International Labour Review, Vol. 125, No. 6, November-December 1986

The elimination of sex discrimination in occupational social security schemes in the EEC

André LAURENT *

On 24 July 1986 the Council of Ministers of the European Communities adopted a Directive on the implementation of the principle of equal treatment for men and women in occupational social security schemes.[1] This Directive adds another element to the body of European Community law which, in matters of equal treatment for men and women, already includes a 1978 Directive relating to statutory social security schemes,[2] and which we described in an earlier article in the *Review*.[3]

The new Directive can be regarded as a "first" in several respects. It is the first time that international social security standards have been specifically devised for private sector schemes. The schemes in question – which are sometimes called "supplementary" – fall midway between statutory social security schemes and purely individual insurance contracts, and include, for example, company schemes, group insurance contracts proposed by the employer to his workers, and schemes based on collective agreements. Their purpose generally is to supplement the retirement pensions provided by the statutory schemes but they are sometimes intended to supplement sickness, unemployment, invalidity or survivors' benefits as well.

These numerous supplementary social security arrangements, which offer an extensive range of benefits beyond the scope of statutory schemes, have only recently begun to form the subject of national legal standards. There is nothing surprising, therefore, about the fact that at the international level, although they have not been ignored in the specialised literature,[4] occupational schemes have not hitherto been the subject of standard-setting instruments devoted solely to them.[5]

The new Directive is also innovative because of the angle from which it approaches occupational schemes. This angle may seem at first sight to be rather narrow since the Directive focuses solely on equal social security treatment for men and women. But in fact it applies to these schemes a very broad interpretation of the notion of equal pay, as defined in Article 1 of the

* The author was for many years in charge of social security matters at the Commission of the European Communities.

ILO's Equal Remuneration Convention, 1951 (No. 100), and reproduced almost word for word in Article 119 of the Treaty of Rome establishing the European Economic Community. In other words, the new Directive accords the notion of equal pay its full dimensions, recognising rightly that remuneration is not limited to wages or salaries in the strict sense but includes "any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer". To be sure, the application of these criteria to occupational schemes is not new in the field of doctrinal or jurisprudential interpretation: indeed the competent committee of the International Labour Conference had already adopted this point of view as long ago as 1950.[6] What is new is the desire to draw from this interpretation all its legal inferences and translate them into international standards, in this case into Community law.

1. Scope and content of the Directive

The schemes covered

Article 2 of the Directive contains a definition of occupational schemes:

> "Occupational social security schemes" means schemes not governed by Directive 79/7/EEC [of 1978] 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.

It makes no difference whether the schemes are compulsory or optional, whereas the 1978 Directive, it should be recalled, governs statutory social security schemes only.

This definition is sufficiently broad to apply to a variety of schemes such as:

- schemes based on collective agreements between employers' and workers' representatives and covering an enterprise, an industry or several industries;
- company schemes set up or provided for unilaterally by the employer for his employees or certain categories of them, whether he sets aside specific reserve funds for this purpose, comes to an arrangement with an insurance company (group insurance, for example), or finances the benefits out of his overall personnel expenditures;
- schemes set up by representatives of an occupation or profession not earning a wage or salary (self-employed craftsmen, private doctors, barristers, etc.).

On the other hand, it rules out anything in the nature of a purely individual initiative. This is why article 2 stipulates that the Directive does not apply to individual contracts, or contracts concluded by a group of workers with an insurance company to which the employer is not a party. It

also excludes 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.

The Directive applies specifically to occupational schemes which provide protection against sickness, invalidity, old age (including early retirement), industrial accidents, occupational diseases and unemployment (article 4). This exhaustive list of contingencies, taken from the 1978 Directive on statutory schemes, is in reality limited to schemes for non-wage-earners since the Directive also applies to occupational schemes which provide for other social security benefits, 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". This is a concrete example of the broad interpretation of the notion of equal pay. When one considers that the vast majority of occupational schemes concern wage earners it can be concluded that in most cases the material scope of the Directive will include the whole spectrum of social security benefits.

Discriminatory provisions prohibited

The Directive prohibits any discrimination based on sex, either directly or indirectly, in particular by reference to marital or family status (article 5). A prohibition that was already applicable to statutory social security schemes (article 4 of the 1978 Directive) has thus been extended to occupational schemes. However, in the new Directive the principle set forth in the above terms is spelt out even more clearly in a list of specifically prohibited provisions (article 6). This list is based on the principal inequalities observed in existing occupational schemes.[3]

The provisons specifically prohibited are those that make a distinction between the sexes for the purpose of:

- determining the persons who may participate in an occupational scheme;
- fixing the compulsory or optional nature of participation in an occupational scheme;
- 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 benefits;
- laying 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;
- setting different conditions for the granting of benefits or restricting such benefits to workers of one sex;
- fixing different retirement ages;

- 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;
- laying down different standards or standards applicable only to workers of one sex as regards the guarantee or retention of entitlement to deferred benefits when a worker leaves a scheme.

Finally, the Directive prohibits provisions setting different levels of benefit or contribution according to the worker's sex. This prohibition, however, had to be qualified to take account of a situation not encountered in the statutory schemes: the use of actuarial data to calculate individual benefits or contributions. The solution adopted consists in distinguishing two types of schemes: those that specify from the outset the level of future benefit (for example, a fixed percentage of the wage) and those that are based on the capitalisation of fixed-rate contributions. In the first type it is forbidden to set different levels of benefit for men and women workers. However, the employer's contributions can be set at different levels to take account, in the case of old-age pensions for example, of the different life expectancy of men and women. In the second type of schemes the opposite applies: the employers' contributions must be identical for all employed personnel (men and women) but the conversion of the accumulated capital into a pension (in the case of retirement for example) can take account of the different life expectancy of men and women. In both types the use of actuarial data in calculating the contributions required of the workers is prohibited. It should be noted that the allowance made for life expectancy in the case of old-age pensions also holds good for morbidity and mortality rates in the case of sickness, invalidity and survivors' benefits.

Discriminatory provisions must be removed from occupational schemes by 1 January 1993 at the latest, and in the meantime member States must enact the necessary laws and regulations (in principle by 30 July 1989). Nevertheless, they may (and this is important) defer application of the Directive with regard to the determination of pensionable age and survivors' pensions until a new Directive requires equality on these matters (article 9). Similarly, the ban on the use of actuarial data in calculating both male and female employees' contributions is deferred for 13 years, that is virtually until the year 2000.

3. What has the Directive achieved?

A step towards equal treatment

At the beginning of this article we drew attention to the links between the new Directive and the 1978 Directive on statutory social security schemes. However, as we have just seen, the new Directive goes on to refer to a future Directive for regulating certain problems that have been left in abeyance. Seen in this perspective, it appears much less as a complete and self-sufficient set of

regulations than as one of the links in a chain, of which the earlier Directives on equal pay and on equal treatment in employment and working conditions also form part.[7] With each step the principle of equal treatment is extended to a new field according to a programme that has been systematically pursued by the European Commission over the past ten years or so.

It has to be recognised, however, that the new link is not as solid as one might have hoped. Where the Commission proposed excluding only individual insurance contracts from the scope of the Directive, the Council has also excluded the optional provisions of occupational schemes offered to participants individually. The logic of the Commission's thinking is clear: individual insurance contracts cannot be described as social security. Does the same apply to the individual options offered in occupational schemes? We have our doubts. Similarly, the Commission had suggested that the application of the provisions concerning equal treatment in respect of retirement age or pensions for surviving spouses might be deferred only in those States where such equality was not achieved in the statutory schemes. This again was logical given the close links between statutory benefits and supplementary occupational benefits; but the Council decided instead in favour of a general deferral to a future Directive. Finally, the compromise reached on the use of actuarial data strongly resembles a damp squib: we shall return to this point below. All in all, these various dilutions of the original proposals will have the effect of deadening some of the expected impact of the Directive, and even most of it in member States where all is in order as regards the other obligations of the Directive either, as in France, because the supplementary schemes were set up on an egalitarian basis to start with or, as in the United Kingdom, because the statute book already contains provisions designed to correct certain inequalities.

Even so, the Directive should result in eliminating a good many existing discriminatory provisions since those in charge of these schemes will be obliged to make the necessary modifications and workers will be afforded the legal means to assert their rights without fear of possible dismissal. It is not to be written off because agreement was not reached on a few matters. The important point is that the Council did in fact adopt the majority of the Commission's proposals. Moreover, some of the shortcomings of the Directive will be made good by supplementary provisions already envisaged for a future Directive, which confirms what we said above about seeing Community initiatives on equal treatment as links in a steadily lengthening chain. Finally, the case law of the European Court of Justice could do much to strengthen the Directive by declaring that certain provisions hitherto in dispute are now clearly contrary to the principle of equal pay.

A step towards equal pay

As we have seen, the principle of equal pay extends beyond the ordinary wage or salary to "any other consideration, whether in cash or in kind, which

the worker receives, directly or indirectly, in respect of his employment from his employer". The restatement of this principle in the preamble to a Directive concerning occupational social security schemes at once casts these schemes in a particular light. It boils down to official acceptance of the idea that the benefits provided under these schemes constitute "considerations" forming part of a person's pay. The idea is reaffirmed, moreover, in the operative part when referring to the benefits taken into account in the occupational schemes for employed persons (article 4 *(b)*).

This is undoubtedly the first time that standards – and international standards at that – apply to occupational schemes an interpretation that considers their benefits to be an integral part of pay. The result is that from now on the benefits (and the contributions that go to finance them) will have to be treated like wages from the standpoint of equal treatment.

This interpretation has taken some time to gain acceptance. During the preparation of ILO Convention No. 100 in 1951,

> the competent Conference Committee noted that allowances paid under social security schemes financed by the undertaking or industry concerned were part of the system of remuneration in the undertaking and were one of the elements making up wages in respect of which there should be no discrimination based on sex. On the other hand, allowances made under a public system of social security were not to be considered as part of remuneration and an amendment to add all social security benefits to the items included in remuneration was withdrawn after having been opposed on the ground that in certain countries social security benefits did not form part of remuneration. It thus appears that a distinction was made between social security schemes financed by the employer or industry concerned – which were meant to be covered by the Convention – and benefits under "purely" public social security schemes which were considered outside its scope.[8]

While this view had never been invalidated, it had also never really been confirmed. In the Community, for example, although the Court of Justice has been asked on several occasions for a ruling on the question, in both the Defrenne case[9] and the Worringham and Humphreys case[10] it refrained from adopting an explicit position.[3] It was only quite recently – and, by happy coincidence, only a couple of months before the Council's adoption of the Directive – that the Court finally held, in the Bilka-Kaufhaus case,[11] that the company pensions scheme in question was not a social security scheme directly governed by the law and that consequently the benefits paid to the employees constituted a "consideration" received by the worker in respect of his employment from his employer, in accordance with Article 119 of the Treaty of Rome.

The new Directive looks therefore, albeit by chance, like a direct application of the Court's interpretation. On the other hand, however, must we not now ask ourselves whether this development in case law has rendered the Directive superfluous since the Court after all accepts that Article 119 applies directly to occupational schemes? Put this way the question is fairly easy to answer. The Directive remains relevant because it will have a far wider impact than that of isolated Court decisions: it will oblige all schemes

under the control of the member States to revise any discriminatory provisions in accordance with precise and identical rules. Besides, Article 119 is only really applicable to cases of direct and open discrimination. Turning the question round, it might be asked whether the existence of the Directive makes recourse to Article 119 superfluous as a legal basis for challenging discriminatory provisions. There are grounds for believing that it will do nothing of the sort and that the Court will continue to rule on the direct applicability of Article 119, at least with reference to direct and open discrimination, especially until such time as the Directive is fully implemented. The question becomes all the more important when one considers that the Directive contains, as we have seen, certain provisions which might lead to requests for Court rulings on their conformity with the principle of equal pay. The solution adopted to settle the question of actuarial data is a case in point.

A step towards equality in actuarial calculations

All schemes, whether statutory or occupational, public or private, must take account of the characteristics of the populations they protect in order to determine the total cost of the risks they are meant to cover and the ways of financing them. In other words, they must take into account actuarial or other calculation factors relating to morbidity, mortality, life expectancy, etc. But must these factors necessarily affect the amount of individual benefits or contributions? In the case of statutory schemes the answer is clearly negative since all beneficiaries receive the same pensions and pay the same contributions whatever their personal characteristics. This does not happen, however, in the occupational schemes based on capitalisation where actuarial data affect the calculation either of the benefit or of the contribution – and even this statement needs to be qualified since in practice the only factor that accounts for differences in the calculations is the sex of the beneficiary.

This last point had led the Commission to propose abandoning this practice, considering that provisions establishing sex-differentiated calculations of benefits and contributions were contrary to the principle of equal treatment. The Commission presented a number of arguments in support of its proposal:

- there are very marked differences in life expectancy between various categories of male workers: if this factor is not generally taken into account in the calculations, the Commission saw no reason why it should be permitted solely in the case of women workers;
- women's life expectancy is estimated statistically for the entire female population; but the female labour force constitutes only a minority of that population and there is every reason to suppose that the life expectancy of working women is not identical with the general average;

- there are marked differences between individual life expectancy and the statistical life expectancy of the group; and the Directive is concerned with individual rights and not populations as such;
- occupational schemes certainly do not all make the same actuarial distinctions; even among those which use the system of capitalisation, one finds some that no longer differentiate between men and women in regard to life expectancy.

The same arguments can obviously be invoked against the use of other actuarial calculation factors as well. Consequently, the Commission recommended that the approach of pooling individual risks which is used in the statutory and some occupational schemes should be extended to all schemes.

This proposal received the backing of the majority in the European Parliament and the Economic and Social Committee. It found further support in a ruling later handed down by the Supreme Court of the United States. In the case of Arizona v. Norris[12] the Court decided that "an individual woman may not be paid lower monthly benefits simply because women as a class live longer than men". It held that "sex-based actuarial tables constitute discrimination", and noted that "sex is the only factor that the tables use to classify individuals of the same age; the tables do not incorporate other factors correlating with longevity such as smoking habits, alcohol consumption, weight, medical history or family history".

Nothing could be clearer. Nevertheless, the Council lacked the will, or the courage, to follow up the proposal which had been submitted to it. It was perhaps reluctant to overturn the habits and practices of the occupational schemes, preferring to settle for a compromise of which the Netherlands and the United Kingdom were the principal architects. The least one can say about this formula is that it does not prohibit all use of actuarial data based on sex.

Consequently, the Commission considered itself obliged to express, in a statement written into the minutes of the Council meeting at which the Directive was approved, serious reservations, from the standpoint of the principle of equal treatment, about the solution adopted. It was a way of reaffirming its own conviction and leaving the door open for a possible re-examination of the question in the future. In the last analysis, the only real breach that will have been made in the wall of actuarial discrimination relates to the fixing of workers' contributions (but not for another 13 years).

3. Conclusions

With the adoption of this Directive on equal treatment in occupational social security schemes Community law has not only advanced the cause of equality between the sexes; it has also formally recognised both the existence of such schemes and the need, taking a broader view of social security than the traditional one, for them to be governed, as are the statutory schemes, by legal standards. The formal acceptance of a more precise interpretation of

the concept of pay should pave the way for the necessary legislative and judicial action.

It is to be hoped that the forces thus set in motion will also have an impact on the work of other international institutions. As a prime mover in the development of legal standards in social and labour matters, the International Labour Organisation would seem to be the natural forum for promoting such initiatives, either in pursuance of Convention No. 100 or when preparing new legal instruments relating, in particular, to equal treatment in social security.

In a field where Community law is still playing a pioneering role, one can only hope that the work so far accomplished will be taken up by other countries, and that they will take a cue from its strong points to make good its weaknesses.

Notes

[1] Council Directive 86/378/EEC, in *Official Journal of the European Communities (OJ)*, No. L 225/40, 12 Aug. 1986.

[2] Council Directive of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (79/7/EEC), in *OJ*, No. L 6/24, 10 Jan. 1979.

[3] A. Laurent: "European Community law and equal treatment for men and women in social security", in *International Labour Review*, July-Aug. 1982, pp. 373-385.

[4] The International Labour Office, the International Social Security Association and the Commission of the European Communities, in particular, have published studies on this subject. The European Institute for Social Security held a symposium on it in 1973. See also G. Tamburi and P. Mouton: "The uncertain frontier between private and public pension schemes", in *International Labour Review*, Mar.-Apr. 1986, pp. 127-140.

[5] It should be pointed out that, according to the ILO's social security Conventions and the European Code of Social Security of the Council of Europe, for the purposes of compliance with the standards of these instruments account is taken of supplementary protection provided by means of non-compulsory schemes (cf. Article 6 of the Social Security (Minimum Standards) Convention, 1952 (No. 102), Article 6 of the Invalidity, Old-Age and Survivors' Benefits Convention, 1967 (No. 128), and Article 6 of the European Code of Social Security, 1964).

[6] ILO: *Equal remuneration for men and women workers for work of equal value*, Report VII (1), International Labour Conference, 34th Session, Geneva, 1951, p. 16.

[7] Council Directive 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 (75/117/EEC), in *OJ*, No. L 45/19, 19 Feb. 1975; and Council Directive 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 (76/207/EEC), ibid., No. L 39/40, 14 Feb. 1976.

[8] See ILO: *Equal remuneration*, General survey by the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 4 B), International Labour Conference, 72nd Session, Geneva, 1986, para. 17.

[9] *Reports of cases before the Court of Justice* (Luxembourg, Office for Official Publications of the European Communities), 1971, Case 80/70, pp. 445-454.

[10] ibid., 1981, Case 69/80, pp. 767-795.

[11] ibid. (forthcoming), Case 170/84, 13 May 1986.

[12] *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans, etc., et al. v. Norris, etc.*, 103 S.Ct. 3492 (1983).