Chapter 2. - Equal treatment in occupational social security schemes

Article 5. Prohibition of discrimination

Without prejudice to Article 4, there shall be no direct or indirect discrimination on grounds of sex in occupational social security schemes, in particular as regards:

(a) the scope of such schemes and the conditions of access to them;

(b) the obligation to contribute and the calculation of contributions;

(c) the calculation of benefits, including supplementary benefits due in respect of a spouse or dependants, and the conditions governing the duration and retention of entitlement to benefits.

Article 6. Personal scope

This Chapter shall apply to members of the working population, including self-employed persons, persons whose activity is interrupted by illness, maternity, accident or involuntary unemployment and persons seeking employment and to retired and disabled workers, and to those claiming under them, in accordance with national law and/or practice.

Article 7. Material scope

1. This Chapter applies to:

(a) occupational social security schemes which provide protection against the following risks:

(i) sickness,

(ii) invalidity,

(iii) old age, including early retirement,

(iv) industrial accidents and occupational diseases,

(v) unemployment;

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

2. This Chapter also applies to pension schemes for a particular category of worker such as that of public servants if the benefits payable under the scheme are paid by reason of the employment relationship with the public employer. The fact that such a scheme forms part of a general statutory scheme shall be without prejudice in that respect.

Article 8. Exclusions from the material scope

1. This Chapter does not apply to:

(a) individual contracts for self-employed persons;

(b) single-member schemes for self-employed persons;

(c) insurance contracts to which the employer is not a party, in the case of workers;

(d) optional provisions of occupational social security schemes offered to participants individually to guarantee them:

(i) either additional benefits,

(ii) or a choice of date on which the normal benefits for self-employed persons will start, or a choice between several benefits;

(e) occupational social security schemes in so far as benefits are financed by contributions paid by workers on a voluntary basis.

2. This Chapter does not preclude an employer granting to persons who have already reached the retirement age for the purposes of granting a pension by virtue of an occupational social security scheme, but who have not yet reached the retirement age for the purposes of granting a statutory retirement pension, a pension supplement, the aim of which is to make equal or more nearly equal the overall amount of benefit paid to these persons in relation to the amount paid to persons of the other sex in the same situation who have already reached the statutory retirement age, until the persons benefiting from the supplement reach the statutory retirement age.

Article 9. Examples of discrimination

1. Provisions contrary to the principle of equal treatment shall include those based on sex, either directly or indirectly, for:

(a) determining the persons who may participate in an occupational social security scheme;

(b) fixing the compulsory or optional nature of participation in an occupational social security scheme;

(c) laying down different rules as regards the age of entry into the scheme or the minimum period of employment or membership of the scheme required to obtain the benefits thereof;

(d) laying down different rules, except as provided for in points

(h) and (j), for the reimbursement of contributions when a worker leaves a scheme without having fulfilled the conditions guaranteeing a deferred right to long-term benefits;

(e) setting different conditions for the granting of benefits or restricting such benefits to workers of one or other of the sexes;

(f) fixing different retirement ages;

(g) suspending the retention or acquisition of rights during periods of maternity leave or leave for family reasons which are granted by law or agreement and are paid by the employer;

(h) setting different levels of benefit, except in so far as may be necessary to take account of actuarial calculation factors which differ according to sex in the case of definedcontribution schemes; in the case of funded defined-benefit schemes, certain elements may be unequal where the inequality of the amounts results from the effects of the use of actuarial factors differing according to sex at the time when the scheme's funding is implemented;

(i) setting different levels for workers' contributions;

(j) setting different levels for employers' contributions, except:

(i) in the case of defined-contribution schemes if the aim is to equalise the amount of the final benefits or to make them more nearly equal for both sexes,

(ii) in the case of funded defined-benefit schemes where the employer's contributions are intended to ensure the adequacy of the funds necessary to cover the cost of the benefits defined;

(k) laying down different standards or standards applicable only to workers of a specified sex, except as provided for in points (h) and (j), as regards the guarantee or retention of entitlement to deferred benefits when a worker leaves a scheme.

2. Where the granting of benefits within the scope of this Chapter is left to the discretion of the scheme's management bodies, the latter shall comply with the principle of equal treatment.

Article 10. Implementation as regards self-employed persons

1. Member States shall take the necessary steps to ensure that the provisions of occupational social security schemes for selfemployed persons contrary to the principle of equal treatment are revised with effect from 1 January 1993 at the latest or for Member States whose accession took place after that date, at the date that Directive 86/378/EEC became applicable in their territory.

2. This Chapter shall not preclude rights and obligations relating to a period of membership of an occupational social security scheme for self-employed persons prior to revision of that scheme from remaining subject to the provisions of the scheme in force during that period.

Article 11. Possibility of deferral as regards self-employed persons

As regards occupational social security schemes for selfemployed persons, Member States may defer compulsory application of the principle of equal treatment with regard to:

(a) determination of pensionable age for the granting of oldage or retirement pensions, and the possible implications for other benefits:

(i) either until the date on which such equality is achieved in statutory schemes,

(ii) or, at the latest, until such equality is prescribed by a directive;

(b) survivors' pensions until Community law establishes the principle of equal treatment in statutory social security schemes in that regard;

(c) the application of Article 9(1)(i) in relation to the use of actuarial calculation factors, until 1 January 1999 or for Member States whose accession took place after that date until the date that Directive 86/378/EEC became applicable in their territory.

Article 12. Retroactive effect

1. Any measure implementing this Chapter, as regards workers, shall cover all benefits under occupational social security schemes derived from periods of employment subsequent to 17 May 1990 and shall apply retroactively to that date, without prejudice to workers or those claiming under them who have, before that date, initiated legal proceedings or raised an equivalent claim under national law. In that event, the implementation measures shall apply retroactively to 8 April 1976 and shall cover all the benefits derived from periods of employment after that date. For Member States which acceded to the Community after 8 April 1976, and before 17 May 1990, that date shall be replaced by the date on which Article 141 of the Treaty became applicable in their territory.

2. The second sentence of paragraph 1 shall not prevent national rules relating to time limits for bringing actions under national law from being relied on against workers or those claiming under them who initiated legal proceedings or raised an equivalent claim under national law before 17 May 1990, provided that they are not less favourable for that type of action than for similar actions of a domestic nature and that they do not render the exercise of rights conferred by Community law impossible in practice.

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3. For Member States whose accession took place after 17 May 1990 and which were on 1 January 1994 Contracting Parties to the Agreement on the European Economic Area, the date of 17 May 1990 in the first sentence of paragraph 1 shall be replaced by 1 January 1994.

4. For other Member States whose accession took place after 17 May 1990, the date of 17 May 1990 in paragraphs 1 and 2 shall be replaced by the date on which Article 141 of the Treaty became applicable in their territory.

Article 13. Flexible pensionable age

Where men and women may claim a flexible pensionable age under the same conditions, this shall not be deemed to be incompatible with this Chapter.

Chapter 3. - Equal treatment as regards access to employment, vocational training and promotion and working conditions

Article 14. Prohibition of discrimination

1. There shall be no direct or indirect discrimination on grounds of sex in the public or private sectors, including public bodies, in relation to:

(a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;

(b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;

(c) employment and working conditions, including dismissals, as well as pay as provided for in Article 141 of the Treaty;

(d) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations.

2. Member States may provide, as regards access to employment including the training leading thereto, that a difference of treatment which is based on a characteristic related to sex shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that its objective is legitimate and the requirement is proportionate.

Article 15. Return from maternity leave

A woman on maternity leave shall be entitled, after the end of her period of maternity leave, to return to her job or to an equivalent post on terms and conditions which are no less favourable to her and to benefit from any improvement in working conditions to which she would have been entitled during her absence.

Article 16. Paternity and adoption leave

This Directive is without prejudice to the right of Member States to recognise distinct rights to paternity and/or adoption leave. Those Member States which recognise such rights shall take the necessary measures to protect working men and women against dismissal due to exercising those rights and ensure that, at the end of such leave, they are entitled to return to their jobs or to equivalent posts on terms and conditions which are no less favourable to them, and to benefit from any improvement in working conditions to which they would have been entitled during their absence.

Title III - HORIZONTAL PROVISIONS

Chapter 1. - Remedies and enforcement

Section 1 - Remedies

Article 17. Defence of rights

1. Member States shall ensure that, after possible recourse to other competent authorities including where they deem it appropriate conciliation procedures, judicial procedures for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.

2. Member States shall ensure that associations, organisations or other legal entities which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his/her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.

3. Paragraphs 1 and 2 are without prejudice to national rules relating to time limits for bringing actions as regards the principle of equal treatment.

Article 18. Compensation or reparation

Member States shall introduce into their national legal systems such measures as are necessary to ensure real and effective compensation or reparation as the Member States so determine for the loss and damage sustained by a person injured as a result of discrimination on grounds of sex, in a way which is dissuasive and proportionate to the damage suffered. Such compensation or reparation may not be restricted by the fixing of a prior upper limit, except in cases where the employer can prove that the only damage suffered by an applicant as a result of discrimination within the meaning of this Directive is the refusal to take his/her job application into consideration.

Section 2 - Burden of proof

Article 19. Burden of proof

1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

2. Paragraph 1 shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs.

3. Member States need not apply paragraph 1 to proceedings in which it is for the court or competent body to investigate the facts of the case.

4. Paragraphs 1, 2 and 3 shall also apply to:

(a) the situations covered by Article 141 of the Treaty and, insofar as discrimination based on sex is concerned, by Directives 92/85/EEC and 96/34/EC;

(b) any civil or administrative procedure concerning the public or private sector which provides for means of redress under national law pursuant to the measures referred to in (a) with the exception of out-of-court procedures of a voluntary nature or provided for in national law.

5. This Article shall not apply to criminal procedures, unless otherwise provided by the Member States.

Chapter 2. - Promotion of equal treatment - dialogue

Article 20. Equality bodies

1. Member States shall designate and make the necessary arrangements for a body or bodies for the promotion, analysis, monitoring and support of equal treatment of all persons without discrimination on grounds of sex. These bodies may form part of agencies with responsibility at national level for the defence of human rights or the safeguard of individuals' rights.

2. Member States shall ensure that the competences of these bodies include:

(a) without prejudice to the right of victims and of associations, organisations or other legal entities referred to in Article 17(2), providing independent assistance to victims of discrimination in pursuing their complaints about discrimination;

(b) conducting independent surveys concerning discrimination;

(c) publishing independent reports and making recommendations on any issue relating to such discrimination;

(d) at the appropriate level exchanging available information with corresponding European bodies such as any future European Institute for Gender Equality.

Article 21. Social dialogue

1. Member States shall, in accordance with national traditions and practice, take adequate measures to promote social dialogue between the social partners with a view to fostering equal treatment, including, for example, through the monitoring of practices in the workplace, in access to employment, vocational training and promotion, as well as through the monitoring of collective agreements, codes of conduct, research or exchange of experience and good practice.

2. Where consistent with national traditions and practice, Member States shall encourage the social partners, without prejudice to their autonomy, to promote equality between men and women, and flexible working arrangements, with the aim of facilitating the reconciliation of work and private life, and to conclude, at the appropriate level, agreements laying down antidiscrimination rules in the fields referred to in Article 1 which fall within the scope of collective bargaining. These agreements shall respect the provisions of this Directive and the relevant national implementing measures.

3. Member States shall, in accordance with national law, collective agreements or practice, encourage employers to promote equal treatment for men and women in a planned and systematic way in the workplace, in access to employment, vocational training and promotion.

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