

# Considerations Regarding the Conditions for Retaining Tenure for Teachers Who Must Retire and for Reinstatement or Continuation of Employment for Those Retired

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## **Abstract**

*This study presents the conditions for maintaining the tenure of teachers who have to retire and for the reinstatement or continuation of employment of retired teachers, as they emerge from the analysis, not simple and necessarily in its entirety, of the provisions of S. 289 of Law no. 1/2011 on national education, of which only those of paragraphs (1), (3), (6) and (7) are still applicable. Especially in the light of the new form of paragraph (7) introduced by item 37 of Article I of Government Emergency Ordinance no. 117/2013 due to the fact that, as noted in its explanatory memorandum, by Constitutional Court Decision no. 397/2013, the previous form of this paragraph was declared unconstitutional. The analysis of this decision is conclusive from the perspective of the teleological method of interpretation, which together with the logical, historical, systematic and grammatical method helps us in our legal research to provide solutions; each university had/has to transpose the provisions which are difficult to interpret into a methodology approved by the university senate, providing for the other legal and procedural conditions. The study is also important from the perspective of the new draft of the higher education law which seems to omit the criticisms and conclusions of the Constitutional Court referred to above.*

**Keywords:** education law, draft law on higher education, age 65, retirement, continuing to work as a tenure teacher, continuing to work and reinstatement of those who have retired.

**JEL Classification:** K31

## **1. Recitals**

Since the old Status of the teaching staff<sup>2</sup>, the Romanian legislator has been constantly concerned with keeping teachers in the system in various forms - by categories of university qualifications and on conditions based on competence or special academic recognition - either until the age of 65, or until the age of 70, or even beyond this age without a limit.

However, the approach has been successively subjected to "censorship" by the Constitutional Court, with less than desirable effects, and always these aspects have been socially controversial and from the perspective of the sensitivity of accountability for those who are part of decision-making structures or occupy decision-making positions in the broad sense.

We have already suggested that in various nuances the problems are maintained by the rules in force and the solutions are not exactly simple from the perspective of the transposition of the relevant legislation in the matter by the universities through legal instruments. This is because this process requires, in application, the interpretation of special labour legislation in relation to the rules of common law in this area and in accordance with the provisions of social security law concerning retirement conditions - in general and by professional category, i.e. by pension category. Moreover, the legal aspects raise the issue of the accumulation of the capacity of teacher and pensioner *versus* the prohibition of such accumulation in different hypotheses and conditions, as well as the limitation of working capacity by postponing retirement for age limit as a personal option with the benefit of the status of tenure; in other words, we enter into the contentious issue of incompatibilities. And to clarify the problem, it would be useful to have a ministerial order that would (also) be based on the findings of the present research and that would help universities to develop methodologies more easily because, as it is well known, the legal literature is not helpful in this respect.

On the other hand, as the history of the tradition of censorship by the Constitutional Court is somewhat more difficult to remember, the new draft of the law on higher education seems to partially

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<sup>2</sup> Law no. 128/1997 on the Status of Teachers published in the Official Gazette of Romania, Part I, No. 158 of July, 1997, subsequently amended, currently repealed by the new national education law.

omit the criticisms and conclusions of the Constitutional Court, as we will show in the conclusions section, thus completing the chronology of the research.

The topic has been dealt with in the legal literature as we will show in order to make the most of the conclusions, but I propose a different analysis in a more "technical" and applied manner, demonstrative-didactic even for a common level of knowledge and understanding, with the help of the known methods of interpretation - systematic, teleological, historical, logical, grammatical.

Thus, the structure of the work will allow the distinction between the conditions for maintaining the status of tenure for retired teachers, respectively for the reinstatement or continuation of activity of retired teachers.

We must begin by stating that according to Section 48 of Law no. 263/2010 on the Unified Public Pension System<sup>3</sup>, the standard retirement age is 65 for men and 63 for women, the latter, according to Annex 5 of the law in force, to be reached in January 2030; until then, their standard retirement age is lower<sup>4</sup>, with a staggered increase (for example, for November 2022 it is 61 years and 11 months).

In general, in European countries, the retirement age is around 65, but an employee in Sweden, for example, can retire from age 61 at the earliest, as there is no upper age limit.

Most European countries have a special regime for the retirement of university teachers. As a rule, university teachers retire at the age of 65, but in Germany, for example, university teachers retire at the age of 68, and in Spain and Norway at 70. In other European countries the retirement age for teachers is also higher than 65 (Denmark, Greece, Finland, Sweden, Estonia, Luxembourg, the Netherlands, Slovakia, etc.). In the USA and England, university teachers can remain in their offices after the standard retirement age.<sup>5</sup>

According to Section 289 (1) of the National Education Law 1/2011<sup>6</sup>, "teaching and research staff shall retire on reaching the age of 65".

Because no distinction is made between genders, the rule applies equally to men and women, unlike the common law rules on the subject.

What is the consequence of retirement? This is regulated in the Labour Code<sup>7</sup>. With regard to university-specific legislation, we note that there is no indication of the consequence of retirement "on reaching the age of 65". We therefore identify it in the relevant provisions of common law - Section 56 (1) (c) sentence 1 of the Labour Code<sup>8</sup> - which, naturally, are therefore applicable to all employees, including academics: their individual employment contracts automatically terminate on the date on which the standard age and the minimum contribution period for retirement are met. Obviously, this is the old-age pension<sup>9</sup>.

However, in order not to produce these effects, both according to the common law rules and according to the rules specific to the university environment, there is the possibility of maintenance them employed, but under different conditions for the two categories of employees and these

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<sup>3</sup> Published in the Official Journal of Romania, Part I, no. 852 of December 20, 2010, as subsequently amended.

<sup>4</sup> The lower retirement age of women is in fact a benefit as it results from the Constitutional Court Decision no. 387/2018 on the constitutional challenge of the provisions of Section 53 (1) sentence I of Law no. 263/2010 on the unified public pension system and of Section 56 (1) (c) sentence I of Law No. 53/2003 - Labour Code (published in the Official Gazette of Romania, Part I, No. 642 of July 24, 2018). Thus, "it should not be understood that the benefit granted to women through the possibility of retiring at a lower age becomes a "consequence of the termination of the individual employment contract", "insofar as it ignores the woman's will to be subject to equal treatment with that applicable to men" (Laura Georgescu, *Încetarea de drept a contractului individual de muncă al salariației la împlinirea vârstei de pensionare*, in "Revista română de dreptul muncii" no. 5/2018, pp. 89-92.)

<sup>5</sup> See for a broad approach, Ioan Leș, *Opinii privitoare la pensionarea cadrelor didactice din învățământul superior*, in "Dreptul" no. 11/2016.

<sup>6</sup> Published in the Official Gazette of Romania, Part I, No 18 of January 10, 2011, as subsequently amended.

<sup>7</sup> Law no. 53/2003 - Labour Code, republished in the Official Gazette of Romania, Part I, no. 345 of May 18, 2011, as subsequently amended.

<sup>8</sup> According to Section 56 (1) (c) sentence 1 of the Labour Code, "the existing individual employment contract shall be terminated by operation of law: (...) on the date of the cumulative fulfilment of the standard age and the minimum contribution period for retirement or, exceptionally, for the woman employee who opts in writing to continue the performance of the individual employment contract, within 30 calendar days prior to the fulfilment of the standard age and minimum contribution period for retirement, at the age of 65".

<sup>9</sup> It follows from a comparison of all the sentences of Section 56 (1) (c) of the Labour Code in the light of Law no. 263/2010 on the Unified Public Pension System.

distinctions are of particular importance, as we will show.

## 2. Remaining employed beyond retirement age under the Labour Code

According to the common law rules on the matter (Section 56(4) of the Labour Code), "on the basis of an application made 30 days before the date on which the standard age and the minimum contribution period for retirement are reached, and with the employer's approval, the employee may be maintained in the same position for a maximum of 3 years beyond the standard retirement age, with the possibility of an annual extension of the individual employment contract". This is therefore a request made by both the man employee and the woman employee concerned<sup>10</sup> which "must be approved by the employer, which is a condition of continued employment. Otherwise, the employment contract will automatically terminate on reaching the standard retirement age (65)"<sup>11</sup>.

Approval of the application "will result in the drawing up of an addendum to the existing individual employment contract which will have the effect of extending this contract by one, two or a maximum of three years. Thus, the term of termination of the contract in question by operation of law is extended, i.e., postponed, and will therefore end by operation of law on the date agreed by the parties". So "the same individual employment contract is maintained, being extended annually until the time of its termination by operation of law". The situation of extension "excludes the possibility of concurrent acquisition (i.e., at the same time) of the pensioner status"; "the accumulation of employee and pensioner status is not possible". "On the other hand, after the individual employment contract extended up to three years has been terminated by operation of law, the person concerned may cumulate the pension with the salary (obviously by concluding an individual employment contract in its own right)"<sup>12</sup>, of course resuming the usual employment procedure - "after prior verification of the professional and personal skills of the person applying for employment" according to Section 29(1) of Labour Code and according to the rules specific to the private or public sector.

Given the legal incompatibility<sup>13</sup> highlighted above (in the sense of limiting the capacity to work<sup>14</sup>), we note that the person concerned can only continue to work if there is proof or at least, in advance, an affidavit that he/she is not receiving/will not receive a pension<sup>15</sup> - before the conclusion of the addendum and during the extension of the individual employment contract. Otherwise, the provisions of Section 57 (1)-(4) and (6)-(7) of the Labour Code may apply, the employee being entitled to remuneration for work, corresponding to the way he/she has performed his/her duties under (5) of the same Section, but the question as to the recovery of the undue pension by the pension fund in such a situation of incompatibility arises. The question arises as to whether the recovery in question would also lead to a return to legality in terms of the validity of the extension of the individual employment contract by an addendum, because of<sup>16</sup> (3) of the said section. It is clear who has to play an active role<sup>17</sup> in preventing or establishing a state of incompatibility, since the obligations relating to the validity of an individual employment contract are incumbent on the employer (the problem is

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<sup>10</sup> See Alexandru Țiclea, Laura Georgescu, Adelina Oana Duțu, *Codul muncii. Legislație conexă. Comentarii. Jurisprudență*, Universul Juridic, Bucharest, 2020, p. 309.

<sup>11</sup> *Ibidem*.

<sup>12</sup> Ion Traian Ștefănescu, *Despre înțelesul noțional al art. 56 alin. (4) din Codul muncii*, in "Dreptul" no. 8/2019, pp. 100-101; Alexandru Țiclea, Laura Georgescu, Adelina Oana Duțu, *Codul muncii. Legislație conexă. Comentarii. Jurisprudență*, op. cit., pp. 309-310.

<sup>13</sup> "The term incompatibility derives from French - "incompatible" - and from German - "inkompatibel" - , meaning "something that cannot be reconciled with something or someone else"; therefore, the state of incompatibility implies two elements that cannot coexist, either of which excludes the other" (Alexandru Țiclea, Laura Georgescu, Ana Ștefănescu, Corneliu Bențe, *Dreptul muncii și securității sociale*, Wolters Kluwer Romania, Bucharest, 2015, p. 122).

<sup>14</sup> *Ibidem*, p. 121.

<sup>15</sup> Only from April 8, 2022, under Law no. 76/2022 (published in the Official Gazette of Romania, Part I, no. 333 of April 5, 2022), which supplemented Section 106 of Law no. 263/2010, the pension fund shall inform the employer of retirement decisions (of any category) within 5 days of the date of issue.

<sup>16</sup> According to Section 57 (3) of the Labour Code, "the nullity of the individual employment contract may be covered by the subsequent fulfilment of the conditions imposed by law".

<sup>17</sup> See Alexandru Țiclea, Laura Georgescu, Ana Ștefănescu, Corneliu Bențe, *Dreptul muncii și securității sociale*, op. cit., p. 123.

more sensitive in the public sector). However, the employee in question is not exempted from liability in terms of the accumulation of pension and salary, since the liability is personal.

### 3. Continuing to work as a tenure holder over the age of 65 according to the National Education Act 1/2011

We reiterate that the provisions of common law are also applicable to academics in terms of the consequences of retirement at the age of 65 - it is a question of the termination of their individual employment contracts, by operation of law, on the date on which they cumulatively meet the standard age conditions and the minimum contribution period for retirement under Section 56 (1) (c) sentence 1 of the Labour Code. But there are derogations regarding the conditions for remaining employed. First of all, in the university environment there is no limit of three years of continued employment on the basis of annual addenda to individual employment contracts. Secondly, approval is conditional on matters concerning the person concerned, but must also be based on objective reasons. Thus, Section 289 (6) of the National Education Act 1/2011 stipulates: "by exception to the provisions of para. (1), if higher education institutions are not able to cover the norms with tenure holders, may decide to maintain the status of tenure holder in teaching and/or research, with all the rights and obligations arising from this status, because of the annual evaluation of academic performance, according to a methodology established by the university senate".

We note, therefore, as announced at the very beginning of the text of the law, that maintaining the status of holder is an exception to retirement for old age [which would lead to the termination by operation of law of the existing individual employment contract, based on the provisions of Section 56 (1) (c) sentence 1 of the Labour Code, applicable in the absence of derogating rules]. Therefore, as the retention of the status of tenure holder is an exception to retirement, the existing individual employment contract is not terminated but maintained - by the conclusion of an addendum to that effect. This is, of course, a possibility. However, the very fact that the retention of the status of tenure holder entails the retention of all the rights and obligations deriving from this status<sup>18</sup> reinforces the identity of the solution of *common law* - *special law*: nothing changes, but the employment relationship continues to run with all its elements, including its content. As such, in the university environment, the aspects showed in the previous paragraph of this Section are valid, bearing in mind the central idea: "the accumulation of employee and pensioner status is not possible"<sup>19</sup>, with all the consequences mentioned above.

On the other hand, given that the decision to maintain tenure can be made "on the basis of the annual evaluation of academic performance", we understand that the addendum will be concluded annually, without a specific time limit, but only if there is an objective situation: "if higher education institutions cannot cover the rules with tenure holders". This can be noted when drawing up the title list, i.e. every year<sup>20</sup>, and is a prerequisite for the submission and approval of applications for this purpose. Of course, all this will be done "according to a methodology established by the University Senate". What would be its role since the conditions are already laid down in law? Just to indicate

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<sup>18</sup> These provisions are of particular importance as tenure holders have special rights compared to associate teachers, respectively to associate teachers invited or to those employed under Section 289 (7) of Law no. 1/2011. The latter, for example, in relation to tenured teachers, cannot receive merit pay and do not have the right to vote or to be elected.

<sup>19</sup> Ion Traian Ștefănescu, *Despre înțelesul noțional al art. 56 alin. (4) din Codul muncii*, op. cit., p. 101; Alexandru Țiclea, Laura Georgescu, Adelina Oana Duțu, *Codul muncii. Legislație conexă. Comentarii. Jurisprudență*, op. cit., p. 310.

<sup>20</sup> Since the title lists are not changed legally during the academic year, on reaching the age of 65, on the basis of a request made 30 days in advance, those concerned may be retained as tenure holders, provided they do not receive a pension, and the following year it will be decided to retain them on the basis of their academic performance. This is a solution adopted in university practice through the methodologies of university senates, also taking into account university autonomy. In Section 32 of the Single Collective Bargaining Agreement at the Level of Group of Units in the Higher Education Activity Sector, registered with the M.M.P.S.-D.D.S. under no. 1241 of 11.10.2021 there is a similar provision but for those who have not been approved for tenure and yet are so maintained until the end of the academic year.

academic performance criteria<sup>21</sup>? As this is an act subsidiary to the law drawn up in application of the latter, should the methodology be clarifying, including from the perspective of the above doctrinal interpretation solutions (special provisions highlighted by means of common law provisions) or should it be limited to criteria and a chronological procedural path? We could move the analysis for a suggestive comparison to another act subsidiary to the law - the internal regulation; according to Section 242 (h) of the Labour Code, it must contain "the modalities of application of other specific legal or contractual provisions". There is always a process of interpretation to be reflected in the written application of legal texts (i.e., in their transposition), and it is desirable that this should be as clear as possible (including in the form of clear and easy-to-understand rules, as in the case of the internal regulation, for example). For the university senate's methodology, the analogy should be borne in mind, if we think of the active role that the university senate has, as "university legislator", in preventing incompatibility between the status of pensioner at the age of 65 and that of tenure holder maintained in activity beyond this age, through the very methodology in question<sup>22</sup>. We are therefore talking about a condition of validity for the extension of the effects of individual employment contracts by means of addenda which are subsidiary to the decision of the university senate approving this<sup>23</sup>. Of course, university autonomy plays an important role in the legal nature of the methodology. I personally recommend a clear physiognomy, even if it is not the most diplomatic option for a sensitive issue, because the special provisions of S. 289 of Law no. 1/2011 require a more rigorous and specialized interpretation that is difficult to access for the common knowledge; on the other hand, in the case of a laconic/avoidant methodology, which is otherwise possible, there should be people specialized in the field who at least ensure the correct application of the law taking into account the implications.

#### **4. Continuation of activity and reinstatement of those who retired at 65 under the National Education Act 1/2011**

For those who retire at 65, i.e., who do not wish to retain tenure or do not receive approval to do so from the University Senate, there are two possibilities:

- a) either to continue working on the basis of S. 289 (3) of the National Education Act 1/2011.
- b) to be reinstated as teaching staff on the basis of S. 289 (7) of the National Education Law no. 1/2011.

- c) for the continuation of the activity S. 289 (3) of the National Education Law no. 1/2011 stipulates: "The University Senate of public, private and denominational universities, based on professional performance criteria and financial situation, may decide to continue the activity of a teaching or research staff member after retirement, on the basis of a fixed-term contract of one year, with the possibility of annual extension according to the University Charter, without age limit. The University Senate may decide to confer the honorary title of Professor Emeritus, for teaching and research excellence, on teachers who have reached retirement age. Retired teachers may be paid on an hourly basis." In conclusion, in the regulated situation, the salary is paid on an hourly basis and

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<sup>21</sup> The reference to "academic performance" leads us to think of a substantive difference from those stipulated in Section 303 (4) of Law no. 1/2011: "employment contracts of teaching and research staff include the assumption by the employee of minimum standards of performance of teaching and research activities, approved by the University Senate, and clauses on sanctioning the employee in the event of failure to meet these minimum standards, in accordance with the legislation in force". Clearly the minimum standards differ from performance - hence from a maximum/peak of activity results.

<sup>22</sup> The fact that from April 8, 2022 the pension fund will inform the employer of retirement decisions (of any kind), as outlined above, obviously does not solve the previous problems when there was no clear basis for continued employment, which would allow the employer to prevent the situation of incompatibility in the absence of specialist advice. It is possible that employers and those retained as tenure holders before April 8, 2022 might at least seek an exemption from any liability on this ground, should the question arise.

<sup>23</sup> In practice, powers are shared for this purpose: the university senate approves the retention on the basis of the opinion of the board of directors and the addendum to the individual employment contract is concluded, as a subsidiary act, between the retained tenure holder and the rector.

can be accumulated with the old-age pension (at 65 years of age)<sup>24</sup>, in which case the prior verification of the professional and personal skills of the retired person for whom a new contract is concluded is not carried out through a competition in which those who are not retired could also participate, i.e. according to the usual rule, but on the basis of professional performance criteria established by the university senate only for retired persons. In this sense we can also say that terminologically "continuing" work leads to the idea of excluding a competition.

d) to be paid under the normal system (and not under the hourly system), the old-age pension must be suspended (at age 65). Thus, Section 289 p. (7) of Law no. 1/2011 on National Education states: "the reinstatement of retired teaching staff in a teaching staff position shall be done annually, maintaining the rights and obligations arising from the teaching activity carried out prior to retirement, with the approval of the University Senate, according to the methodology set out in (6), provided that the pension is suspended during the period of reinstatement". Because those who have been reinstated are not tenured, they logically retain the rights and obligations arising from their teaching activity prior to their retirement, except for those that are exclusively incumbent to tenure holders.

The re-employment is done by the university senate according to the same methodology but the reference to (6) of S. 289 concerns only the normative legal act itself, which, in addition to the conditions of continued employment for the tenure holders, must also contain rules on the reinstatement and continuation of employment (given the link between all these). So, we are talking about three distinct hypotheses with distinct provisions and rules which have in common the age of 65 - concerning pensioners who are not entitled to an old-age pension and pensioners who can keep their pension by receiving their salary on an hourly-paid basis, or those who must suspend their pension in order to receive their salary under the normal regime they had before retirement.

It should first be noted that this para. (7) of S. 289 of Law no. 1/2011 on national education regulating the re-employment was introduced by para. 37 of art. I of Government Emergency Ordinance no. 117/2013<sup>25</sup> due to the fact that, as noted in the explanatory memorandum, by Constitutional Court Decision no. 397/2013, the pre-decision form of this paragraph was declared unconstitutional<sup>26</sup>; in short, the criticism concerned precisely the tenure: "the rules criticized in the present case are discriminatory, since they allow the recognition of tenure in teaching by (...) the university senate, in a way other than the competition, which all other persons who want to access teaching posts as tenured are obliged to observe. In fact, the legal provisions at issue allow (...) senates to confer tenure on teachers who have retired status. Moreover, the confusing regulation creates difficulties of interpretation and application." Consequently, in the new form of para. (7), this status of retired tenured teacher has been excluded due to the need to ensure consistency with constitutional

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<sup>24</sup> The provision in para. (5) of Section 289 of Law no. 1/2011 ["The legal regime of accumulation of salary with pension does not apply to teachers who benefit from the provisions of para. (3) (...)"] is no longer applicable. This was related to that of Section 17 of Law no. 329/2009 on the reorganisation of certain public authorities and institutions, the rationalisation of public expenditure, support for the business environment and compliance with the framework agreements with the European Commission and the International Monetary Fund (published in the Official Gazette of Romania, Part I, No 761 of November 9, 2009), which stated that 'in public authorities and institutions' it was possible 'to cumulate the net pension with the income thus earned, provided that the level of the net pension does not exceed the average gross salary in the economy used to establish the state social security budget and approved by the state social security budget law'. Since the latter has been repealed, the former is not applicable. For the link between the two provisions, see Constitutional Court Decision no. 397/2013 on the constitutional challenge of the provisions of Section 284 (7) and Section 289 (7) of the National Education Act no. 1/2011 (published in the Official Gazette of Romania, Part I, no. 663 of October 29, 2013).

<sup>25</sup> Published in the Official Journal of Romania, Part I, No 843 of December 30, 2013.

<sup>26</sup> The previous form of para. (7) of Section 289 stipulated that: "the teaching staff who have held tenure may be recognised as such, annually, by the University Senate, in accordance with the methodology set out in para. (6), on condition that they waive their pension for the period during which they remain tenured". So, it was the hypothesis that the individual contract had terminated by operation of law, the pension having been obtained and the tenure could still be recognised. For comparison, the previous form of paragraph (6) of Section 289 is reproduced below: "by exception to the provisions of (1), (2) and (4), if higher education institutions are unable to fill the teaching load with tenure holders, they may decide to maintain tenure in teaching and/or research on the basis of an annual evaluation of academic performance, according to a methodology established by the University Senate". The latter provisions brought to the fore the fact that the individual employment contract did not terminate, no old-age pension was awarded and tenure was thus maintained. We note the contradiction between the two distinct situations - para. (6) and para. (7) - but both with maintenance/recognition of the status of tenure holder/retired tenure holder and without competition.

rules on the requirement of non-discrimination.

With regard to the condition of suspension of pension, which in fact was the starting point of the referral to the Court by the Ombudsman, as stated in the same decision, it remains irrelevant: "the finding of unconstitutionality of the legislative solution enshrined in the legal texts criticized, namely the establishment of the possibility of recognizing the status of retired teaching staff as tenured teachers, means that the examination of the conditions that the same texts require for acquiring this status (the waiver of pension, to which the criticism of unconstitutionality refers) remains irrelevant". It was argued by the Ombudsman that "teaching staff are participants in the public pension system, receive a pension belonging to that system and must therefore enjoy non-discriminatory treatment in relation to other pensioners" and "who work after retirement in other fields" without "the obligation to give up their pension during the period they work in the public sector". However, following Constitutional Court Decision no. 397/2013 and based on the current form of para. (7) of S. 289, it follows that reinstatement after retirement (i.e., after the individual employment contract has been terminated by operation of law in order to benefit from the old-age pension) can be made without competition (but excluding the acquisition of the status of tenure holder), provided that the pension is suspended. If you wish to keep your pension, you will have to take the usual competition procedure either for the position of full professor or for that of associate professor, as this is a matter of employment and not of reinstatement/reemployment. In other words, in response to the People's Ombudsman's criticism, we would point out that in other areas of the public sector it is possible to combine pension and salary, including at present, but this does not exclude the competition, since the existing contract before retirement ceases by operation of law. So instead of raising the issue of discrimination against academics in relation to other employees, the issue of discrimination against other employees in relation to academics has in fact been raised. So, without a competition, even with the suspension of the pension after the individual employment contract ceased by operation of law, it was discriminatory and unconstitutional precisely to maintain the status of tenure holder in relation to the other participants in the usual selection process.

On the other hand, the condition of suspension of pension to make reinstatement possible must also be seen as a limitation of the capacity to work; it is a condition of the same type as that of the lack of pension benefits to maintain the status of tenure holder. *Mutatis mutandis*, the absence of the condition of suspension of pension leads to an incompatibility for those reinstated, i.e., it is not allowed to grant pension during the reinstatement of the retired teaching staff, with all the consequences indicated in item 2 of this material.

## 5. Comparative law

For European academic researchers and professors over 60 years old, standing still is not an option. Many European countries impose a mandatory retirement age for public employees, ranging from a minimum of 60 in France to a maximum of 67 in Norway and Sweden. Since most universities in Europe are state-run, this limit generally applies to professors as well. Although many senior researchers relish the opportunity to hang up their lab coats for good, others see it as an unnecessary waste of their skills and experience. Some people dream of retirement, but none are in the category of valuable people in academia or research.<sup>27</sup>

Those who are determined to stay at the bench after retirement often lead a precarious life, relying on the generosity of younger colleagues for lab space and access to infrastructure. Some of the biggest names in European science have managed to make special offers to stay, but otherwise the only alternative is to look for a job where there are no such age restrictions, most often in the United States. Europe, and Switzerland in particular, must pay serious attention to a potential brain drain to the United States due to the various laws governing age retirement, as has been repeatedly

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<sup>27</sup> 1940 Statement of Principles on Academic Freedom and Tenure – AAUP. Aaup.org. 10 July 2006. Retrieved 16 October 2017, *What is academic tenure?*. Aaup.org. 30 June 2006. Retrieved 16 October 2017, *Tenure*. American Federation of Teachers. 2015-06-01. Retrieved 2021-01-07.

expressed by scholars in this the country. But this exodus may not last long. In response to pension problems and calls for an end to age discrimination, Europe is in the process of either increasing the mandatory retirement age or abolishing it altogether.<sup>28</sup>

Mandatory retirement for tenured university employees in the United States ended in 1994 under an amendment to the Age Discrimination in Employment Act of 1967. Australia, New Zealand, and some Canadian provinces have similar provisions. But Europe has not given up yet. To continue his work on prion diseases after his retirement from the University of Zurich, molecular biologist and biotechnology pioneer Charles Weissmann, 72, left Switzerland in 1999 for the Prion Unit of the University Medical Research Council College London. There he has a 5-year contract that can be extended from year to year. He is also considering an offer from the United States. Weissmann's younger colleague in Zurich, Adriano Aguzzi, head of neuropathology at the University Hospital, says his departure has left a void. Indeed, says Howard Schachman, a molecular biologist who fought his own retirement from the University of California Berkeley in 1990 and still teaches there at age 85, "it's absurd to kick [Weissmann] out of the country".

A forced retirement triggered a national crisis. ETH's Wuthrich had already moved part of his operation to the Scripps Research Institute in La Jolla, Calif., pending retirement when he shared the 2002 Nobel Prize in Chemistry for his work on the structure of biological molecules. The prospect of the new Nobel laureate leaving Switzerland for the United States so inflamed public opinion that the Swiss Parliament amended the law governing retirement at federal polytechnics, including ETH Zurich, to take special cases into account. If this change - popularly known as Lex Wuthrich - had happened 3 years earlier, Wuthrich wrote in the Swiss weekly *Die Weltwoche*, he would have had no reason to go to America. "Switzerland's loss is very much Scripps' gain", says Peter Wright, chair of the molecular biology department at Scripps. Beginning with his retirement in 2004, Wuthrich will spend 8 months of the year at Scripps and the rest at ETH.<sup>29</sup>

Of course, to go abroad you must be asked. And even when asked, many would prefer to avoid personal twists. As a "first-class" research director funded by CNRS, France's fundamental research agency, Williams applied for and was granted a 5-year extension beyond the age of 65, but this offers little reward for his experience and years of service. The emeritus position comes with office space, a small amount of money for travel, supplies and cafeteria meals. Her salary is paid from her pension. She can no longer be a principal investigator on grants, but she can apply as a co-investigator, a fact for which the researcher is satisfied, compared to other colleagues who were not retained, but sent to retirement, emphasizing that she is privileged.<sup>30</sup>

Even international organizations such as the European Molecular Biology Laboratory (EMBL) in Heidelberg and CERN, the European particle physics laboratory near Geneva, subscribe to mandatory retirement. "The director general's leaving when he's 65," says Keith Williamson, EMBL's deputy chief executive. CERN researchers also must retire by age 65, but retirees still have access to the labs and computers. Jack Steinberger, who shared the Nobel Prize in physics in 1988 for discovering the muon neutrino, told *Science* that he still shows up every day at CERN, where he has a desk and a computer and is "trying to study cosmology."<sup>31</sup>

Critics of mandatory retirement lament the waste of experience gained over decades. "Everyone who does good science and thinks critically is part of the public good," says Rajewsky. Others, however, support Europe's approach. Austrian-born Gottfried Schatz, who retired relatively early (at 63) from the University of Basel's Biozentrum and now heads the Swiss government's Science and Technology Council, argues that the American system is breaking the generational

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<sup>28</sup> Ellen Schrecker, *The Lost Soul of Higher Education: Corporatization, the Assault on Academic Freedom, and the End of the American University*, The New Press, 2010, p. 26.

<sup>29</sup> Aeon J. Skoble, *Tenure, The Good Outweighs the Bad -- A Surreponse to James E. Bruce*, in „Journal of Markets & Morality”, Volume 22, Number 1 (Spring 2019): 207–210, p. 208.

<sup>30</sup> Ellen Schrecker, *The Lost Soul of Higher Education: Corporatization, the Assault on Academic Freedom, and the End of the American University*, The New Press, 2010, p. 27-28.

<sup>31</sup> Aeon J. Skoble, *op. cit.*, p. 210.

contract, especially in Europe, where young teachers find few places and often have to wait for an older colleague to retire. "Tenure Track would break down because universities can't plan for promotions if faculty positions are open," Schatz says. Even people who want to continue don't necessarily think it's right for everyone.

A gray scientific workforce may, however, be inevitable. According to the Paris-based Organization for Economic Co-operation and Development, less than half of European workers aged 55 to 64 are currently employed. As people are living longer, Europe's pension providers are struggling to meet their commitments, and so the European Union wants to raise the age at which Europeans effectively leave the labor market by 5 years. The European Union has also approved a directive to eliminate age discrimination. Although the directive does not ban compulsory retirement, the UK intends to end or ban most of the restrictions once the directive comes into force to be in line with the rest of the United Europe.

## **6. Conclusions**

The whole of Section 289 of Law no. 1/2011 on national education, which also applies paragraphs. (1), (3), (6) and (7), contains the common idea of retention in the university system, with the approval of the university senate, after the age of 65, regardless of gender, without competition, if one opts for, as the case may be:

a) the annual continuation of activity after retirement for a teaching or research staff member on an hourly-paid basis and with the possibility of accumulation of pension "on the basis of professional performance criteria and financial situation", by concluding a new "fixed-term contract" (given the termination by operation of law of the existing contract when the conditions for retirement on grounds of age are met), with the possibility of extension" "in accordance with the University Charter, without limit" (according to paragraph (3));

b) maintaining annually "tenure in teaching and/or research, with all the rights and obligations deriving therefrom", under conditions of academic performance and if the "positions cannot be filled by tenured staff", provided that the person concerned does not receive an old-age pension and the contract in existence when the conditions for retirement are met does not cease by operation of law, but is maintained by an addendum (according to paragraph (6));

c) the annual reinstatement "of retired teaching staff in their teaching position" (given the termination by operation of law of the existing contract when the conditions for retirement on grounds of age are met), "while maintaining the rights and obligations arising from the teaching activity carried out prior to retirement" (other than those granted exclusively to tenured staff), provided that the pension is suspended during the period of reinstatement with a new "fixed-term contract" (according to para.7)). If the pension is to be maintained, one will have to go through the normal competition procedure for either the full or associate teaching staff status, in which case we are talking about employment and not reinstatement/reemployment.

Thus, it is possible for retired teachers not to have their employment contract automatically terminated when they reach the age of 65 and to continue working by concluding an addendum to it prior to that date only if they do not get retired for the entire duration of their employment. If they retire, there is the possibility of continuing to work only on an hourly-paid basis, annually, by concluding new contracts; only in the condition of the suspension of pension there is the possibility of maintaining the rights and obligations arising from the teaching activity carried out prior to retirement (including salary) through reinstatement/reemployment, annually, under other employment contracts. There are three legal institutions between which a distinction must be made. And the method of grammatical interpretation suggests that in the case of continuation of employment, i.e., reinstatement, as in the case of maintained/continued employment (the terms are suggestive), there should not be a break in the coverage of the title lists between the moment of retirement (i.e., the end of the old contract) and the new employment contracts. The retirement/pension conditions are conditions of validity for the addendum, i.e., for the individual employment contracts.

All this interpretation must be transposed by each university into a methodology approved by the university senate, including other legal and procedural conditions. However, as the legal texts are "susceptible to divergent interpretations", "they have already led to the promotion of administrative practices without a solid legal basis"<sup>32</sup>, as stated in the legal literature. Therefore, I hope that the results of this research will be useful for better and uniform practices, appropriate academic methodologies and for a ministerial order that will halve the efforts for the application of the provisions of the law.

For the time being, the new draft on higher education seems to partially omit the criticisms and conclusions of the Constitutional Court which we have referred to; the text of the draft law speaks for itself, so we are reproducing it to reflect the results of the research from this point of view as well<sup>33</sup>:

"Section 218

(1) Teaching and research staff shall retire on reaching the age of 65.

(2) By exception to the provisions of para. (1), at the request of the employee, he or she may, until the age of 70, continue to hold the post of permanent employee/tenure.

(3) The university senate of public, private and denominational institutions, based on the criteria of professional performance and financial situation, may decide on the continuation of the activity of a teaching or research staff member after retirement. In this case, the higher education institution shall conclude, on an annual basis, with the staff to whom the maintenance of tenure beyond the age of 70 was approved, a fixed-term employment contract. Retired teachers who are not tenure teachers may be paid on an hourly-paid basis.

(4) The University Senate may decide to confer the honorary title of Professor Emeritus for excellence in teaching and research, to teachers who have reached retirement age."

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<sup>32</sup> It is also a conclusion of the extensive study we referred to previously (Ioan Leș, *Opinii privitoare la pensionarea cadrelor didactice din învățământul superior*, in "Dreptul" no. 11/2016).

<sup>33</sup> The document is available online at [https://media.hotnews.ro/media\\_server1/document-2022-07-13-25676743-0-proiect-lege-invatamant-superior-ministerul-educatiei-2022.pdf](https://media.hotnews.ro/media_server1/document-2022-07-13-25676743-0-proiect-lege-invatamant-superior-ministerul-educatiei-2022.pdf) (consulted on 18.11.2022).