* (judgment of the Court 6 November 2012).

[7] Council Directive 2000/78/EC of 27 Nov. 2000 establishing a general framework for equal treatment in employment and occupation. (OJ, 2000, L 303, 16–22).

[8] For the sake of consistency, this article will utilize the term "intergenerational balance".

[9] The author is aware that there are also other legitimate aims for which mandatory retirement may be a legitimate aim but this article confines itself it the issue of intergenerational balance.

which ensuring intergenerational balance within a particular organisation is considered a legitimate aim ("the specific organisation cases"). The article reveals that the ECJ, in determining these cases, does give guidance to national courts in both categories of cases, although the guidance given by the ECJ in specific organisation cases appears to be more rigorous and hence provides greater assistance to national courts in determining this difficult question. Thirdly, this article also examines the theoretical and empirical evidence behind the conflict between mandatory retirement and intergenerational balance. The evidence reveals that arguably in many cases the imposition of mandatory retirement policies do not achieve intergenerational balance and that, therefore, there is an even greater imperative on the part of the ECJ to give stronger and more focused guidance to national courts on this issue. The theoretical and empirical analysis also reveals certain factors which could form part of the guidance provided by the ECJ to national courts. Such guidance would not only protect the right to equality on the ground of age more effectively but it would also ensure a more consistent application and interpretation of EU law in Member States.

1. The Dual Challenge Facing Europe: The Economic and Demographic Crises

The European Union recognizes that it faces a unique challenge:

> "Europe faces a moment of transformation. The crisis has wiped out years of economic and social progress and exposed structural weaknesses in Europe's economy. In the meantime, the world is moving fast and long-term challenges – globalisation, pressure on resources, ageing – intensify. The EU must now take charge of its future"[10].

At the core of this challenge are the economic crisis and the associated youth unemployment levels in the European Union. Young people have been particularly affected by this unemployment crisis[11] and youth unemployment rates have tended to be much higher than those in other categories.[12] In 2011, the youth unemployment rate in the EU Member States combined was 21.4%, which was almost double the overall unemployment rate.[13] Rates of youth unemployment in individual EU Member States highlight more vividly the specific challenges facing many EU Member States[14]. The highest youth unemployment rates are in Spain, Greece and Slovakia with 46.4%, 44.4% and 33.5% of young people between the ages

---

[10] European Commission, *supra* note 4, 3.

[11] See Eurostat, "Impact of the Economic Crisis on Unemployment" (2009) available at http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Impact_of_the_economic_crisis_on_unemployment (Accessed 28.11.2012).

[12] Eurostat, "Unemployment Statistics" (2012) available at http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Unemployment_statistics#Database (Accessed 28.11.2012).

[13] Eurostat, *supra* note 12. See also European Commission, "Tackling Youth Unemployment: Using EU Structural Funds to Help Young People" available at http://ec.europa.eu/europe2020/pdf/themes/17_youth_action_team_en.pdf (Accessed 28.11.2012), 1.

[14] Unemployment rates represent unemployed persons as a percentage of the labour force. Eurostat defines the labour force as "the total number of people employed and unemployed. Unemployed persons comprise persons aged 15 to 64 who were: a. without work during the reference week, b. currently available for work, i.e. were available for paid employment or self-employment before the end of the two weeks following the reference week, c. actively seeking work, i.e. had taken specific steps in the four weeks period ending with the reference week to seek paid employment or self-employment or who found a job to start later, i.e. within a period of, at most, three months" available at http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&init=1&language=en&pcode=tsdec460&plugin=1 (Accessed 28.11.2012).

of 15-24, respectively, unemployed. Other countries, such as Lithuania (32.9%), Latvia (31%), Portugal (30.1%), Ireland (29.4%) and Italy (29.1%) also present worrying statistics. These figures exceed significantly the overall level of youth unemployment in the EU generally and present unique challenges to these Member States in terms of the strategies they intend to impose to eliminate youth unemployment.

Against this backdrop of high youth unemployment, the EU has identified high levels of older worker unemployment as one of the structural weaknesses inherent in the European economy with only 46% of 55-64 year olds in employment in Europe.[15] This, combined with demographic change resulting from longer lifespans, lower fertility and decreasing inward migration, will have a significant impact on the ability of the EU to extricate itself from the economic crisis.[16] Over the next fifty years, the increase in persons over the age of 65 in the European Union will double[17], reducing the number of persons available to work[18] and doubling the old-age dependency ratio[19]. This will essentially mean that many countries in Europe face a situation in which "private sector saving is widely regarded as too low and the scope of government commitment to pension payments [is] too high"[20].

One of the most interesting questions that has arisen as a result of this perceived tension between the demographic crisis and the economic crisis is the question of mandatory retirement policies. From a demographic perspective, mandatory retirement policies can be viewed as preventing the continued contribution of older workers in the workforce and, as such, acting counter to the needs of society. However, from the perspective of countries with high youth unemployment mandatory retirement can be seen as a way of ensuring that jobs become available for young people by the substitution of older workers for younger workers (although the veracity of such claims can be challenged)[21]. EU law, including both legislation and the case law of the ECJ, appears to have dealt with this challenge of balancing the demographic and economic priorities by taking a flexible approach to the issue and leaving national courts, often with limited guidance, with the ultimate decision making power on such questions.

2. The Flexible Approach of EU Law

---

[15] European Commission, *supra* note 4, 7.
[16] For a discussion of the demographic changes occurring in Europe, the reasons and the effects see: European Commission, *supra* note 5, 19. See also Tung and Comeau, "Perceived Benefits and Drawbacks of the Retirement Age Policy in Malaysia: HR Perspective" (2012) 7(19) *International Journal of Business and Management* 1, 2; Gendron, "Older Workers and Active Aging in France: The Changing Early Retirement and Company Approach" (2011) 22(6) *International Journal of Human Resource Management* 1221; Casey, *Incentives and Disincentive to Early and Late Retirement* (Vienna, 1998); Barrell, Kirby and Orazgani, *The Macroeconomic Impact From Extending Working Lives* (London, 2011); Barrell, Hurst and Kirby, *Extending Working Lives in Europe,* presented at a DGEcFin conference in Brussels, 13th Mar. 2008 available at http://ec.europa.eu/economy_finance/events/2008/20080313/barrell_presentation_en.pdf (Accessed 28.11.2012); Barrell, Fitzgerald and Riley, "EU Enlargement and Migration: Assessing the macroeconomic impacts" (2010) 48(2) *Journal of Common Market Studies* 373; Barrell, Holland and Kirby, Retirement and Economic Recovery (London: National Institute Economic Review No. 213, 2010); Barrell, Hurst and Kirby*, How to Pay for the Crisis or Macroeconomic Implications of Pension Reform* (London: NIESR Discussion Paper No. 333, 2009); Barrell, "Retirement and Saving" (2007) *National Institute Economic Review No. 199* 58.
[17] European Commission, *supra* note 4, 21.
[18] European Commission, *supra* note 4, 21.
[19] Calculated as the ratio of people aged 65 or above relative to the working-age population aged 15-64.
[20] Barrell, Hurst and Kirby, *supra* note 16. See also Khosan and Weale, "Saving for an Aging Population" the Peston Lecture, University of London, March 2008.
[21] See section 3 below for a discussion of this issue.

An examination of the development and provisions of the Directive and the case law reveals that there is an inherent and in-built flexibility in existing EU law which gives a Member State a great deal of discretion as to the policies which it seeks to implement for the purposes of economic and social policy. This flexibility is also enhanced, to a certain extent, by the limited level of guidance given by the ECJ to national courts in determining questions relating to the compatibility of a national measure with EU law. This creates a real risk of inconsistent application and interpretation of EU law.

2.1. Flexible Legislative Approach

The Treaty of Amsterdam, 1997[22] was the first Treaty to identify "age discrimination" as a matter requiring urgent attention.[23] However, the "age" question had been one which had been on the policy agenda from at least 1982[24], many years before the insertion of Article 19 (ex Article 13) TEU. In 1982, the European Parliament issued a resolution on the situation and problems of the aged in the European Community[25], which was followed in 1986 by a European Parliament resolution on services for the elderly[26] and a European Parliament resolution on Community measures to improve the situation of old people[27]. 1986 was also proposed by the European Parliament to be the European Year of the Elderly.[28] Of integral interest is the Council recommendation of 10 December 1982 on the principles of a Community policy with regard to retirement age[29]. This recommendation essentially encouraged a flexible, as opposed to a mandatory, retirement age structure in the European Community. In 1989, the Community Charter on the Fundamental Social Rights of Workers highlighted the need for effective resources for elderly persons who had reached retirement age.[30] In 1990, the Council adopted a Decision on Community Action for the Elderly[31] which highlighted the growing "economic and social implications, in particular for the employment market, social security and social expenditure"[32] of the current demographic developments in most Member States. This was again followed by a Commission Decision establishing a liaison group on the elderly[33] in 1991 and culminating in a Council Decision on the organisation of the European Year of the Elderly and of Solidarity between Generations (1993)[34] which again highlighted the social and economic imperatives of locating better

[22] For example, no mention of age discrimination can be found in the Treaty Establishing the European Coal and Steel Community (Paris, 1951), the Treaty establishing the European Economic Community (Rome, 1957) or the Treaty on European Union (Maastrict, 1992).
[23] See the discussion in Linos, "Path Dependence in Discrimination Law: Employment Cases in the United States and the European Union" (2010) 35 YJIL 115, 117.
[24] There are some potential implications that there was some reference to retirement ages in 1979. See for example, the 18 Dec. 1979 when the Council adopted a resolution on the adaptation of working time (OJ, 1980, No C 2, 1.) and a broad consensus was noted in the Standing Committee on Employment to the effect that all workers should gradually be given the right from a certain age to choose the time of their retirement.
[25] European Parliament Resolution of 18 Feb. 1982 on the situation and problems of the aged in the European Community (OJ, 1982, No C 66, 71).
[26] European Parliament Resolution of 10 Mar. 1986 on services for the elderly (OJ, 1986, No C 88, 17).
[27] European Parliament Resolution of 14 May 1986 on Community measures to improve the situation of old people (OJ No C 148, 16. 6. 1986, 61).
[28] This eventually came about in 1993.
[29] (O J L 357 , 18.12.1982, 27 – 28).
[30] Community Charter on the Fundamental Social Rights of Workers 1989, Arts. 24 and 25.
[31] European Council Decision of 26 Nov. 1990 on Community actions for the elderly (OJ No L 28, 2. 2. 1991, 29).
[32] European Council Decision of 26 Nov. 1990 on Community actions for the elderly (OJ No L 28, 2. 2. 1991, 29) at Recital.
[33] Commission Decision establishing a Liaison Group on the Elderly (91/544/EEC).
[34]Council Decision on the organisation of the European Year of the Elderly and of Solidarity between Generations (1993) (92/440/EC).

strategies for coping with the shifting demographics of Europe. The economic and social roles of the older worker were also recognized in the Commission's White Paper on "European Social Policy – The way forward for the Union" in which a decision was made to further "Union-wide actions to help meet the challenges of an ageing population covering, in particular, the role and contribution of the active retired population".[35]

In a unique reference to "age discrimination" (one of the first in the EU context), an evaluation of the actions of the Commission in relation to older people between 1991 and 1993 also identified that there was documented evidence of age discrimination during this period.[36] The Commission report "Age and Attitudes" in 1993 documented high levels of perceived age discrimination among the general public in the EC 12 Member States[37] with the view being that Member States should introduce age discrimination legislation as a matter of priority.[38] The embodiment of the prohibition on age discrimination in the TEU took the form of Art. 13 TEU (ex 6a EC) which provided that

> "the Council acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation".

This provision provided a specific legal basis for the development of legislation on age discrimination, which had been absent until this juncture. The case law of the ECJ has also confirmed the existence of a more general principle of a prohibition on age discrimination.[39] These provisions were further extended and reformed by the Treaty of Lisbon, (2010) which reiterated the protection against non-discrimination more generally and age discrimination more specifically.[40] The Charter of Fundamental Rights ("CFR") has also identified "age" as

---

[35] Commission of the European Union, White Paper, "European Social Policy: A Way Forward for the Union" COM (94) 333 Final, Brussels, 27.07.1994, 39.

[36] Proposal for a Council Decision on Community Support for Actions in favour of Older People / Community actions for older people 1991-1993 including the European Year of Older People and Solidarity between Generations / EVALUATION REPORT (presented by the Commission), COM (95) 53 final, Commission of the European Communities 1995, 42.

[37] 78.8% felt that they were discriminated during recruitment, 61.5% during promotion and 67.1% during training. See Eurobarometer Survey, "Age and Attitudes" (1993) available at http://ec.europa.eu/public_opinion/archives/ebs/ebs_069_en.pdf (Accessed 28.11.2012), 26.

[38] See Eurobarometer Survey, *supra* note 37, 26.

[39] At the time of writing, the following cases have reiterated the emergence of the general principle of the prohibition of age discrimination: C-144/04, *Mangold* [2005] ECR I-09981; Case C-227/04, *Lindorfer* [2007] ECR I-06767; Case C-411/05, *Palacios de la Villa* [2007] ECR I-08531; Case C-427/06, *Bartsch* [2008] ECR I-07245; Case C-388/07, *Age Concern England* [2009] ECR I-01569; Case C-555/07, *Seda Kücükdeveci* [2010] ECR I-00365; Case C-88/08, *Hütter* [2009] ECR I-05325; Case C-229/08, *Wolf* [2010] ECR I-00001; Case C-341/08, *Petersen* [2010] ECR I-00047; Case C – 499/08, *Ingeniørforeningen i Danmark* [2010] ECR I-0000 (judgment of the Grand Chamber 12 October 2010); Case C-45/09, *Rosenbladt* [2010] ECR I-9391; Case C-246/09, *Bulicke* [2010] I-06999; Case C-268/09, *Georgiev* [2010] ECR I-11869; Case C-447/09, *Prigge and Others* [2011] ECR I-000 (judgment of the Grand Chamber 13 September 2011); Joined Cases C-159/10 and C-160/10, *Fuchs and Köhler* [2011] ECR I-000 (judgment of the Court 21 July 2011); Joined Cases C – 297/10 and C-298/10, *Hennigs* and *Mai* (judgment of the Court 8 September 2011); Case C-141/11 *Hörnfeldt* (judgment of the Court 5 July 2012) and Case C-132/11 *Tyrolean Airways* (judgment of the Court 6 July 2012); Case C-286/12 *Commission v. Hungary* (judgment of the Court 6 November 2012). There are also a number of applications currently before the ECJ including Case C-501/12 *Specht v. Land Berlin*; Case C-502/12 *Schombera v. Land Berlin*; Case C-503/12 *Wieland v. Land Berlin*; Case C-504/12 *Schönefeld v. Land Berlin*; Case C-505/12 *Wilke v. Land Berlin*; Case C-506/12 *Schini v. Land Berlin*; Case C-540/12 *Schmell v. Germany*; Case C-541/12 *Schuster v. Germany*; Case C-20/13 *Unland v. Land Berlin*.

[40] Art. 10 and Art. 19 (ex 13), TFEU.

a ground of discrimination and ensured its place at the heart of EU anti-discrimination policy.[41]

The drafting of Directive 2000/78 EC[42], which would provide the first legislative protection against age discrimination in employment, coincided with the Lisbon Special European Council which met[43] and acknowledged that overall the European Union "employment rate is too low and is characterized by insufficient participation in the labour market by women and older workers"[44]. It also coincided with the European Commission's Review of the Employment Market in 2000 which indicated that policy initiatives to integrate isolated older workers into the labour force are "urgently required"[45] and identified "considerable employment potential to be gained in the Union from increasing the employment potential of older workers of 55 and over"[46]. Further, the December 1999 European Council Summit in Helsinki recognized the need to develop a policy on "active aging"[47] to encourage the integration of older workers. The initial proposal for the Directive drafted by the European Council highlighted that the rationale for the Directive was to ensure that "as high a percentage as possible of people of working age are in jobs"[48] and referred specifically to a *Eurolink* report in 1993 which identified age discrimination as a particularly sensitive issue requiring attention.[49] The justification for a European wide measure in relation to age discrimination appeared to stem from economic and social foundations relating to the need to combat unemployment and exclusion in the European workforce. Indeed, the proposal made specific reference to the Employment Guidelines 1999 which focused on age in the context of improved employability.[50] There appeared to be a recognition in the highest institutions of the European Union that economic and social necessities required the development of flexible policy initiatives in the area of older workers to ensure their greater integration into the labour market. As Duncan correctly observes, the Directive coincided with the European institutional "concerns over the affordability of older people and of intergenerational equity in the light of demographic aging"[51] and the genuine challenged posed by rising life expectancy and its impact on public pension funds.[52] However, there is also a strong argument that the inclusion of the human rights provisions in the Treaty in 1997 may also have widened the horizons of

---

[41] Art. 21, CFR.

[42] On the introduction of the Directive see: Bribosia & Bombois, "Interdiction des discriminations en raison de l'âge: du principe et de ses exceptions" (2011) 47(1) janv-mars , *Revue trimestrielle de droit européen* 41.

[43] The European Council held a special meeting on 23-24 Mar. 2000 in Lisbon to agree a "new strategic goal for the Union in order to strengthen employment, economic reform and social cohesion as part of a knowledge-based economy". Lisbon Special European Council, *Presidency Conclusions*, (Lisbon, Mar. 2000) at Introduction.

[44] Lisbon Special European Council, *supra* note 43, para 4. *Cf:* McArdle, "From Jilted John to the Oldest Swinger in Town" (2009) available at https://dspace.stir.ac.uk/bitstream/1893/2258/1/Parrish%20draft2.doc (last visited 6 Mar. 2012), 3.

[45] European Commission, Directorate General for Employment, Social Affairs and Equal Opportunities, *Employment in Europe 2000*, (Luxembourg: Office for Official Publications of the European Communities, 2000), 11 available at http://digitalcommons.ilr.cornell.edu/intl/22 (Accessed 28.11.2012).

[46] European Commission, *supra* note 45, 47.

[47] Helsinki European Council 10 and 11 Dec. 1999, *Presidency Conclusions*, para 31 available at http://www.europarl.europa.eu/summits/hel1_en.htm (Accessed 28.11.2012).

[48] Proposal for a Council Directive Establishing a General Framework for Equal Treatment in Employment and Occupation. (/*Com/ 99/0565 final) (OJ, 2000, C 177E, p. 42-46), s. 2.

[49] Drury, "Age discrimination against older workers in the European Community" (Eurolink Age, 1993).

[50] Council Resolution of 22 Feb. 1999 on the 1999 Employment Guidelines (*Official Journal C 069 , 12/03/1999 P. 0002 – 0008),* s. I (4), 19.

[51] Duncan, "The dangers and limitations of equality agendas as a means for tackling old-age prejudice" (2008) 28 *Aging and Society* 1133, 1133-1134.

[52] Bredt, "Between labour market and retirement pension – flexible transition as a new paradigm for aging societies?" (2008) 16(4) *International Social Security Review* 95, 96.

the legislators and impacted on the development of the Directive. Therefore, while there were social and economic imperatives underpinning the Directive, the impact of fundamental rights should not be underestimated.

Action-specific legislation relating to the harmonization of age discrimination laws across the Member States did not appear until November 2000, three years after its addition to the TEU, and became the subject of much debate and criticism.[53] Strikingly, the provisions relating to age discrimination would not have to be implemented for a further six years, an indication, perhaps, of some early dissent by Member States[54]. While it could be argued that this was a particularly lengthy time and reflected some difficulties in developing the legislation, it could also, on the other hand, be considered to be a very swift development considering that unanimity was required to implement such legislation.

The Directive provides for the prohibition of discrimination on a number of grounds, including age, in employment and occupation across the EU Member States. The Directive applies the standard discrimination model under which both direct and indirect discrimination are prohibited. However, certain justifications are possible in the case of indirect discrimination.[55] In a unique move, providing evidence of the need for compromise between Member States, the Directive also makes specific and "flexible"[56] provision for discrimination on grounds of age (Article 6). Article 6 provides that a difference in treatment on grounds of age (which would normally be considered to be direct or indirect discrimination) can be objectively justified in certain circumstances, and thus will not amount to direct or indirect discrimination on grounds of age. It provides that:

> "Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary. Such differences of treatment may include, among others: (a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection; (b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment; (c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in

---

[53] See generally Schmidt, "The Principle of Non-Discrimination in Respect of Age: Dimensions of ECJ's Mangold Judgment" (2005) 7(5) GLJ 505 at p. 510 where she refers to the strong opposition from academic and German society. *Cf:* Saeker, "Vernunft statt Freiheit – Die Tugendrepublik der neuen Jakobiner, referentenentwarf eines privatrechtlichen Diskriminierungsgesetzes" (2002) 35 ZRP 286 and Adomeit, „Diskriminierung – Inflation eines Begriffs" (2002) 55 NJW 1622.

[54] See Art. 18 which provides that Member States may invoke a transition period of a further 3 years in relation to age discrimination from the original implementation date of 2003. Therefore, provisions relating to age did not have to be implemented until Dec. 2006. See generally, Skidmore, "EC Framework Directive on Equal Treatment in Employment: Towards a Comprehensive Community Anti-Discrimination Policy?" (2001) 30 ILJ 126 at p. 127.

[55] Art. 2.

[56] Skidmore argues that it is in the "field of age discrimination that the greatest flexibility has been accorded to Member States". Skidmore, *supra* note 54, 130.

question or the need for a reasonable period of employment before retirement"[57].

Overall it can be determined that despite a general overall support in favour of older worker participation and integration in the labour market, the Directive is reflective of the realities facing Member States and the need for flexibility in dealing with sensitive social and economic issues. This is also reflected in the case law of the ECJ.

2.2.Flexible Judicial Approach

The ECJ has had, in the recent mandatory retirement cases, a unique opportunity to review the apparent conflict between high youth unemployment and the demographic challenge facing Europe in the context of age discrimination and to determine how these apparently opposing challenges can be effectively balanced. The ECJ has consistently held that mandatory retirement cases do fall within the scope of the Directive,[58] that the imposition of such policies does constitute a difference in treatment on the grounds of age[59] and that the concept of intergenerational balance can constitute a legitimate aim which may justify a difference in treatment as long as the measure imposed is proportionate to meeting that aim.[60] As regards the concept of proportionality, the ECJ requires that the measure must be both "necessary" (this involves a consideration of whether the legitimate aim pursued could have been achieved 'by an equally suitable but more lenient means'[61]) and "appropriate" (this involves a measurement of the suitability of the measure in relation to the aim sought to be achieved and only where the measure is deemed to be 'manifestly unsuitable' will the ECJ consider it to be inappropriate.[62]).

In the recent case of *Commission v. Hungary*[63], the ECJ held that the lowering of the retirement age for judges, notaries and prosecutors from 70 years to 62 years was inappropriate to meet the aim of achieving a "balanced age structure" and unnecessary to meet the aim of standardization in the public service. This case is illustrative of the difficult task facing national courts in determining the issue of proportionality of mandatory retirement measures. In determining the necessity of the measure to meet the aim of standardizing the public service, the ECJ held that an examination of the hardship the measure might cause to the persons affected and the benefit to society of the measure should be conducted. [64] On balance, the ECJ held that the lack of transitional measures to allow the individuals affected to take economic and financial measures to alleviate the hardship of the measure and the failure of Hungary to demonstrate that there was not a more lenient measure which could have implemented to achieve the same objective, meant that the measure was not necessary to meet the aim. In determining the appropriateness of the "balanced age structure" aim, the ECJ considered not only the short term effect of the measure which would result "in the vacation of numerous posts which will be liable to be occupied by young lawyers, as well as in the

---

[57] Art. 6.

[58] *Age Concern England, supra* n. 6, at para 2.; *Rosenbladt supra* n. 6, at para 36 and see also the opinion of A.G. Tizzano at para 32.

[59] See, for example, the case of *Palacious de la Villa, supra* n. 6.

[60] For a detailed discussion of the stages see Dewhurst, "The Development of EU Case-Law on Age Discrimination in Employment: 'Will You Still Need Me? Will You Still Feed Me? When I'm Sixty-Four'" (2013) 19(4) *European Law Journal* 517, 534-536.

[61] *Ingeniørforeningen i Danmark*, *supra* n. 6, opinion of A.G. Kokott at para 60.

[62]*Ingeniørforeningen i Danmark*, *supra* n. 6, opinion of A.G. Kokott at para 53.

[63] See *Commission v. Hungary*, *supra* note 6.

[64] See *Commission v. Hungary*, *supra* note 6, para 66.

acceleration of the rotation and renewal of the personnel within the profession concerned"[65], but also the medium and longer term effects of the measure. In the latter regard, the apparently positive short-term effects were liable to "call into question the possibility of achieving a truly balanced age structure in the medium and long terms"[66]. The ECJ noted that while in 2012 there would be a "very significant acceleration due to the fact that eight age groups will be replaced by one single age group"[67] (as a result of lowering the mandatory retirement age from 70 years to 62 years), that turnover rate would be "subject to an equally radical slowing-down in 2013 when only one age group will have to be replaced"[68]. Therefore, it held that the provision at issue was "not appropriate to achieve the objective of establishing a more balanced 'age structure'"[69].

The decision in the case of *Commission v. Hungary*, while illustrative of the very challenging task of national courts in determining the issue of proportionality, can be distinguished from other mandatory retirement cases as it is not a preliminary ruling (which all the other mandatory retirement cases are) and the ECJ was, therefore, in a position to issue what Tridimas would refer to as an 'outcome' decision[70] (which is not the case in preliminary rulings where the ECJ is limited to providing guidance to national courts) [71]. It is the role of the national court to determine whether, in fact, the measure introduced in their jurisdiction is proportionate to the aim sought to be achieved. While the author acknowledges that the level of guidance given in age discrimination cases does not differ significantly from the level of guidance given in other discrimination cases, it is contended that there is a difference in the level of guidance given within age discrimination cases, and more particularly and central to the focus of this article, there are differences in the level of guidance given within mandatory retirement cases. The main difficulty identified in this article is that the level of guidance appears to differ depending on the type of mandatory retirement case before the ECJ. In general labour market cases, it would appear that very little guidance is given to national courts, whereas the opposite would appear to be the case in relation to specific organisation cases. This next section identifies this differing approach and the potential for this approach to lead to inconsistencies in the application and interpretation of EU law.

2.2.1. The General Labour Market Cases

The ECJ has held in the cases of *Palacious de la Villa*, *Rosenblatt* and *Hörnfeldt* (three specific cases on mandatory retirement in a general labour market context) that the protection of youth employment within the general labour market is a legitimate aim and that mandatory retirement measures may be a proportionate means of achieving that aim. A useful example is the case of *Palacious de la Villa* where the Spanish Government argued that the mandatory retirement measures in the labour market were introduced to meet the legitimate aim of "seeking to promote better access to employment, by means of better distribution of work between the generations"[72]. In particular, it argued that the mandatory retirement measure was introduced to deal with an "economic backdrop characterised by high unemployment, in order

---

[65] See *Commission v. Hungary*, *supra* note 6, para 76.
[66] See *Commission v. Hungary*, *supra* note 6, para 77.
[67] See *Commission v. Hungary*, *supra* note 6, para 78.
[68] See *Commission v. Hungary*, *supra* note 6, para 78.
[69] See *Commission v. Hungary*, *supra* note 6, para 79.
[70] Tridimas, "Constitutional review of member state action: The virtues and vices of an incomplete jurisdiction" (2011) 9(3-4) *International Journal of Constitutional Law* 737, 740.
[71] Cases where the ECJ "sets parameters and provides the national court with guidelines which it must take into account in resolving the dispute" Tridimas, *supra* n.70, 741.
[72] *Palacious de la Villa, supra* note 6, para 53.

to create, in the context of national employment policy, opportunities on the labour market for persons seeking employment"[73]. The Spanish Government did not attempt to argue that there was any particular problem in any particular industry but argued that mandatory retirement was a necessary policy to achieve intergenerational balance in the labour market more generally. This reasoning was accepted by the ECJ as a legitimate employment policy aim capable of justifying a difference in treatment on the grounds of age and the ECJ concluded that the "legitimacy of such an aim of public interest cannot reasonably be called into question, since employment policy and labour market trends are among the objectives expressly laid down" in the Directive.[74] It was also not considered "unreasonable" for the authorities of a Member State to take the view that a mandatory retirement measure "may be appropriate and necessary in order to achieve a legitimate aim in the context of national employment policy, consisting in the promotion of full employment by facilitating access to the labour market"[75]. However, limited guidance was given to the national court by the ECJ on the manner in which such appropriateness or necessity should be determined.

Equally in the case of *Rosenblatt*, a case which also falls into this general category, the German Government argued that a mandatory retirement clause in Mrs. Rosenblatt's contract of employment was achieving the legitimate aim of sharing employment between the generations. More specifically, the German Government submitted that the "termination of the employment contracts of [the employees affected] directly benefits young workers by making it easier for them to find work, which is otherwise difficult at a time of chronic unemployment"[76]. The ECJ, once again with very limited guidance, agreed that the aims of the German Government must be regarded as legitimate and the means of achieving these aims proportionate within the meaning of Article 6. Finally, in one of the more recent age discrimination cases to come before the ECJ, *Hörnfeldt*, the ECJ once again held that the imposition of a mandatory retirement age of 67 was justified on the basis of the fact "that it frees up posts for younger workers on the labour market". Once again the ECJ accepted, with little guidance, that this was not only a legitimate aim but that mandatory retirement policies may an appropriate and reasonable method of achieving this aim.

2.2.2. Specific Organisation Cases

The approach in specific organisation cases is markedly different. In the cases of *Petersen*, *Georgiev*, and *Fuchs and Kohler (*mandatory retirement cases in specific organisation situations), the ECJ has held that the protection of youth employment and promotional opportunities within a specific organisation is a legitimate aim capable of justifying a difference of treatment on the grounds of age and that mandatory retirement policies may be a proportionate means of meeting this particular aim. However, unlike the first category of cases above, the ECJ in these cases has given more guidance to the national courts as to how to assess the issue of proportionality.

In the case of *Petersen*, the German Government argued that the mandatory retirement age of 68 in the public dental profession was necessary in order to "share out among the generations employment opportunities in the profession of panel dentist"[77]. The ECJ held that this was an

[73] *Palacious de la Villa, supra* note 6, para 58.
[74] *Palacious de la Villa, supra* note 6, para 67.
[75] *Palacious de la Villa, supra* note 6, para 72.
[76] *Rosenblatt, supra* note 6, para 44.
[77] *Petersen, supra* note 6, para 65.

employment policy measure and could therefore be a legitimate aim within the meaning of Article 6 of the Directive. Equally, the ECJ held, in considering whether this mandatory retirement measure was appropriate and necessary, that it was not "unreasonable for the authorities of a Member State to consider that the application of an age limit, leading to the withdrawal from the labour market of older practitioners, may make it possible to promote the employment of younger ones"[78]. Interestingly, the ECJ did provide some guidance to the national courts on the assessment of the proportionality of the measure and, in particular, guided national courts to consider whether the age limit of 68 set by the legislature was, in fact, appropriate and necessary. The ECJ also guided the national court to consider situations where the number of panel dentists in the labour market concerned was not excessive in relation to the needs of patients. In such circumstances, "entry into that market is usually possible for new practitioners, especially young ones, regardless of the presence of dentists who have passed a certain age".[79] In such circumstances, the ECJ held that "the introduction of an age limit might be neither appropriate nor necessary for achieving the aim pursued".[80] Therefore, the employment prospects in the specific organisation were considered by the ECJ to be a relevant factor in determining the issue of proportionality.

Similarly, in *Georgiev*, which involved the mandatory retirement of University professors, both the University authorities and the Bulgarian Government submitted that the national legislation at issue in the main proceedings pursued a social policy aim of ensuring that professorship posts were allocated "in the best possible way by establishing a balance between the generations", among other reasons. In relation to the intergenerational balance argument, the ECJ held that the "encouragement of recruitment in higher education by means of the offer of posts as professors to younger people may constitute such a legitimate aim"[81]. Compelling arguments were made on behalf of Mr. Geogiev to the effect that the arguments of the University and the Bulgarian Government in this case were not "aligned to the reality of the labour market" (one of the key factors of consideration in the case of *Petersen*) in that the average age of university professors was in fact 58 and the fact that there were not more than 1000 of them, a "situation which is explained by the absence of interest on the part of young people in a career as a professor" and that the legislation at issue did not encourage the recruitment of young people[82]. The ECJ guided the national court to consider factors such as whether the posts for university professor are, in general of a limited number and open only to people who have attained the highest qualifications in the field concerned and or whether a vacant post has to be available for a professor to be appointed. In such circumstances the ECJ took the view that a Member State may consider it appropriate to set an age limit to achieve aims of employment policy.[83] However, this was for the national court to determine based on the particular circumstances existing in *Georgiev*.[84]

Finally, further evidence of this approach in "specific organisation" cases, is the decision of the ECJ in *Fuchs and Kohler*. Once again, the applicants, who were state lawyers, argued that the mandatory retirement age imposed on them was contrary to Article 6 of the Directive. One of the legitimate aims relied on by the German Government to justify this difference in treatment was the development of a favourable age structure which is to be achieved by "the simultaneous presence within the profession at issue – that of prosecutors – of young

[78] *Petersen, supra* note 6, para 70.
[79] *Petersen, supra* note 6, para 71.
[80] *Petersen, supra* note 6, para 71.
[81] *Georgiev, supra* note 6 , para 47.
[82] *Georgiev, supra* note 6, para 47.
[83] *Georgiev, supra* note 6, para 52.
[84] *Georgiev, supra* note 6, para 53.

employees at the start of their careers and older employees at a more advanced stage of theirs".[85] Therefore the law was "designed to establish a balance between the generations".[86] In relation to the appropriateness or reasonableness of the measure, the German Government submitted that as the number of posts, available in the civil service was limited, particularly at senior levels and the opportunity to create new posts was also limited, the setting for a compulsory retirement age was the only means of ensuring that employment was fairly distributed among the generations.[87] The ECJ guided the national court to examine closely the profession of prosecutors in Germany and noted that it was apparent that access to that profession was limited by the requirement that members should have obtained a special qualification entailing the successful completion of a course of study and a traineeship. In addition, the entry of young people into the profession could be restricted owing to the fact that the civil servants concerned are appointed permanently.[88] That being the case, it did not appear unreasonable for the competent authorities of a Member State to take the view that a measure can secure the aim of putting in place a balanced age structure in order to facilitate planning of staff departures, ensure the promotion of civil servants, particularly the younger ones among them, and prevent disputes that might arise on retirement.[89]

The ECJ does appear to provide a certain level of guidance to national courts in these specific organization cases and the ECJ's determinations highlight different factors in each case which national courts could take into consideration. There is also a measure of consistency in the guidance provided to national courts with certain factors for consideration recurring in the judgments. The ECJ guides national courts to examine and determine the reality of the employment prospects within the specific organization and the nature of the particular employment (including the importance of tenure and skill level). However, guidance on factors which would also be relevant including culture of the organization or the medium and long term impact of the measures are not addressed but, as the analysis later in this article identifies, are equally important. Despite these omissions, the approach of the ECJ in these cases is an improvement on the more limited guidance approach taken in general labour market cases.

2.3. The Implications of this Flexible Approach

The most significant problems arising from these cases are related to the fact that even though the cases are entirely similar and raise the same legal issue, some cases receive more guidance than other cases and in those cases where some guidance is offered, many important and relevant issues are not addressed. The inevitable results of such an approach are two-fold. Firstly, the potential for inconsistency in the application of EU law between Member States and within Member States is increased, particularly in general labour market type cases. An almost identical case may be considered proportionate in one Member State and disproportionate in another Member State. Thus in a case involving identical facts, a Spanish court may determine that mandatory retirement is a proportionate means of meeting this legitimate aim, but an Irish court may determine that mandatory retirement is not, in fact, proportionate. Even more concerning is a situation in which national courts in the same

[85] *Fuchs and Kohler, supra* note 6, para 47.
[86] *Fuchs and Kohler, supra* note 6, para 47.
[87] *Fuchs and Kohler, supra* note 6, para 57.
[88] *Fuchs and Kohler, supra* note 6, para 59.
[89] *Fuchs and Kohler, supra* note 6, para 60.

jurisdiction may make inconsistent determinations in similar cases. This has the effect of potentially "prejudicing uniform application" of age discrimination law and creating a sense of "incompleteness" in the interpretation of EU law.[90] Secondly, it has been contended that "taken to extremes, the [intergenerational balance] aims could be taken to justify almost any retirement age"[91], where there is inadequate guidance from the ECJ as to the factors to be considered in each case. On the other hand, more effective and consistent guidance could offer "national courts a stake in the application of community law and the shaping of the community legal order" and is certainly "more in keeping with the model of cooperative federalism".[92] Consistent and adequate guidance in each case would have significant advantages considering the very difficult nature of the question posed to the national courts.

3. Mandatory Retirement, Intergenerational Balance and the Lump of Labour Fallacy

As has been identified above, the question which the national courts have to struggle with is unenviable: is mandatory retirement a proportionate response to the issue of intergenerational balance in a particular case? The question is loaded with economic and social implications and the determination on either side of the debate is sure to be met with controversy. This section of the paper considers this issue from a purely national perspective and questions whether mandatory retirement can ever be a proportionate response to intergenerational balance concerns. It is also very useful in elucidating the factors which should be considered by national courts in determining whether a mandatory retirement measure is proportionate to the aim of intergenerational balance.

3.1.Mandatory Retirement Policies in the General Labour Market

Mandatory retirement as a policy for dealing with issues of intergenerational balance depends, in many cases, upon the acceptance of the "lump of labour" theory.[93] This theory presumes that there are a limited number of job opportunities available and that the implementation of mandatory retirement policies may be necessary to remove older workers to make way for younger workers[94] and to ensure greater promotional opportunities for younger workers[95]. This theory has also been utilized in the past to discourage the participation of immigrants or women in the labour market or to reduce working hours.[96] More recently, it has become

---

[90] Tridimas, *supra* n.70, 755.

[91] *Seldon v Clarkson, Wright & Jakes* [2012] UKSC 16, 67 (*per* Lady Hale).

[92] Tridimas, *supra* n.70, 755.

[93] Walker, "Why economists dislike a lump of labor" (2007) 65(3) *Review of Social Economy* 279. For a more detailed treatment of this topic see Blanchard ''The Economic Future of Europe'' (2004) 18(4) *Journal of Economic Perspectives* 3; Hunt ''Has Work-Sharing Worked in Germany?'' (1999) 114(1) *Quarterly Journal of Economics* 117; Philip, Slater, and Harvie, ''Preferences, Power, and the Determination of Working Hours'' (2005) 39(1) *Journal of Economic Issues* 75; Walker, ''The 'Lump-of-Labor' Case Against Work-Sharing: Populist Fallacy or Marginalist Throwback?'' in Golden andFigart (eds) *Working Time: International Trends, Theory and Policy Perspectives* (New York and London, 2000); Wilson, ''Economic Fallacies and Labour Utopias'' (1871) 113(261) *Quarterly Review* 229.

[94] Turner, "Ageing and Generational Conflicts: A Reply to Sarah Irwin" (1998) 49(2) *The British Journal of Sociology* 299, 303. See also Cowgill, "Aging and modernization: a revision of the theory" in Gubrium (ed.) *Late Life: Communities and Environmental Policy* (Springfield, Illinois, 1974), 130; M. Gunderson and Pesando, "Eliminating Mandatory Retirement: Economics and Human Rights" (1980) 6(2) *Canadian Public Policy* 352, 358; LaSelva, "Mandatory Retirement: Intergenerational Justice and the Canadian Charter of Rights and Freedoms" (1987) 20 *Canadian Journal of Political Science* 149, 150 and 161.

[95] Lazear, "Why is there Mandatory Retirement?" (1979) 87(6) *Journal of Political Economy* 1261, 1263.

[96] Buttonwood, "Keep on Trucking: Why the old should not make way for the young" (2012) *The Economist* (11th February). See also Munnell and Wu, *infra* note 115, 1 who refer to opponents of free trade, technological advance and immigration as those who use the "lump of labour" fallacy to advance their arguments.

commonplace in the debate over older and younger workers and the maintenance of intergenerational balance.[97] From the perspective of this theory, mandatory retirement is a "realistic antidote to unemployment in depressing industries and in the economy at large".[98] However, there are a number of theoretical and empirical flaws in this analysis.

3.3.1. The Theoretical Flaws

The "lump of labour" theory has been described as one of the best known fallacies in economics[99] and the imposition of mandatory retirement policies to combat youth unemployment is often viewed with suspicion by economists. This is because the idea of substitution or "crowding out", which the "lump of labour" theory is founded upon, cannot be substantiated due to a number of distinct theoretical factors.

One of the most basic flaws in the "lump of labour" theory is the idea that there is only so much work to go around, that the labour market has only a fixed number of jobs and that younger workers can only obtain employment, once an older person has left a job. However, economists would argue that labour markets are not fixed but are flexible, constantly expanding and developing in various ways. Researchers who have studied the "lump of labour" theory in the context of trade, technology, working hours or female or immigrant labour participation have found little evidence of the "crowding out" of workers theory.[100]

Another common assumption is that once older workers have left a particular job younger workers will become the natural substitute for these workers. However, due to changing job patterns[101], entry and exit flows in the labour market do not necessarily overlap.[102] There is therefore, what MacNicol describes as, a "spatial mismatch" between the jobs left and the jobs available[103]. Equally, in relation to entry and exit flows, the International Labour Organisation has concluded that on a macro-economic level, there is no reason to believe that

---

[97] For more information on the "lump of labour" theory see Walker, "Why economists dislike a lump of labor" (2007) 65(3) *Review of Social Economy* 279; Walker, "The "lump-of-labor" case against work-sharing: Populist fallacy or marginalist throwback?" In Golden and Figart, *Working Time: International Trends, Theory and Policy Perspectives* (London, 2000); Clark, "Moral Discourse and Public Policy in Aging: Framing Problems, Seeking Solutions, and 'Public Ethics'" (1993) 12(4) *Canadian Journal on Aging* 485, 496.

[98] Graebner, *A History of Retirement, The Meaning and Function of an American Institution (1885-1978)* (New Haven and London, 1980), 53.

[99] Walker, "Why economists dislike a lump of labor" (2007) 65(3) *Review of Social Economy* 279, 279 and Bishop, *Essential Economics* (London, 2004), 159.

[100] Munnell and Wu, *supra* note 115, 2.

[101] Buttonwood, *supra* note 96.

[102] See Sen who has commented that "[t]here are many big issues to be faced in scrutinizing the proposals for revising the retirement age. That is a very big issue and I do not want to address it so off-handedly but I am just pointing out how conflicts are often seen when none might exist…Indeed the combination of the gut reaction to the effect that the source of the problem of an ageing population is that the old cannot work with the gut reaction that the young must lose jobs if the older people did work is to provide a hopeless impasse which rides just on unexamined possibilities, based on a simple presumption of conflict that may or may not actually exist. I am afraid quite a lot of thinking on labour economics is really governed by presumption of conflicts which have not been thoroughly examined". A. Sen, Nobel Laureate in Economics, International Labour Conference, Geneva 87th Session 15 June 1999, section 7.

[103] MacNicol, Age Discrimination: An Historical and Contemporary Analysis (Cambridge, 2006), 18. See also Shapiro and Sandell, "The Reduced Pay of Older Job Losers: Age Discrimination and Other Explanations" in S. Sandell (ed.) *The Problem isn't Age. Work and Older Americans* (Praeger, 1987), 43-49 and Sandell, "The Labour Force by the Year 2000 and Employment Policy for Older Workers" in R. Morris and S. Bass (Eds.) *Retirement Reconsidered. Economic and Social Roles for Older People* (Springer, 1988), 107-115.

those leaving the labour market give jobs to younger workers.[104] Therefore, the idea that mandatory retirement can always be a proportionate response to intergenerational balance generally appears to be theoretically flawed.

3.1.2. The Empirical Flaws

There are also empirical problems with the theory which appear to be particularly relevant in the general labour market type cases i.e. cases where the Member State imposes mandatory retirement policies on all workers. Most significantly, the argument that older workers crowd younger workers out of the labour market is generally unsubstantiated by empirical research. There have been a number of empirical studies concentrated on ascertaining the impact of retention of older workers on youth employment and unemployment rates. The overwhelming evidence from these reports supports the theory that the retention of older workers has no effect on the employment of younger or older workers.

Initial studies conducted in Canada on this issue are instructive. Generally, it has been found that as elderly labour force participation rose, the youth labour force participation also rose.[105] Baker, Gruber and Milligan have concluded in the Canadian context that "there is little evidence here that the labour supply changes of the elderly are having impact on the young"[106]. The research found by comparison that a one point increase in elderly employment predicts a drop on the unemployment rate for the young. This is the opposite direction that one would expect if an increase in elderly employment costs younger workers work opportunities.[107] When the results of the research were further scrutinised with the addition of variables in GDP, GDP growth and the share of manufacturing in GDP, the estimates remain unchanged. This suggests that the results were driven by strong economic growth and that therefore "in a strong growth environment both young and elderly employment improves"[108]. The authors similarly conclude the evidence suggests that "employment of the different age groups tends to move together rather than in opposite directions"[109].

While one must be cautious of drawing direct comparisons with the relatively stable economy of Canada with the more turbulent EU economy in recent years, the authors themselves argue that their results are transferrable despite these problems. Further research on this issue conducted by Gruber, Milligan and Wise[110] indicates that the economies are not closed and inflexible as the "lump of labour" theory suggests. The authors use the example of the increase in the number of women in the workplace as evidence of the flaws in this theory.[111] Examining the impact of the increase in the number of women in the labour market in 12 countries, the authors found that while initially there was a small decline in the employment rate of men in all but one of the countries, on average, the smallest of declines were noticed in

---

[104] Auer and Fortuny, *Aging of the Labour Force in OECD Countries: Economic and Social Consequences* (Geneva, International Labour Office, Employment Sector, 2000), Employment Paper 2000/2, section 7(iii).
[105] Baker, Gruber and Milligan, "The Interaction of Youth and Elderly Labour Markets in Canada" In J. Gruber and D. Wise, *National Bureau of Economic Research Social Security Programmes and Retirement around the World: The Relationship to Youth Unemployment* (Chicago, 2010) at p. 77.
[106] Baker, Gruber and Milligan, *supra* note 105 at p. 81.
[107] Baker, Gruber and Milligan, *supra* note.105 at p. 88.
[108] Baker, Gruber and Milligan, *supra* note 105 at p. 88.
[109] Baker, Gruber and Milligan, *supra* note 105 at p. 90.
[110] Gruber, Milligan and Wise "Social Security Programs and Retirement Around the World: The Relationship to Youth Employment" (NBER Working Paper No. 14647) available at http://www.nber.org/papers/w14647.
[111] Gruber, Milligan and Wise, *supra* note 110 at p. 7.

countries with the largest increase in the employment rate for women.[112] Economies are therefore not boxed but are flexible and can expand to meet the demands for work. The authors, in continuing this vein of reasoning, argue that there is "no evidence that increases in the employment of older persons are related to a reduction in the employment of younger persons, or that decreases in the employment of older persons are associated with increases in the unemployment of younger persons".[113] The authors also examine the effects of precipitating events that are intended to induce older workers to leave the labour force, such as an increase in pension entitlements or the introduction of an early retirement age. An examination of the incentives in Germany to induce people to take early retirement in the 1970's revealed that a reduction in the number of older workers in the economy was associated with an increase in the youth unemployment rate, despite the fact that the unemployment rate of young workers had been relatively stable over the preceding years. While the research has been criticised for the methods and data used which had to be adapted for ease of comparison, the limitation of the study to employment of younger workers and for not comparing data after the recent recession which might produce very different results to the results from growing economies, the results of the research have been corroborated by later studies.[114]

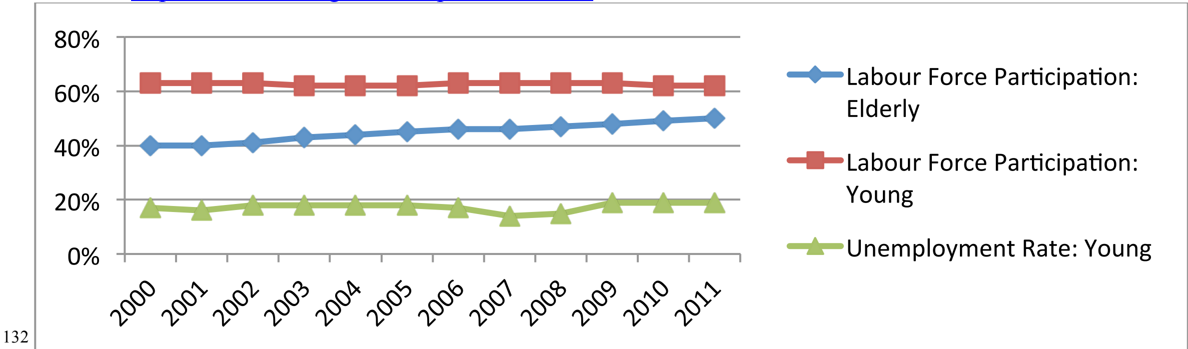
The most recent research conducted in the United States directly on the issue of intergenerational balance[115], which also addresses the impact of the recession (which had been a criticism of earlier research[116]) reveals almost identical results.[117] The authors of the research utilized data from the Current Population Survey, which is the largest annual labour market survey in the United States and studied variables such as labour force participation, employment and unemployment, hours worked and wage rates. The research also includes a variable for the recession, "to capture the impact of the economic downturn on labor supply"[118]. The research found that a one-percentage point increase in the older worker employment rate is associated with a decline in youth unemployment of 0.11 percentage points and an increase in youth employment of 0.21 percentage points[119]. The authors challenge the results using different age groups,[120] controlling for differences among states[121] and examining differences in gender[122] or the impact on wages.[123] The results indicate that none of these variables have any impact on the baseline result: there is no evidence that older workers are crowding younger workers out of the labour market.

---

[112] Gruber, Milligan and Wise, *supra* note 110, 8. The authors use the example of the Netherlands where the employment rate of women increased by 54 percentage points but the employment rate of men declined only by one percentage point.
[113] Gruber, Milligan and Wise, *supra* note 110, 12.
[114] See Munnell and Wu, *infra* note 115, 2 for details on the problems with the research conducted to date on the issue.
[115] Munnell and Wu, "Are Aging Baby Boomers Squeezing Young Workers Out of Jobs?" (2012) Number 12-18 *Centre for Retirement Research at Boston College Issue in Brief* available at http://crr.bc.edu/wp-content/uploads/2012/09/IB_12-18-508.pdf (last accessed 27.11.2012).
[116] Munnell and Wu, *supra* note 115, 4-5.
[117] Munnell and Wu, *supra* note 115, 1.
[118] Munnell and Wu, *supra* note 115, 2. See also Munnell and Wu, "Will Delayed Retirement by the Baby Boomers Lead to Higher Unemployment amoung Younger Workers?" Working Paper (2012) Chestnut Hill, MA: Centre for Retirement Research at Boston College.
[119] Munnell and Wu, *supra* note 115, 2.
[120] Munnell and Wu, *supra* note 115, 3.
[121] Munnell and Wu, *supra* note 115, 3. The authors conduct a "fixed-effects" model by introducing state controls which isolate the effects of "changing economic conditions on labor force participation from the largely structural influences that vary across states".
[122] Munnell and Wu, *supra* note 115, 3.
[123] Munnell and Wu, *supra* note 115, 3.

Finally, the authors analyse the impact of the recession on labour force participation of young and old workers. The aim of the authors was to test the proposition that "when employment overall is dropping, crowd-out between different groups might be possible"[124]. The results indicate that the only impact of the recession is that an increase in the older worker employment rate is associated with an increased hourly wage rate of the young by an additional 0.28 percent. "This finding, however, contradicts the crowd-out effects"[125]. The only impact that was significant was in female employment where there was some evidence of crowding-out.[126] For males, however, it was found that the employment of older males "has an even more positive impact on the various labour market outcomes of younger males than in a typical business cycle"[127]. More significantly, the research utilizes an instrumental variable approach to try to establish a causal relationship between older workers' employment and the labour force activity of younger workers. However, even taking into account that some "endogenous factor could be affecting the employment of both the older and the young" the results do not alter.[128] On the contrary, the results indicate that "greater employment of older persons leads to better outcomes for the young – reduced unemployment, increased employment, and a higher wage"[129].

There is no independent research available in the EU context on the impact of the recession on the employment rates of young and old workers.[130] Repeating the analysis carried out in other research on a more rudimentary level in the context of the European Union[131], it can be determined that there is no significant difference between the results in the US and Canada and the EU. An evaluation of the labour force participation rates of the elderly, youth and the unemployment rate of the young reveals that labour force participation of the elderly has been increasing steadily over the past decade. However, this has had no discernible impact on the unemployment rates of the young with the unemployment rate decreasing dramatically at certain points when the labour force participation rates of the elderly were, in fact, increasing[132]. Equally, when comparisons are drawn with the labour force participation of the elderly, the rate of youth unemployment and the rate of prime age unemployment, it can be

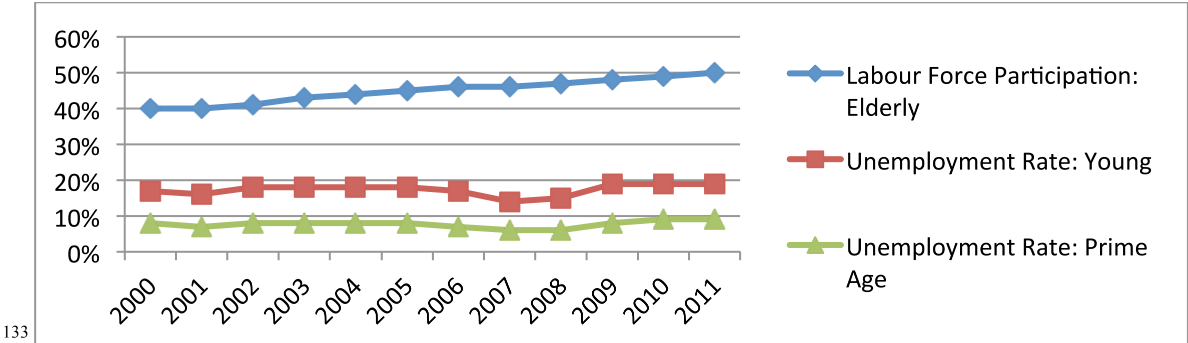
[124] Munnell and Wu, *supra* note 115, 4.
[125] Munnell and Wu, *supra* note 115, 4.
[126] Munnell and Wu, *supra* note 115, 4.
[127] Munnell and Wu, *supra* note 115, 4.
[128] Munnell and Wu, *supra* note 115, 5.
[129] Munnell and Wu, *supra* note 115, 5.
[130] There has been some research conducted more generally on the issue of the impact of mandatory retirement policies generally: See Wood, Robertson and Wintersgill, *A Comparative Review of International Approaches to Mandatory Retirement* (London: Department of Work and Pensions, Research Report 674, 2010) which echoed the findings in Canada and the USA. See also the OECD, *Review of Policies to improve Labour Market Prospects for Older Workers: Country Reports* which reveal similar results. Available at http://www.oecd.org/els/emp/ageingandemploymentpolicies.htm.
[131] The author has conducted this rudimentary analysis using statistics from the OECD statistics extracts available at http://stats.oecd.org/index.aspx?r=513422#.
[132]


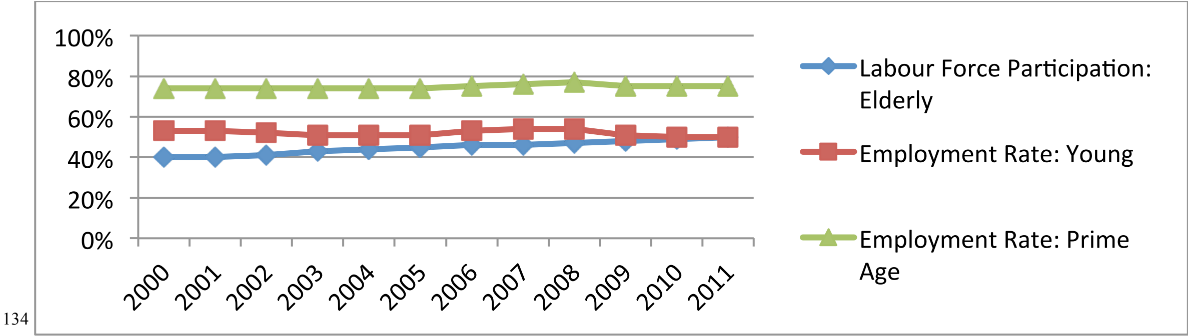
seen that as elderly labour force participation increases, youth and prime age unemployment tend to move in a parallel manner.[133] Similar results can be seen if the labour force participation rates of the elderly are compared with the employment rates of the young and prime age.[134]

3.2. Mandatory Retirement Policies in Specific Organisation Cases

While the arguments relating to the unreasonableness of imposing mandatory retirement policies in order to achieve intergenerational balance in the context of the general labour market are compelling, there may be some logic to the extension of the theory to "specific organisation" type cases where work opportunities are fixed and where there may be potential substitution which might impact on youth employment rates in a particular organisation. A typical example of such a situation may be seen in the case of *Georgiev* where the number of university professorships was fixed and where substitution of older workers with younger workers may be achieved by the imposition of mandatory retirement policies. In such closed environments, it might be expected that an increase in the number of older workers in such environments (caused by the removal of a mandatory retirement policy) might lead to a decrease in the number of younger workers in such employment. However, in the recent decision of *Commission v. Hungary*, the ECJ did note (in a specific organization system of judges, prosecutors and notaries) that while there may be short term benefits from the introduction of a lower mandatory retirement age, the medium and long term benefits are not so clear.

Another factor which may indicate a potential for substitution in a particular organisation is the skill levels of the individuals involved. Research conducted in the US on the issue of substitution in such circumstances may be enlightening in this context. The authors of the research tested the hypothesis that "the more similar the groups with respect to skills, the greater the degree of possible substitution"[135]. So, for example, similar to the case of *Georgiev*, the university environment, made up of professors, would be an example of a group

133 

134 

135 Munnell and Wu, *supra* note 115, 4.

of workers with identical skills who could be possible substitutes for one another. The authors tested this hypothesis by studying the correlation between similar educational attainment and substitution by considering the effects separately for those with "high-school-and-less" and "college-and-above" educations. The results indicated that the baseline results did not vary with educational attainment[136] and provide "no support for the crowd-out hypothesis"[137]. The authors conclude that the "relationship between older and younger persons' labor force behavior does not vary by educational attainment"[138]. However, care must be taken in applying this research in certain closed organisational structures, such as a university, as the educational levels tested were rather broad and do not adequately simulate the more niche environment of a university or other closed organisation.

No research has been conducted on the other factors which might lead to substitution in a particular organisation including the employment prospects in that organisation or sector (e.g. in the case of *Petersen* it was arguable that there were too many panel dentists for the number of patients) which will be determinative of the number of posts which may come available or the opportunities to create new posts in that particular organization (which may very well be limited), the qualifications of the persons within that organisation which may be very specific and as such may be more susceptible to substitution and the impact of tenure and permanency of jobs on levels of substitution. Until such research is conducted it would not be advisable to conclude, as in the general labour market context, that there is no possibility of crowding out or substitution in specific organisation cases. The more sensible approach would be to identify certain factors which should be considered and assessed in individual cases to determine the potential for substitution.

4. Conclusions and Recommendations

The issue of mandatory retirement and intergenerational balance raises significant economic, social and political concerns and Member States and national courts are often best placed to respond to the differing situations which arise within their jurisdictions. The specific role of the ECJ, in these cases, is to provide national courts with guidance as to the interpretation of EU law. The issue of the proportionality of a mandatory retirement measure is often very difficult to assess and it is contended that adequate guidance from the ECJ would be very useful to national courts in determining this challenging question. To date, the ECJ has adopted, fairly consistently, a guidance approach to cases involving mandatory retirement. However, the level and content of the guidance issued has differed depending on the nature of the case (general labour market cases receiving limited guidance and specific organisation cases receiving more useful guidance) or has been limited in its scope. This can have a number of negative effects in relation to the consistent application and interpretation of EU law in Member States. In light of this and the analysis of the empirical evidence on the issue of intergenerational balance and mandatory retirement, the author recommends the development of more detailed guidance on how national courts are to assess this difficult issue. An analysis of existing theoretical and empirical evidence, as well as the judicial response of the ECJ, reveals a number of important factors which should be considered in all of these cases and which could form the basis of any guidance given to national courts.

Firstly, labour market conditions are particularly relevant. If there are limited job opportunities in a given sector or organisation, this might indicate the need for mandatory

[136] Munnell and Wu, *supra* note 115, 4.
[137] Munnell and Wu, *supra* note 115, 4.
[138] Munnell and Wu, *supra* note 115, 4.

retirement policies. However, supporting evidence should be carefully examined to ensure that there is limited reliance on the theoretically and empirically flawed lump of labour theory. Specific organisation cases, which involve situations where there is a limited number of jobs available in a particular sector, might provide limited job opportunities and as such may benefit from mandatory retirement policies. However, this will depend on whether the specific organisation is in fact limited in the number of job opportunities it can provide and whether this limitation is permanent or whether it is dependent on other variable factors, such as consumer demand. Linked to this is the issue of what evidence national courts should require before making determinations in such cases. An examination of the empirical evidence in this article reveals a need for statistical and other evidence to be examined at a national level. There has only been one reference by the ECJ in mandatory retirement cases as to the type of evidence which must be produced by the Member State in order to demonstrate the appropriateness and necessity of the measure imposed and, in particular, whether statistics or empirical evidence must be supplied.[139] The ECJ held in the case of *Fuchs and Kohler* that "[i]t is for the national court to assess, according to the rules of national law, the probative value of the evidence adduced, which may, inter alia, include statistical evidence"[140]. Therefore, the ECJ does theoretically support the examination of statistical evidence, where appropriate. However, this is a matter for the national court to determine according to the circumstances of the case before them. This approach is mirrored in other areas of EU law which are also of a sensitive domestic nature.[141] Even in other areas of discrimination law[142], the ECJ has confirmed that no empirical evidence has to be produced to demonstrate that the measure was actually necessary to achieve the objective pursued and it has been argued that "it now appears sufficient under EC law if the Member State government could reasonably be entitled to take that view"[143]. This approach has been criticized in the social security context as limiting the ability of the concept of indirect discrimination to "achieve true substantive equality" in this field.[144] This may also be the case in relation to age discrimination and it may be that more detailed guidance from the ECJ to national courts as to the probity and value of

[139] *Fuchs and Kohler, supra* note 6, para 75.

[140] *Fuchs and Kohler, supra* note 6, paras 80-82.

[141] The issue of gambling is interesting in this respect as the ECJ has essentially given unlimited discretion (Case C-125/97 *Läärä* [1999] ECR I-6067) and a "sufficient degree of latitude" (Case C-275/92 *Schlindler*[1994] ECR I- 1039) to national courts to determine what is required in a given case. Given sensitivity of the matter and its connection with economic and social policy within a Member State, it is unsurprising that the ECJ has chosen to take such an approach in these cases. See Planzer, "The ECJ on Gambling: How much discretion for Member States?" Paper delivered at EASG, Vienna, 15 September 2010. The approach is entirely difference in competition law cases where "sufficiently precise and consistent evidence to support the firm conviction that the infringement was committed" is required. See Parr, "Evidence in Competition Law Proceedings: A Comparative Perspective" Paper delivered at University College London, 6 June, 2013. Perhaps the intimate connection of competition law with the free movement aims of the EU explains this difference in approach.

[142] Particularly social security law - See Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security. See also Ellis, *EU Anti-Discrimination Law* (Oxford: Oxford University Press, 2005) 369- 372 where she refers to the following cases of evidence of a weaker level of scrutiny on the part of the Court of Justice is social security cases. See Case C-226/91 *Molenbroek v. Bestuur van de Sociale Verzekeringsbank* [1992] ECR I-5943; Case C-317/93 *Nolte v. Landesversicherungsanstalt Hannover* [1995] ECR I-4625; Case C-444/93 *Megner and Scheffel v. Innungskrankenkasse Vorderplatz* [1995] ECR I-4741 (E. Ellis notes that the latter two cases prompted the editors of the *Equal Opportunities Review* to comment that the decisions reduced "significantly the standard of proof required of a Member State in order to justif indirectly discriminatory legislation" (1996) 67 *Equal Opportunities Review* 43 at 44; Case C- 343/92, *De Weerd, née Roks* [1994] ECR I-571; Case C- 280/94 *Posthuma-van Damme v. Bestuur van de Bedrijsvereniging voor Detailhandel, Ambachten en Huisvrouwen* [1996] ECR I-179.

[143] Editorial (1996) 67 *Equal Opportunities Review* 43 at 44.

[144] Ellis, *supra* n. 142, 374.

empirical and other forms of evidence would ensure greater protection for the principle of equality.

Secondly, another factor to be considered is the skill level of the workers concerned. In some cases, where skill sets are very specific, there may well be the potential for substitution where there are limited job opportunities available. However, the more general the skill set the more unlikely it is that substitution will be an issue. Once again, the actual limitation of job opportunities and its dependence on factors such as demand should be examined.

Thirdly, the culture of a particular organisation in relation to tenure will be important. Where there are high levels of tenure and permanency, this may lead to substitution and crowding out of workers. However, the impact of tenure will be minimized by the ability for the organisation to create new posts. If there is opportunity to create posts and the individual does not have to wait for a vacancy to arise before they can be appointed, then the possibility that younger workers will be crowded out by older workers will also be minimised. Culture will also impact on the ability of an organisation to carry out alternatives to mandatory retirement policies, such as performance appraisal. Where there is a culture of appraisal, for example, this would alleviate the need for the imposition of a mandatory retirement age. Alternatives to mandatory retirement should always be considered anyway as part of the proportionality test.

Fourthly, lessons can also be learned from the recent decision of *Commission v. Hungary* where the ECJ held that it is important for national courts to examine the short, medium and long term effects of these types of measures on a particular labour market. In such circumstances, statistical evidence may be useful in determining the impact of the measure in subsequent years.

Finally, in light of the call for greater guidance from the ECJ, it could be argued that it may be more satisfactory to develop secondary legislation in this area to assist national courts in their unenviable task.[145] This author contends that such intervention is perhaps unnecessary for two main reasons. Firstly, it is contended that adequate and consistent guidance from the ECJ would, and has in other areas of EU law, provided the requisite assistance to national courts to determine such issues. Secondly, the benefit of leaving this task to the ECJ, rather than to more formal secondary legislation, is that it can be altered and developed by the ECJ depending on the circumstances of the case, the nature of the claim and the changing conditions within a Member State. The author contends that the ECJ is very well placed to assist national courts in this regard.

The issue of intergenerational balance is a divisive one and one which Member States are rightly concerned. National courts are often faced with challenges to mandatory retirement policies and are often forced to make determinations on these complex issues with limited guidance from the ECJ. Given that "age discrimination legislation—even when restricted to employment—is not the pursuit of a simple single interest but rather a search for an acceptable accommodation of competing social and economic interests"[146] and given the potential for inconsistency in the application and interpretation of EU law arising from limited guidance, it is contended that more adequate and consistent guidance from the ECJ would ensure a steady application and interpretation of EU law and a greater protection of the right to equality on grounds of age within the EU.

[145] The author is very grateful to the reviewers for bringing this idea to her attention.
[146] Swift, "Pale, Stale, Male" (2007) 157 (7269) NLJ 532 – 534.