



COMMISSION OF THE EUROPEAN COMMUNITIES

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REPORT FROM THE COMMISSION

**on the implementation of Directive 79/7/EEC  
of 19 December 1978 in Spain and Portugal**

**(as at December 1994)**

## INTRODUCTION

- 1 Directive 79/7/EEC provides for the progressive implementation of the principle of equal treatment for men and women in the field of social security and social assistance; its purpose is to eliminate any direct or indirect discrimination on grounds of sex in the statutory schemes providing protection against contingencies such as sickness, invalidity, old age, accidents at work, occupational diseases and unemployment, and in social assistance measures intended to supplement or replace the statutory schemes.

This Directive is without prejudice to the provisions relating to the protection of women on the grounds of maternity and excludes from its scope a number of benefits granted under conditions which are at present discriminatory in several Member States.

- 2 Under Article 8 of the Directive, Member States must bring into force the laws, regulations and administrative provisions necessary to comply with the Directive within six years.

The Commission prepared an interim report (COM(83)793 of 6.1.1984) in order to enable Member States to meet their obligations.

- 3 Article 9 of the Directive stipulates that, within seven years of notification of the Directive, Member States must forward all necessary information to the Commission to enable it to draw up a report on the application of the Directive for submission to the Council and to propose such further measures as may be required for the implementation of the principle of equal treatment.

A questionnaire was sent to governments, who were asked to forward it to employers' and trade union organisations and to the committees set up in most of the Member States to look at problems of female employment.

As regards the areas referred to in the Directive, the replies were to cover the public and semi-public sectors, workers whose employment is interrupted by sickness, an accident or involuntary unemployment, and persons seeking work, as well as retired and disabled workers.

The Commission prepared a second report based on the replies received from governments, supplemented by information from organisations or committees concerned with equal treatment issues; this report describes the situation in the 10 Member States as at 22 December 1988.

4 Given that Spain and Portugal joined the European Community only on 1 January 1986, the two Commission reports were unable to examine the situation in these two countries as regards the implementation of the principle of equal treatment for men and women.

However, as both countries were required to implement Community legislation from the time of their accession, the Commission sent a detailed questionnaire to the Spanish and Portuguese governments, to employers and trade union organisations, and to committees on female employment set up at national level.

On the basis of the replies received, supplemented in some cases by other information obtained by the Commission, this report describes the situation as at December 1994 concerning the implementation of the Directive in the Spanish and Portuguese legal systems.

## SECTION I TRANSPOSITION OF THE DIRECTIVE INTO NATIONAL LAW

Under Article 8 of the Directive, governments are required to communicate to the Commission the text of laws, regulations and administrative provisions designed to implement the Directive which have been adopted or are already in force.

Using the information provided by governments, it is interesting to ascertain whether the Directive was implemented by means of a general law or by amending certain parts of existing laws or regulations.

In Spain, Article 14 of the 1978 Constitution provides that there shall be no discrimination on grounds of sex. As a result, many steps have been taken to bring about equal treatment for men and women in various areas including those excluded from the scope of the Directive; according to the government report, no laws or regulations discriminate against either of the sexes.

In Portugal, Article 13 of the Constitution of 2 April 1976 lays down the principle of equality before the law of all citizens and states that no one may gain an advantage or be placed at a disadvantage on grounds of sex.

Thus, according to the government report, Portuguese legislation on social security is in line with Directive 79/7/EEC.

## SECTION II

### EXAMINATION OF THE SITUATION IN THE MEMBER STATES CONCERNED

This report will examine the steps taken in Spain and Portugal to eliminate direct and indirect discrimination in the areas of social security and social assistance and any remnants of direct and indirect discrimination, as well as the steps taken to guarantee rights of remedy and the question of exclusions from the scope of the Directive.

It should be pointed out that, for the Commission, there is a presumption of indirect discrimination if an ostensibly neutral measure in practice mainly affects workers of one sex, in which case it is not necessary to prove an intent to discriminate<sup>1</sup>. It is up to the author of the discriminatory measure (the State) to prove that the measure is objectively justified and necessary in order to achieve an objective of its social policy.

#### I. SPAIN

Spain has taken many steps to bring about equal treatment for men and women in various areas, including those excluded from the scope of the Directive.

##### 1. DIRECT DISCRIMINATION

###### 1.1. Social security

According to the Spanish government's report, there is no direct discrimination as regards the scope of the provisions, the qualifying conditions, the obligation to contribute or the way in which benefits are calculated.

###### 1.2. Scope

Men and women are covered by the statutory social security schemes regardless of their marital or family status provided they meet the qualifying conditions.

As regards self-employed workers, it should be pointed out that a person who is actively employed in the undertaking of his or her spouse and meets the necessary conditions is covered by special schemes for self-employed workers. In such cases, the person concerned will be entitled to the same social protection as his or her spouse.

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<sup>1</sup> Judgments of the Court of Justice of the European Communities of 13.5.86 (Case 170/84 *Bilka-Kaufhaus*), of 11.6.67 (Case 30/85 *Teuling*), of 13.07.89 (Case 171/88 *Rinner-Kühn*) and of 8.05.91 (Case 229/89 *Commission vs Belgium*).

The special scheme for domestic workers has rules under which men and women are treated differently. Thus, persons who are related (spouse, relatives in the ascending and descending line, and other relatives) to the actual self-employed person (head of the undertaking, shopkeeper, etc.) may be excluded from the scheme. Decree No 2346 of 25 September 1969 states that the degree of kinship, which determines whether an individual is covered by this scheme, does not constitute grounds for excluding persons of the female sex who belong to the households of unmarried priests and share accommodation with them.

Husbands or wives who regularly work with their spouses in the latter's businesses and who meet the necessary requirements are covered by the special scheme for seafarers as self-employed workers.

The scheme for agricultural workers covers, as a self-employed worker, the spouse of the owner of an agricultural holding on condition that the income thereby obtained contributes to the maintenance of the household and that the spouse lives with, or is financially dependent on, the owner of the holding. However, if the spouse can prove that he or she is working on another person's account then he or she may be covered by this scheme as an employee. In its present form this scheme may lead to indirect discrimination of the kind prohibited by Directive 79/7/EEC.

In addition, the employment of dependent workers does not constitute an obstacle to inclusion in this scheme as a self-employed person provided that none of the dependent workers are employed on a permanent basis or that the number of days of work for which employees are paid does not, over one year, exceed the number for which a permanent worker would be paid. This limit does not apply if the owner of the holding is a man who is incapable of work or a woman who has been widowed or is incapable of work.

### **1.3. Qualifying conditions**

All Spaniards are covered by the social security system irrespective of their sex, marital status or occupation on condition that they reside, and normally carry out their work, in Spain. Men and women are covered by statutory schemes under the same conditions, without discrimination on grounds of sex. The only exceptions are those referred to in 1.2.

As regards the acquisition of an entitlement for a spouse who remains at home, Spanish legislation does not allow the latter to be covered by the social security system.

As regards the entitlement to child benefits, a decree of 2 October 1985 recognises the right of fathers or mothers who meet the necessary

conditions to receive child benefits on a regular basis where the family is living together.

#### **1.4. Obligation to contribute and calculation of contributions**

Spanish legislation makes no distinction between men and women as regards the obligation to pay contributions.

Similarly, the level of contributions and the way in which they are calculated are not based on any form of sex discrimination.

#### **1.5. Calculation of benefits**

##### **a) Individual benefits**

The government report does not mention any discrimination on grounds of sex affecting the way in which benefits are calculated, the periods of entitlement, the minimum amounts involved and the periods treated as periods of insurance.

##### **b) Family-related benefits**

Under Spanish law, benefits are calculated on the basis of the contributions paid by the person who holds or creates an entitlement.

A pension supplement for a dependent spouse is paid without discrimination on grounds of sex and without a specific calculation being made if the spouse is living with the person receiving a pension, is financially dependent on that person and receives no income, pension or regular benefits. However, the spouse is regarded as dependent only if the monthly income of the household from all sources is less than the national minimum wage.

The number of dependent children affects the way in which unemployment benefit is calculated in that it determines what percentage is to be applied when calculating the maximum amount to be paid. If both spouses are unemployed, they may each be entitled to an additional payment irrespective of marital status.

#### **1.6. Social assistance**

##### **a) Scope**

According to the government report, there is no discrimination on grounds of sex in social assistance schemes.

b) Calculation of benefits

Social assistance benefits are paid at a flat rate which varies according to the type of benefit concerned.

Unemployed persons who are responsible for looking after a family and have used up their entitlement to unemployment benefit may receive unemployment assistance<sup>2</sup> subject to conditions, and for an amount, which are identical for men and women.

**1.7. Matters excluded under the terms of Article 3(2)**

In Spain, there is no difference in treatment as regards the granting of survivors' pensions. Both widows and widowers are entitled to survivors' benefits on condition that they have lived together on a regular basis. To this end, in the event of divorce or separation, the pension is shared between one or more surviving spouses or partners legally recognised as beneficiaries in proportion to the period of cohabitation with the deceased person.

Family benefits for dependent children are granted without discrimination to the father or mother (see 1.3 above).

**2. INDIRECT DISCRIMINATION**

**2.1. General remarks**

Spanish legislation contains no definition of the concept of indirect discrimination. Case law and the legal literature, however, give an interpretation of this concept which is in line with that put forward by the Commission<sup>3</sup>.

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<sup>2</sup> This unemployment assistance is a non-contributory benefit.

<sup>3</sup> Interim report on the implementation of Directive 79/7/EEC, COM(83)793.

## **2.2. Application of social security and social assistance benefits**

### **a) Scope**

According to the government report, no one is excluded from statutory schemes on grounds of marital or family status.

### **b) Increments for dependent spouses**

Increments for dependent spouses are paid irrespective of whether the latter are men or women.

### **c) Head of household concept**

In Spanish legislation, this concept applies both to women and men.

However, the social reality is different: as women are still under-represented in the workforce, more often than not it is men who are recognised as beneficiaries. According to the government report, this situation cannot be regarded as a discriminatory rule. However, where legislation provides for equal treatment for both spouses, the "head of household" concept itself is problematical.

### **d) Period during which entitlement to medical care is retained after employment is interrupted owing to illness**

As regards the length of the period during which entitlement to medical care continues in the event of the insured person's employment being interrupted as a result of illness, this varies from one case to another but is always longer for the insured person than for other entitled persons. This measure affects the spouse, who in most cases is the wife.

### **e) Waiting period**

Under the special scheme for domestic workers, cash benefits relating to incapacity for work are paid from the 29th day following the date on which the sickness began (under the general scheme, they are paid from the fourth day onwards). The government report points out that, although contributions to the two schemes are not the same, the difference is not so great as to justify the 29-day waiting period.

## **2.3. Part-time work**

### **a) Percentage of men and women in part-time work**



According to a government report covering 1986, 10.59% of the working population were then in part-time work. Within this figure, 6.02% were women. In the same year, 58.9% of part-time employment contracts involved female workers.

b) Persons covered and social security benefits

Part-time workers are covered by statutory social security schemes and receive the same benefits as full-time workers (e.g. for retirement, invalidity, unemployment, etc.).

Strictly speaking, a part-time employment contract is a contract requiring a person to work a given number of hours per day or per week or a given number of days per week or per month, this number being no more than two-thirds of the number normally worked.

c) Minimum qualifying periods and the criteria for calculating benefits

Here, certain special features should be mentioned. The minimum qualifying periods for benefits are calculated by counting the number of hours actually worked. The (theoretical) number of days worked is then obtained by dividing the number of hours worked by the number of hours normally worked in that particular branch each day.

There are differences in treatment between the Workers' Statute (Articles 12 and 36) and the General Social Security Act (Article 74). Article 12 of the Workers' Statute provides that the pay to which part-time workers are entitled should be proportional to the number of hours and days worked and lays down a minimum and maximum working time (one-third of a day and two-thirds of a day respectively) for part-time workers. On the other hand, Article 74 of the General Social Security Act stipulates that the minimum amount to be used for calculating contributions shall be equal to the national minimum wage applicable at any given moment, irrespective of the number of hours worked. According to the Spanish legal literature, Article 12 of the Workers' Statute is in explicit derogation of Article 74 of the General Social Security Act. On the basis of the government report, this would appear to indicate some indirect discrimination against women.

As regards benefits relating to a temporary incapacity for work on grounds of maternity, the minimum qualifying period for this benefit must fall within the 18 months preceding the commencement of the compulsory or voluntary cessation of work. The basis for calculating the benefit paid to those temporarily incapable of work corresponds to the basis for assessing average monthly contributions obtained by dividing the total annual contribution by 12.

d) Period of entitlement

Benefits for part-time workers are paid for the same length of time as those for full-time workers.

**3. RIGHT TO APPLY TO THE COURTS**

- a) According to the government report, the right of remedy is guaranteed by Article 53 of the Constitution. Any citizen may bring an action before an ordinary court and, where necessary, apply to the Constitutional Court for protection of his or her constitutional rights.
- b) The right of remedy is an individual right. However, if actions of an identical nature are brought before a labour court, all the interested parties may appear jointly.
- c) Trade unions and employers' organisations cannot bring an action on behalf of an injured party.

In addition, challenges against laws and statutes on grounds of unconstitutionality may be made by the Prime Minister, 50 deputies, 50 senators, the executive organs of the Autonomous Communities and regional assemblies, while requests for preliminary rulings can be submitted by judicial bodies to the Constitutional Court.

**4. EXCLUSION FROM THE SCOPE OF THE DIRECTIVE UNDER THE TERMS OF ARTICLE 7(1)**

**4.1. Matters excluded**

According to the government report, the matters that, under Article 7, may be excluded from the scope of the Directive do not give rise to any unequal treatment for men and women.

**4.2. Retirement age**

There is an identical retirement age for men and women.

**4.3. Benefits for persons who have brought up children**

Under Spanish law, persons in old-age pension schemes who have brought up children receive no extra benefits.

#### **4.4. Derived entitlements of a wife**

The entitlement to old-age and invalidity benefits is a personal entitlement of the insured person and gives rise to no derived rights.

#### **4.5. Increments for dependent spouses (old-age, invalidity, accidents at work and occupational disease benefits)**

Increased pensions that take account of dependent spouses are granted without discrimination between men and women.

## **II. PORTUGAL**

The Portuguese government's report considers that Directive 79/7/EEC can be implemented by means of the existing provisions in Portuguese social security legislation.

Article 13 of the Portuguese Constitution guarantees the equality of all citizens before the law and stipulates that no one shall enjoy advantages or suffer detriment on grounds of sex. The Constitution's provisions are directly applicable and legally binding on the legislative and executive branches of government and on the judiciary.

### **1 DIRECT DISCRIMINATION**

#### **1.1 Social security**

According to the government report, there is no direct discrimination concerning the scope of schemes, qualifying conditions, the obligation to contribute and the calculation of benefits.

#### **1.2 Scope**

Employees and self-employed persons as well as civil servants and public employees are subject to no direct discrimination based on sex.

It should be noted that since 1.01.94 all spouses of self-employed persons who work with the latter on a permanent basis have been covered by the social security provisions applicable to self-employed persons under Article 6(c) of Decree-Law No 328/93 of 25 September 1993.

### **1.3 Qualifying conditions**

Under the statutory social security schemes, the same conditions of membership apply to men and women.

Discriminatory measures favouring women exist for old-age pensions paid to employees and self-employed persons.

The government report recognises that a system based on equal treatment is desirable, given the fact that the social situation has changed and more women are working.

Under Portuguese legislation, spouses who remain at home do not receive any entitlement by virtue of the gainful activity of their spouses.

The principle of equal treatment is applied to family benefits. The latter are paid to one of the spouses if it is proved that the other is not already receiving them.

### **1.4 Obligation to contribute and calculation of contributions**

For employees, self-employed persons, civil servants and public employees there is no direct discrimination on grounds of sex in either of these two areas.

### **1.5 Calculation of benefits**

#### **a) Individual benefits**

According to the government report, under Portuguese law employees and self-employed persons as well as civil servants and public employees are not subject to any discrimination on grounds of sex as regards the method of calculating benefits, the period of entitlement, the minimum amounts involved and the periods treated as insurance periods.

#### **b) Family-related benefits**

As regards employees and self-employed persons, the composition of their household is only taken into account in certain areas.

The level of unemployment assistance depends on the number of persons who are dependent on the recipient (who may be a man or a woman).

The level of family allowances is increased from the third child onwards, subject to a means test.



Consequently, the surviving partner of a couple who were not married (but lived together) or were legally separated at the time of his or her partner's death is eligible for a survivor's pension if he or she lived with the partner in question for at least two years in the same manner as legally married persons.

Payment of the survivor's pension is conditional upon legal recognition of the person's entitlement to such a pension pursuant to the Code of Civil Procedure (generally in the case of persons living together without being married) or on the basis of their legal status as a beneficiary resulting automatically from their family status.

It should be emphasised that the new legislation applies only to the surviving partner in the case of deaths occurring after the entry into force of Decree-Law No 322/90.

As to the granting of family benefits for dependent persons, according to the government report, there is no discrimination (see final paragraph of 1.3 above).

## **2 INDIRECT DISCRIMINATION**

### **2.1 General remarks**

Portuguese legislation and case law contains no definition of the concept of indirect discrimination.

The Portuguese government follows the interpretation given by the Commission<sup>5</sup>.

### **2.2 Application of social security and social assistance benefits**

#### **a) Scope**

According to the government report, no one is excluded from statutory schemes on grounds of marital or family status.

However, according to a non-governmental report<sup>6</sup>, temporary employees (persons who occasionally work on a part-time basis or seasonal workers)

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<sup>5</sup> Interim report on the application of Directive 79/7/EEC, COM(83) 793.

<sup>6</sup> Report by the Commission's network of independent experts on the application of the equal opportunities directives.

and voluntary workers (persons working on a voluntary basis, sometimes for a very small remuneration) are not covered by the social security system; since a high proportion of such workers are women, this situation in the atypical work sector deserves special attention. The government report considers that, as employed persons, temporary workers are covered by the general social security system. It finds that the situation of "voluntary workers" is different because they are (or may be) covered by a less favourable scheme (voluntary social insurance).

b) Increments for dependent spouses

Employees and self-employed persons receive an increased benefit for dependent spouses without discrimination on grounds of sex.

However, in practice, it is usually the man who receives the extra payment. Under the Basic Social Security Act, the Portuguese government is planning to get rid of this additional payment and reassess the basis for calculating pensions.

c) Head of household concept

This concept has been abolished by the Portuguese Constitution.

d) The level of survivors' pensions (widows' and widowers' pensions) to which the spouses of employees and self-employed persons may be entitled is lower than the amount paid to the deceased pension holders. However, the sum of the pensions paid to all the survivors may sometimes be equal to the amount of the pension received by the deceased pension holder.

## 2.3 Part-time work

- a) Percentage of men and women in part-time work based on figures in table below (in '000).

	Total	Women	Men
Number of persons in active employment	4 190.1	1 722.2	2 467.8
Number of persons whose weekly hours of work are less than normal	157.3	99.2	58.1
of which:			
persons working less than 20 hours per week	52.4	35.3	17.0
persons working more than 20 hours per week	104.9	63.9	41.1

Source: INE employment survey

Thus, 5.7% of women and 2.3% of men in the Portuguese workforce are in part-time employment.

- b) Social security coverage and benefits

In the case of employees and self-employed persons, the statutory social security schemes provide the same coverage for part-time workers as for full-time workers.

However, the benefits paid when a social risk occurs are calculated on the basis of the pay actually received. The level of these benefits is therefore lower than that provided for full-time workers.

Part-time work is not very common in Portugal, where it involves only 3.7% of the working population. However, 63% of those in part-time work are women and 37% men; the higher percentage for women applies whether the number of hours worked is above or below 20 hours per week.

In the case of civil servants and public employees, the scheme covering half-time work maintains entitlement to social security benefits. The two schemes for part-time workers expressly define the benefits to which officials may be entitled.



- c) Benefits for part-time workers are not based on proportionality although the level of some benefits may vary because they are calculated on the basis of the worker's average pay.

A non-governmental report<sup>7</sup> has found that a large number of women work part-time and receive less social protection against unemployment than men. Existing schemes providing such protection are subject to conditions which are particularly difficult for women to fulfil because, in many cases, they work at home or under a fixed-term contract, have little job security and do work which is less skilled and less well-paid. Apart from the specific question of discrimination, this is a more general sociological problem which deserves closer examination.

- d) Benefits are paid for the same period as that applicable to full-time workers.

### **3 RIGHT TO APPLY TO THE COURTS**

- a) According to the nature of the dispute, workers have a right to institute administrative proceedings and bring civil actions before administrative and civil courts.
- b) The right of remedy can only be exercised by the individual in whom rights are directly, personally and lawfully vested.
- c) No organisation may bring an action on behalf of an injured party<sup>8</sup>.

### **4 EXCLUSION FROM THE SCOPE OF THE DIRECTIVE UNDER THE TERMS OF ARTICLE 7(1)**

#### **4.1. Matters excluded**

The Portuguese government recently adopted new legal provisions aimed at progressively equalising the pensionable age for both sexes.

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<sup>7</sup> Report by the Commission's network of independent experts on the application of the equal opportunities directives.

<sup>8</sup> The Code of Administrative Procedure which came into force in May 1992 permits organisations to act on behalf of injured parties.

#### **4.2. Retirement age**

From 1999 onwards, the age at which retirement pensions are paid to employees and self-employed persons will be 65 for both sexes.

#### **4.3. Benefits for persons who have brought up children**

The right to a two-year special study leave may be exercised by the father or mother. This leave is treated as a period of work when calculating old-age and invalidity benefits.

Maternity or paternity leave is treated as an insurance period.

#### **4.4. Derived entitlements of wives**

Portuguese law makes no provision for the derived entitlements of wives to old-age and invalidity benefits.

#### **4.5. Increments for dependent spouses**

Portuguese law provided for such additional payments until 1993. Under Decree-Law No 328/93 of 25 September 1993, however, these increments were abolished except for persons who were already receiving them; the latter continue to enjoy this right (Article 100 of the decree-law).

### **SECTION III CONCLUSIONS**

#### **I. Transposition into national law**

Implementation of the Directive poses certain problems. This is due in part to the number of amendments which Member States must make to their own legislation to bring it into line with the Directive and, in part, to the various problems of interpretation that exist and the strict limits placed on the scope of the Directive.

Neither Spain nor Portugal have had to make major changes to their respective legal systems since both their constitutions already contain the principle of equal treatment for men and women.

Significant progress has already been made but further efforts are needed.

## II. Direct discrimination

This report lists in some detail the changes which Member States have made to their legal provisions in order to eliminate direct discrimination. Subject to certain constraints, it attempts to assess to what extent these provisions are in line with the Directive.

To a large extent, Spain had already carried out the measures introduced in the Directive. In 1978 it adopted a new Constitution which proclaimed the principle of equal treatment for men and women. Most of the Spanish social security legislation was already in line with the Constitution. However, on 1 January 1986, when Spain joined the European Community, certain inconsistencies remained. For example, the scale of benefits paid to persons who were permanently incapable of work\* but were not disabled made a distinction between men and women. This example of direct discrimination was removed by an ordinance of 1 May 1988, which has retroactive effect to the date on which the Directive was implemented in Spain and Portugal (1 January 1986). Direct discrimination therefore seems to have been eliminated, except perhaps in the case of differences between men and women in the special Spanish scheme for domestic workers.

Portugal, too, has recently adopted a new Constitution which recognises the equality of all before the law and, notably, in social security matters. However, Portuguese legislation in 1986 still provided for direct discrimination between men and women, mainly to the advantage of women. For example, the conditions under which survivors' pensions were paid to the surviving spouse of a person in receipt of an old-age or invalidity pension or of someone who had died following an accident at work or an occupational disease were more restrictive for men than for women.

Since 1986 certain specific changes have been made to Portuguese legislation. Thus, Decree-Law No 322 of 18 October 1990 provided for equal treatment in respect of survivors' pensions. The discriminatory provisions concerning accidents at work and occupational diseases were declared to be unconstitutional and have therefore been removed. Decree-Law No 79-A of 13 March 1989 reorganised the scheme for the protection of unemployed persons by making it easier to obtain the various benefits, especially for part-time workers.

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\* Translator's note:  
Presumably this means "work in their habitual occupation"

The Commission would point out that, according to the decisions of the Court of Justice<sup>9</sup>, individuals may challenge the implementation of incompatible legislation under Article 4 of the Directive, which is directly applicable.

### III. Indirect discrimination

The Directive does not define indirect discrimination but stipulates, in Article 4, that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly.

The Commission has attempted to give this concept a more precise meaning. It has taken the view that a presumption of indirect discrimination exists when, in practice, an ostensibly neutral measure mainly affects workers of one sex. It is up to the author of the discriminatory measure to prove that there was no intention to discriminate and that the measure is objectively justified.

An examination of the replies from the governments concerned indicates that Spain and Portugal have no definition of indirect discrimination in their national legal systems.

The problem of indirect discrimination is often raised in connection with benefits relating to the concept of "head of household", increments for dependent spouses and, finally, part-time work.

Although the "head of household" concept is applicable to both sexes in Spain, the government acknowledges that in practice it is usually the man who is recognised as the beneficiary but denies that this must lead to a presumption of indirect discrimination. As regards increments for dependent spouses, these are not only granted irrespective of the sex of the spouse but may be regarded in many cases as a means of guaranteeing a minimum income for the recipient household.

As regards part-time work, where women are well represented, there are two cases in which indirect discrimination against women may arise. The first concerns the special scheme for domestic workers and the entitlement to a cash benefit for temporary work incapacity from the 29th day following the commencement of the sickness (under the general scheme, this benefit is paid from the fourth day onwards). (In Portugal, sickness benefit is paid after three days have gone by). The second example concerns the basis for calculating contributions in respect of part-time workers.

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<sup>9</sup> Judgment of 4.12.86 (Case 7/85 *FNI*), confirmed by the judgments of 24.03.87 (Case 286/85 *McDermott and Cotter*) and of 24.06.87 (Case 385/85 *Borrie Clarke*) and by all the relevant judgments in subsequent cases, in particular the judgments of 8.05.88 (Case 80/87 *Dick*), of 11.06.87 (Case 30/85 *Teuling*), of 13.12.89 (Case 102/88 *Ruzius-Wilbrink*), of 21.11.90 (Case 373/89 *Caisse d'Assurances sociales pour Travailleurs Indépendants "Integrity" v Rouvroy*), of 13.03.91 (Case 377/89 *McDermott and Cotter 2*), of 11.07.91 (Case 31/90 *Johnson*), of 20.07.91 (Case 208/90 *Emmott*), of 19.11.92 (Case C-226/91 *Molenbroek*), of 30.3.93 (Case C-328/91 *Thomas and Others*), and of 1.07.93 (Case C-154/92 *Van Cant*).

Portuguese law has made considerable progress and the controversial notion of "head of household" has been done away with. As for part-time work, certain inequalities appear to exist. The social protection provided for part-time workers is the same as that for full-time workers although certain gaps have been identified<sup>10</sup>, in particular as regards the conditions for granting unemployment assistance and the lower rate for certain benefits. These gaps suggest there is a lower level of social protection and a presumption of indirect discrimination as it is mainly women who are in part-time work, which is less well paid, less skilled and has less job security.

A non-governmental report<sup>11</sup> draws attention to an example of indirect discrimination in the civil service, where temporary employees are excluded from statutory social security schemes, pointing out that most of the workers involved are women.

However, it should be pointed out that where there is a presumption of indirect discrimination in that one sex is more affected than the other by an ostensibly neutral measure, such differing treatment might be tolerated under Community law if the measure in question, by any objective criteria, is not intended to discriminate.

#### **IV. Right to apply to the courts**

In Spain and Portugal, the right of remedy, which already existed in the national legal systems before the Directive came into force, is an individual right exercised before ordinary courts by the injured party concerned, who cannot be represented by trade unions or employers' organisations.

#### **Exclusions**

The Directive allows Member States to exclude certain matters from its scope.

Spain has not exercised this option as it considers that the matters which can be excluded do not, in Spanish law, involve discrimination on grounds of sex.

Portugal has amended its legislation. Thus, Decree-Law No 329 of 25 September 1993 stipulates that men and women are to receive old-age and retirement pensions at the same age, i.e. 65. As the previous legislation laid down a different pensionable age for each sex (62 for men, 65 for women), this equalisation will take place in stages. Women's pensionable age will be raised by six months each year, reaching equality by 1999.

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<sup>10</sup> Report by the Commission's network of independent experts on the application of the equal opportunities directives.

<sup>11</sup> Report by the Commission's network of independent experts on the application of the equal opportunities directives.

## Conclusions

On the basis of the information collected, it would appear that Spain and Portugal have carried out a detailed study of the legislation that comes within the scope of Directive 79/7/EEC.

The transposition of the Directive into national law has enabled **most** instances of direct discrimination to be eliminated in both countries to a satisfactory extent.

As regards indirect discrimination, various provisions in both countries have to be improved or removed.

In this vein, the Commission will focus its attention on the elimination of indirect discrimination, initiating where appropriate infringement proceedings against Member States which unjustifiably maintain discrimination of this kind. In addition, it will support and encourage measures taken by and in the Member States to educate, inform and advise the population concerned.

Finally, the Commission wishes to point out that Directive 79/7/EEC is only an initial stage in the implementation of the principle of equal treatment in matters of social security. A second stage was completed with the adoption of Directive 86/378/EEC, which extends this principle to occupational schemes. A further step was taken with the adoption of Directive 86/613/EEC, which concerns the implementation of the principle of equal treatment for men and women for certain categories of self-employed workers. Finally, in the last stage, a proposal for a directive (COM (87) 494 final) of 23 October 1987, which is still being discussed, complements the two earlier directives with a view to remedying shortcomings and completing the programme for equal treatment of men and women in the social security field. This proposal is still under consideration by the Council despite the favourable opinions of the Parliament and the Economic and Social Committee, since various Member States have problems in adopting it given that it deals with such complex matters as retirement age and survivors' benefits.

Nonetheless, in view of changes in family and social structures and in case law concerning occupational social security schemes<sup>12</sup>, it is high time that shortcomings in

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<sup>12</sup> In its judgment of 17 May 1990 in Case 262/88 *Barber* and in subsequent interpreting judgments, the Court confirmed that benefits granted under occupational social security schemes fall within the concept of pay for the purposes of Article 119 of the Treaty. As a result, derogations from Directive 86/378 concerning the principle of equal treatment are rendered invalid for employed persons. That is why the 1987 proposal [Proposal for a Council 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, 23.10.1987; OJ No C 309, 19.11.1987, p. 10] should be targeted at shortcomings in statutory schemes and, in the case of occupational schemes, only at shortcomings in schemes for the self-employed. It should be noted that, on 16 May 1995, the Commission presented a proposal for a Directive amending Directive 86/378 to bring it into line with Article 119 of the Treaty as interpreted by the Court of Justice in the above-mentioned judgments [COM(95) 186].

respect of equal treatment for social protection purposes were remedied, thus completing the process started in 1978.

For this purpose, reference must be made to the Community Charter of the Fundamental Social Rights of Workers (point 16) and the third medium-term equal opportunities programme (1991-1995), that provides for the development of equal opportunities in the social protection field; there is still a great deal for Member States to do in order to bring about full legal equality in this area.

The Parliament resolution of 14 December 1991 and the own-initiative report (the Oomen-Ruijten report) reinforce this view.

Finally, the Treaty on European Union contains various provisions relating to the social field and equality between men and women. The Treaty establishing the European Community now contains a protocol (No 14) on social policy whereby eleven Member States adopted an agreement on social policy which opens up new prospects. Article 2 of this agreement provides that the Community shall support and complement the activities of the Member States in various areas, including equality between men and women with regard to labour market opportunities and treatment at work.

The European Union must continue its work to implement the principle of equal treatment for men and women, in particular as regards social protection, and must ensure that a fundamental principle of Community law is transposed into positive law.

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