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COUNCIL DIRECTIVE 96/97/EC

of 20 December 1996

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

(OJ L 46, 17.2.1997, p. 20)

Corrected by:

►**C1** Corrigendum, OJ L 151, 18.6.1999, p. 39 (96/97)

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COUNCIL DIRECTIVE 96/97/EC

of 20 December 1996

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

THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the Commission [1],

Having regard to the opinion of the European Parliament [2],

Having regard to the opinion of the Economic and Social Committee [3],

Whereas Article 119 of the Treaty provides that each Member State shall ensure the application of the principle that men and women should receive equal pay for equal work; whereas 'pay' should be taken to mean the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, from his employer in respect of his employment;

Whereas, in its judgement of 17 May 1990, in Case 262/88: Barber v. Guardian Royal Exchange Assurance Group [4], the Court of Justice of the European Communities acknowledges that all forms of occupational pension constitute an element of pay within the meaning of Article 119 of the Treaty;

Whereas, in the abovementioned judgment, as clarified by the judgment of 14 December 1993 (Case C-110/91: Moroni v. Collo GmbH) [5], the Court interprets Article 119 of the Treaty in such a way that discrimination between men and women in occupational social security schemes is prohibited in general and not only in respect of establishing the age of entitlement to a pension or when an occupational pension is offered by way of compensation for compulsory retirement on economic grounds;

Whereas, in accordance with Protocol 2 concerning Article 119 of the Treaty annexed to the Treaty establishing the European Community, benefits under occupational social security schemes shall not be considered as remuneration if and in so far as they are attributable to periods of employment prior to 17 May 1990, except in the case of workers or those claiming under them who have, before that date, initiated legal proceedings or raised an equivalent claim under the applicable national law;

Whereas, in its judgments of 28 September 1994 [6] (Case C-57/93: Vroege v. NCIV Instituut voor Volkshuisvesting BV and Case C-128/93: Fisscher v. Voorhuis Hengelo BV), the Court ruled that the abovementioned Protocol did not affect the right to join an occupational pension scheme, which continues to be governed by the judgment of 13 May 1986 in Case 170/84: Bilka-Kaufhaus GmbH v. Hartz [7], and that the limitation of the effects in time of the judgment of 17 May 1990 in Case C-262/88: Barber v. Guardian Royal Exchange Assurance Group does not apply to the right to join an occupational pension scheme; whereas the Court also ruled that the national rules relating to time limits for bringing actions under national law may be relied on against workers who assert their right to join an occupational pension scheme, provided that they are not less favourable for that type of action than for similar actions of a domestic nature and that they do not render the

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[1] OJ No C 218, 23. 8. 1995, p. 5.
[2] Opinion delivered on 12 November 1996 (OJ No C 362, 2. 12. 1996).
[3] OJ No C 18, 22. 1. 1996, p. 132.
[4] [1990] ECR I-1889.
[5] [1993] ECR I-6591.
[6] [1994] ECR I-4541 and (1994) ECR I-4583, respectively.
[7] [1986] ECR I-1607.

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exercise of rights conferred by Community law impossible in practice; whereas the Court has also pointed out that the fact that a worker can claim retroactively to join an occupational pension scheme does not allow the worker to avoid paying the contributions relating to the period of membership concerned;

Whereas the exclusion of workers on the grounds of the nature of their work contracts from access to a company or sectorial social security scheme may constitute indirect discrimination against women;

Whereas, in its judgment of 9 November 1993 (Case C-132/92: Birds Eye Walls Ltd v. Friedel M. Roberts) ([1]), the Court has also specified that it is not contrary to Article 119 of the Treaty, when calculating the amount of a bridging pension which is paid by an employer to male and female employees who have taken early retirement on grounds of ill health and which is intended to compensate, in particular, for loss of income resulting from the fact that they have not yet reached the age required for payment of the State pension which they will subsequently receive and to reduce the amount of the bridging pension accordingly, even though, in the case of men and women aged between 60 and 65, the result is that a female ex-employee receives a smaller bridging pension than that paid to her male counterpart, the difference being equal to the amount of the State pension to which she is entitled as from the age of 60 in respect of the periods of service completed with that employer;

Whereas, in its judgment of 6 October 1993 (Case C-109/91: Ten Oever v. Stichting Bedrijfpensioenfonds voor het Glazenwassers- en Schoonmaakbedrijf) ([2]) and in its judgments of 14 December 1993 (Case C-110/91: Moroni v. Collo GmbH), 22 December 1993 (Case C-152/91: Neath v. Hugh Steeper Ltd) ([3]) and 28 September 1994 (Case C-200/91: Coloroll Pension Trustees Limited v. Russell and Others) ([4]), the Court confirms that, by virtue of the judgment of 17 May 1990 (Case C-262/88: Barber v. Guardian Royal Exchange Assurance Group), the direct effect of Article 119 of the Treaty may be relied on, for the purpose of claiming equal treatment in the matter of occupational pensions, only in relation to benefits payable in respect of periods of service subsequent to 17 May 1990, except in the case of workers or those claiming under them who have, before that date, initiated legal proceedings or raised an equivalent claim under the applicable national law;

Whereas, in its abovementioned judgments (Case C-109/91: Ten Oever v. Stichting Bedrijfpensioenfonds voor het Glazenwassers- en Schoonmaakbedrijf and Case C-200/91: Coloroll Pension Trustees Limited v. Russell and Others), the Court confirms that the limitation of the effects in time of the Barber judgment applies to survivors' pensions and, consequently, equal treatment in this matter may be claimed only in relation to periods of service subsequent to 17 May 1990, except in the case of those who have, before that date, initiated legal proceedings or raised an equivalent claim under the applicable national law;

Whereas, moreover, in its judgments in Case C-152/91 and Case C-200/91, the Court specifies that the contributions of male and female workers to a defined-benefit pension scheme must be the same, since they are covered by Article 119 of the Treaty, whereas inequality of employers' contributions paid under funded defined-benefit schemes, which is due to the use of actuarial factors differing according to sex, is not to be assessed in the light of that same provision;

Whereas, in its judgments of 28 September 1994 ([5]) (Case C-408/92: Smith v. Advel Systems and Case C-28/93: Van den Akker v. Stichting Shell Pensioenfonds), the Court points out that Article 119 of the Treaty precludes an employer who adopts measures necessary to comply with the Barber judgment of 17 May 1990 (C-262/88) from raising the

([1]) [1993] ECR I-5579.
([2]) [1993] ECR I-4879.
([3]) [1993] ECR I-6953.
([4]) [1994] ECR I-4389.
([5]) [1994] ECR I-4435 and [1994] ECR I-4527, respectively.