

COMMISSION OF THE EUROPEAN COMMUNITIES

COM(83) 217 final

Brussels, 29 April 1983

Proposal for a
COUNCIL DIRECTIVE

on the implementation of the principle of equal treatment for men
and women in occupational social security schemes

(submitted to the Council by the Commission)

COM(83) 217 final

EXPLANATORY MEMORANDUM

COM 2.8

I. INTRODUCTION

On 19 December 1978 the Council adopted a Directive on the progressive implementation of the principle of equal treatment for men and women in matters of social security. This Directive, which applies only to statutory schemes, lays down in Article 3(3) that, "with a view to ensuring the implementation of the principle of equal treatment in occupational schemes, the Council, acting on a proposal from the Commission, will adopt provisions defining its substance, its scope and the arrangements for its application".

Occupational schemes fall between statutory social security schemes and purely private insurance contracts. Unlike the former, their content is not therefore defined by law; but unlike the latter, it is not defined, either, by free negotiation between individuals and the insurance companies. These features apply to various types of scheme whose purpose is to supplement the benefits provided by statutory social security schemes (in the area of old age/survival, unemployment, invalidity, sickness) or, more rarely, to replace them. They include :

- 1) schemes based on collective agreements between employers' and workers' representatives and applying to an undertaking, an occupational sector or several such sectors;
- 2) company schemes, set up or planned unilaterally by the employer for the benefit of his workers or certain categories thereof, whether he allocates specific reserve funds for this purpose or uses the services of an insurance company (group insurance, for example) or finances the planned benefits under the heading of staff expenditure;
- 3) schemes set up by the representatives of a self-employed occupation (craftsmen, doctors, lawyers, etc.).

The new legal instrument proposed concerns all these types of scheme. It should be noted that the basic distinguishing feature of occupational schemes - unlike, for example, purely individual insurance - is that affiliation to such schemes forms part of the conditions of employment in the sense that it derives, directly or indirectly, from the contract of employment or from the exercise of the occupational activity.

The second paragraph of Article 119 of the Treaty establishing the European Economic Community, which provides for equal pay for men and women, lays down that "pay" means not only the wage 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". Since employees are involved, the benefits provided by occupational schemes therefore fall, by virtue of this definition, within the scope of the second paragraph of Article 119.

It follows from this that the new Directive will have a field of application which, in the case of certain schemes or certain benefits under such schemes, will coincide with that of Article 119 of the Treaty of which it will in this respect constitute an implementing measure. In the case of other schemes or other features of such schemes, on the other hand, the Directive's scope will differ from that of this Article.

This explains why, with regard to the Directive's material field of application, while the same risks must be covered as those provided for by the Directive of 19 December 1978, the area covered as far as employees are concerned must be widened to include all benefits which may be deemed to fall within the scope of the second paragraph of Article 119.

On the other hand, the field of application with regard to persons and the scope of the principle of equal treatment correspond with the relevant provisions of the Directive on statutory social security schemes. The new Directive therefore applies to all workers - whether employees or self-employed - and the principle of equal treatment implies the absence of any discrimination on the basis of sex, either directly or indirectly by reference - for example - to marital or family status.

In this respect, it may be noted first of all that there are two reasons why women benefit proportionately less than men from occupational schemes; the first is that such schemes are often lacking in firms employing chiefly female labour because of traditional ideas of the respective roles of men and women in society.

The second reason is the exclusion of part-time work from many occupational schemes. While this does not constitute direct discrimination, it affects women to a greater extent and is therefore more unfavourable to them.

These two factors, which partly explain the present situation, appear therefore to be incapable of solution by direct measures aimed at removing discrimination based on sex but must be solved by broader social protection measures. One such measure, the social protection of part-time work, which formed the subject of a draft Commission directive, will have the effect of affording to part-time workers protection equivalent to that afforded to full-time workers, thereby remedying, indirectly, the unfavourable position of women mentioned earlier.

Direct measures aimed at eliminating forms of discrimination are required, however, in the other cases, particularly in a whole range of relatively frequent instances of unequal treatment which it was thought should be set out in the Directive.

A two-year period was set for the elimination of such discrimination. However, as regards pensionable age and surviving spouses' pensions, Member States may defer compulsory application of the equal treatment principle, under specific conditions, in view of the special link in these two fields between the provisions of occupational schemes and the corresponding provisions of statutory schemes. The Commission is moreover shortly to submit to the Council its proposals aimed at settling the matters at present excluded from Directive 79/7/EEC and the present directive.

On account of their complexity and their relation to the statutory social security system, occupational schemes were not taken into consideration in the Directive of 10 February 1975 on equal pay. They were also disregarded in the drafting and subsequent adoption of the Directive of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security. The new Directive thus fills a gap and will thereby help to bring clarity and legal certainty to an area in which the application of the principle of equal treatment is still often subject to doubt for both workers and employers.

II. COMMENTS ON THE ARTICLES

Article 1

This Article defines the aim of the Directive : the implementation of the principle of equal treatment in occupational social security schemes.

Article 2

To define occupational schemes, the Directive takes as its basis a definition already adopted at Community level in the Directive of 5 March 1979 on the business of direct life assurance. Article 2(3) of this Directive excludes from its scope organizations whose operations precisely correspond with those of occupational schemes. This definition has, however, been adapted somewhat to cover the entire range of social security risks.

To avoid confusion, it is specified that all occupational schemes are included, whether or not membership has been made compulsory by administrative measure, as the fact that such a measure has been introduced does not alter the character of these contractual schemes, whose provisions continue to be regulated by collective negotiation.

Article 3

Like previous Directives concerning equal treatment, the Directive's field of application with regard to persons relates to all categories of the working population, whether wage-earners or self-employed, including the sick, pensioners, the unemployed and the disabled.

Article 4

All occupational schemes which cover the risks provided for in the Directive on equal treatment in statutory social security schemes are included in the scope of this Article : illness, invalidity, old age, industrial accidents/occupational diseases, unemployment. This correspondence is explained by the close relationship between statutory and occupational schemes.

~~However, where occupational schemes apply to wage-earners, this rule~~ is rendered nugatory by the fact that the benefits of such schemes are in the nature of considerations paid by the employer to the worker by virtue of the latter's employment. Hence, the material field of application can no longer be limited to certain risks; on the contrary, it must extend to all benefits, in cash or in kind, which may be paid by such schemes, including therefore benefits not referred to in the list of risks in the foregoing paragraph.

However, provision is made in Article 9 for the possibility of deferring compulsory application of the Directive where the pension of a surviving spouse is concerned.

Article 5

This Article defines the scope of the principle of equal treatment in occupational social security schemes. This scope is identical to that already defined in the case of statutory schemes : the absence of any discrimination, de jure or de facto, based on sex, either directly or indirectly by reference, in particular, to marital or family status.

The article also recalls that this principle is without prejudice to any provisions relating to the protection of women on maternity grounds.

Article 6

1. The very general character of the principle laid down in the foregoing Article in an area which is particularly complex and often little known was liable to lead to misunderstandings or disputes. To avoid these difficulties, it seemed essential to enumerate a number of provisions which are contrary to the principle of equal treatment. The list is not exhaustive but relates to a series of forms of discrimination often encountered in occupational schemes.

- a) Certain occupational schemes, particularly pension schemes, are open solely to men; women are excluded from them. In other cases, the exclusion relates only to married women. There is no reason, either "technical" or specific to occupational schemes, which can justify such exclusions, since most schemes are in reality open to both women and men, which shows clearly that there exists no preliminary problem to be settled in this matter.
- b) The same may be said of schemes which are compulsory for men but optional for women or for married women.

It may be conceded that affiliation to a scheme should be optional rather than compulsory, but there is no objective reason to be adduced in this respect; i.e., for making a distinction between men and women at a time when female employment is tending to become universal. However, abolition of this form of discrimination poses no special problem.

- c) Some schemes impose higher age or longer period of service conditions in the case of women. These conditions are not justified by objective technical or legal considerations. Their aim is essentially, and even purely, deterrent : to keep out of the schemes young women who do not intend to remain in working life (at the same time penalizing those who do wish to continue to work). Given the present trend, such preconceptions are no longer defensible and penalizing certain categories in this way is no longer acceptable.
- d) The same reasoning applies in preventing, as being incompatible with equal treatment, the adoption of different rules 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) Equal treatment is also incompatible with a situation whereby the conditions governing the granting of benefits vary according to the sex of the worker. It is apparent that in practice different conditions often mean conditions which are more difficult for women to fulfil, which amounts in effect to depriving them of the advantages of the scheme.
- f) Retirement age represents one of the conditions just mentioned. The fixing of a lower age for women than for men as a condition for the granting of the retirement pension is relatively frequent in occupational schemes, especially in countries whose statutory scheme also provides for this particular feature. There is obviously a link between the two phenomena.

The fact, however, that in these same countries one finds occupational schemes which specify a uniform retirement age shows that this link is not as strong as it appears and that there are no "technical" reasons making it necessary to maintain this form of inequality. However, provision is made in Article 9 for the possibility of deferring compulsory application of the Directive.

~~Equal treatment must not be construed as a pretext for depriving women~~
of the protection to which they are entitled on maternity grounds. The preservation or acquisition of entitlement to benefits under occupational schemes may not be suspended during periods of statutory maternity leave.

- h) For the purpose of fixing the amount of certain benefits, account is taken in both statutory and occupational schemes of factors entering into calculations, actuarial or otherwise, as regards the phenomena of ill health, mortality or life expectancy. The same factors generally obtain for both sexes: the amount of the pension for a female worker, for example, will not be different from that for a male worker, provided that their pay, length of membership, etc. are the same.

However, in certain occupational pension schemes which apply the system whereby contributions are accumulated to build a capital sum (money purchase system), this sum is transformed into a pension on the employee's retirement and, at the time of this operation, the amount of the pension will be calculated assuming a life expectancy which differs for men and women. The woman's pension, for example, will be lower than that of her male colleague because she is expected to draw it for longer. Practices of this kind are also evident in the granting of other benefits, for example, sickness and invalidity benefits where different morbidity rates are applied.

In the Directive, these practices are held to be in conflict with the principle of equal treatment for various reasons :

- differences in life expectancy are very clear-cut between categories of male workers, according to the occupation pursued : if account is not generally taken of them in calculations it is difficult to see why an exception should be made only in the case of female workers;
- the life expectancy of women is assessed statistically with reference to the entire female population; however, women workers represent only a minority of this population and everything suggests that their life expectancy does not correspond to the overall average;
- individual life expectancy by no means corresponds to the statistical life expectancy of the group; the area covered by the Directive is that of individual rights, population groups as such;

- not all occupational schemes make the same actuarial distinctions by any means; even among those applying the money purchase system there are some which no longer distinguish between men and women for this purpose.

These reasons also obtain where account is taken of phenomena other than life expectancy. It must be stressed that the Directive is not opposed to actuarial factors being taken into account; it is opposed only to the application of different actuarial factors for workers of one or the other sex. The solution would be to generalize coverage of the risks in question, as in some occupational schemes and all statutory schemes. A specific deadline by which this objective must be attained is laid down in Article 8.

- i) For the same reasons, differing rates of contribution according to the sex of the worker are excluded.
- j) It can happen that a worker leaves the scheme during his or her working life : in such cases, in many countries the law provides that, under certain conditions, he retains a deferred entitlement to benefit (old age pension, for example) at a later date (in the example given, at retirement age). Sometimes, acquired rights may be transferred to another scheme, of which the worker becomes a member. In both these hypothetical situations the application of different standards to male and female workers - and more especially their application, de jure or de facto, to workers of one sex only - must be avoided.

2. In paragraph 2 of the same Article the situation is envisaged, in which, the award of certain subsidiary benefits is not governed by law but left to the discretion of the scheme's management; in such cases, these bodies are not at liberty to float the principle of equal treatment, however.

Article 7

Member States must take all measures necessary to ensure that provisions contrary to the principle of equal treatment are rendered null and void or amended. Such provisions cannot, of course, be approved or declared compulsory by the public authorities.

Article 8

This Article concerns the dates by which the Directive must be implemented.

In most cases two years is allowed. A more distant deadline is not necessary since these schemes are often of modest proportions and can therefore be easily amended; in addition, most of them already fall within the scope of the second paragraph of Article 119 of the EEC Treaty.

Article 9

This Article gives Member States the right to defer compulsory application of the principle of equal treatment as regards :

- (a) determination of pensionable age for the purposes of granting old-age or retirement pensions;
- (b) pension awarded to the surviving spouse.

There is a special link in these two fields between the provisions of occupational schemes and the corresponding provisions of statutory schemes. Inasmuch as equal treatment has not yet been introduced, in these two fields, into the statutory schemes of some Member States, application of that principle to occupational schemes could face real obstacles. It was therefore deemed advisable to give such Member States the right to defer compulsory application of the principle of equal treatment to occupational schemes until such time as the principle has been incorporated into statutory schemes. This does not prevent quicker, voluntary application where possible. However, exercise of this right by Member States would not be justified in cases where equal treatment is already included in the relevant provisions of statutory schemes.

Article 10

With regard to the benefits referred to in Article 6(h) that are based on actuarial calculations which differ according to sex, this Article recognizes that contractual relations between insured persons and insurers may continue to be governed by the earlier contract, as regards the period of affiliation to a scheme prior to the implementation of the Directive. The same applies to benefits already settled and in the process of being paid.

On the other hand, the future effects of situations which started under the previous legislation will be governed by the new legislation which prohibits discriminatory methods of settlement. New stipulations are to be inserted in amendments to contracts under which contributions paid on an equal basis on behalf of workers (irrespective of their sex) will give rise to the payment of benefits on the same equal basis and the elimination of different calculations according to sex.

It would, however, be desirable, for the period prior to the implementation of the Directive, to provide for the possibility of guaranteeing, for the same period, the same level of benefits for workers of both sexes, by appropriate methods, including if necessary the payment of retroactive contribution supplements.

Article 11

This Article enables any person who is a victim of discrimination to pursue his claims at law. This guarantee is usual in all Directives relating to equal treatment.

Article 12

Workers must also be protected against dismissal following on a complaint aimed at ensuring that the principle of equal treatment is respected. This guarantee is also provided for in other Directives in this field.

Article 13

As in other Directives, this Article provides that, within a period of three years, Member States must transmit to the Commission all such information as may enable the latter to prepare a report on the Directive's implementation.

Article 14

This Article specifies that the Directive is addressed to the Member States.

Proposal for a
COUNCIL DIRECTIVE

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on the implementation of the principle of
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occupational social security schemes

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

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

Having regard to the proposal from the Commission,

Having regard to the Opinion of the European Parliament,

Having regard to the Opinion of the Economic and Social Committee,

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, for the purpose of the said Article, pay means 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, in respect of his employment from his employer;

Whereas, although Article 119 does indeed apply directly in cases where discrimination can be determined solely on the basis of the criteria of equal treatment and equal pay, there are also possible situations in which achievement of the principle of equal pay implies the adoption of additional measures which more clearly define its scope;

Whereas Article 1(2) of 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 (1) provides that, with a view to ensuring the progressive implementation of the principle of equal treatment in matters of social security, the Council, acting on a proposal from the Commission, will adopt provisions defining its substance, its scope and the arrangements for its

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(1) OJ No L 39, 14.2.1976, p. 40

application; whereas the Council adopted to this end 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 (1);

Whereas Article 3 (3) of Directive 79/7/EEC provides that, with a view to ensuring implementation of the principle of equal treatment in occupational schemes, the Council, acting on a proposal from the Commission, will adopt provisions defining its substance, its scope and the arrangements for its application;

Whereas the principle of equal treatment should be implemented in occupational social security schemes which provide protection against the risks specified in Article 3 (1) of Directive 79/7/EEC as well as those which provide, to employees, any other consideration in cash or in kind within the meaning of Article 119;

Whereas implementation of the principle of equal treatment does not prejudice the provisions relating to the protection of women on the ground of maternity,

HAS ADOPTED THIS DIRECTIVE :

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 schemes" means schemes whose purpose is to provide workers, whether employees or self-employed, in an undertaking or group of undertakings or an 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 affiliation to such schemes is compulsory or optional.

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(1) OJ No L 6, 10.1.1979, p. 24

2. This Directive shall cover all occupational schemes, whether or not declared compulsory by administrative measures.

Article 3

This Directive shall apply to members of the working population, including self-employed persons, whose activity is interrupted by illness, accident or involuntary unemployment, to 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,
 - industrial accidents and occupational diseases,
 - unemployment.
- (b) occupational schemes which provide for other social benefits, in cash or in kind, and in particular survivors' benefits, family allowances and benefits in respect of various periods of leave for family reasons, 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. The principle of equal treatment shall imply that there be no discrimination whatsoever 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 thereto,
 - the obligation to contribute and the calculation of contributions,

- the calculation of benefits, including supplementary benefits due in respect of a spouse or dependents, 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 on the ground of maternity.

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, intended, inter alia, to :
 - (a) specify those persons who may participate in an occupational scheme,
 - (b) fix the compulsory or optional nature of participation in an occupational scheme,
 - (c) lay down different rules as regards the age of entry into the scheme or the minimum period of employment or affiliation to the scheme required to obtain the benefits thereof,
 - (d) lay down different rules 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) set different conditions for the grant of benefits or restrict such benefits to workers of one sex only,
 - (f) fix different retirement ages,
 - (g) suspend the retention or acquisition of rights during periods of maternity leave or family leave granted by law or collective agreement,
 - (h) provide for benefits whose level or amount differ and, in particular, set the level of benefits by taking into account different factors of calculation, actuarial or otherwise, with regard to the phenomena of ill health, mortality or life expectancy,

- (i) set contributions at different rates, in particular by taking into account the factors of calculation mentioned under (h),
- (j) lay down different standards or standards applicable only to workers of a given sex as regards the guarantee or retention of entitlement to deferred benefits where a worker leaves a scheme or as regards the transfer of such entitlement to another scheme.

2. Where the grant of certain subsidiary benefits is left to the discretionary power of a scheme's management bodies, the said bodies must take account of the principle of equal treatment.

Article 7

Member States shall take all necessary measures to ensure that :

- (a) provisions contrary to the principle of equal treatment in 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 declared compulsory by administrative measures.

Article 8

Member States shall take all necessary measures to ensure that provisions of occupational schemes contrary to the principle of equal treatment are revised before 1 January 1986.

Article 9

1. This Directive shall be without prejudice to the right of Member States to 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;
 - (b) pension awarded to the surviving spouse.

2. The right referred to above may be exercised provided that the principle of equal treatment has not yet been implemented in the corresponding provisions of statutory social security schemes.
3. Compulsory implementation of the principle of equal treatment shall not under any circumstances be deferred beyond the date on which such equality is achieved in statutory schemes.

Article 10

1. This Directive shall be without prejudice to the methods of calculating the benefits referred to in Article 6(1)(h), insofar as they are calculated on the basis of different actuarial data for each sex, whether they are already settled and being paid or to be settled and paid in due course and which relate to a period of affiliation to an occupational scheme prior to the revision of that scheme as provided for in Article 8, from continuing to be governed by the provisions of the occupational scheme in force during the period of affiliation.
2. This Directive shall also be without prejudice to the establishing of appropriate methods, such as the payment of retroactive contribution supplements, which guarantee equal benefits for the earlier period of affiliation.

Article 11

Member States shall introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves injured by a 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 12

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

Article 13

1. Member States shall bring into force such laws, regulations and administrative provisions as are necessary in order to comply with this Directive before 1 January 1985. They shall immediately inform the Commission thereof.
2. Member States shall communicate to the Commission before 1 January 1987 all information necessary to enable the Commission to draw up a report on the application of this Directive for submission to the Council.

Article 14

This Directive is addressed to the Member States.

Done at Brussels,

For the Council