

## COUNCIL DIRECTIVE 96/97/EC

of 20 December 1996

amending Directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 100 thereof,

Having regard to the proposal from the Commission <sup>(1)</sup>,

Having regard to the opinion of the European Parliament <sup>(2)</sup>,

Having regard to the opinion of the Economic and Social Committee <sup>(3)</sup>,

Whereas Article 119 of the Treaty provides that each Member State shall ensure the application of the principle that men and women should receive equal pay for equal work; whereas 'pay' should be taken to mean the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, from his employer in respect of his employment;

Whereas, in its judgement of 17 May 1990, in Case 262/88: Barber v. Guardian Royal Exchange Assurance Group <sup>(4)</sup>, the Court of Justice of the European Communities acknowledges that all forms of occupational pension constitute an element of pay within the meaning of Article 119 of the Treaty;

Whereas, in the abovementioned judgment, as clarified by the judgment of 14 December 1993 (Case C-110/91: Moroni v. Collo GmbH) <sup>(5)</sup>, the Court interprets Article 119 of the Treaty in such a way that discrimination between men and women in occupational social security schemes is prohibited in general and not only in respect of establishing the age of entitlement to a pension or when an occupational pension is offered by way of compensation for compulsory retirement on economic grounds;

Whereas, in accordance with Protocol 2 concerning Article 119 of the Treaty annexed to the Treaty establishing the European Community, benefits under

occupational social security schemes shall not be considered as remuneration if and in so far as they are attributable to periods of employment prior to 17 May 1990, except in the case of workers or those claiming under them who have, before that date, initiated legal proceedings or raised an equivalent claim under the applicable national law;

Whereas, in its judgments of 28 September 1994 <sup>(6)</sup> (Case C-57/93: Vroege v. NCIV Instituut voor Volkshuisvesting BV and Case C-128/93: Fisscher v. Voorhuis Hengelo BV), the Court ruled that the abovementioned Protocol did not affect the right to join an occupational pension scheme, which continues to be governed by the judgment of 13 May 1986 in Case 170/84: Bilka-Kaufhaus GmbH v. Hartz <sup>(7)</sup>, and that the limitation of the effects in time of the judgment of 17 May 1990 in Case C-262/88: Barber v. Guardian Royal Exchange Assurance Group does not apply to the right to join an occupational pension scheme; whereas the Court also ruled that the national rules relating to time limits for bringing actions under national law may be relied on against workers who assert their right to join an occupational pension scheme, provided that they are not less favourable for that type of action than for similar actions of a domestic nature and that they do not render the exercise of rights conferred by Community law impossible in practice; whereas the Court has also pointed out that the fact that a worker can claim retroactively to join an occupational pension scheme does not allow the worker to avoid paying the contributions relating to the period of membership concerned;

Whereas the exclusion of workers on the grounds of the nature of their work contracts from access to a company or sectorial social security scheme may constitute indirect discrimination against women;

Whereas, in its judgment of 9 November 1993 (Case C-132/92: Birds Eye Walls Ltd v. Friedel M. Roberts) <sup>(8)</sup>, the Court has also specified that it is not contrary to Article 119 of the Treaty, when calculating the amount of a bridging pension which is paid by an employer to male and female employees who have taken early retirement on grounds of ill health and which is intended to

<sup>(1)</sup> OJ No C 218, 23. 8. 1995, p. 5.

<sup>(2)</sup> Opinion delivered on 12 November 1996 (OJ No C 362, 2. 12. 1996).

<sup>(3)</sup> OJ No C 18, 22. 1. 1996, p. 132.

<sup>(4)</sup> [1990] ECR I-1889.

<sup>(5)</sup> [1993] ECR I-6591.

<sup>(6)</sup> [1994] ECR I-4541 and (1994) ECR I-4583, respectively.

<sup>(7)</sup> [1986] ECR I-1607.

<sup>(8)</sup> [1993] ECR I-5579.

compensate, in particular, for loss of income resulting from the fact that they have not yet reached the age required for payment of the State pension which they will subsequently receive and to reduce the amount of the bridging pension accordingly, even though, in the case of men and women aged between 60 and 65, the result is that a female ex-employee receives a smaller bridging pension than that paid to her male counterpart, the difference being equal to the amount of the State pension to which she is entitled as from the age of 60 in respect of the periods of service completed with that employer;

Whereas, in its judgment of 6 October 1993 (Case C-109/91: *Ten Oever v. Stichting Bedrijfspensioenfonds voor het Glazenwassers- en Schoonmaakbedrijf*)<sup>(1)</sup> and in its judgments of 14 December 1993 (Case C-110/91: *Moroni v. Collo GmbH*), 22 December 1993 (Case C-152/91: *Neath v. Hugh Steeper Ltd*)<sup>(2)</sup> and 28 September 1994 (Case C-200/91: *Coloroll Pension Trustees Limited v. Russell and Others*)<sup>(3)</sup>, the Court confirms that, by virtue of the judgment of 17 May 1990 (Case C-262/88: *Barber v. Guardian Royal Exchange Assurance Group*), the direct effect of Article 119 of the Treaty may be relied on, for the purpose of claiming equal treatment in the matter of occupational pensions, only in relation to benefits payable in respect of periods of service subsequent to 17 May 1990, except in the case of workers or those claiming under them who have, before that date, initiated legal proceedings or raised an equivalent claim under the applicable national law;

Whereas, in its abovementioned judgments (Case C-109/91: *Ten Oever v. Stichting Bedrijfspensioenfonds voor het Glazenwassers- en Schoonmaakbedrijf* and Case C-200/91: *Coloroll Pension Trustees Limited v. Russell and Others*), the Court confirms that the limitation of the effects in time of the Barber judgment applies to survivors' pensions and, consequently, equal treatment in this matter may be claimed only in relation to periods of service subsequent to 17 May 1990, except in the case of those who have, before that date, initiated legal proceedings or raised an equivalent claim under the applicable national law;

Whereas, moreover, in its judgments in Case C-152/91 and Case C-200/91, the Court specifies that the contributions of male and female workers to a defined-benefit pension scheme must be the same, since they are covered by Article 119 of the Treaty, whereas inequality of employers' contributions paid under funded

defined-benefit schemes, which is due to the use of actuarial factors differing according to sex, is not to be assessed in the light of that same provision;

Whereas, in its judgments of 28 September 1994<sup>(4)</sup> (Case C-408/92: *Smith v. Advel Systems* and Case C-28/93: *Van den Akker v. Stichting Shell Pensioenfonds*), the Court points out that Article 119 of the Treaty precludes an employer who adopts measures necessary to comply with the Barber judgment of 17 May 1990 (C-262/88) from raising the retirement age for women to that which exists for men in relation to periods of service completed between 17 May 1990 and the date on which those measures come into force; on the other hand, as regards periods of service completed after the latter date, Article 119 does not prevent an employer from taking that step; as regards periods of service prior to 17 May 1990, Community law imposed no obligation which would justify retroactive reduction of the advantages which women enjoyed;

Whereas, in its abovementioned judgment in Case C-200/91: *Coloroll Pension Trustees Limited v. Russell and Others*, the Court ruled that additional benefits stemming from contributions paid by employees on a purely voluntary basis are not covered by Article 119 of the Treaty;

Whereas, among the measures included in its third medium-term action programme on equal opportunities for women and men (1991 to 1995)<sup>(5)</sup>, the Commission emphasizes once more the adoption of suitable measures to take account of the consequences of the judgment of 17 May 1990 in Case 262/88 (*Barber v. Guardian Royal Exchange Assurance Group*);

Whereas that judgment automatically invalidates certain provisions of Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes<sup>(6)</sup> in respect of paid workers;

Whereas Article 119 of the Treaty is directly applicable and can be invoked before the national courts against any employer, whether a private person or a legal person, and whereas it is for these courts to safeguard the rights which that provision confers on individuals;

Whereas, on grounds of legal certainty, it is necessary to amend Directive 86/378/EEC in order to adapt the provisions which are affected by the Barber case-law,

<sup>(1)</sup> [1993] ECR I-4879.

<sup>(2)</sup> [1993] ECR I-6953.

<sup>(3)</sup> [1994] ECR I-4389.

<sup>(4)</sup> [1994] ECR I-4435 and [1994] ECR I-4527, respectively.

<sup>(5)</sup> OJ No C 142, 31. 5. 1991, p. 1.

<sup>(6)</sup> OJ No L 225, 12. 8. 1986, p. 40.

HAS ADOPTED THIS DIRECTIVE:

2. Article 3 shall be replaced by the following:

#### *Article 1*

Directive 86/378/EEG shall be amended as follows:

1. Article 2 shall be replaced by the following:

#### *'Article 2*

1. "Occupational social security schemes" means schemes not governed by Directive 79/7/EEC whose purpose is to provide workers, whether employees or self-employed, in an undertaking or group of undertakings, area of economic activity, occupational sector or group of sectors with benefits intended to supplement the benefits provided by statutory social security schemes or to replace them, whether membership of such schemes is compulsory or optional.

2. This Directive does not apply to:

- (a) individual contracts for self-employed workers;
- (b) schemes for self-employed workers having only one member;
- (c) insurance contracts to which the employer is not a party, in the case of salaried workers;
- (d) optional provisions of occupational schemes offered to participants individually to guarantee them:
  - either additional benefits, or
  - a choice of date on which the normal benefits for self-employed workers will start, or a choice between several benefits;
- (e) occupational schemes in so far as benefits are financed by contributions paid by workers on a voluntary basis.

3. This Directive does not preclude an employer granting to persons who have already reached the retirement age for the purposes of granting a pension by virtue of an occupational scheme, but who have not yet reached the retirement age for the purposes of granting a statutory retirement pension, a pension supplement, the aim of which is to make equal or more nearly equal the overall amount of benefit paid to these persons in relation to the amount paid to persons of the other sex in the same situation who have already reached the statutory retirement age, until the persons benefiting from the supplement reach the statutory retirement age.'

#### *'Article 3*

This Directive shall apply to members of the working population, including self-employed persons, persons whose activity is interrupted by illness, maternity, accident or involuntary unemployment and persons seeking employment, to retired and disabled workers and to those claiming under them, in accordance with national law and/or practice.'

3. Article 6 shall be replaced by the following:

#### *'Article 6*

1. Provisions contrary to the principle of equal treatment shall include those based on sex, either directly or indirectly, in particular by reference to marital or family status, for:

- (a) determining the persons who may participate in an occupational scheme;
- (b) fixing the compulsory or optional nature of participation in an occupational scheme;
- (c) laying down different rules as regards the age of entry into the scheme or the minimum period of employment or membership of the scheme required to obtain the benefits thereof;
- (d) laying down different rules, except as provided for in points (h) and (i), for the reimbursement of contributions when a worker leaves a scheme without having fulfilled the conditions guaranteeing a deferred right to long-term benefits;
- (e) setting different conditions for the granting of benefits or restricting such benefits to workers of one or other of the sexes;
- (f) fixing different retirement ages;
- (g) suspending the retention or acquisition of rights during periods of maternity leave or leave for family reasons which are granted by law or agreement and are paid by the employer;
- (h) setting different levels of benefit, except in so far as may be necessary to take account of actuarial calculation factors which differ according to sex in the case of defined-contribution schemes.

In the case of funded defined-benefit schemes, certain elements (examples of which are annexed) may be unequal where the inequality of the amounts results from the effects of the use of actuarial factors differing according to sex at the time when the scheme's funding is implemented;

(i) setting different levels for workers' contributions;

setting different levels for employers' contributions, except:

— in the case of defined-contribution schemes if the aim is to equalize the amount of the final benefits or to make them more nearly equal for both sexes,

— in the case of funded defined-benefit schemes where the employer's contributions are intended to ensure the adequacy of the funds necessary to cover the cost of the benefits defined,

(j) laying down different standards or standards applicable only to workers of a specified sex, except as provided for in points (h) and (i), as regards the guarantee or retention of entitlement to deferred benefits when a worker leaves a scheme.

2. Where the granting of benefits within the scope of this Directive is left to the discretion of the scheme's management bodies, the latter must comply with the principle of equal treatment.'

4. Article 8 shall be replaced by the following:

*'Article 8*

1. Member States shall take the necessary steps to ensure that the provisions of occupational schemes for self-employed workers contrary to the principle of equal treatment are revised with effect from 1 January 1993 at the latest.

2. This Directive shall not preclude rights and obligations relating to a period of membership of an occupational scheme for self-employed workers prior to revision of that scheme from remaining subject to the provisions of the scheme in force during that period.'

5. Article 9 shall be replaced by the following:

*'Article 9*

As regards schemes for self-employed workers, Member States may defer compulsory application of the principle of equal treatment with regard to:

(a) determination of pensionable age for the granting of old-age or retirement pensions, and the possible implications for other benefits:

- either until the date on which such equality is achieved in statutory schemes,
- or, at the latest, until such equality is prescribed by a directive;

(b) survivors' pensions until Community law establishes the principle of equal treatment in statutory social security schemes in that regard;

(c) the application of the first subparagraph of point (i) of Article 6 (1) to take account of the different actuarial calculation factors, at the latest until 1 January 1999.'

6. The following Article shall be inserted:

*'Article 9a*

Where men and women may claim a flexible pensionable age under the same conditions, this shall not be deemed to be incompatible with this Directive.'

7. The following Annex shall be added:

*'ANNEX*

Examples of elements which may be unequal, in respect of funded defined-benefit schemes, as referred to in Article 6 (h):

- conversion into a capital sum of part of a periodic pension,
- transfer of pension rights,
- a reversionary pension payable to a dependant in return for the surrender of part of a pension,
- a reduced pension where the worker opts to take early retirement.'

*Article 2*

1. Any measure implementing this Directive, as regards paid workers, must cover all benefits derived from periods of employment subsequent to 17 May 1990 and shall apply retroactively to that date, without prejudice to workers or those claiming under them who have, before that date, initiated legal proceedings or raised an equivalent claim under national law. In that event, the implementation measures must apply retroactively to 8 April 1976 and must cover all the benefits derived from periods of employment after that date. For Member States which acceded to the Community after 8 April 1976, that date shall be replaced by the date on which Article 119 of the Treaty became applicable on their territory.

2. The second sentence of paragraph 1 shall not prevent national rules relating to time limits for bringing actions under national law from being relied on against workers or those claiming under them who initiated legal proceedings or raise an equivalent claim under national law before 17 May 1990, provided that they are not less favourable for that type of action than for similar actions of a domestic nature and that they do not render the exercise of Community law impossible in practice.

3. For Member States whose accession took place after 17 May 1990 and who were on 1 January 1994 Contracting Parties to the Agreement on the European Economic Area, the date of 17 May 1990 in paragraph 1 and 2 of this Directive is replaced by 1 January 1994.

#### Article 3

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 1 July 1997. They shall forthwith inform the Commission thereof.

When Member States adopt these provisions, they shall contain a reference to this Directive or be accompanied

by such reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.

2. Member States shall communicate to the Commission, at the latest two years after the entry into force of this Directive, all information necessary to enable the Commission to draw up a report on the application of this Directive.

#### Article 4

This Directive shall enter into force on the 20 day following that of its publication in the *Official Journal of the European Communities*.

#### Article 5

This Directive is addressed to the Member States.

Done at Brussels, 20 December 1996.

*For the Council*

*The President*

S. BARRETT