



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 19.11.1996  
COM(96) 605 final

95/0117 (CNS)

Amended proposal for a

**EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE**

**AMENDING  
DIRECTIVE 86/378/EEC of 24 July  
1986 on equal treatment for men and  
women in occupational social security  
schemes**

(presented by the Commission pursuant to Article 189 a (2)  
of the EC-Treaty)

## EXPLANATORY MEMORANDUM

On 16 May 1996, the Commission presented a proposal for a Council Directive modifying Directive 86/378/EEC of 24 July 1986 on equal treatment for men and women in occupational social security schemes<sup>1</sup>. This proposal for a Directive aims to ensure that Directive 86/378/EEC is consistent with Article 119 of the Treaty as interpreted by the Court of Justice in the Barber case and subsequent judgments. Therefore, its nature is purely declaratory since Article 119 of the Treaty is a provision of primary law directly applicable.

The legal basis of this proposal is Article 100 of the EC Treaty as the proposed modifications concern the application of the principle of equal pay to employees. The Economic and Social Committee and the European Parliament have been consulted on the basis of Article 100 of the Treaty and the Economic and Social Committee has given a favourable opinion on that proposal.

The European Parliament, in its plenary session of November 1996, adopted several amendments to the initial text of the Commission. The Commission could not accept all these amendments since most went beyond the Court's case-law (especially those concerning unisex actuarial calculation for employers' contributions) and consequently beyond the declaratory nature of the directive. However, it accepted certain amendments, relating principally to the explicit inclusion of part-time workers in the scope rationae personae of the Directive.

Therefore the Commission proposes, on the basis of Article 189 a §2 of the Treaty, to modify its initial proposal in order to take account of certain amendments proposed by the European Parliament in its legislative resolution.

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<sup>1</sup> COM (95) 186 final, JO C-218 du 23.8.95, p. 5

## COMMENT ON PROPOSED MODIFICATIONS

1. Amendment consisting in the addition of a new recital to the initial proposal

This amendment reflects the case law of the Court in cases called Vroege and Fischer, and is added because it explains certain proposed modifications of Articles.

2. Amendment relating to:  
**Article 1 (2a) (new)**  
**Article 5(1) (Directive 86/378/EEC)**

This amendment consists in modifying the basic Article of the original Directive 86/378/EEC (Article 5 §1) relating to the elimination of any discrimination on the basis of sex by adding that the "atypical nature of the job" should not be a basis for discrimination.

This element is a matter of clarification.

3. Amendment relating to:  
**Article 1 (3)**  
**Article 6 (1), introduction (Directive 86/378/EEC)**

This amendment is similar to amendment 4 but it concerns Article 6 §1 of the original Directive 86/378/EEC which provides an indicative list of provisions contrary to the principle of equal treatment. The objective of the amendment is to include the "atypical nature of the job" as a matter which cannot justify discrimination.

The atypical nature of the work is technically covered by the initial text since atypical workers are members of the working population. However, this point is added as a matter of clarification.

4. Amendment relating to:  
**Article 1 (3)**  
**Article 6 (1) (g) (Directive 86/378/EEC)**

This amendment concerns Article 6 §1 g) of the initial Directive 86/378. It concerns discrimination regarding the acquisition of rights during periods of any kind of leave and not only in cases of maternity leave or leave for family reasons as is provided for in the original text.

The political concern is that "maternity" leave should not be singled out as against parental leave in the broader sense.

Therefore, this point is added as a matter of clarification.

5. Amendment relating to:  
**Article 1 (5a) (new)**  
**Article 9 (Directive 86/378/EEC)**

This amendment concerns Article 9 of the Directive.

It consists in adding a new paragraph stipulating that men and women may claim a flexible pensionable age under the same conditions. This shall not be deemed to be incompatible with this Directive.

This aspect is already covered by Article 119. Equality of treatment can be realised by a flexible pensionable age under the same conditions for women and men. However, given the interest in this point shown by the European Parliament, it seems worthwhile to add this provision to the text as a matter of clarification.

6. Amendment relating to:  
**Article 2(1) first paragraph**

This amendment seeks to add periods of paid leave to the periods of employment covered by the directive. This is added in order to specify that benefits derived from periods of paid leave should be covered as well as benefits derived from periods of actual work. It is clear that this is the Commission's intention in its initial proposal: by "periods of employment", we understand periods during which there is an employment relationship in being, covering both periods of actual work and periods of paid leave. It seems worthwhile to clarify the point.

**PROPOSAL FOR A COUNCIL  
DIRECTIVE AMENDING  
DIRECTIVE 86/378/EEC of 24 July  
1986 on equal treatment for men and  
women in occupational social security  
schemes**

**MODIFIED PROPOSAL FOR A  
COUNCIL DIRECTIVE AMENDING  
DIRECTIVE 86/378/EEC of 24 July  
1986 on equal treatment for men and  
women in occupational social security  
schemes on the basis of Article 189 a  
§2.**

**PREVIOUS VERSION**

presented by the Commission on 16 May  
1996.

**NEW VERSION**

taking account of certain amendments  
of the European Parliament

**THE COUNCIL OF THE EUROPEAN  
UNION,**

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

**Unchanged**

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 EC 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;

**Unchanged**

Whereas, in its judgment of 17 May 1990, in Case 262/88 Barber<sup>4</sup> v Royal Exchange Assurance, 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;

**Unchanged**

Whereas, in the above-mentioned judgment, as clarified by the judgment of 14 December 1993 (Case C-110/91 Moroni)<sup>5</sup>, the Court clearly defines its position as regards the actual scope of Article 119 of the Treaty, stating 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;

**Unchanged**

Whereas, in accordance with the Protocol concerning Article 119 of the Treaty establishing the European Community, signed in Maastricht by the twelve Heads of State and Government, for the purposes of applying Article 119, 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;

**Unchanged**

Whereas, in its judgments of 28 September 1994<sup>6</sup> (Case C-128/93 Fisscher and Case C-57/93 Vroege), the Court ruled that the Protocol concerning Article 119 of the Treaty establishing the European Community, annexed to the Treaty on European Union, does 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.

Unchanged

Whereas the exclusion of workers with atypical work contracts from access to a company or sectoral social security scheme may constitute indirect discrimination against women.

Whereas, in its judgment of 6 October 1993 (C-109/91 Ten Oever)<sup>8</sup> and in its judgments of 14 December 1993 (C-110/91 Moroni), 22 December 1993 (C-152/91 Neath)<sup>9</sup> and 28 September 1994 (C-200/91 Coloroll)<sup>10</sup>, the Court confirms that, by virtue of the judgment of 17 May 1990 (C-262/88 Barber), the direct effect of Article 119 of the Treaty may be relied upon, 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.

Unchanged

Whereas, in its judgments of 6 October 1993 (C-109/91 Ten Oever) and 28 September 1994 (C-200/91 Coloroll), the Court further 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;

**Unchanged**

Whereas, moreover, in its judgments of 22 December 1993 (C-152/91 Neath) and 28 September 1994 (C-200/91 Coloroll), 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 struck at by Article 119;

**Unchanged**



Whereas, in its judgments of 28 September 1994<sup>11</sup> (Case C-408/92 Smith and Case C-28/93 Van den Akker), the Court specifies that Article 119 of the EC 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 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.

**Unchanged**

Whereas, in its judgment of 28 September 1994 (Case C-200/91 Coloroll), the Court specifies that additional benefits stemming from contributions paid by employees on a purely voluntary basis are not covered by Article 119 of the Treaty;

**Unchanged**

Whereas the Commission's third medium-term action programme on equal opportunities for women and men (1991-95)<sup>12</sup> - [COM(90)449 final du 6.11.90] emphasises 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);

**Unchanged**

Whereas this judgment automatically invalidates certain provisions of Directive 86/378/EEC<sup>13</sup> in respect of paid workers;

**Unchanged**

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 this provision confers on individuals;

**Unchanged**

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,

**Unchanged**

HAS ADOPTED THIS DIRECTIVE:

Article 1

Directive 86/378/EEC is amended as follows:

**Unchanged**

1) Article 2 is 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

**Unchanged**

social security schemes or to replace them, whether membership of such schemes is compulsory or optional.

2. This Directive does not apply to:

**Unchanged**

- (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 paid 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."

2) Article 3 is replaced by the following :

Unchanged

"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."

2 a) Article 5(1) is replaced by the following:

"Article 5

1. Under the conditions laid down in the following provisions, the principle of equal treatment implies that there shall be no discrimination on the basis of sex, either directly or indirectly, by reference in particular to marital or family status, or the atypical nature of the job, especially as regards

- the scope of the schemes and the conditions of access to them;
- the obligation to contribute and the calculation of contributions;
- the calculation of benefits, including supplementary benefits due in respect of a spouse or dependants, and the conditions governing the duration and retention of entitlement to benefits."

3) Article 6 is 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 subparagraphs (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

3) Article 6 is 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 or the atypical nature of the job, for:

Unchanged

Unchanged

Unchanged

Unchanged

Unchanged

or restricting such benefits to workers of one or other of the sexes;

Unchanged

(f) fixing different retirement ages;

Unchanged

(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;

(g) suspending the retention or acquisition of rights during periods of leave which are granted by law or agreement and are paid by the employer,

(h) setting different levels of benefit, except insofar as may be necessary to take account of actuarial calculation factors which differ according to sex in the case of defined-contribution schemes;

**Unchanged**

(i) setting different levels for workers' contributions;  
setting different levels for employers' contributions;  
except

**Unchanged**

– 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 subparagraphs (h) and (i), as regards the guarantee or retention of entitlement to deferred benefits when a worker leaves a scheme.

**Unchanged**

2. When 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."

**Unchanged**

4) Article 8 is 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.

**Unchanged**

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."

**Unchanged**



5) Article 9 is 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.

**Unchanged**

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

**Unchanged**

(c) the application of the first subparagraph of Article 6(1)(i) to take account of the different actuarial calculation factors, at the latest until the expiry of a thirteen-year period as from the notification of this Directive."

**Unchanged**

5a) **A new Article 9a) is inserted as follows:**

**"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."

## Article 2

1. Any measure transposing 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 (or, for Member States which acceded to the Community after that date, the date on which Article 119 became applicable on their territory) and must cover all the benefits derived from periods of employment after that date.

For Member States acceding to the European Union after 17 May 1990, the latter date is replaced by 1 January 1994.

2. The first paragraph of this Article shall not affect national rules relating to time limits for bringing actions under national law, which may be relied on against workers who assert their right to equal

## Article 2

1. Any measure implementing this Directive, as regards paid workers, must cover all benefits derived from periods of employment or periods of leave paid by the employer 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 or periods of leave paid by the employer 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 became applicable on their territory.

Unchanged

treatment in the context of 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 Community law impossible in practice.

### Article 3

1. Member States shall bring into force such laws, regulations and administrative provisions as are necessary to comply with this Directive at the latest one year after its publication in the Official Journal of the European Communities. They shall immediately inform the Commission thereof.

**Unchanged**

Such provisions, when adopted by the Member States, shall contain a reference to this Directive or shall be accompanied by such a reference at the time of their official publication. The details of such reference shall be laid down by the Member States.

**Unchanged**

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.

**Unchanged**

Article 4

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

**Unchanged**

Article 5

This Directive is addressed to the Member States.

**Unchanged**

Done at Brussels,

1. OJ
2. OJ
3. OJ
4. [1990] ECR I-1889
5. [1993] ECR I-6591
6. [1994] ECR I-4541; [1994] ECR I-4583
7. [1986] ECR I-1607
8. [1993] ECR I-4879
9. [1993] ECR I-6953

10. [1994] ECR I-4389
11. [1994] ECR I-4435; [1994] ECR I-4527
12. OJ No C 142, 31.5.1991, p.1
13. OJ No L 225, 12.8.1986, p.40

ISSN 0254-1475

COM(96) 605 final

# DOCUMENTS

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Catalogue number : CB-CO-96-597-EN-C

ISBN 92-78-11715-3

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Office for Official Publications of the European Communities

L-2985 Luxembourg