



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 16.05.1995
COM(95) 186 final

95/0117 (CNS)

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

(presented by the Commission)

EXPLANATORY MEMORANDUM

I. INTRODUCTION

This proposal for a Directive aims to ensure that Directive 86/378/EEC on equal treatment for men and women in occupational social security schemes, adopted on 24 July 1986, is consistent with Article 119 of the Treaty as interpreted by the Court of Justice.

In its Barber judgment of 17 May 1990⁽¹⁾ and in subsequent interpreting judgments⁽²⁾, in particular its judgment of 14 December 1993 (Case C-152/91 Moroni), the Court of Justice of the European Communities acknowledges that all forms of occupational pension - and, in turn, all forms of benefit deriving from employees' occupational social security schemes⁽³⁾ - constitute an element of pay within the meaning of Article 119 of the EC Treaty, which provides for equal pay for men and women.

Since Article 119 of the Treaty is directly applicable and may be relied upon by individuals before the national courts against both public and private employers⁽⁴⁾, it does not permit any derogation from the principle of equal treatment. Consequently, certain provisions of Directive 86/378/EEC of 24 July 1986 on equal treatment for men and women in occupational social security schemes, providing for derogation from the principle of equal treatment (particularly with regard to retirement age and survivors' benefits, Article 9 of Directive 86/378/EEC) are now invalid as far as paid workers are concerned, since such persons can invoke Article 119 of the Treaty before national authorities, this Article being a provision of primary law which prevails over Directive 86/378/EEC, the latter being only an instrument of secondary legislation. It is clear that Article 119 of the Treaty does not apply to self-employed workers, in respect of whom Directive 86/378/EEC remains wholly valid.

In the interests of legal certainty and clarity, and in order to avoid any confusion for the national authorities which are required to apply Community law, the Commission is therefore compelled to put forward this proposal for a Directive amending Directive 86/378/EEC in

⁽¹⁾ ECR 1990, p. 1889.

⁽²⁾ ECR 1993 I-4879, judgment of 6 October 1993, Case C-109/93 Ten Oever.
ECR 1993 I-6591, judgment of 14 December 1993, Case C-110/91 Moroni.
ECR 1993 I-6953, judgement of 22 December 1993, Case C-152/91 Neath.
ECR 1994 I-4389, judgment of 28 September 1994, Case C-200/91 Coloroll.
ECR 1994 I-4435, judgment of 28 September 1994, Case C-408/92 Smith.
ECR 1994 I-4527, judgment of 28 September 1994, Case C-28/93 Van den Akker.
ECR 1994 I-4541, judgment of 28 September 1994, Case C-128/93 Fisscher.
ECR 1994 I-4583, judgment of 28 September 1994, Case C-57/93 Vroege.
ECR 1994 I-4471, judgment of 28 September 1994, Case C-7/93 Beune.

⁽³⁾ "Occupational social security schemes" means any scheme which originates in a contract of employment between a worker and a given employer, except statutory schemes proper and insurance and pension contracts concluded privately without the employer being involved.

⁽⁴⁾ ECR 1976 p. 455, judgment of 8 April 1976, Case 43/75 Defrenne v Sabena ("Defrenne II").

order to ensure consistency with Article 119 of the Treaty. The proposed amendments are only to transpose the case law of the Court, and this proposal for a Directive is of a purely declaratory nature. The legal basis chosen is Article 100 since the proposed amendments relate only to paid workers.

II. COMMENTS ON THE ARTICLES

The proposed amendments are summarised in Article 1. Article 2 has to do with the effective date of transposing the Directive. Articles 3 and 4 contain the standard final provisions in a proposal for a Directive.

Article 1

1. Amendment concerning Article 2 of Directive 86/378/EEC

Following the judgment of 17 May 1990 it has proved necessary for this Article to be consistent with Article 119 of the Treaty as interpreted by the Court of Justice, where occupational schemes are to be taken as meaning all schemes originating in the contract of employment between a worker and employer except the statutory schemes not covered by Article 119 and insurance or pension contracts concluded privately without the employer being involved. As a result, the derogations in Article 2(2)(a) and (b) are now valid only for self-employed workers. As far as the derogation under Article 2(2)(d) is concerned, the indent remains unchanged since the Court has confirmed, in its Coloroll judgment, that optional arrangements available to employees for the purpose of guaranteeing additional benefits are not covered by Article 119 of the Treaty. On the other hand, the second indent, which provides for derogation from the principle of equal treatment in terms of the date on which normal benefits are to start or a choice between several benefits available to workers, has to be amended and restricted to self-employed persons.

2. Amendment concerning Article 3

An addition has to be made to Article 3 dealing with persons covered by the Directive in order to include members of the families of the workers concerned and their successors, so that the Directive must apply also to survivors' pensions (benefits for surviving spouses and orphans), family benefits, etc.

3. Amendment concerning Article 6

This Article, and more particularly paragraphs (h) and (i), has been redrafted to take account of comments made by government experts and other parties in the course of preliminary consultations with a view to preparing the proposal for a Directive, calling for clarification of this Article in the light of the case law of the Court of Justice.

The Court, in its judgments of 22 December 1993 (Case C-152/91 Neath) and 28 September 1994 (Case C-200/91 Coloroll), has specified that employees' contributions under a defined benefit scheme where the employer undertakes to grant a final benefit must be the same as they constitute an element of pay within the meaning of Article 119 of the Treaty. The same argument applies to employees' contributions under defined-contribution schemes. On the

other hand, the employer's contributions under a defined-benefit scheme do not constitute pay within the meaning of the said Article, since the funding arrangements adopted by the employer to secure a final benefit which is the same for both sexes may take account of actuarial calculation factors differing according to sex. The same applies in the event of the transfer of rights acquired under a defined-benefit scheme to another scheme, for instance owing to a change of job, where the sums transferred may differ as a result of women requiring higher sums to purchase the same entitlements as men in the same situation.

While the Court delivered a clear judgment on defined-benefit schemes, it did not rule on the question of an employer's contributions paid in the context of defined-contribution schemes where the employer promises a "defined" contribution and, consequently, the benefits finally paid to employees may differ according to sex to take account of actuarial calculation factors. However, in the light of the case law of the Court, particularly in the judgment of 9 November 1993 (Case C-132/92 Birds Eye Walls)⁽⁵⁾, it is considered that the amount of such contributions may differ if the aim is to equalize the amount of the final benefits or to make them more nearly equal for both sexes.

In view of the foregoing, it is proposed to redraft Article 6(h) and (i) as follows:

1. With regard to benefits paid by occupational schemes, the rule is that such benefits must be equal for both sexes except in the case of defined-contribution schemes where the schemes may take account of actuarial calculation factors differing according to sex (Article 6(h)).
2. As regards employees' contributions, the rule is that such contributions must be equal for both sexes in all cases.
3. Where employers' contributions are concerned, the rule is that they must be equal, but they may differ to take account of actuarial calculation factors varying according to sex, 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 (the employer is not obliged to pay higher contributions for either of the sexes, but may opt to do so);
 - 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 defined benefits, which should be the same for men and women in the same situation.

4. Amendment of Article 8

Article 8 has to be amended to take account of the situation arising from the case law of the Court in the Barber Case and subsequent judgments.

⁽⁵⁾ ECR 1993 I p. 5579, Birds Eye Walls/Friedel M. Roberts.

Consequently, paragraphs 1 and 2 specify, on the one hand, that the target date of 1 January 1993 now applies only to self-employed workers and, on the other hand, that the Directive may not apply to self-employed workers in connection with rights and obligations relating to a period of membership of an occupational scheme prior to revision of that scheme following the adoption of the Directive. The Barber judgment and subsequent judgments concerning application of Article 119 relate only to paid workers.

5. Amendment of Article 9

The derogations provided for in Article 9(a), (b) and (c) are now valid only for self-employed workers.

With the judgment of 17 May 1990 these derogations have become null and void for self-employed workers, who are covered by Article 119 of the Treaty. From this date, schemes for self-employed workers must safeguard the principle of equal treatment for men and women with regard to the age of entitlement to an old-age or retirement pension, the granting of survivors' benefits and employees' contributions.

Directive 86/378/EEC, as adopted on 24 July 1986, provides for equality in employees' contributions, albeit from 30 July 1999 (Article 9(c)). This derogation is no longer valid following the judgment of 17 May 1990 (Barber) and the judgments of 22 December 1993 (Neath) and 28 September 1994 (Coloroll). The level of employees' contributions is a factor in the negotiations between employees and employers and therefore constitutes an element of pay within the meaning of Article 119 of the Treaty.

Consequently, the new version of Article 9 seeks to clarify the situation, namely that exemptions remain valid, for self-employed workers only, as long as the 1987 proposal for a directive [COM(87) 494 final of 23 October 1987] is not adopted [Article 9 (2)(a), (b) and (c)].

Article 2

This Article refers to the effective date for measures to transpose the proposed amendments and takes account of the Barber judgment of 17 May 1990 as clarified by the Court of Justice in connected judgements and the supplementary Protocol annexed to the Union Treaty.

Thus, the retroactive effect of the Directive for paid workers is established as 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 to safeguard their rights.

For these persons only, the Directive may have retroactive effect encompassing benefits attributable to employment before 17 May 1990 back to 8 April 1976⁽⁶⁾, the date on which Article 119 was declared to be directly applicable.

⁽⁶⁾ See abovementioned Defrenne II judgment.

However, for Member States acceding to the Community after 8 April 1976, the retroactive date applying to transposal measures is the date of application of Article 119 provided for in their Act of Accession.

For Member States acceding to the Community after 17 May 1990, namely Austria, Finland and Sweden, the date of application is 1 January 1994 in accordance with the EEA Treaty.

Paragraph 2 refers to the possibility of invoking national rules relating to the time limit for bringing actions under national law applicable to workers asserting their right to equal treatment in respect of an occupational pension scheme, provided that they are not less favourable for this type of action than for similar actions of a domestic nature and that they do not render impossible in practice the exercise of Community law.

Article 3

This Article contains standard provisions in respect of the date for transposing the proposed amendments. The one-year period is reasonable for implementing amendments which merely adapt Directive 86/378/EEC in the light of the case law of the Court and make it consistent with Article 119 of the Treaty.

Moreover, the Member States are asked to conform with the spirit of the Treaty on European Union by making reference to the Directive in any transposal measure.

Article 4

Standard provision as to entry into force.

Article 5

Standard provision stating that the Directive is addressed to the Member States.

III. JUSTIFICATION FOR THE PROPOSAL WITH REGARD TO THE PRINCIPLE OF SUBSIDIARITY

Since Article 119 of the Treaty is a provision of primary law which can be altered only by an amendment to the Treaty and prevails over any instrument of secondary legislation such as Directive 86/378/EEC, it is advisable to bring the latter into line with Article 119 as interpreted by the Court of Justice and confirmed by the twelve Heads of State and Government in Maastricht. A proposal for a directive is therefore the only way of doing this.

With this in mind, the Commission is presenting this proposal for a Directive amending Directive 86/378/EEC in order to avoid any possible confusion on the part of national authorities at all levels which are called upon to apply Community law, and in order to ensure the transparency and effectiveness of Community law.

IV. CONSULTATION PROCESS

The Commission has on several occasions consulted government experts, European-level pension fund and actuary representatives, the Advisory Committee on Equal Opportunities and the social partners on the proposed amendment of Directive 86/378/EEC in the light of the Barber judgment and subsequent judgments.

There has been broad consensus for adjusting the text of Directive 86/378/EEC to make it consistent with the case law of the Court interpreting Article 119 of the Treaty.

It should be noted that the Commission, in accordance with the Agreement on the European Economic Area, has also consulted EFTA States which are contracting parties to the EEA, namely Norway and Iceland.

V. APPLICATION IN THE EEA STATES

Article 119 of the Treaty and Directive 86/378/EEC form part of the acquis communautaire of the Agreement on the European Economic Area entering into force with effect from 1 January 1994.

Article 119 of the Treaty corresponds to Article 69 of the EEA Agreement. Directive 86/378/EEC features in the list of instruments of secondary legislation concerning the application of Article 69 (point 20 of Annex XVIII).

Proposal for a
COUNCIL DIRECTIVE

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⁽¹⁾,

Having regard to the opinion of the European Parliament⁽²⁾,

Having regard to the opinion of the Economic and Social Committee⁽³⁾,

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 judgment of 17 May 1990, in Case 262/88 Barber v Guardian Royal Exchange Assurance⁽⁴⁾, 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)⁽⁵⁾, 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;

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;

(1) OJ No

(2) OJ No

(3) OJ No

(4) [1990] ECR I-1889.

(5) [1993] ECR I-6591.

Whereas, in its judgments of 28 September 1994⁽⁶⁾ (Case C-57/93 Vroege v NCTV Instituut voor Volkshuisvesting BV and Case C-128/93 Fischer v Voorhuis Hengelo BV), 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⁽⁷⁾, 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, in its judgment of 6 October 1993 (Case C-109/91 Ten Oever)⁽⁸⁾ and in its judgments of 14 December 1993 (Case C-110/91 Moroni), 22 December 1993 (Case C-152/91 Neath)⁽⁹⁾ and 28 September 1994 (Case C-200/91 Coloroll)⁽¹⁰⁾, the Court confirms that, by virtue of the judgment of 17 May 1990 (Case 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;

Whereas, in its judgments of 6 October 1993 (Case C-109/91 Ten Oever) and 28 September 1994 (Case 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;

Whereas, moreover, in its judgments of 22 December 1993 (Case C-152/91 Neath) and 28 September 1994 (Case 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 to be assessed in the light of Article 119;

Whereas, in its judgments of 28 September 1994⁽¹¹⁾ (Case C-408/92 Smith v Advel Systems and Case C-28/93 Van den Akker v Stichting Shell Pensioenfonds), the Court specifies 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 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

(6) [1994] ECR I-4541 and [1994] ECR I-4583, respectively.

(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 and [1994] ECR I-4527, respectively.

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 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;

Whereas the Commission's third medium-term action programme on equal opportunities for women and men (1991-95)⁽¹²⁾ 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);

Whereas that judgment automatically invalidates certain provisions of Council Directive 86/378/EEC⁽¹³⁾ 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;

HAS ADOPTED THIS DIRECTIVE:

Article 1

Directive 86/378/EEC is amended as follows:

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 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 paid workers,

⁽¹²⁾ OJ No C 142, 31.5.1991, p. 1.

⁽¹³⁾ OJ No L 225, 12.8.1986, p. 40.

- (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:

"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."

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 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;
- (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 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.
- 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 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;

- (b) survivors' pensions until a directive 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 the expiry of a thirteen-year period as from the notification of this Directive."

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 (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 whose accession took place after 17 May 1990, the latter date is replaced by 1 January 1994.

2. Paragraph 1 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 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 the laws, regulations and administrative provisions necessary to comply with this Directive by 1 July 1996. They shall immediately inform the Commission thereof.

When Member States adopt these provisions, these shall contain a reference to this Directive or shall be accompanied by such reference at the time of their official publication. The procedure for such reference shall be adopted by 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 twentieth 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,

For the Council
The President

ANNEX I

PREVIOUS VERSION

COUNCIL DIRECTIVE
of 24 July 1986
on the implementation of the
principle of equal treatment for
men and women in occupational
social security schemes

(86/378/EEC)

Article 1

The object of this Directive is to implement, in occupational social security schemes, the principle of equal treatment for men and women, hereinafter referred to as "the principle of equal treatment".

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 or occupational sector or group of such 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:
 - (a) to individual contracts,

NEW VERSION

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

Article 1

unchanged

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) to schemes having only one member,
- (c) in the case of salaried workers, to insurance contracts to which the employer is not a party,
- (d) to 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 will start, or a choice between several benefits.

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, and to retired and disabled workers.

Article 4

This Directive shall apply to:

- (a) occupational schemes which provide protection against the following risks:
 - sickness,
 - invalidity,
 - old age, including early retirement,
 - industrial accidents and occupational diseases,
 - unemployment;

- (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.

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.

Article 4

Unchanged

- (b) occupational schemes which provide for other social benefits, in cash or in kind, and in particular survivors' benefits and family allowances, if such benefits are accorded to employed persons and thus constitute a consideration paid by the employer to the worker by reason of the latter's employment.

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, 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.
2. The principle of equal treatment shall not prejudice the provisions relating to the protection of women by reason of maternity.

Article 5

Unchanged

Article 6

- I. 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 where a worker leaves a scheme without having fulfilled the conditions guaranteeing him 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;

Article 6

- I. 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 insofar as may be necessary to take account of actuarial calculation factors which differ according to sex in the case of benefits designated as contribution-defined;

(i) setting different levels of worker contribution; setting different levels of employer contribution in the case of benefits designated as contribution-defined, except with a view to making the amount of those benefits more nearly equal;

(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.

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 take account of the principle of equal treatment.

(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;

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

- in the case of defined contribution schemes 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.

Article 7

Member States shall take all necessary steps to ensure that:

- (a) provisions contrary to the principle of equal treatment in legally compulsory collective agreements, staff rules of undertakings or any other arrangements relating to occupational schemes are null and void, or may be declared null and void or amended;
- (b) schemes containing such provisions may not be approved or extended by administrative measures.

Article 8

- 1. Member States shall take all necessary steps to ensure that the provisions of occupational schemes contrary to the principle of equal treatment are revised by 1 January 1993.
- 2. This Directive shall not preclude rights and obligations relating to a period of membership of an occupational scheme prior to revision of that scheme from remaining subject to the provisions of the scheme in force during that period.

Article 7

Unchanged

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.

Article 9

Member States may defer compulsory application of the principle of equal treatment with regard to:

- (a) determination of pensionable age for the purposes of granting 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 required by a directive.
- (b) survivors' pensions until a directive requires the principle of equal treatment in statutory social security schemes in that regard;
- (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 the thirteen-year period as from the notification of this Directive.

Article 10

Member States shall introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves injured by failure to apply the principle of equal treatment to pursue their claims before the courts, possibly after bringing the matters before other competent authorities.

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 directive.
- (b) survivors' pensions until a directive 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 the expiry of a thirteen-year period as from notification of the Directive.

Article 10

Unchanged

Article 11

Member States shall take all the necessary steps to protect workers against dismissal where this constitutes a response on the part of the employer to a complaint made at undertaking level or to the institution of legal proceedings aimed at enforcing compliance with the principle of equal treatment.

Article 11

Unchanged

Article 12

1. Member States shall bring into force such laws, regulations and administrative provisions as are necessary in order to comply with this Directive at the latest three years after notification thereof. They shall immediately inform the Commission thereof.
2. Member States shall communicate to the Commission at the latest five years after notification of this Directive all information necessary to enable the Commission to draw up a report on the application of this Directive for submission to the Council.

Article 12

Unchanged

Article 13

This Directive is addressed to the Member States.

Article 13

Unchanged

(Article 2 of the Directive amending Directive 86/378/EEC)

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 (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 whose accession took place after 17 May 1990, the latter date is replaced by 1 January 1994.

2. Paragraph 1 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 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 of the Directive amending Directive 86/378/EEC)

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 1 July 1996. They shall immediately inform the Commission thereof.

When Member States adopt these provisions, these shall contain a reference to this Directive or shall be accompanied by such reference at the time of their official publication. The procedure for such reference shall be adopted by 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 of the Directive amending Directive 86/378/EEC)

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

(Article 5 of the Directive amending Directive 86/378/EEC)

This Directive is addressed to the Member States.

Done at Brussels, 24 July 1986

For the Council
The President
A. Clark

Done at Brussels,

For the Council
The President

ANNEX 2

BACKGROUND

Under Article 119 of the Treaty, "pay" means not only wages or salary but also "any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer". One of the first questions raised was whether "any other consideration" was intended to include benefits and contributions relating to occupational schemes, i.e. company or supplementary schemes. This issue also lay at the heart of the reference for a preliminary ruling in Case 80/70 Defrenne v Belgian State. In its judgment of 25 May 1971 (Case 80/70)⁽¹⁾ Defrenne, the Court of Justice clarified its position, excluding statutory social security schemes from the concept of "any other consideration". The Court, following the conclusions of the Advocate-General, said that the concept of considerations paid directly or indirectly, in cash or in kind, could not encompass benefits of statutory social security schemes without any element of agreement within the enterprise or the occupational branch concerned, and obligatorily applicable to general categories of workers. The Court noted that, for the funding of these schemes, workers, employers, and public authorities contribute to an extent determined less by the employment relationship between workers and employers than by considerations of social policy. For these reasons, the Court concluded that "any other consideration" could not be regarded as encompassing benefits of statutory social security schemes. On the other hand, however, as the Commission deduced immediately, this line of reasoning means that company occupational schemes are included, as it is precisely these which are not directly governed by law. They involve an element of agreement within the enterprise or the branch, they are not compulsory for general categories of workers but only for those categories covered in the enterprise or the branch, and are financed by employers or workers who contribute directly, depending on the schemes' funding requirements and not on considerations of social policy.

When Directive 75/117/EEC⁽²⁾ on equal pay, clarifying the scope of Article 119 of the Treaty, was being drawn up, the question of including occupational schemes in the material scope of the Directive again arose, since the case law of the Court, even in 1971, implied that benefits accruing from such schemes constituted an element of pay.

Nevertheless, as it would be difficult to harmonise the situation as regards occupational schemes without doing so for statutory schemes (in as far as the two are complementary), it was thought preferable not to deal with occupational schemes in Directive 75/117 on equal pay but in a separate directive.

⁽¹⁾ ECR 1971, p. 455.

⁽²⁾ Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women: OJ No L 45, 19.2.1975, p. 19.

Moreover, the second directive dealing with equal treatment for men and women, Directive 76/207⁽³⁾ adopted on 9 February 1976 concerning equal treatment as regards access to employment, vocational training and promotion, and working conditions, excluded social security from its scope, stating (Article 1(2)) that the Council, acting on a proposal from the Commission, would at a later stage adopt a directive dealing specifically with social security.

Thus, an initial proposal for a Council Directive on equal treatment in the field of social security, presented by the Commission in 1977, was intended to apply to all schemes, whether statutory or occupational, public or private.

The third Directive, 79/7/EEC⁽⁴⁾ adopted on 19 December 1978, aimed at the progressive implementation of the principle of equal treatment for men and women in matters of social security, was nevertheless restricted to statutory schemes, excluding occupational schemes, the Council having opted for gradual implementation of the principle of equal treatment for men and women in the social security field. Moreover, though restricted to statutory schemes only, this Directive also excluded from its scope a number of key aspects such as survivors' benefits, family benefits and retirement age.

To repair the omissions vis-à-vis occupational schemes, the Commission submitted a proposal for a Directive in 1983⁽⁵⁾. Directive 86/378/EEC, adopted by the Council on 24 July 1986, applies to occupational or supplementary schemes as defined in Article 2 but does not cover retirement age or survivors' benefits.

To make good the shortcomings of Directives 79/7/EEC and 86/378/EEC, the Commission presented on 23 October 1987 a proposal for a Directive completing the implementation of the principle of equal treatment for men and women in statutory and occupational social security schemes [COM(87) 494 final]. This proposal is still pending before the Council despite being endorsed by the European Parliament and the Economic and Social Committee.

A highly significant case-law development occurred in the meantime. Even before the Barber judgment, the Court had confirmed in 1986 the implicit ruling given in the above-mentioned Defrenne I judgment in 1971⁽⁶⁾, namely that only benefits deriving from a statutory social security scheme were outside the scope of Article 119 of the Treaty. The Court accordingly ruled, on 13 May 1986 in Case 170/84 Bilka-Kaufhaus v Weber⁽⁷⁾, that the exclusion of part-time employees from an occupational pension scheme funded by the employer constitutes an infringement of Article 119 of the EC Treaty, where such exclusion affects a far greater

(3) Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions: OJ No L 39, 14.2.1976, p. 40.

(4) Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security: OJ No L 6, 10.1.1979, p. 24.

(5) 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: OJ No L 225, 12.8.1986, p. 40.

(6) ECR 1971, p. 445, Case 80/70 Defrenne v Belgian State ("Defrenne I").

(7) ECR 1986, p. 1607.

number of women than men, unless the employer shows that the exclusion is based on objectively justified factors unrelated to any discrimination on grounds of sex.

In its judgment of 17 May 1990 (Case 262/88 Barber) the Court confirms its earlier case law (Case 170/84 Bilka), leaving no further room for doubt; social benefits under the terms of an occupational scheme fall within the concept of pay within the meaning of Article 119 of the Treaty.

Discrimination between men and women in occupational social security schemes is generally prohibited and not only when the age of entitlement to a pension is established or when an occupational pension is offered by way of compensation for dismissal on economic grounds (the facts of Case 262/88 Barber). The main exceptions to the principle of equal treatment provided for in Article 9 of Directive 86/378/EEC (retirement ages varying according to sex; survivors' pensions), which already existed in the corresponding Directive dealing with statutory social security schemes⁽⁸⁾, are rendered null and void for paid workers. It is clear that Directive 79/7/EEC is not affected by the Barber judgment since the benefits provided by statutory social security schemes are not considered as pay within the meaning of Article 119 of the Treaty. What is more, derogation from the principle of equal treatment under the latter Directive is valid until the above-mentioned 1987 proposal for a Directive is adopted by the Council.

Nevertheless the Court did, when handing down the Barber judgment, leave some doubt as to the (retroactive) effects in time of application of Article 119 of the Treaty on occupational social security schemes.

A number of requests for preliminary rulings have been referred to the Court, seeking to clarify the Barber judgment and the actual scope of application of Article 119 in connection with occupational social security schemes.

Before the Court's judgment, the Heads of State and Government meeting in Maastricht signed a supplementary protocol to Article 119 of the Treaty which appears in the Treaty establishing the European Union and which is intended to limit the effects in time of Article 119 of the Treaty in connection with occupational schemes.

According to this protocol:

"For the purposes of 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 (date of the Barber judgment), 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".

The Court, in its judgments of 6 October 1993 (Ten Oever), 14 December 1993 (Moroni), 22 December 1993 (Neath) and six judgments of 28 September 1994 (including Coloroll), confirms this interpretation of the retroactive effect of the application of the principle of equal treatment between men and women in occupational schemes for paid workers.

⁽⁸⁾ Abovementioned Directive 79/7/EEC, OJ No L 6, 10.1.1979, p. 24; see Defrenne I judgment above.

In Case C-109/91 "Ten Oever" (judgment of 6 October 1993), the Court confirms that Article 119 applies to survivors' benefits provided by an occupational social security scheme with effect from 17 May 1990 and discrimination between men and women is no longer permitted from that date as regards the granting of such benefits.

In Case C-110/91 "Moroni" (judgment of 14 December 1993), the Court confirms that Article 119 of the Treaty applies to all types of occupational scheme and, consequently, the age of entitlement to an old-age or retirement pension pursuant to such schemes must be the same for both sexes with effect from 17 May 1990.

In Case C-152/91 "Neath" (judgment of 22 December 1993) and Case C-200/91 "Coloroll" (judgment of 28 September 1994), the Court specifies that employees' contributions to an occupational social security scheme must be the same for both sexes since they constitute an element of pay within the meaning of Article 119 of the Treaty. On the other hand, employers' contributions to such schemes may differ according to sex in so far as they are based on objective actuarial calculations which take account of the longer life expectancy of women.

With regard to the problem of taking account of actuarial factors differing according to sex for the calculation of contributions and benefits under occupational schemes, it should be borne in mind that the Commission, in its proposal of 23 April 1983 (COM(83) 219 final), which was the forerunner to Directive 86/378/EEC, gave a non-exhaustive list, in Article 6, of certain provisions contrary to the principle of equal treatment. The main problem with this Directive stems from this Article, and particularly paragraphs (h) and (i).

Directive 86/378/EEC provides that the schemes may take account of actuarial calculation factors which differ according to sex in respect of employers' contributions and benefits designated as contribution-defined. At first sight, the exceptions relate to schemes entailing defined contributions, but it has to be said that the adopted text is not very clear and, in the course of consultations aimed at amending Directive 86/378, involving government experts, pension funds and the social partners, all the parties were agreed that the text needed to be clarified.

The situation surrounding the provisions of Article 6(h) and (i) has been clarified by the case law of the Court, and more particularly by the above-mentioned judgments of 22 December 1993 (Case C-152/91 Neath) and 28 September 1994 (Case C-200/91 Coloroll). According to the Court, the use of actuarial factors differing according to sex in funded defined-benefit occupational pension schemes does not fall within the scope of Article 119 of the EC Treaty.

The Court points out that this conclusion necessarily extends to specific aspects of the questions referred to it for a preliminary ruling in the Neath and Coloroll cases, namely the capitalisation of part of the periodic pension and the transfer of pension rights, whose value can only be determined in terms of the funding arrangements.

The Court goes on to point out that employees' contributions must be the same for both sexes in a contributory occupational scheme. Its conclusion is based on the idea that, in the context of occupational pensions, Article 119 covers only what is promised by the employer, i.e. the periodic benefits accruing from the pension to be received once the retirement age has been

attained. The employer's contributions thus do not fall within the scope of Article 119 nor do the sums transferred from one pension fund to another following a change of job.

These factors are clearly related to the "funding" of a pension scheme and are not, according to the Court's line of reasoning, covered by Article 119. What is less clear is whether this line of reasoning also excludes from the scope of Article 119 the capital sum which some schemes provide in return for relinquishing one's claim to part of the normal pension. The Court clearly considers that capital formation of this type is excluded from the scope of Article 119 (point 33 in the grounds for the Neath judgment). Nevertheless, it must be noted that the capitalised sum merely represents a substitute for part of the normal pension and that the Court's line of reasoning applies only to defined-benefit schemes.

It follows from the above that the provisions of Article 6(h) and (i), as adopted by the Council of Ministers, remain consistent with Article 119 of the Treaty. There is, however, a need for certain adjustments to help clarify matters, e.g. by making a distinction between defined-contribution schemes (where the employer promises a contribution) and defined-benefit schemes (where the employer's promise is the final benefit).

For this reason the Commission feels that, henceforth, no reference should be made to actuarial factors which differ according to sex for the contributions of paid workers.

As far as the employer's contributions are concerned, the Court has ruled expressly on the amount to be paid in the context of defined-benefit schemes where, according to the Court, this amount may vary according to sex to take account of differing actuarial calculation factors. On the other hand, the Court has not ruled on the amount of such contributions in defined-contribution schemes. In the light of the judgment of 9 November 1993 in Case C-132/92 Birds Eye Walls, that differences in employers' contributions under such schemes may be permitted on condition that the aim is to achieve equal pensions for both sexes.

On 28 September 1994, in addition to the judgment in Case C-200/91 Coloroll, the Court further clarified, in five other judgments, the scope of Article 119 of the Treaty and its application in connection with occupational social security schemes.

The judgment in Case 200/91 Coloroll, besides the issue of actuarial factors, confirms the main principles laid down in previous judgments of the Court (Ten Oever, Moroni, Neath), providing further clarification in certain areas such as the fact that Article 119 of the Treaty is not applicable to schemes which have at all times had members of only one sex and that Article 119 may be relied on by both employees and their dependants against trustees (administrators of occupational schemes) who are bound to observe the principle of equal treatment (employer's and trustees' respective obligations).

In its judgments in Cases 408/92 Smith and 28/93 Van den Akker, the Court considers that Article 119 of the Treaty must be interpreted in the sense that it precludes an employer from making the retirement age equal by raising the age for women to that for men in relation to periods of service completed between 17 May 1990 (date of the Barber judgment) and the date on which the new measures come into force, in order to comply with the Barber judgment.

All in all, as regards periods of service completed between 17 May 1990 and the date of entry into force of the rule by which the scheme imposes a uniform retirement age, Article 119 does not allow a situation of equality to be achieved otherwise than by applying to male employees the same arrangements as those enjoyed by female employees.

On the other hand, as regards periods of service completed after the date of entry into force of the egalitarian measures, Article 119 does not prevent the raising of the retirement age for women to that for men. 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.

The judgments in Case C-57/93 Vroege and Case C-128/93 Fisscher have to do with the right of part-time workers to join an occupational pension scheme.

The Court, confirming its previous case law (Case C-170/84 Bilka), considers that the exclusion of part-time workers from membership of an occupational scheme may constitute indirect discrimination against women prohibited by Article 119 of the Treaty if there is no objective justification for such exclusion. The limitation of the effects in time of the Barber judgment of 17 May 1990 as well as the Protocol No 2 concerning Article 119 of the Treaty do not apply to the right to join an occupational pension scheme, which continues to be governed by the Bilka judgment of 13 May 1986. Since the latter judgment included no limitation in time, the direct effect of Article 119 can be relied upon in order retroactively to claim equal treatment in relation to the right to join an occupational pension scheme and this may be done as from 8 April 1976, the date of the Defrenne II judgment in which the Court held for the first time that Article 119 has direct effect.

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.

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 such actions 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.

In its judgment in Case C-7/93 Beune, the Court sets out the criteria according to which Article 119 applies in connection with certain schemes for civil servants.

Consequently, since this case law and the supplementary protocol to Article 119 of the Treaty signed in Maastricht necessarily mean that certain provisions of Directive 86/378/EEC, which appear to authorise exceptions (particularly in Article 9), are not applicable to paid workers, the Commission is proposing this Directive amending Directive 86/378/EEC in order to make it consistent with Article 119.

IMPACT ASSESSMENT FORM

IMPACT OF THE PROPOSAL ON BUSINESSES, WITH SPECIAL REFERENCE TO SMALL AND MEDIUM-SIZED ENTERPRISES

Taking account of the principle of subsidiarity, why is Community legislation necessary in this area and what are its main aims?

This question is irrelevant to the present proposal for a Directive. The objective is to bring an act of secondary legislation (Directive 86/378/EEC) into line with a provision of primary legislation (Article 119 of the Treaty) as interpreted by the Court of Justice. A proposal for a Directive is the only way to do this.

Who will be affected by the proposal?

All occupational social security schemes established by an employer for his workers within the meaning of Article 2 of Directive 86/378/EEC are affected, including those established within small and medium-sized enterprises. In actual practice, very few small and medium-sized enterprises will be affected.

What will businesses have to do to comply with the proposal?

The proposal merely clarifies the fact that Article 119 of the Treaty applies to all employees' occupational social security schemes, in the light of the case-law of the Court. Any supplementary schemes established by an employer for his workers must respect the principle of equal treatment for men and women as from 17 May 1990 and for periods of employment after that date, particularly with regard to the granting of old-age or retirement pensions and survivors' pensions, except in respect of persons who before that date had already initiated legal proceedings or raised an equivalent claim under the applicable national law.

It should be noted that businesses are in fact already obliged to comply.

What economic effects is the proposal likely to have?

The proposal for a Directive as such will have no economic effects, as it is of a purely declaratory nature in relation to law which already exists.

Does the proposal contain measures to take account of the specific situation of small and medium-sized firms (reduced or different requirements, etc.)?

No. It is a matter of clarification of a directly applicable Article of the Treaty .

ISSN 0254-1475

COM(95) 186 final

DOCUMENTS

EN

05 04

Catalogue number : CB-CO-95-222-EN-C

ISBN 92-77-89066-5

Office for Official Publications of the European Communities

L-2985 Luxembourg