AN EU PERSPECTIVE ON RESTRUCTURING OF ENTERPRISES IN BELGIUM: AGE OF THE EMPLOYEE AS DISTINGUISHING CRITERION FOR COLLECTIVE DISMISSALS

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Labour Law and the Ongoing Crisis

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1. INTRODUCTION

The European Union (EU) is undergoing an economic crisis, with countries like Portugal, Italy, Greece and Spain being hit severely.[1] As a consequence, companies across the EU may be forced to reorganise their activities in an attempt to cope with the substantial hardship they face. They take preventive measures to safeguard the company's viability and maintain employment, e.g. by requesting that employees work part-time for a number of months (most of the times on a voluntary basis).[2] In a later stage, however, (collective) dismissals may be the only option left for survival of the company.[3]
The question arises how such collective dismissals should affect different categories of workers. Can the employer select workers on the basis of a mere economic rationale? Can he engage in a random selection of employees? Should he take account of social rights?

This paper looks at the way in which the workers' social right to equal treatment shapes the possibilities of the employer to decide which workers are to be made redundant. The specific focus is on age as the criterion to distinguish amongst workers. The question regarding age discrimination in restructuring measures relates to the debate regarding the conciliation between the economic crisis and social rights and can also be framed within the EU's flexicurity debate.[4]

[1] For more information on the economic and social situation in the EU, see e.g. Eurofound, *Social and employment policies for a fair and competitive Europe. Foundation Forum 2013. Background paper*. available at http://www.eurofound.europa.eu/pubdocs/2013/09/en/1/EF1309EN.pdf (consulted April 9, 2013).
[2] For more information, see European Commission, *La restructuration en Europe en 2011*, Luxembourg, Publications Office of the European Union, 2012, 31-33.
[3] In the ongoing economic crisis it seems that the choice for (collective) dismissals has been the last resort for many employers. At least for some countries Eurofound has mentioned that redundancies of core staff were less common than in previous recessions. See Eurofound factsheets regarding the Resource pack on 'Unleashing the potential – Flexibility in European companies', available at http://www.eurofound.europa.eu/resourcepacks/flexibility.htm (consulted on April 10, 2013).
[4] Flexicurity is an integrated strategy for enhancing, at the same time**,** flexibility and security in the labour market. It attempts to reconcile employers' need for a flexible workforce with workers' need for security. With flexicurity, the EU has added an extra element to the employer-oriented vision on flexibility. The flexicurity debate pays particular attention to the position of older workers, who make up one of the vulnerable groups on the labour market. See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Towards Common Principles of Flexicurity: More and better jobs through flexibility and security*, COM(2007) 359 final.

The paper is written from a Belgian perspective, and takes Belgian measures regarding collective dismissals as the point of departure. All information is put into an EU perspective and, at a number of stages, a functional comparison is made with the Netherlands.

2. EU GUIDELINES FOR COMPANIES FACING ECONOMIC HARDSHIP

In order to find out to which extent age can play a role in the selection of workers to be made collectively redundant, account should be taken of EU legislation regarding discrimination on the basis of age, and the possible justifications for such discrimination.

A. Non-discrimination on the Basis of Age

A number of EU provisions appear to be relevant for the discussion regarding age discrimination in collective dismissals.

In the first place, article 21(1) of the Charter of Fundamental Rights of the EU (hereinafter: the Charter) generally prohibits discrimination on any ground such as age. In the *Kücükdeveci* case the Court of Justice of the EU (hereinafter: the CJEU) referred for the first time to the binding force of Article 21 of the Charter.[5] This was only done in a subsidiary way, probably because only Member States and public authorities, and not private parties, come within the ambit of the Charter. Recently, however, the CJEU has started to refer explicitly to article 21 in discrimination cases.[6]

As regards the equal treatment of workers in particular, reference ought to be made to the Framework Directive (2000), based on article 19 TFEU (ex article 13 TEC). This directive guarantees the right for workers not to be discriminated against on the basis of, among other things, age.[7]
Although the Framework Directive principally prohibits discrimination on the basis of age, not all age based instances of differential treatment eventually amount to discrimination. The Framework Directive contains several provisions that allow justifications for age based differences in treatment. Such justifications prevent differential treatment from being called 'discrimination'.[8]
The provisions relating to justifications in particular have been the basis for a vast body of recent case law of the CJEU.[9]

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[5] C-555/07 *Seda Kücükdeveci v. Swedex GmbH & Co. KG, ECR I,* 2010, para. 22. T. PAPADOPOULOS, "Criticising the horizontal direct effect of the EU general principle of equality", *EHRLW,* 2011, 444.

[6] T. PAPADOPOULOS, "Criticising the horizontal direct effect of the EU general principle of equality", *EHRLW,* 2011, 445. In *Association belge des Consommateurs* (C-236/09 *Association Belge des Consommateurs Test-Achats ASBL v Conseil des Ministres,* ECR *I,* 2011, para. 17) the CJEU stated that the principle of equal treatment for men and women, which is also included in articles 21 and 23 of the Charter, applies to horizontal situations. In this way the application of the general principle of equal treatment to horizontal situations is enhanced.

[7] Council Directive 2000/78 of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ 2000, L 303/16.

[8] C. BAYART, *Discriminatie tegenover differentiatie: Arbeidsverhoudingen na de Discriminatiewet Arbeidsrecht na de Europese Ras- en Kaderrichtlijn,* Gent, Larcier, 2004, 2.

[9] The age discrimination provisions of the Framework Directive have generated more preliminary references to the CJEU than all other discrimination grounds of the Framework Directive together. See C. O'CINNEIDE, "Age discrimination and the European Court of Justice: EU equality law comes of ages", *RAE,* 2009-2010, (253) 259

For the purposes of this paper the key provision of the Framework Directive is article 6(1). On the basis of this article, Member States may provide that (both direct and indirect)[10] 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".[11]

As opposed to the other provisions offering justificatory possibilities for differential treatment,[12] article 6(1) only relates to age-based treatment.[13] As a consequence, and on the condition that Member States have actually implemented article 6(1) of the Framework Directive,[14] there appears to be an interesting way out of the age discrimination debate. The size of this way out is largely

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and W. SWINNEN, "The economic perspective in the reasoning of the CJEU in age discrimination cases", *E.L.L.J.* 2010, 254. CJEU age discrimination in employment cases include: C-144/04 *Werner Mangold v. Rüdiger Helm,* ECR *I,* 2005; C-227/04 *Maria-Louise Lindorfer v. Council of the European Union,* ECR *I,* 2007; C-411/05 *Félix Palacios de la Villa v. Cortefiel Servicios SA,* ECR *I,* 2007 ; C-427/06 *Birgit Bartsch v. Bosch und Siemens Hausgeräte (BSH) Alterfürsorge GmbH,* ECR *I,* 2008; C-388/07 *The Incorporated Trustees of the National Council on Ageing (Age Concern England) v. Secretary of State for Business, Enterprise and Regulatory Reform,* ECR *I,* 2009; C-88/09 *David Hütter v. Technische Universität Graz,* ECR *I,* 2009; C-341/08 *Domnica Petersen v. Berufungsausschuss für Zahnärzte für den Bezirk estfalen-Lippe,* ECR *I,* 2009; C-229/08 *Colin Wolf v. Stadt Frankfurt am Main,* ECR *I,* 2009; C-555/07 *Seda Kücükdeveci v. Swedex GmbH & Co. KG,* ECR *I,* 2010; C-499/08 *Ingeniörforeningen I Danmark (Andersen) v. Region Syddanmark,* ECR *I,* 2010; C-45/09 *Gisela Rosenbladt v. Oellerking Gebäudereinigungsges. mbH.,* ECR *I,* 2010; C-250/09 and C-268/09 *Vasil Ivanov Georgiev v. Tehnicheski universitet –Sofia, filial Plovdiv,* ECR *I,* 2010; C-147/08 *Jürgen Römer v. Freie und Hansestadt Hamburg,* ECR *I,* 2011; C-159/10 and C-160/10 *Gerhard Fuchs en Peter Köhler v. Verwaltungsgericht Frankfurt am Main,* ECR *I,* 2011; C-297/10 and C-298/10 *Sabine Hennigs v. Eisenbahn-Bundesamt and Land Berlin v. Alexander Mai,* ECR *I,* 2011; C-447/09 *Reinhard Prigge, Michael Fromm, Volker Lambach v. Deutsche Lufthansa AG,* ECR *I,* 2011; C-141/11 *Torsten Hörnfeldt v. Posten Meddelande AB,* ECR *I,* 2012; C-286/12, *European Commission v. Hungary,* ECR *I,* 2012; C-152/11 *Johann Odar v. Baxter Deutschland GmbH,* ECR *I,* 2012.

[10] C. BAYART, *Discriminatie tegenover differentiatie: Arbeidsverhoudingen na de Discriminatiewet Arbeidsrecht na de Europese Ras- en Kaderrichtlijn,* Gent, Larcier, 2004, 297.

[11] A significant number of CJEU cases concern this article 6(1) of the Framework Directive. The Directive adds to the paragraph already cited in the text that "[s]uch 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 question or the need for a reasonable period of employment before retirement".

[12] Provisions that offer general justificatory possibilities for treatment based on all criteria mentioned in the Framework Directive include: article 2(2), (b)(i) containing a general justification possibility for indirect discrimination; article 2(5) setting aside measures relating to public security, public order, protection of health and protection of rights and freedoms of others; article 4(1) regarding measures in which age constitutes a genuine and determining occupational requirement.

[13] This extra justificatory possibility shows that age is a criterion that is different from all other criteria enumerated in the Framework Directive. (H. MEENAN, "Age equality after the employment directive", *MJ* 2003, 16 and 23; L. WADDINGTON and M. BELL, "More equal than others: distinguishing European union equality directives", *CML Rev.* 2001, 599 and 610-611; M. Sargeant, *The law on age discrimination in the EU,* the Netherlands, Kluwer Law International BV, 2008, 10, 17 and 19; D. Schiek, "Age discrimination before the ECJ conceptual and theoretical issues", *CML Rev.* 2011, (777) 784).

[14] H. MEENAN, "Age equality after the employment directive", *MJ* 2003, 18.

dependent on the CJEU's interpretation of the "legitimate aim" mentioned in article 6(1) of the Directive.

B. The CJEU's Interpretation of the Justification of Age-Based Treatment

The CJEU has stated that legitimate aims within the meaning of article 6(1) of the Framework Directive include aims that have a public interest nature distinguishable from purely individual reasons particular to the employer's situation, like cost reduction or improving competitiveness. However, the Court has stated that a national rule may recognise a certain degree of flexibility for the employers.[15] Member States can take account of budgetary considerations when such considerations are linked with social policy. Still the Court has added that such considerations cannot by themselves constitute a legitimate aim.[16]

In a number of countries, like Belgium and the Netherlands, the social partners play an important role in addressing economic or social problems in the employment sector. In the 2011 *Hennigs*[17] *case* the CJEU already highlighted that collective agreements substantially differ from measures adopted unilaterally by the Member States, by way of legislation or regulation. When exercising their fundamental right to collective bargaining recognised in article 28 of the Charter, the social partners take care to strike a balance between their respective interests. The CJEU created the impression that the mere fact that the social partners have made a rule, allows for a less rigorous examination of the appropriate and necessary character of the means.[18]

On the basis of the above, it appears that the CJEU has given the Member States and the social partners a relatively wide margin of discretion when making use of age-based distinctions.[19]

One could imagine that measures taken by Member States or social partners, in order to help safeguard companies' viability during an economic crisis, could come within the ambit of the CJEU's

[15] C-388/07 *The Incorporated Trustees of the National Council on Ageing (Age Concern England) v. Secretary of State for Business, Enterprise and Regulatory Reform,* ECR *I,* 2009, para. 46; C-159/10 and C-160/10 *Gerhard Fuchs and Peter Köhler v. Verwaltungsgericht Frankfurt am Main,* ECR *I,* 2011, para. 52.

[16] C-159/10 and C-160/10 *Gerhard Fuchs and Peter Köhler v. Verwaltungsgericht Frankfurt am Main,* ECR *I,* 2011, para. 74; C-447/09 *Reinhard Prigge, Michael Fromm, Volker Lambach v. Deutsche Lufthansa AG,* ECR *I,* 2011, para. 81.

[17] C-297/10 and C-298/10 *Sabine Hennigs v. Eisenbahn-Bundesamt and Land Berlin v. Alexander Mai,* ECR *I,* 2011, para. 66.

[18] In e.g. *Palacios de la villa* and in *Rosenbladt* the CJEU decided that "*the fact that the task of striking a balance between their respective interests is entrusted to the social partners [...] [offers] considerable flexibility, as each of the parties may, where appropriate, opt not to adopt the agreement".* C-411/05 *Félix Palacios de la Villa v. Cortefiel Servicios SA,* ECR *I,* 2007, para. 74 and C-45/09 *Gisela Rosenbladt v. Oellerking Gebäudereinigungsges. mbH.,* ECR *I,* 2010, para. 67. F. ROLIN, "Quelques précisions quant à la nature et au régime de justification des discriminations fondées sur l'âge", *RAE* 2011, (609) 614 ; A.G. Veldman, "Contouren van het Europese leeftijdsdiscriminatierecht", *TRA* 2012, 4.

[19] C-144/04 *Werner Mangold v. Rüdiger Helm,* ECR *I,* 2005, para. 63; C-411/05 *Félix Palacios de la Villa v. Cortefiel Servicios SA,* ECR *I,* 2007, para. 68. See also C. O'CINNEIDE, "Age discrimination and the European Court of Justice: EU equality law comes of ages", *RAE,* 2009-2010, (253) 259.

approach of accepting budgetary considerations when linked with social policy.[20] Until very recently, the CJEU did not have the occasion to judge on such anti-crisis measures. In its very recent *Odar*[21] judgment, however, the CJEU gave a number of guidelines regarding the use of age as a criterion in collective dismissals.

In *Odar*, an Austrian occupational social security scheme including a social plan was put to the test. Under this scheme, workers over 54 years of age who were made redundant on operational grounds were compensated on the basis of the earliest possible date on which their pension would begin. This was a deviation from the standard method of calculation, which takes account in particular of the length of service. The result was that the compensation paid to those older workers was lower than the compensation resulting from the application of that standard method. The idea was that older workers would soon be entitled to an old age pension.

The CJEU eventually decided that a difference based on age in a social plan like the one mentioned "pursues an objective based on the view that, since the economic disadvantages will manifest themselves in the future, certain workers who will not be faced with such disadvantages resulting from loss of their employment, or only to a limited extent compared with others, may, as a rule, be excluded from entitlement to compensation."[22] The CJEU reiterated what it had already stated in *Ingeniörforeningen i Danmark*, namely that "the aim of preventing compensation on termination from being claimed by persons who are not seeking new employment but will receive a replacement income in the form of an occupational old-age pension must be considered to be legitimate".[23]
The CJEU also cited the German Government's observation that "a social plan must provide for a distribution of limited resources, so that it may fulfil its 'transitional function' in respect of all workers, not just older workers. Such a plan cannot, in principle, jeopardise the survival of the undertaking or the remaining posts".[24]

The CJEU then went on to see whether "the means employed [were] appropriate and necessary and [did] not go beyond what is required to achieve the objective pursued".[25] It confirmed its point of view "that the Member States and, as necessary, the social partners at national level have broad discretion in choosing not only to pursue a particular aim in the field of social and employment policy, but also in defining measures to implement it (see, to that effect, Case C-141/11 *Hörnfeldt* [2012] ECR I-0000, paragraph 32)".[26] The appropriateness of the means was accepted on the basis of the idea that it made sense to reduce the severance pay of employees who are financially secure, and to facilitate the transition to new employment for employees with more limited financial

[20] The CJEU has already accepted several aims as legitimate aims of social policy, which could also be used in the context of an economic crisis: increasing the flexibility of personnel management (*Kücükdeveci*, para. 35), giving priority to appropriate and foreseeable planning of personnel and recruitment management over the interest of employees in maintaining their financial position (*Rosenbladt*, para. 59), regulating the national labour market and checking unemployment (*Palacios de la Villa*, para. 62); sharing out among the generations employment opportunities (*Petersen*, para. 65).
[21] C-152/11 *Johann Odar v. Baxter Deutschland GmbH,* ECR *I,* 2012.
[22] C-152/11 *Johann Odar v. Baxter Deutschland GmbH,* ECR *I,* 2012, para. 40.
[23] C-499/08 *Ingeniörforeningen I Danmark (Andersen) v. Region Syddanmark,* ECR *I,* 2010, para. 44.
[24] C-499/08 *Ingeniörforeningen I Danmark (Andersen) v. Region Syddanmark,* ECR *I,* 2010, para. 41.
[25] C-152/11 *Johann Odar v. Baxter Deutschland GmbH,* ECR *I,* 2012, para. 46.
[26] C-152/11 *Johann Odar v. Baxter Deutschland GmbH,* ECR *I,* 2012, para. 47.

resources.[27] The necessity of the means was accepted on the basis of considerations related to the fact that the social plan only provided for a *reduction* in the amount of compensation granted to older workers.[28] Moreover, the CJEU added to this that the social plan "is the result of an agreement negotiated between employees' and employers' representatives exercising their right to bargain collectively which is recognised as a fundamental right. The fact that the task of striking a balance between their respective interests is entrusted to the social partners offers considerable flexibility, as each of the parties may, where appropriate, opt not to adopt the agreement (see, to that effect, Case C-45/09 *Rosenbladt* [2010] ECR I-9391, paragraph 67)."[29]

In the last part of the *Odar* judgment, the CJEU dealt with yet another distinction that had been made in the Austrian social plan, namely a difference in treatment between severely disabled workers of 54 years of age or older, on the one hand, and the non-severely disabled workers of 54 years of age or older, on the other. After all, the social plan lead to a situation where severely disabled workers, who are eligible for a pension at a younger age than non-disabled workers, receive less compensation on termination of employment because of their serious disability.

Here the CJEU decided that the difference in treatment was proportionate to the needs of the workers concerned,[30] but went beyond what was necessary to achieve the social policy objectives pursued by the national rules.[31] After all, this rule disregards the risks faced by severely disabled people, who generally face greater difficulties in finding new employment, as well as the fact that those risks tend to become exacerbated as they approach retirement age.[32]

3. RESTRUCTURING OF ENTERPRISES IN BELGIUM: DOES AGE MATTER?

A. Belgian Rules on Collective Dismissals

Belgium has a spread and not always coherent legislation on collective dismissals. The most well-known parts involve the regulation of three different aspects of the collective dismissal: (1) the procedure of information and consultation of workers' representatives, (2) the notification of the dismissal[33] and (3) the compensation for collective redundancies.[34] As far as the selection of

[27] C-152/11 *Johann Odar v. Baxter Deutschland GmbH,* ECR *I,* 2012, para. 48.
[28] C-152/11 *Johann Odar v. Baxter Deutschland GmbH,* ECR *I,* 2012, paras. 51-52.
[29] C-152/11 *Johann Odar v. Baxter Deutschland GmbH,* ECR *I,* 2012, para. 53. In the recent *Kenny* case on equal pay for men and women, the CJEU voiced an equally tolerant view vis-à-vis social partners: C-427/11, *Margaret Kenny and others v. Minister for Justice, Equality and Law Reform*, not yet reported in ECR, paras. 49-50;
[30] C-152/11 *Johann Odar v. Baxter Deutschland GmbH,* ECR *I,* 2012, para. 68.
[31] C-152/11 *Johann Odar v. Baxter Deutschland GmbH,* ECR *I,* 2012, para. 70.
[32] C-152/11 *Johann Odar v. Baxter Deutschland GmbH,* ECR *I,* 2012, para. 69.
[33] Article 62-70 of the Law of February 13, 1998 on measures to promote employment, *Belgian Official Gazette* February 19, 1998; Royal Decree of May 24, 1976 on collective dismissals, *Belgian Official Gazette* September 17, 1976; CLA no. 24 of October 2, 1975 on the procedure for informing and consulting workers' representatives with regard to collective redundancies, *Belgian Official Gazette* February 17, 1976. Article 2 of the CLA no. 24 defines collective redundancies as covering any dismissal of one or more employees, for reasons not related to the individual employees concerned (economic or technical reasons in the broad sense), provided that, over a period of 60 days, the number of employees dismissed is: (1) at least 10 in technical work/production units which, during the calendar year preceding the dismissals, employed on average more than 20 but fewer than 100 workers; (2) at least 10 percent of the number of workers in technical

employees to be made redundant is concerned, employers are basically free in their selection of employees to be made redundant. Still, each employer has to take account of existing Belgian legislation and avoid discrimination between employees. For the purposes of this paper the rules to be mentioned include the Law of May 10, 2007 on certain forms of discrimination,[35] implementing the Framework Directive, and Collective Labour Agreement (hereinafter: CLA) no. 95 of October 10, 2008 concerning equal treatment during all stages of the employment relationship.[36] These two pieces of legislation prohibit discrimination on the basis of a number of criteria, amongst other things age.[37]

Similar to the facts underlying the *Odar* judgment, collective dismissals in Belgium often go hand in hand with the adoption of a social plan. The adoption of a social plan is not compulsory, however. A social plan is typically concluded (1) in a CLA, (2) in a collective agreement between the works council, the trade union representatives, the employees' representatives or the employees themselves, (3) in an individual agreement, or (4) in a unilateral decision between the employer and the employee.[38] In practice the first option is most commonly used. A social plan usually contains a set of measures mitigating the impact for employees of a reorganisation. Such measures come in addition to what an employer is already obliged to do on the basis of supranational and national legislation and other rules on sectoral and company level.[39] Typical measures include retraining and reclassification, financial assistance and assistance for older workers (e.g. reallocation[40], outplacement, voluntary departure, conventional retirement bonuses, guaranteed income, early retirement, ...).[41] However, social plans may also include provisions regarding the criteria on the basis of which employees to be made redundant are to be selected.

B. Age as a Selection Criterion for Redundancy in Social Plans

work/production units which, during the calendar year preceding the dismissals, employed on average at least 100 but fewer than 300 workers; (3) at least 30 in technical work/production units which, during the calendar year preceding the dismissals, employed on average at least 300 workers.

[34] CLA No. 10 of May 8, 1973 on collective dismissals, *Belgian Official Gazette,* August 17, 1973.

[35] Law of May 10, 2007 to combat certain forms of discrimination, *Belgian Official Gazette* June 5, 2007.

[36] W. VANDEPUTTE, *Ontslagrecht en de arbeidsmarkt, naar een modernisering van het Belgische ontslagrecht,* Brugge, die Keure, 2012, 259-268.

[37] The list of protected grounds in the Law of May 10, 2007 is slightly different from the one in the CLA no. 95. The law of May 10, 2007 prohibits discrimination on the basis of criteria like age, sexual orientation, marital status, birth, wealth, religion or belief, political opinion, trade union conviction, language, current or future state of health, disability, physical or genetic characteristic and social origin. The CLA no. 95 prohibits discrimination on the grounds of age, sex or sexual orientation, marital status, medical history, race, colour, ancestry or national or ethnic origin, political opinions or beliefs, disability, union membership or membership in another organization.

[38] F. ROBERT, "Les mesures d'accompagnement des travailleurs dans le cadre des restructurations d'entreprises", *Or.* 2007, 4.

[39] For example: the employer is obliged to pay the wage until the last day, the severance pay, the holiday pay until the termination of employment, the pro rata end of year bonus, the closure or collective severance pay, the bonuses at sectoral or company level (if provided), as well as to provide outplacement for workers aged 45 and older. (V. BUELENS, "Reeks collectief ontslag: het sociaal plan", *P&O,* 2006, 11; B. VANSCHOEBEKE and E. MATTHYS, *Collectief ontslag en sluiting van onderneming,* Ghent, Larcier, 2003, 137).

[40] The employer can try to spread the work between as much as possible employees. This reallocation can be realised by time credit or a reduction in working hours.

[41] V. BUELENS, "Reeks collectief ontslag: het sociaal plan", *P&O,* 2006, 11-14.

The question arises which selection criteria can be used in social plans to single out the employees to be made redundant. It is to be expected that such selection of employees may amount to discrimination.[42] Belgian labour courts already dealt with this specific question in a handful of cases.

The first and most well-known case concerned the reorganisation of the Ford company in Genk in 2002-2003.[43] The CLA provided for both voluntary and compulsory dismissals. The workers who voluntarily left, received a bonus reduced with their days of absence (including their absence because of illness) as of the moment the information sessions on the restructuring of the company had started. In order to decide on the compulsory dismissals, the CLA provided a 'system of points'. Workers who had been repeatedly ill or unlawfully absent during the last 5, 10 or 15 years[44], were given penalty points. The higher the number of penalty points, the higher the chance that the worker would be made redundant. Certain employees claimed that this system was discriminatory, on the grounds of previous health condition for the voluntary dismissals and on the grounds of age, seniority and facts of the past for the compulsory dismissals. The Antwerp court eventually decided that illness, more specifically previous health condition, did not constitute a protected ground under European and national law. After all, the CJEU stated in its case law that illness as such does not come within the ambit of the disability ground protected by the Framework Directive.[45] Moreover, Belgian discrimination law[46] only protects the current or future state of health. The Antwerp court also stated that there was no indirect discrimination based on age because of the lack of a correlation with age.[47]

The labour court of Ghent[48] had to deal with a social plan including a difference in treatment on the grounds of age. The court decided that, when only workers aged 55 years or older are dismissed

[42] I. VERHELST EN S. RAETS, "Discriminatie op de arbeidsplaats: gewikt en gewogen – een overzicht van de rechtspraak van de arbeidsgerechten betreffende de antidiscriminatiewetten van 10 mei 2007"*, Oriëntatie,* 2011 (90)116; S. DE RIDDER, "Vervroegd(e) brugpensioen(leeftijd) als selectiecriterium bij collectief ontslag onder de discriminatieloep", *RABG,* 2009, 1001, annotation under Labour Court of Ghent, October 22, 2008, *RABG,* 2009, 990.

[43] Labour Court of Antwerp (department Hasselt), September 3, 2008, *RABG,* 2009, 970, annotation J. HERMAN, "Gezondheid is de grootste schat. Collectief ontslag en selectie van werknemers op grond van hun gezondheidstoestand, *RABG,* 2009, 987; Labour Tribunal of Tongeren June 26, 2006, *Limb. Rechtsl.,* 2006, 340.

[44] The number of penalty points differed depending on the number of the time being repeatedly ill or unlawfully absent over a certain timelapse. F. ex. 20 penalty points were given to a worker who had been unlawfully absent the last 10 years, whereas 10 penalty points were given to a worker who had been repeatedly ill for 9 times over a time lapse of 5 years.

[45] C-13/05 *Chacón Navas v Eurest Colectividades SA,* ECR *I,* 2006, paras. 43 and 47 ; C-335/11 and C-337/11 *HK Danmark v Dansk almennyttigt Boligselskab and HK Danmark v Dansk Arbejdsgiverforening,* ECR *I ,* 2013, paras. 36-39.

[46] The Law on anti-discrimination of February 25, 2003 replaced by the Law of May 10, 2007 on certain forms of discrimination.

[47] Labour Court of Antwerp (department Hasselt), September 3, 2008, *RABG,* 2009, 970, annotation J. HERMAN, "Gezondheid is de grootste schat. Collectief ontslag en selectie van werknemers op grond van hun gezondheidstoestand, *RABG,* 2009, 987; Labour Tribunal of Tongeren June 26, 2006, *Limb. Rechtsl.,* 2006, 340; M. DE VOS, "De bestrijding van discriminatie in de arbeidsverhoudingen: van impasse naar doorbraak?, *RW,* 2006, 337-338; I. VERHELST EN S. RAETS, "Discriminatie op de arbeidsplaats: gewikt en gewogen – een overzicht van de rechtspraak van de arbeidsgerechten betreffende de antidiscriminatiewetten van 10 mei 2007"*, Oriëntatie,* 2011, 108.

[48] Labour Court of Ghent, October 22, 2008, *RABG,* 2009, 990, annotation S. DE RIDDER, "Vervroegd(e) brugpensioen(leeftijd) als selectiecriterium bij collectief ontslag onder de discriminatieloep", *RABG,* 2009, 1000.

within the framework of a collective dismissal, such difference in treatment can be objectively and reasonably justified. After all, the court judged that such selection of employees reaches a double aim. It limits both the social impact of the collective dismissal and the number of dismissals without any material or financial benefits (by using the technique of early retirement[49]). The labour court was obviously inspired by the *Palacios de la Villa* case where it highlighted that during a social dialogue a balance is reached between different interests. In doing so, the Belgian court also created the impression, like the CJEU did, that the result of a social dialogue is sufficient to justify the difference.

Both the above mentioned cases were decided when the Law of May 10, 2007 was not yet applicable. Contrary to the Law of May 10, 2007, which only accepts justifications that are explicitly prescribed by law, in these cases a general justification was allowed for. A difference in treatment was seen to be justifiable if an objective and reasonable justification was available. As a consequence, it is unclear whether the courts would have ruled similarly under the current justification-test. If the national courts were to follow the CJEU case law, they probably would need to reach a similar decision.

Belgian judges also addressed the differentiation in the compensation of employees during a reorganisation. A social plan including a special closure fee for all workers, except those whose contract has been suspended for more than two years, was seen to be objectively and reasonably justified, as it aims at compensating for the sudden loss of wages of active employees.[50] This seems to be in line with CJEU case law as well. Under reference to *Odar*, one could advance that certain workers will not or only in a limited way suffer from the disadvantages resulting from their loss of employment.[51]

C. The 2012 Law on the Age Pyramid-Principle

The Law of March 29, 2012 containing various provisions[52] (not yet applicable) has, in order to prohibit that mostly older (and more expensive) employees lose their jobs in collective redundancies, introduced the age pyramid-principle.[53] This is not solely seen as a way to prevent age discrimination. It also has a budgetary impact, because the (re)employment opportunities for older employers are indeed lower than for other workers.[54]

The Law of March 29, 2012 states that the age pyramid-principle has to be taken into account in case of collective dismissals as defined in the Royal Decree of May 24, 1976.[55] This principle implies that

[49] Early retirement is a favourable unemployment status which combines a guaranteed unemployment benefit with an additional fee payed by the last employer until the statutory pension age is reached. (A. GIELEN, I. VERHELST, A. WITTERS, "Vlinderakkoord: langer en meer werken, *Or.* 2013, 4).

[50] Labour Tribunal of Brussel June 25, 2009, AR 7094, *JTT,* 2009, 398; I. VERHELST EN S. RAETS, "Discriminatie op de arbeidsplaats: gewikt en gewogen – een overzicht van de rechtspraak van de arbeidsgerechten betreffende de antidiscriminatiewetten van 10 mei 2007"*, Oriëntatie,* 2011, 116.

[51] C-152/11 *Johann Odar v. Baxter Deutschland GmbH,* ECR *I,* 2012, para. 40.

[52] Law of March 29, 2012 containing various provisions, *Belgian Official Gazette* 30 maart 2012.

[53] Bill, *Parl.St.* Kamer 2011-2012, nr. 2097/001, 53.

[54] Bill, *Parl.St.* Kamer 2011-2012, nr. 2097/001, 54.

[55] Article 62 of the Law of March 29, 2012 containing various provisions, referring to the Royal Decree of May 24, 1976 on collective dismissals, *Belgian Official Gazette* September 17, 1976. This principle will not be applied when the (collective) dismissals are given during (1) a procedure to bankruptcy, (2) a judicial dissolution

when an employer proceeds to a collective dismissal the number of redundancies has to be evenly spread over three different age-categories: (1) the employees younger than 30 years; (2) the employees of 30 up to 49 years and (3) the employees of 50 years or older.[56]

However, this principle is seriously tempered. The first mitigation is when a collective dismissal has an impact only in one or more departments or in one or more business segments. In that case, the employer has to re-apply the age-pyramid principle in the departments or business segments concerned.[57] The second mitigation is the possibility of a deviation of 10% in every age-category. This percentage can even be adapted by Royal Decree depending on the size of the company.[58] Eventually, employees with a key position in the company will not be taken into account when applying the scheme provided by the age-pyramid principle.[59]

Not respecting the age pyramid-principle is to have financial consequences for the employer. He will have to repay the structural and target reductions[60] of social contributions, obtained for his employees of 50 years or older, to the National Office of Social Security, for the previous eight quarters.[61] However, since a Royal Decree is required to implement this principle and to declare when it will enter into force, the age-pyramid principle is currently a merely theoretical concept.[62]

Moreover, the social partners were given the possibility to look for an alternative for the various provisions regarding the age-pyramid principle contained in the Law of March 29, 2012. The Belgian Minister of Work asked, in a letter of February 22, 2012, the opinion of the National Labour Council. This Council suggested three modifications to the Law of March 29, 2012. It also proposed the

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pursuant to article 41 § 1 of the law of January 31, 2009 on the continuity of enterprises; (3) a closure of the company within the meaning of article 3 § 1 of the Law of June 26, 2002 on the conclusion of companies where this closure is complete and covers all employees of the company (article 62 (2)).

[56] Article 63 §1 (1) of the Law of March 29, 2012 containing various provisions; It takes into account the age of the employees at the time of the notification of the intention to proceed with collective redundancies mentioned in Article 7 of the Royal Decree of May 24, 1976 (article 63 §1 (2). Moreover, employees with a fixed-term contract or a contract for a specific work are excluded, unless the termination of employment due to a collective redundancy takes place before the expiry of the term or the completion of the work (article 63 §4)

[57] Article 63 §2 of the Law of March, 29, 2012 containing various provisions.

[58] Article 63 §3 of the Law of March, 29, 2012 containing various provisions.

[59] Article 63 §5 of the Law of March, 29, 2012 containing various provisions. Key positions employees play such an important role that the work organisation of the company would be jeopardised and no solution can be found by shifting of the personnel or internal mutation. National Labour Council (Nationale Arbeidsraad), Opinion 1.803 June 27, 2012 on the Law of March 29, 2012 containing various provisions – implementing the National Labour Council, Opinion nr. 1.795 – Respect for the age-pyramid in collective dismissals, http://www.cnt-nar.be/ADVIES/advies-1803.pdf, 12 (consulted on June 6, 2013).; A. VANDERSCHAEGE, "Collectief ontslag: toekomst via leeftijdspiramide", *P&O Praktijkblad,* 2013, 15.

[60] Structural reductions reduce an employers' social security contribution. Employers can benefit from this reduction for all employees who are subject to all rules of social security and have worked for the entire preceding quarter. Target reductions are fixed reductions of the social security contributions granted on top of the structural reductions. These reductions are targeted at particular groups of employers and the amount of reduction given, is dependent on the target group.

[61] Article 327 of the Programme Law of December 24, 2002, *Belgian Official Gazette* 31 December 2002. This is the only sanction when breaching the age-pyramid principle. The legislator has not given individual protection to the employee, in order to not affect the negotiated social plan (Bill, *Parl.St.* Kamer 2011-2012, nr. 2097/001, 54).

[62] Article 63 §6 and art. 65 of the Law of March, 29, 2012 containing various provisions.

adoption of a CLA in which the proportional distribution between the age groups is dealt with (see second suggestion).[63]

Firstly, the Council highlighted that age should not at all be taken into account when determining the criteria to select the workers to be made redundant.

In a more subordinate way, the Council suggested the introduction of an age-pyramid principle with only two instead of three age groups.[64] In this way consistency would be ensured with other legislation.[65] However, the three exemptions already provided for in the Law of March 29, 2012, would remain valid.

The Council's third and last suggestion was the creation of a threshold against individual dismissal disputes by providing for a mechanism that increases legal certainty.[66] The social partners described two situations. The first situation occurs when the employer respects the proportional distribution. In this case three possible solutions are suggested: 1) to introduce into the Law that such proportional distribution can never amount to discrimination based on age; 2) to introduce into the Law a rebuttable presumption, in favour of the employer; 3) to introduce another solution in order to create more legal certainty.[67] The second situation occurs when the employer did not comply with the proportional distribution because of reasons which were approved of by the Belgian federal employment authorities (e.g. economic, technical or organisational reasons). In this case, a rebuttable presumption, in favour of the employer, should be applicable.[68]
However, it still is to be seen whether the social partners' recommendations will be taken on by the government.

[63] National Labour Council (Nationale Arbeidsraad), Opinion 1.803 June 27, 2012 on the Law of March 29, 2012 containing various provisions – implementing the National Labour Council, Opinion nr. 1.795 – Respect for the age-pyramid in collective dismissals, http://www.cnt-nar.be/ADVIES/advies-1803.pdf, 5 (consulted on June 6, 2013).
[64] The group of the workers younger than 45 years and the group of workers older than 45 years.
[65] National Labour Council (Nationale Arbeidsraad), Opinion 1.803 June 27, 2012 on the Law of March 29, 2012 containing various provisions – implementing the National Labour Council, Opinion nr. 1.795 – Respect for the age-pyramid in collective dismissals, http://www.cnt-nar.be/ADVIES/advies-1803.pdf, 9 (consulted on June 6, 2013); This division is already made in the context of active management in reorganisation (Royal Decree of March 9, 2006 on activation policies in cases of restructuring, *Belgian Official Gazette* March 31, 2006) and in outplacement (Law of September 5, 2001 on improvement of the employment rate of employees, *Belgian Official Gazette* September 15, 2001 (Wet tot de verbetering van de werkgelegenheidsgraad van de werknemers) and CLA no. 82 of July 10, 2002 on outplacement for dismissed employees of 45 years old and older, *Belgian Official Gazette* October 5, 2002 (CAO nr. 82 betreffende outplacement voor werknemers van 45 jaar en ouder die worden ontslagen).
[66] National Labour Council (Nationale Arbeidsraad), Opinion 1.803 June 27, 2012 on the Law of March 29, 2012 containing various provisions – implementing the National Labour Council, Opinion nr. 1.795 – Respect for the age-pyramid in collective dismissals, http://www.cnt-nar.be/ADVIES/advies-1803.pdf, 13-14 (consulted on June 6, 2013).
[67] National Labour Council (Nationale Arbeidsraad), Opinion 1.803 June 27, 2012 on the Law of March 29, 2012 containing various provisions – implementing the National Labour Council, Opinion nr. 1.795 – Respect for the age-pyramid in collective dismissals, http://www.cnt-nar.be/ADVIES/advies-1803.pdf, 14-15 (consulted on June 6, 2013(.
[68] National Labour Council (Nationale Arbeidsraad), Opinion 1.803 June 27, 2012 on the Law of March 29, 2012 containing various provisions – implementing the National Labour Council, Opinion nr. 1.795 – Respect for the age-pyramid in collective dismissals, http://www.cnt-nar.be/ADVIES/advies-1803.pdf, 15-16 (consulted on June 6, 2013).

D. A Comparison with the Dutch "Mirror-Principle"

The Dutch regulation on collective dismissals is, like the Belgian legislation on this subject, spread across multiple legal texts. The Law on the Notification of Collective Dismissals[69] applies if an employer intends to make 20 or more employees redundant within the work area of the same social security institution,[70] and this within a period of three months.[71]

Contrary to the Belgian situation (with the age-pyramid principle currently still being a theoretical concept), Dutch employers cannot decide discretionary which employees they will dismiss. Besides respecting the 'general' legislation on equal treatment in employment[72] (as is currently also the case in Belgium), the selection of employees to be dismissed for economic reasons must be made, based on the "mirror-principle".[73]

The aim of this "mirror-principle" (in determining the order of dismissal) is twofold : (i) maintain a balanced composition of the company's working population, and (ii) determine in an objective manner which employees must be dismissed.[74]

This principle requires that the employer divides all employees in comparable (interchangeable) positions into age-categories (15-25, 25-35, 35-45, 45-55, and over 55 years) and determines on that basis the percentage of each age-category. Based on the total number of intended dismissals, the employer must then use the above percentage per function/position, in order to establish how many employees must be made redundant in each age-category.[75] The "seniority principle" will then be applied to the effect that in each age group the employee with the fewest years of service will be dismissed.[76]
The "mirror-principle" will not apply (a) in case of a company closure (as all employees then need to be dismissed), (b) when a unique position/function would disappear or (c) when a whole category of interchangeable positions/functions would disappear.
Apart from the above and under strict conditions, one can deviate from the mirror-principle,[77] (a) on the ground of a 'severity clause' (in case of "posting of workers"), (b) when it concerns an indispensable employee or (c) if the 'employee selected for dismissal' has a weak 'labour market position' whilst such is not the case for the employee who is next in line for dismissal.

[69] Law of 24 March 1976 on the Notification of Collective Dismissals, *Dutch Official Gazette* 1976, 223 ("Wet Melding Collectief Ontslag").
[70] Social security institution = "Uitvoeringsinstituut Werknemersverzekeringen" ("UWV").
[71] Article 3, 1. of the Law on the Notification of Collective Dismissals .
[72] 'General legislation, such as the Law of 17 December 2003 on equal treatment on grounds of age in employment, *Dutch Official Gazette* 2004, 30.
[73] The "mirror-principle" is governed by the Dismissal Decree of 7 December 1998, *Stb.* 1998, 238 ("Ontslagbesluit") which was concluded pursuant to the Extraordinary Labour Relations Decree of 5 October 1945, *Dutch Official Gazette,* 1963, 271 ("Buitengewoon Besluit Arbeidsverhoudingen" (BBA 1945)). Article 4 of the Dismissal Decree deals with dismissals for economic reasons and provides the "mirror-principle".
[74] M.E. LIPS and A. MEULENVELD, "Stoelendansen in het land van de bollebozen", *Tijdschrift Arbeidsrecht* 2011, 19.
[75] RUSSELL ADVOCATEN B.V., *Handboek ontslagrecht*, Maklu Apeldoorn-Antwerpen, 2012, 62-63.
[76] Also referred to as the "lifo-principle" = "last-in-first-out".
[77] Article 4:2, 3-4-5 of the Dismissal Decree.

Under Dutch legislation, (collective) dismissals are normally processed by the social security institution "UWV".[78] The social security institution "UWV" is strictly bound by the Dismissal Decree (which imposes the "mirror-principle").[79]

Another *option* for the employer consists in pursuing the dismissal ('dissolution of the employment agreement') before the *Dutch Cantonal Courts.*[80] The employer can even file a 'collective request' for dismissal.[81] Formally the aforementioned regulation (i.e. the Dismissal Decree and other) does not directly apply to the cantonal courts. The so-called "reflex-effect"[82] may, however, entail that the cantonal courts will nevertheless respect these regulations.[83] This consideration is mainly important as it gives the (cantonal) courts more room for deviation from the "mirror-principle".[84]

Analysis of case law and doctrine on (the application of) the "mirror-principle"[85] teaches that Dutch employers became rather creative in circumventing the relevant regulation.[86] Employers still prefer 'quality' ('the employee's capability') over the "mirror-principle", as a selection criterion for collective dismissal. The cantonal courts' rather wide discretion in this matter[87] creates opportunities for Dutch employers. Under strict conditions (shaped by case law and doctrine), employers can deviate

[78] According to the Extraordinary Labour Relations Decree (BBA 1945), the social security institution "UWV" must grant the employer a 'dismissal permit' prior to any dismissal (Article 6.1. of the Extraordinary Labour Relations Decree). The employer can then proceed with the dismissals by giving due notice of termination. See also: RUSSELL ADVOCATEN B.V., *Handboek ontslagrecht*, Maklu Apeldoorn-Antwerpen, 2012, 54; J. DOP, "Reflexwerking afspiegelingsbeginsel bij ontbinding door kantonrechter: Goldewijk", noot *Jurisprudentie Arbeidsrecht* 2012 (aflevering 7), 121.

[79] The social security institution "UWV" is in this context also bound by the Extraordinary Labour Relations Decree (BBA 1945) and by the Law on the Notification of Collective Dismissals.

[80] Article 7:685, 1 of the Dutch Civil Code (artikel 685, 1. "Burgerlijk Wetboek Boek 7, Bijzondere overeenkomsten"). RUSSELL ADVOCATEN B.V., *Handboek ontslagrecht*, Maklu Apeldoorn-Antwerpen, 2012, 117-161.

[81] J. DOP, "Reflexwerking afspiegelingsbeginsel bij ontbinding door kantonrechter: Goldewijk", annotation *Jurisprudentie Arbeidsrecht* 2012 (aflevering 7), 121.

[82] Reflex-effect = so-called 'reflexwerking'.

[83] J. DOP, "Reflexwerking afspiegelingsbeginsel bij ontbinding door kantonrechter: Goldewijk", noot *Jurisprudentie Arbeidsrecht* 2012 (aflevering 7), 121.

[84] R. HAMPSINK, "Selectie op basis van kwaliteit", *Tijdschrift Recht en Arbeid* 2012, 55. M.E. LIPS ann A. MEULENVELD, "Stoelendansen in het land van de bollebozen", *Tijdschrift Arbeidsrecht* 2011, 19.

[85] The "mirror-principle" is in fact a mere variant of the "lifo-principle". Until 1 March 2006 (= date of entry into force of the "mirror-principle") the "lifo-principle" was the main rule for determining the dismissal order. The case law cited dating from before March 1, 2006 therefore relates to the "lifo-principle".

[86] R. HAMPSINK, "Selectie op basis van kwaliteit", *Tijdschrift Recht en Arbeid* 2012, 55. M.E. LIPS ann A. MEULENVELD, "Stoelendansen in het land van de bollebozen", *Tijdschrift Arbeidsrecht* 2011, 19. A.G. VELDMAN, "Voorbij het 'lifo-beginsel' bij reorganisatie: wat zijn wenselijke en geoorloofde selectiegronden voor ontslagkeuze en afvloeiingsvoorwaarden?", *Arbeid integraal* 2005, 43-59. Cantonal court Zwolle, 28 September 1992, JAR 1992/96; cantonal court Rotterdam, 6 January 1994, JAR 1994/53, cantonal court Rotterdam, 7 June 1995, JAR 1995/202, cantonal court Tilburg, 15 December 1998, JAR 1999/23, cantonal court Roermond, 25 January 2003, JAR 2003/109, cantonal court Leeuwarden 24 October 2003, nr. 133992 /VZ VERZ 03-607, Rechtspraak.nl (LJN AM2973), cantonal court Wageningen, 19 November 2003, JAR 2004/10, cantonal court Utrecht, 4 December 2003, JAR 2004/23, cantonal court Leeuwarden, 9 December 2003, LJN AN9783 en LJN AN9784, cantonal court Haarlem, 5 November 2004, JAR 2005/56, cantonal court Den Haag, 22 December 2004, JAR 2005/55, cantonal court Sittard-Geleen, 17 May 2005, JAR 2005/143, cantonal court Hilversum, 30 June 2005, JAR 2005/224, cantonal court Enschede, 21 August 2009, JAR 2009/238, cantonal court Almelo, 24 December 2010, JAR 2011/26.

[87] See previous paragraph (on the reflex-effect).

from the "mirror-principle".[88] If the alternative selection method[89] is based on objective and verifiable criteria ánd is written down in a social plan (thus with the consent of the trade unions/works council), it will gain extra credibility and enforceability (which seems to conform to the above mentioned CJEU case law).[90] Cantonal courts herewith acknowledge the principle that the "employer is basically free to set his organisation in an optimal way".[91]

The majority of claims concerning the "mirror-principle" seem to relate to the interchangeability of functions, the notion 'company/branch', the weak labour market position, … .[92] Claims based on age discrimination are not as frequent, and seem to surface mostly with respect to alternative selection methods. The cantonal court of Alphen a/d Rijn recently decided that the selection criteria (namely 'performance' and 'potential') concluded in a social plan (and deviating from the "mirror-principle"), envisaged mostly elderly employees.[93] Therefore the cantonal court rejected the employer's request for dismissing the concerned employee.

Some authors are asking whether the solutions offered (in case, the "mirror-principle") are not worse than the disease (possible age discrimination).[94] It is indeed surprising to note that in the proposals on the introduction of the "mirror-principle" not a single word is devoted to the fact that this principle, strictly speaking, may - in a more direct manner - differentiate by age.[95] Therefore the answer to the preliminary question lodged by a German labour court in February 2010 would have been extremely relevant and interesting:[96] the question was whether the German "mirror-principle"

[88] The aforementioned doctrine (footnote 72, and more specifically R. Hampsink's article) retained following conditions for justifying deviation from the "mirror-principle" and selecting employees on the basis of 'quality/capability' :

- the employer underpins the economic reasons for collective dismissal;
- the employer shows that trade unions and the works council agree on deviation from the "mirror-principle" and application of alternative selection criteria;
- the employer provides a redundancy period ('boventalligheidsperiode') during which redundant employees can follow courses, can retrain and/or apply for a new job;
- the employer allows redundant employees to apply for alternative (new) functions within the company. These new functions may not be interchangeable with the lapsed functions. Selection of the candidates must occur on the basis of objective and verifiable criteria;
- after expiry of the redundancy period, the employer must request dismissal before the cantonal courts (based on article 7:685 of the Civil Code) and grant an adequate compensation;
- the employer provides an independent assembled committee where redundant employees can file their claims.

The less of the above conditions are fulfilled, the greater the chance that the alternative method of selection will not be accepted by the cantonal courts.

[89] Alternative selection method = a method different from the "mirror-principle".

[90] R. HAMPSINK, "Selectie op basis van kwaliteit", *Tijdschrift Recht en Arbeid* 2012, 55. M.E. LIPS and A. MEULENVELD, "Stoelendansen in het land van de bollebozen", *Tijdschrift Arbeidsrecht* 2011, 19.

[91] A. MEULENVELD, "Stoelendansen in het land van de bollebozen", Tijdschrift Arbeidsrecht 2011, 20 (own translation).

[92] M.E. LIPS AND A. MEULENVELD, "Stoelendansen in het land van de bollebozen", *Tijdschrift Arbeidsrecht* 2011, 19.

[93] Cantonal court Alphen a/d Rijn, 11 September 2012, JAR 2012/15.

[94] A.G. VELDMAN, "Voorbij het 'lifo-beginsel' bij reorganisatie: wat zijn wenselijke en geoorloofde selectiegronden voor ontslagkeuze en afvloeiingsvoorwaarden?", *Arbeid integraal* 2005, 47.

[95] A.G. VELDMAN, "Voorbij het 'lifo-beginsel' bij reorganisatie: wat zijn wenselijke en geoorloofde selectiegronden voor ontslagkeuze en afvloeiingsvoorwaarden?", *Arbeid integraal* 2005, 47-48.

[96] Reference for a preliminary ruling from the Arbeitsgericht Siegburg (Germany) lodged on 12 February 2010 — Hüseyin Balaban v Zelter GmbH (Case C-86/10) : "*Should Article 6 of Council Directive 2000/78/EC (1) of 27*

was compliant with article 6(1) of the Framework Directive. Unfortunately the preliminary question became devoid of purpose. As a consequence, the CJEU did not have to hand down a judgment.

Finally, it is worth mentioning that the Dutch government is intending to reform its dismissal law.[97] One of the intended reforms concerns self-regulation: in case of dismissals for economic reasons, it would be made possible to deviate from the "mirror-principle" by concluding a CLA. This should create more space to develop 'quality criteria' to determine the dismissal order. Due to the current recession, these government plans are however put on hold until 2016.

E. PROVISIONAL CONCLUSION: GUIDELINES FOR THE FUTURE?

This paper started out from the question whether age could be used as a criterion to distinguish amongst workers within the framework of collective dismissals. Based on the above analysis of Belgian and Dutch legislation, and more in particular the age-pyramid and mirror-principles, we could rephrase the question as follows: can an employer dismiss an employee, merely based on his age and pursuant to national legislation containing and age-pyramid or mirror-principle? Is such national legislation in accordance with the current European anti-discrimination legislation?

Although both principles are prompted by a concern to combat age discrimination, they may in the end become counterproductive. Strictly spoken, the "mirror at age" differentiates in a more direct way on the basis of age than is the case with a mere selection of employees on the basis of years of service. From a purely formalistic viewpoint, there are reasons to argue that the age-pyramid and mirror-principles breach the principle of equal treatment of workers. Given the fact that the CJEU has, in the past, often taken a quite formalistic approach to the idea of equality and equal treatment, one could claim that the age-pyramid and mirror-principles would experience difficulties to stand the EU law test.

However, analysis of recent case law on the equal treatment topic shows that the CJEU may have changed its approach. There are several indications that the CJEU may be moving in the direction of a more substantive approach to equality and equal treatment.

In *Odar*, for example, a lot of attention is being given to the fact that the social plan under consideration must provide for a distribution of limited resources, so that it may fulfil its 'transitional function' in respect of all workers, not just older workers. The CJEU approves of the idea that such a plan cannot, in principle, jeopardise the survival of the undertaking or the remaining posts

It is also remarkable that, in several of its recent judgments, the CJEU has attached major importance to the social dialogue. Social partners at national level are given broad discretion in choosing the appropriate aims and measures to safeguard a company's viability.

November 2000 be interpreted as precluding national legislation which, in the selection of workers to be dismissed on operational grounds, allows age groups to be formed in order to ensure a balanced age structure and to ensure that the selection between comparable workers will be made in such a way that the ratio of the number of workers to be selected from the respective age groups to the total number of comparable workers to be dismissed corresponds to the ratio of the number of workers employed in the respective age groups to the number of all comparable workers of the undertaking?"

[97] C.J. LOONSTRA, "Naar een nieuw ontslagrecht?", *Arbeid & Recht* Special December 2012.

This new approach of the CJEU already seems to be reflected in national (Belgian and Dutch) case law (or did it go the other way round?). Individual employees may bear the brunt of this evolution. The wellbeing of all workers may get priority over the wellbeing of the individual. In our opinion, it will be harder for the individual employee to 'successfully' introduce a claim based on age discrimination.

Still review of Dutch case law shows that deviations from the "mirror-principle" are relatively easily accepted if the social partners support the derogation. This trend can, in our view, also be extended to the Belgian practice on equality issues. Agreements entered into by the social partners are considered of paramount importance.

Our biggest concern is, however, that giving more leeway to the social partners is not necessarily the best move to achieve greater equality. Trade unions appear to be bastions where "inequality" is often deeply ingrained. Therefore, one may wonder whether the mild CJEU approach to social partners' agreements does not bring along the risk of consolidating inequality.