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The Final Directive: Equal Social Security Benefits for Men and Women in the European Economic Community

I. INTRODUCTION

Women in the European Economic Community (EEC) are striving to improve their economic and social status.¹ Consequently, more women in the EEC are upgrading their education and seeking employment.² Additionally, more married women in the EEC are entering the workforce.³ Women in the EEC are improving their financial position,⁴ increasing their general sense of happiness and success,⁵ and elevating their social status by engaging in non-traditional roles outside the home.⁶

The majority of women in the EEC prefer to work even though their employers give them fewer opportunities and benefits than male employees.⁷ One problem that women encounter is that they earn less money than men.⁸ This occurs because women are generally employed in low paying professions or are not promoted to high paying positions within their companies.⁹ The pay differential between men and women increases when social security and work-related benefits are included in total earnings. Social security benefits supplement workers' wages and help workers pay for situations such as illness and retirement. Presently, employers do not pay men and women equal social security benefits.¹⁰

¹ See COMMISSION OF THE EUROPEAN COMMUNITIES, *WOMEN AND MEN OF EUROPE IN 1983: THE SITUATION OF WOMEN AND EMPLOYMENT* 86 (1984) [hereinafter *WOMEN AND MEN OF EUROPE*].

² OFFICE FOR OFFICIAL PUBLICATIONS OF THE EUROPEAN COMMUNITIES, *WOMEN IN THE EUROPEAN COMMUNITY, 12-13* (European Documentation 1984) [hereinafter *WOMEN IN THE EUROPEAN COMMUNITY*].

³ *Id.* at 13.

⁴ *WOMEN AND MEN OF EUROPE*, *supra* note 1, at 86.

⁵ *WOMEN IN THE EUROPEAN COMMUNITY*, *supra* note 2, at 6.

⁶ *WOMEN AND MEN OF EUROPE*, *supra* note 1, at 86.

⁷ *Id.* at 61. Two-thirds of all women in the EEC report that they would like to work outside the home. One half of these women are actually able to secure employment. *Id.* at 80.

⁸ ECONOMIC COMMISSION FOR EUROPE, *THE ECONOMIC ROLE OF WOMEN IN THE ECE REGION, DEVELOPMENTS 1975/85*, at 67-68, U.N. Doc. E/ECE/1100, U.N. Doc. No. 155.349.20, U.N. Sales No. E.85.H.E.20 [hereinafter *REPORT ON ECONOMIC ROLE OF WOMEN*]; *WOMEN IN THE EUROPEAN COMMUNITY*, *supra* note 2, at 14.

⁹ See *WOMEN IN THE EUROPEAN COMMUNITY*, *supra* note 2, at 14; see also *REPORT ON ECONOMIC ROLE OF WOMEN*, *supra* note 8, at 86-91. Other factors which affect women's pay are age, length of service, education, and the size of the company at which women work. *Id.* at 81-86. Sex discrimination also affects women's pay. *WOMEN IN THE EUROPEAN COMMUNITY*, *supra* note 2, at 14.

¹⁰ See *infra* notes 113-257 and accompanying text.

The low status of women in the workplace and in the political process adversely affects their social and economic status in society. Women have a lower standard of living than men because women are paid lower wages and benefits.¹¹ In addition, women do not play a major role in business or political decision-making.¹² Women, therefore, are less able than men to influence policies which affect their social and economic position.

The EEC is considering many measures to improve the social and economic position of women. As one part of its activities, the EEC is striving to equalize social security benefits between men and women. To date, the Council of the European Communities (Council) has adopted two directives toward this goal.¹³ The Commission of the European Communities (Commission) proposed a third directive to the Council in 1987.¹⁴ The Council is currently considering the Commission's proposed directive.

This Comment analyzes the EEC legislation which implements the principle of equal treatment in the social security area. The Comment first discusses the history and progress of the current social security directives.¹⁵ The Comment then explores the applicability of article 119, which equalizes pay between men and women, to the social security area.¹⁶ The Comment follows with a discussion of the current directives and the Commission proposal for equal social security benefits.¹⁷ Finally, the Comment concludes that the Community's efforts to equalize benefits should extend beyond the three mentioned social security measures because they do not adequately equalize benefits between men and women.¹⁸

II. THE HISTORY AND PROGRESS OF THE SOCIAL SECURITY DIRECTIVES

The EEC was formed in 1957 to strengthen Europe's economy and internal relations.¹⁹ The Merger Treaty of 1965 established the European Community

¹¹ REPORT ON ECONOMIC ROLE OF WOMEN, *supra* note 8, at 66-69.

¹² WOMEN IN THE EUROPEAN COMMUNITY, *supra* note 2, at 10.

¹³ Directive 79/7, 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, 22 O.J. EUR. COMM. (No. L 6) 24 (1979) [hereinafter Directive 79/7]; Directive 86/378, Council Directive of 24 July 1986 on the Implementation of the Principle of Equal Treatment for Men and Women in Occupational Social Security Schemes, 29 O.J. EUR. COMM. (No. L 225) 40 (1986) [hereinafter Directive 86/378].

¹⁴ 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, 30 O.J. EUR. COMM. (No. C 309) 10, [hereinafter Directive Proposal].

¹⁵ See *infra* notes 19-66 and accompanying text.

¹⁶ See *infra* notes 67-112 and accompanying text.

¹⁷ See *infra* notes 113-257 and accompanying text.

¹⁸ See *infra* notes 217-57 and accompanying text.

¹⁹ See generally Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty].

which governs the EEC and other similar European organizations.²⁰ The major bodies governing the EEC under this treaty are the Commission of the European Communities (Commission), the Council of Ministers of the European Communities (Council), the European Parliament (Parliament), the Economic and Social Committee (ESC), and the Court of Justice of the European Communities (European Court).²¹

A. *EEC Action Programs*

The EEC equalized social security benefits between men and women as part of a program to harmonize member states' social policies. Officials signing the EEC Treaty assumed that member states would integrate their social policies as the states became more economically interdependent.²² The Community, however, found that harmonizing social policies required formal action.²³ During

²⁰ Treaty Establishing a Single Council and a Single Commission of the European Communities, April 8, 1965, 4 INT'L LEGAL MATERIALS 776 (1965) [hereinafter *Merger Treaty*].

²¹ S.A. BUDD, *THE EEC: A GUIDE TO THE MAZE* 30-41 (2d ed. 1987). The Commission proposes legislation and enforces Community law. To initiate legislation, the Commission may draft regulations, directives, and decisions which legally bind member states. Toepke, *The European Economic Community: A Profile*, 3 Nw. J. INT'L L. & BUS. 640, 648 (1981). The Commission may also draft recommendations and opinions which do not legally bind member states. *Id.* Although the Commission initially drafts legislation, any person or group may express their view to the Commission on the subject of the draft legislation. S.A. BUDD, *supra*, at 56. The Commission must include as many opinions as possible in this preliminary draft legislation. *Id.*

The Commission gives copies of draft legislation to the European Parliament (Parliament) and the Economic and Social Committee (ESC). *Id.* at 51. The Parliament considers these drafts through an appropriate committee. Although the Parliament can only suggest changes, it exerts influence because it must approve the Community's budget. The ESC, however, is less influential than the European Parliament. *See id.* at 34-36.

After the Parliament and ESC return the proposal, the Commission submits the proposal to the Council. *Id.* at 52. First, lower level Council members called the Committee of Permanent Representatives (COREPER) attempt to agree on the proposal. If they succeed, the Council of Ministers of the European Communities (Council) officially adopt the proposal into law. If the COREPER cannot agree, the Ministers must negotiate the proposal. If the Ministers cannot agree, they may submit the proposal to the European Summit. *Id.* at 37-38.

The Commission enforces legislation after it has been adopted by the Council. *Id.* at 40. The Commission monitors member states' compliance with Community law. If the Commission finds a member state in violation of Community law, it requires the state to explain or change its activity. If the member state fails to explain or comply with Community law, the Commission may take the member state before the Court of Justice of the European Communities (European Court). *Id.* at 41.

The European Court interprets Community law. *Id.* at 40. In addition to cases brought by the Commission, the European Court may hear cases instituted by individuals and member states. *Id.* Individuals and member states may bring cases challenging Commission or Council decisions which the states believe are unfair or ineffective. Toepke, *supra*, at 651. Individuals seeking redress against other individuals must go through their national courts. S.A. BUDD, *supra*, at 40. National courts also may refer questions to the European Court for interpretations of Community law. Toepke, *supra*, at 651.

²² *Labor, Working Conditions, Social Security*, 2 Common Mkt. Rep. (CCH) ¶ 3900 (1978).

²³ *Id.*

the 1969 Hague Conference, the Commission recommended that the Community adopt a uniform social policy.²⁴ Additionally, officials at the Paris Summit Conference of 1972 proposed that the Community draft and implement a common social program.²⁵

The Council adopted a social action program in 1974.²⁶ The Council's goals for this program were to improve employment and social conditions.²⁷ Through this program, the Council adopted measures to eradicate sex discrimination from the workplace by 1976.²⁸ The Council renewed the social action program in 1984.²⁹ Currently, through this program, the Council seeks to upgrade employment, teach workers new skills, upgrade industry, continue social welfare benefits, and promote social unity within the European Community.³⁰

The Council also adopted an action program to increase opportunities for women by 1985.³¹ Upon the Commission's recommendation,³² the Council extended this program until 1990.³³ In 1989, the Commission will evaluate the Community's progress in this area.³⁴

B. *EEC Directives Which Equalize Opportunities Between Men and Women*

Through its original Social Action Programme, the Council began adopting directives to equalize rights between men and women. The Council's first legislation, Directive 75/117,³⁵ implements the principle of equal pay under article

²⁴ *Id.* at ¶ 3901.

²⁵ *Id.*

²⁶ *Id.* at ¶ 3900.

²⁷ *Id.*

²⁸ *Id.* at ¶ 3901.

²⁹ GENERAL SECRETARIAT OF THE COUNCIL OF THE EUROPEAN COMMUNITIES, THIRTY-SECOND REVIEW OF THE COUNCIL'S WORK 1 JANUARY-31 DECEMBER 1984, at 56 (1985) [hereinafter COUNCIL ACTIVITIES 1984].

³⁰ *Id.*

³¹ GENERAL SECRETARIAT OF THE COUNCIL OF THE EUROPEAN COMMUNITIES, THIRTIETH REVIEW OF THE COUNCIL'S WORK 1 JANUARY-31 DECEMBER 1982, at 52 (1983) [hereinafter COUNCIL ACTIVITIES 1982].

³² See Report from the Commission to the Council on the Implementation of the New Community Action Programme on the Promotion of Equal Opportunities for Women (1982-85), COM (85) 641 final, at 55-59 [hereinafter Commission Report on Equal Opportunities].

³³ GENERAL SECRETARIAT OF THE COUNCIL OF THE EUROPEAN COMMUNITIES, THIRTY-FOURTH REVIEW OF THE COUNCIL'S WORK 1 JANUARY-31 DECEMBER 1986, at 55 (1987) [hereinafter COUNCIL ACTIVITIES 1986].

³⁴ Social Dimension of the Internal Market, SEC(88) 1148 final, at 56 [hereinafter Social Dimension Report].

³⁵ Directive 75/117, 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, the Implementation of Equal Pay for Equal Work, 18 O.J. EUR. COMM. (No. L 45) 19 (1975) [hereinafter Directive 75/117].

119 of the EEC Treaty.³⁶ The Council also enacted Directive 76/207 to equalize work and educational opportunities between men and women.³⁷

In 1978, the Council began to equalize social security benefits for men and women.³⁸ First, the Council adopted Directive 79/7 to equalize state sponsored, or statutory, social security benefits.³⁹ Second, the Council equalized employer sponsored, or occupational, social security benefits through Directive 86/378.⁴⁰

Through these directives and similar EEC legislation, women obtain some enforceable rights against their national governments and private individuals.⁴¹ Courts directly enforce EEC legislation if it is precise and can be applied without elaborate judicial interpretation.⁴² Article 119, for example, is directly enforce-

³⁶ *Id.*

³⁷ Directive 76/207, 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, 19 O.J. EUR. COMM. (No. L 39) 40 (1976) [hereinafter Directive 76/207].

³⁸ See Directive 79/7, *supra* note 13. The Social Security directives were enacted pursuant to article 118 of the EEC Treaty. See *Newstead v. Department of Transport and H.M. Treasury*, 1988 E. Comm. Ct. J. Rep. —, 51 Comm. Mkt. L.R. 219, 232 (1988). Article 118 states:

Without prejudice to the other provisions of this Treaty and in conformity with its general objectives, the Commission shall have the task of promoting close co-operation between Member States in the social field, particularly in matters relating to: employment; labour law and working conditions; basic and advanced vocational training; social security; prevention of occupational hygiene; the right of association, and collective bargaining between employers and workers.

EEC Treaty, *supra* note 19, at art. 118.

Advocate General Darmon, who submitted two opinions about *Newstead* to the European Court, stated that articles 117 and 118 governed social security directive 79/7. *Newstead v. Department of Transport and H.M. Treasury*, 51 Comm. Mkt. L.R. at 230.

Article 117 states:

Member States agree upon the need to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonisation while the improvement is being maintained.

They believe that such a development will ensue not only from the functioning of the common market, which will favour the harmonisation of social systems, but also from the procedures provided for in this Treaty and from the approximation of provisions laid down by law, regulation or administrative action.

EEC Treaty, *supra* note 19, at art. 117.

³⁹ Directive 79/7, *supra* note 13, at art. 3.

⁴⁰ Directive 86/378, *supra* note 13.

⁴¹ See Wyatt, *The Direct Effect of Community Social Law—Not Forgetting Directives*, 8 EUR. L. REV. 241 (1983). See, e.g., *Defrenne v. S.A. Belge De Navigation Aeriennne (Defrenne II)*, 1976 E. Comm. Ct. J. Rep. 455, 18 Comm. Mkt. L.R. 98, 125 (1976) (airline hostess obtained backpay directly through article 119 of the EEC Treaty because she was paid less money than a male airline host performing the same work).

⁴² See *Defrenne v. S.A. Belge De Navigation Aeriennne (Defrenne III)*, 1978 E. Comm. Ct. J. Rep. 1365, 23 Comm. Mkt. L.R. 312, 328 (1978); see *Newstead v. Department of Transport and H.M. Treasury*, 51 Comm. Mkt. L.R. at 232. In *Defrenne III*, the Court contrasted articles 117 and 118 of the EEC Treaty to article 119. Articles 117 and 118 are not directly enforceable because they prescribe a broad program for improving employment conditions. *Defrenne III*, 23 Comm. Mkt. L.R. at 312. Article 119, on the other hand, is directly enforceable because it is a narrow treaty provision dealing only with workers' pay. *Id.* at 328.

able against governments (vertical direct effect) and private individuals (horizontal direct effect).⁴³ Directives may have a vertical but not a horizontal direct effect.⁴⁴ Directives 76/207⁴⁵ and 79/7,⁴⁶ therefore, have only a vertical direct effect. The European Court has not officially determined whether Directive 86/378 has a direct effect.⁴⁷

C. *Current Status of EEC Legislation to Equalize Opportunities Between Men and Women*

Despite the EEC's efforts, economic problems and traditional attitudes have made actual implementation of the equality principle slow. The EEC's unemployment rate, for example, rose to 12 percent in 1987.⁴⁸ Women are adversely affected by this situation because they are more likely than men to lose jobs and opportunities during periods of high unemployment.⁴⁹ Additionally, the EEC's social security system faces future financial problems because the EEC's elderly population has increased.⁵⁰ Due to these problems, officials will be less able to increase women's benefits to make them more equal to men's benefits.⁵¹

Traditional attitudes also slow the adoption of measures to equalize men's and women's rights. People who have traditional attitudes expect women to rear children at home while men economically support the family.⁵² Since

⁴³ Defrenne III, 23 Comm. Mkt. L.R. at 328.

⁴⁴ Wyatt, *supra* note 41, at 245; *see also* Interim Report on the Application of Directive 79/7/EEC of 19 December 1978 on the Progressive Implementation of the Principle of Equal Treatment for Men and Women in Matters of Social Security, COM(83) 793 final, at 2.

⁴⁵ Marshall v. Southampton and South West Hampshire Area Health Authority, 1986 E.Comm. Ct. J. Rep. —, 45 Comm. Mkt. L.R. 688, 711–12 (1986).

⁴⁶ McDermott v. Minister For Social Welfare, 1987 E. Comm. Ct. J. Rep. —, 49 Comm. Mkt. L.R. 607, 615 (1987); Clarke v. Chief Adjudication Officer, 1987 E. Comm. Ct. J. Rep. —, 50 Comm. Mkt. L.R. 277, 289 (1987); State of the Netherlands v. Federatie Nederlandse Vakbeweging, 31 O.J. EUR. COMM. (No. C 8) 4 (1988).

⁴⁷ Directive 86/378 does not have to be implemented by member states until July 30, 1989. *See infra* note 184 and accompanying text.

⁴⁸ COMMISSION OF THE EUROPEAN COMMUNITIES, TWENTY-FIRST GENERAL REPORT ON THE ACTIVITIES OF THE EUROPEAN COMMUNITIES IN 1987, at 79 (1988) [hereinafter COMMISSION ACTIVITIES 1987].

⁴⁹ WOMEN IN THE EUROPEAN COMMUNITY, *supra* note 2, at 14.

⁵⁰ *See* COMMISSION OF THE EUROPEAN COMMUNITIES, TWENTIETH GENERAL REPORT ON THE ACTIVITIES OF THE EUROPEAN COMMUNITIES IN 1986, at 195 (1987) [hereinafter COMMISSION ACTIVITIES 1986].

⁵¹ Telephone Interview with Barbara Sloan, Head of Public Inquiries of the Delegation of the Commission of the European Communities in Washington D.C. (Feb. 21, 1989); *see also* WOMEN IN THE EUROPEAN COMMUNITY, *supra* note 2, at 26.

⁵² *See, e.g.,* Worringham and Humphreys v. Lloyds Bank Ltd., 27 Comm. Mkt. L.R. 293, 303 (1980). While discussing a pension scheme which discriminated against women under the age of twenty-five, Lord Denning of the English Court of Appeals stated:

So there is a difference between the two pension schemes. Those differences are due, no doubt, to natural causes. The young women under 25 are often birds of passage. They come for a short time and then fly off to get married and bring up their children. The men are usually long stayers. They make their careers in the bank until they retire. These differences affect the calculations of the actuaries: and are reflected in the two schemes. But the conse-

women are not expected to have dependents or a commitment to work, government officials and employers may approve employment policies which give working women less benefits and opportunities. The EEC is attempting to change these traditional attitudes.⁵³ The EEC's efforts to equalize men's and women's social security benefits, however, are undercut by these economic problems and traditional attitudes.

The EEC expects to improve its economy through the Single European Act (SEA).⁵⁴ Through the SEA, the EEC strives to create a single European internal market.⁵⁵ The SEA, for example, provides for free trade between member states as well as freedom of movement for workers.⁵⁶ By eliminating trade and other economic barriers, the EEC expects to increase business activity.⁵⁷ This increased business activity will improve the EEC's economic and employment problems.⁵⁸

As Europe's economic conditions improve, equal rights between men and women will be easier to achieve.⁵⁹ Member states, for example, will be more willing to finance programs and benefits aiding women.⁶⁰ Additionally, women may obtain employment opportunities more easily as the job market expands.⁶¹ Through increased opportunities, women will obtain more economic power and expand their role in society. Women, therefore, will exert more influence and more easily obtain rights equal to men.

The Commission, however, predicts that the SEA will not immediately benefit some individuals in the EEC's general population.⁶² For example, the Commission predicts that individuals will obtain minimal improvements while the EEC implements the single market.⁶³ The Commission also predicts that disfavored

quence is that the women's scheme is less favourable to women under 25 than the men's scheme is to men under 25 doing the same work.

Id.

⁵³ See Commission Report on Equal Opportunities, *supra* note 32, at 55-59; see also Resolution on the Depiction and Position of Women in the Media, 30 O.J. EUR. COMM. (No. C 305) 66-69 (1987).

⁵⁴ Single European Act, Feb. 17, 1986, 29 O.J. EUR. COMM. (No. L 169) 1 (1987) [hereinafter SEA].

⁵⁵ See *id.* at art. 13.

⁵⁶ *Id.*

⁵⁷ See Social Dimension Report, *supra* note 34, at foreward.

⁵⁸ *Id.*

⁵⁹ See WOMEN IN THE EUROPEAN COMMUNITY, *supra* note 2, at 6, 26. See Commission Report on Equal Opportunities, *supra* note 32, at 20-23. Member states have reported that they will not equalize some social security benefits for men and women because they are unable to finance improved benefits for women. *Id.* See also Opinion on the 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, 31 O.J. EUR. COMM. (No. C 95) 4 (1988).

⁶⁰ See *supra* note 59 and accompanying text.

⁶¹ See WOMEN IN THE EUROPEAN COMMUNITY, *supra* note 2, at 6, 14; see Social Dimension Report, *supra* note 34, at 4, 8. The Commission predicts that two to five million jobs could be created through the internal market. *Id.* at 4.

⁶² Social Dimension Report, *supra* note 34, at 17, 29, 52.

⁶³ *Id.*

groups are likely to obtain smaller benefits from the improving economy than other members of the population.⁶⁴

The Commission reports that supplementary measures must be adopted to extend the SEA's economic benefits to many individuals.⁶⁵ Moreover, the Commission continues to consider adopting measures which will equalize rights between men and women. The Commission, accordingly, proposed a final measure to equalize men's and women's social security benefits in 1987.⁶⁶

III. ARTICLE 119

Article 119 requires employers to pay women the same amount of money as men who perform equal work.⁶⁷ Article 119 defines pay as remuneration that employers pay their employees "directly or indirectly" through money or services.⁶⁸ Article 119 requires employers to pay men and women the same hourly rate when they perform equal work.⁶⁹ It also requires employers to pay men and women who perform piecework at an equal rate.⁷⁰

A. *Direct and Indirect Sex Discrimination Under Article 119*

Article 119 gives victims of overt sex discrimination enforceable rights against private individuals and member states.⁷¹ The European Court defines overt sex

⁶⁴ See *id.* at 52, 56. Young people and women are disfavored groups in the job market. See generally Council Resolution of 7 June 1984 on Action to Combat Employment Amongst Women, 27 O.J. EUR. COMM. (No. C 161) 4 (1984). See also COUNCIL ACTIVITIES 1986, *supra* note 33, at 18; GENERAL SECRETARIAT OF THE COUNCIL OF THE EUROPEAN COMMUNITIES, TWENTY-FIFTH REVIEW OF THE COUNCIL'S WORK 1 JANUARY-31 DECEMBER 1977, at 38 (1978) [hereinafter COUNCIL ACTIVITIES 1977]. Recognizing that women are a disfavored group, the Commission reports that it will continue to propose measures to help women obtain employment. Social Dimension Report, *supra* note 34, at 56.

The EEC is currently considering several measures to aid women. The EEC, for example, is considering measures to help women build their own businesses, increase women's opportunities within firms, and put the burden of proof on employers for proving that no discrimination exists in equal pay disputes. The EEC is also considering programs to help women and migrant women gain vocational training. Additionally, the EEC is considering measures to encourage the sharing of family responsibilities between men and women, improve parental and family leave options, and improve the rights of pregnant women. Finally, the EEC is considering a third proposal to equalize social security benefits between men and women. Social Dimension Report, *supra* note 34, at annex II.

⁶⁵ See generally *id.* at 52-57.

⁶⁶ Directive Proposal, *supra* note 14.

⁶⁷ EEC Treaty, *supra* note 19, at art. 119.

⁶⁸ *Id.* Article 119, in pertinent part, states:

Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work.

For the purpose of this Article, "pay" means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind which the worker receives, directly or indirectly, in respect of his employment from his employer. . . .

Id.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ See *Defrenne v. S.A. Belge De Navigation Aeriennne (Defrenne II)*, 1976 E. Comm. Ct. J. Rep. 455, 18 Comm. Mkt. L.R. 98, 123-25. (1976).

discrimination as employer practices which violate the express terms of article 119.⁷² The European Court, for example, found that overt discrimination existed when men and women employed in the same institution or service were paid unequal salaries for equal work.⁷³

Applying this definition, the European Court ruled that the plaintiffs in *Worringham and Humphreys v. Lloyds Bank Ltd.* had enforceable rights under article 119.⁷⁴ In *Worringham*, females under the age of twenty-five earned 5 percent less gross pay than male employees the same age.⁷⁵ Lloyds Bank immediately deducted this 5 percent from men's paychecks and contributed it towards an occupational pension scheme.⁷⁶ If male employees left Lloyds, they were refunded this 5 percent.⁷⁷ Female employees leaving Lloyds before the age of twenty-five were not refunded any money because they had contributed no funds to the pension plan.⁷⁸ Additionally, women received lower unemployment and other salary-related benefits than men because these benefits were based on a worker's gross pay.⁷⁹ The European Court held that Lloyds overtly discriminated against women through its pension scheme.⁸⁰ Thus, article 119 allowed the plaintiffs in *Worringham* to obtain direct relief against Lloyds.

Article 119, however, rarely provides protection to victims of indirect discrimination. The European Court has defined indirect discrimination as employer practices which predominantly affect women which do not serve any reasonable business purpose.⁸¹ When employers assert justifications for their policies, national courts must determine whether the employers in fact discriminate against women on grounds of sex.⁸² If the national court refers solely to article 119 in

⁷² See *id.* at 123.

⁷³ *Id.* at 123-24.

⁷⁴ *Worringham and Humphreys v. Lloyds Bank Ltd. (Worringham II)*, 1981 E. Comm. Ct. J. Rep. 767, 31 Comm. Mkt. L.R. 1, 23 (1981).

⁷⁵ *Id.* at 4.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 23.

⁸¹ *Jenkins v. Kingsgate Ltd.*, 1981 E. Comm. Ct. J. Rep. 911, 31 Comm. Mkt. L.R. 24, 40-41 (1981). See also Proposal for a Council Directive on the Burden of Proof in the Area of Equal Pay and Equal Treatment for Women and Men, COM (88) 269 final, 53 Comm. Mkt. L.R. 272 (1988). Article 5 of this proposal defines indirect sex discrimination as follows:

For the purposes of the principle of equality referred to in Article 1(2), indirect discrimination exists where an apparently neutral provision, criterion or practice disproportionately disadvantages the members of one sex, by reference in particular to marital or family status, and is not objectively justified by any necessary reason or condition unrelated to the sex of the person concerned.

Member States shall ensure that the intentions of the respondent are not taken into account in determining whether the principle of equality has been infringed in any individual case.

Id.

⁸² *Jenkins v. Kingsgate Ltd.*, 31 Comm. Mkt. L.R. at 40.

concluding that sex discrimination exists, plaintiffs will have enforceable article 119 rights.⁸³

In *Jenkins v. Kingsgate Ltd.*, the English courts had to determine whether the plaintiff had enforceable article 119 rights.⁸⁴ The plaintiff was a part-time worker at Kingsgate Limited in England.⁸⁵ Kingsgate paid part-time employees a lower hourly rate than full-time employees. The plaintiff argued that Kingsgate's pay policy violated article 119 because it adversely affected a disproportionate number of women. Kingsgate asserted that it paid part-time employees a lower hourly rate to attract full-time employees.⁸⁶ Based on Kingsgate's justification, the European Court held that Kingsgate's pay policy was not clearly in violation of article 119.⁸⁷ The plaintiff, therefore, could only obtain enforceable rights by appealing to England's national courts.⁸⁸ Thus, victims of overt discrimination are more likely than victims of indirect discrimination to have enforceable article 119 rights against private individuals and member states.

B. *Social Security Benefits Under Article 119*

Litigants have attempted to obtain equal social security benefits through article 119. These litigants have argued that social security benefits, such as pension or health entitlements, constituted pay under article 119.⁸⁹ Therefore, they expected such benefits to be paid equally to men and women.

The European Court, however, has defined very few statutory social security benefits as article 119 pay.⁹⁰ In *Defrenne v. S.A. Anonyme Belge De Navigation Aeriennne (Defrenne I)*, for example, the European Court held that statutory social security benefits were not pay under article 119. In *Defrenne I*, the plaintiff worked as a principal airline hostess for the Sabena company in Belgium. Sabena required her to retire at age forty. As a result of air hostesses' short length of service, the Belgium government permitted airlines to exclude them from a statutory pension scheme.⁹¹ A male airline host, on the other hand, retired at

⁸³ *Id.* at 41. The *Jenkins* Court stated:

Where the national court is able, using the criteria of equal work and equal pay, without the operation of Community or national measures, to establish that the payment of lower hourly rates of remuneration for part-time work than for full-time work represents discrimination based on difference of sex the provisions of Article 119 of the Treaty apply directly to such a situation.

Id.

⁸⁴ *Id.* at 40.

⁸⁵ *Id.* at 26.

⁸⁶ *See id.* at 27.

⁸⁷ *See id.* at 40-41.

⁸⁸ *See id.*

⁸⁹ *See infra* notes 90-112 and accompanying text.

⁹⁰ *Defrenne v Belgium*, 1971 E. Comm. Ct. J. Rep. 445, 13 Comm. Mkt. L.R. 494, 509 (1974).

⁹¹ *Id.* at 495.

fifty-five and was entitled to statutory pension benefits. The European Court held that such statutory benefits were not pay under article 119 because they were statutorily prescribed and employees did not negotiate for them.⁹² Thus, the European Court held that Sabena was not required to equalize its statutory pension benefits under article 119.⁹³

The Court, on the other hand, has defined statutory and occupational social security benefits as article 119 pay when they affect a worker's gross pay. In *W.G.M. Liefing v. Directive Van Get Academisch Ziekenhuis Bij De Universiteit Van Amsterdam*, for example, the Dutch government contributed more money to statutory pension benefits for married men than it did for married women.⁹⁴ These contributions affected the amount of the workers' gross pay.⁹⁵ Consequently, these contributions adversely affected women's salary-related benefits because such benefits were based on the workers' gross salary.⁹⁶ The European Court held that such benefits constituted article 119 pay.⁹⁷ The Court also held in *Worringham* that occupational benefits constituted article 119 pay when they were calculated into workers' gross pay and affected salary-related benefits.⁹⁸

Additionally, the Court has found that occupational benefits constitute pay under article 119 when they supplement statutory benefits and are financed solely by the employer. In *Bilka-Kaufhaus GmbH v. von Hartz*,⁹⁹ the European Court held that occupational schemes which supplement statutory schemes are article 119 pay. In *Bilka*, part-time workers could participate in an occupational pension scheme only after fifteen years of full-time service.¹⁰⁰ The plaintiff only worked eleven years as a full-time Bilka employee and thus was not permitted to participate in Bilka's supplementary pension scheme.¹⁰¹ She complained that Bilka's pension rules were contrary to article 119 because the pension scheme

⁹² *Id.* at 508.

⁹³ *Id.* at 509. In a subsequent Defrenne case, the European Court ruled that employment conditions were not pay even though they affected a worker's pay and benefits. *Defrenne v. S.A. Belge De Navigation Aeriennne (Defrenne III)*, 1978 E. Comm. Ct. J. Rep. 1365, 23 Comm. Mkt. L.R. 312, 328 (1978). Thus, the European Court held that Sabena did not have to equalize men and women's retirement ages to make airline hostesses eligible for pension benefits. These conditions, the Court ruled, could only be equalized through further Community and national legislation pursuant to articles 117 and 118. Working conditions remain outside the scope of article 119. *Id.* at 328-30. The Council adopted a directive to equalize working conditions in 1976. See Directive 76/207, *supra* note 37.

⁹⁴ *Liefing v. Directive van het Academisch Ziekenhuis Bij De Universiteit Van Amsterdam*, 1984 E. Comm. Ct. J. Rep. 3225, 41 Comm. Mkt. L.R. 702, 706-07 (1984).

⁹⁵ *Id.* at 702, 713.

⁹⁶ See *id.* at 713-14.

⁹⁷ *Id.* at 715.

⁹⁸ *Worringham and Humphreys v. Lloyds Bank Ltd. (Worringham II)*, 1981 E. Comm. Ct. J. Rep. 767, 31 Comm. Mkt. L.R. 1, 23 (1981).

⁹⁹ *Bilka-Kaufhaus GmbH v. von Hartz*, 1986 E. Comm. Ct. J. Rep. —, 46 Comm. Mkt. L.R. 701, 719 (1986).

¹⁰⁰ *Id.* at 716.

¹⁰¹ *Id.*

adversely affected a disproportionate number of women.¹⁰² The Court noted that this occupational scheme supplemented workers' statutory pensions and was funded solely by Bilka.¹⁰³ Under these conditions, the Court ruled that Bilka's supplementary pension scheme constituted article 119 pay.¹⁰⁴ The plaintiff, however, could not directly enforce her article 119 rights unless she could prove that Bilka's discrimination against part-time workers constituted indirect sex discrimination.¹⁰⁵

The European Court, however, has not held that occupational schemes are article 119 pay if they replace statutory benefits. In *Newstead v. Department of Transportation and H.M. Treasury*,¹⁰⁶ for example, the Court found that employee contributions to occupational schemes did not constitute article 119 pay. In *Newstead*, the Department of Transportation required the plaintiff to contribute 1.5 percent of his gross pay to an occupational widow's pension.¹⁰⁷ Female employees working with the plaintiff earned the same gross salary, but were not required to contribute to a widower's pension.¹⁰⁸ The plaintiff argued that his contributions deprived him of pay on the basis of sex.¹⁰⁹ The Court decided that the transportation department's occupational scheme was a substitute for the state sponsored widow's pensions.¹¹⁰ The Court held, therefore, that the plaintiff's contributions were not pay because the scheme to which he contributed was comparable to a statutory social security scheme.¹¹¹ The plaintiff, therefore, did not have any directly enforceable rights under article 119.¹¹² Since article 119 is not available to most litigants seeking equal social security benefits, workers must resort to the Council's social security directives for equal treatment.

IV. THE SOCIAL SECURITY DIRECTIVES

A. Directive 79/7: Statutory Social Security Benefits

In 1978, the Council adopted Directive 79/7. This directive prohibits employers from directly or indirectly distributing unequal statutory benefits to men

¹⁰² *Id.*

¹⁰³ *Id.* at 719.

¹⁰⁴ *See id.* at 722-23.

¹⁰⁵ *Id.* at 723.

¹⁰⁶ *Newstead v. Department of Transport and H.M. Treasury*, 1988 E. Comm. Ct. J. Rep. —, 51 Comm. Mkt. L.R. 219, 239 (1988). For a more detailed discussion of *Newstead*, see Arnulf, *Widows' Mite*, 13 EUR. L. REV., 135 (1988).

¹⁰⁷ *Newstead v. Department of Transport and H.M. Treasury*, 51 Comm. Mkt. L.R. at 222.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 224.

¹¹⁰ *Id.* at 239.

¹¹¹ *Id.* at 242.

¹¹² *Id.* For a more in-depth discussion of the equal pay principle see, Forman, *The Equal Pay Principle Under Community Law: A Commentary on Article 119 EEC*, 1982 LEGAL ISSUES EUR. INTEGRATION 17.

and women based on their gender, marital status, or family circumstances.¹¹³ This directive applies to the working population. Directive 79/7 defines the working population as employees and individuals working for themselves who cannot work because they are sick, injured, or forced to leave their employment.¹¹⁴ Additionally, Directive 79/7 provides invalids and retirees with equal social security benefits.¹¹⁵

1. The Scope of Directive 79/7

Directive 79/7 equalizes many types of statutory social security benefits. For example, the directive requires employers to equalize benefits between men and women workers who become ill, disabled, retired, injured or ill from work, or unemployed.¹¹⁶ Directive 79/7 also requires employers to equalize social assistance benefits which supplement or replace statutory social security benefits.¹¹⁷

Directive 79/7 provides men and women with equal benefits and equal access to benefits.¹¹⁸ Employers may not preclude one sex from participating in or contributing to a benefit scheme.¹¹⁹ Nor may employers require different contribution amounts from workers on the basis of sex.¹²⁰ Additionally, employers may not calculate benefits differently due to the sex of the employee.¹²¹

2. Survivor and Family Benefits

Directive 79/7 allows employers to pay men and women unequal survivor benefits.¹²² Employers generally require male employees to set up widows' pensions. Employers, however, do not always require or permit female employees to set up widowers' pension funds.¹²³

Directive 79/7 also allows employers to pay men and women unequal family benefits.¹²⁴ Employers may pay workers family benefits to help workers support children and other dependents. Directive 79/7 equalizes men's and women's family benefits in situations of illness, disability, retirement, work-related injury

¹¹³ Directive 79/7, *supra* note 13, at art. 4(1).

¹¹⁴ *Id.* at art. 2.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at art. 3(1)(a).

¹¹⁷ *Id.* at art. 3(1)(b).

¹¹⁸ *Id.* at art. 4(1).

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* Maternity benefits which women currently receive will not be changed due to this directive. *Id.* at art. 4(2).

¹²² *Id.* at art. 3(2).

¹²³ See, e.g., *Newstead v. Department of Transport and H.M. Treasury*, 1988 E. Comm. Ct. J. Rep. ___, 51 Comm. Mkt. L.R. 219 (1988).

¹²⁴ Directive 79/7, *supra* note 13, at arts. 7(c), (d).

or illness, or unemployment.¹²⁵ Directive 79/7, however, does not require employers to pay female employees family benefits equal to those of male employees for a dependent spouse except upon unemployment.¹²⁶

In *Re A Retirement Pension For A Woman Civil Servant*,¹²⁷ a woman civil servant applied for increases to her dependent husband's pension benefits.¹²⁸ A man in her circumstances would have received the increased pension benefits which she requested.¹²⁹ England's Social Security Act, however, imposed more stringent standards on women seeking increased benefits for a dependent spouse than on men.¹³⁰ Since Directive 79/7 did not equalize men's and women's family benefits for dependent spouses, the plaintiff could not obtain relief from this sex discrimination.¹³¹

3. Individual Retirement Benefits

Additionally, Directive 79/7 does not completely equalize individual pension benefits between men and women.¹³² Workers become eligible to collect pension benefits at set pensionable ages.¹³³ Employers may dismiss employees at set retirement ages. Usually, employers retire workers when they become eligible for state pension benefits. Under English law, for example, female employees become eligible for state pensions at age sixty while men become eligible for these pensions at age sixty-five.¹³⁴ Employers, therefore, usually require women to retire at the age of sixty and men to retire at the age of sixty-five.¹³⁵

Directive 79/7 allows employers to set unequal pensionable ages even though such action will perpetuate inequality in pension benefits between men and women.¹³⁶ In *Burton v. British Railways Board*,¹³⁷ the British Railways Board offered early pension benefits to female employees at age fifty-five and to male employees at age sixty.¹³⁸ The plaintiff was a man who wished to collect pension

¹²⁵ *Id.* at art. 3(2).

¹²⁶ *Id.* at arts. 7(c), (d).

¹²⁷ *Re A Retirement Pension For A Woman Civil Servant*, 1988 E. Comm. Ct. J. Rep. —, 53 Comm. Mkt. L.R. 582 (1988).

¹²⁸ *Id.* at 583.

¹²⁹ *Id.* at 586.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² Directive 79/7, *supra* note 13, at art. 7(1)(a).

¹³³ *Marshall v. Southampton and South West Hampshire Area Health Authority*, 1986 E. Comm. Ct. J. Rep. —, 45 Comm. Mkt. L.R. 688, 703 (1986).

¹³⁴ *Id.*

¹³⁵ *See, e.g., id.*

¹³⁶ Directive 79/7, *supra* note 13, at art. 7(1)(a).

¹³⁷ *Burton v British Railways Board*, 1982 E. Comm. Ct. J. Rep. 555, 34 Comm. Mkt. L.R. 136 (1982).

¹³⁸ *Id.* at 155.

benefits at age fifty-eight.¹³⁹ British Railways would not allow him to collect pension benefits at the age of fifty-eight because he was a man.¹⁴⁰ The European Court held that British Railways did not violate Directive 79/7 by imposing higher pensionable ages for men than for women even though these age differentials adversely affected the plaintiff's pension benefits.¹⁴¹

The European Court has ruled, however, that retirement ages for men and women must be equal. In *Marshall v. Southampton and South West Hampshire Area Health Authority*,¹⁴² the plaintiff desired to retire at the age of sixty-five. Her employer dismissed her at the age of sixty-two because she had exceeded the normal retirement age for women which was sixty.¹⁴³ The plaintiff sought compensation for lost earnings and feelings of dissatisfaction.¹⁴⁴ The European Court held that Southampton violated Directive 76/207 because the employer dismissed men and women at unequal retirement ages.¹⁴⁵ *Marshall* only discussed men's and women's retirement ages, thus differing from *Burton* which discussed men's and women's pensionable ages and benefits.¹⁴⁶ Although Directive 79/7 permits employers to base pension benefits on discriminatory ages, employers may not force women to retire earlier than men.¹⁴⁷

Directive 79/7 also fails to equalize pensions for people who rear children.¹⁴⁸ Women who bring up children or interrupt their careers to raise children are entitled to pension benefits.¹⁴⁹ Men who rear children, however, often do not receive equal pension benefits.¹⁵⁰

4. Provisions Which Implement Directive 79/7

Member states must implement these provisions through action prescribed in Directive 79/7.¹⁵¹ Directive 79/7 directs member states to abolish all legislation and rules which are contrary to the principle of equal treatment.¹⁵² Member states must also introduce positive legislation to equalize statutory social security

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 157.

¹⁴² *Marshall v. Southampton and South West Hampshire Area Health Authority*, 45 Comm. Mkt. L.R. at 713.

¹⁴³ *Id.* at 703.

¹⁴⁴ *Id.* at 704.

¹⁴⁵ *Id.* at 708, 713.

¹⁴⁶ *Id.* at 707.

¹⁴⁷ *Id.*

¹⁴⁸ Directive 79/7, *supra* note 13, at art. 7(1)(b).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ See *id.* at arts. 5, 6, 8, 9, 10.

¹⁵² *Id.* at art. 5.

benefits.¹⁵³ Finally, Directive 79/7 requires member states to give aggrieved persons access to the court system.¹⁵⁴ The member states were expected to effect these changes by 1984.¹⁵⁵

B. *Directive 86/378: Occupational Social Security Benefits*

The Council adopted Directive 86/378 to equalize occupational benefits.¹⁵⁶ Directive 86/378 prohibits employers from directly or indirectly distributing unequal occupational benefits between men and women based on their gender, marital status, or family circumstances.¹⁵⁷ Directive 86/378 defines occupational benefits as those provided to workers to supplement or replace statutory entitlements.¹⁵⁸

1. The Scope of Directive 86/378

Directive 86/378 does not equalize benefits between men and women in certain types of occupational schemes.¹⁵⁹ For example, Directive 86/378 does not require employers to pay equal benefits to men and women who are not salaried employees or who are the sole beneficiaries under a benefit plan.¹⁶⁰ Additionally, Directive 86/378 does not require employers to give salaried workers equal treatment in choosing between benefits or choosing when they will receive their benefits.¹⁶¹

The directive does require employers to equalize a wide range of occupational benefits.¹⁶² Directive 86/378 equalizes benefits between men and women workers when they become ill, disabled, retired, injured or ill at work, or unemployed. Additionally, Directive 86/378 requires employers to equalize benefits for men and women who retire at a young age.¹⁶³ Directive 86/378 also allows women

¹⁵³ *Id.* at art. 8(1).

¹⁵⁴ *Id.* at art. 6.

¹⁵⁵ *Id.* at art. 8(1). Article 8(1) states, "Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive within six years of its notification. They shall immediately inform the Commission thereof." *Id.* The directive was enacted on December 19, 1978. Member states were expected to implement Directive 79/7 by December 23, 1984. *McDermott v. Minister For Social Welfare*, 1987 E. Comm. Ct. J. Rep. ___, 49 Comm. Mkt. L.R. 607, 615 (1987); *Clarke v. Chief Adjudication Officer*, 1987 E. Comm. Ct. J. Rep. ___, 50 Comm. Mkt. L.R. 277, 289 (1987); *State of the Netherlands v. Federatie Nederlandse Vakbeweging*, 31 O.J. EUR. COMM. (No. C 8) 4 (1988).

¹⁵⁶ Directive 86/378, *supra* note 13, at art. 1.

¹⁵⁷ *Id.* at art. 5(1).

¹⁵⁸ *Id.* at art. 2(1).

¹⁵⁹ *See id.* at art. 2(2).

¹⁶⁰ *Id.* at arts. 2(2)(a), (b).

¹⁶¹ *Id.* at art. 2(2)(c).

¹⁶² *See id.* at art. 4(a).

¹⁶³ *Id.*

leaving work for maternity reasons to retain their benefits.¹⁶⁴ In general, this directive provides men and women equal amounts of occupational benefits.¹⁶⁵ Employers, for example, may not calculate benefits differently on grounds of sex.¹⁶⁶ Nor may employers grant unequal rights¹⁶⁷ or contribution refunds¹⁶⁸ to men and women who withdraw from a benefit plan.

Directive 86/378, however, allows employers to pay men and women unequal benefit amounts in some circumstances. For example, employers may pay unequal benefits to men and women based on actuarial differences between the sexes.¹⁶⁹ Since women have a longer life expectancy rate than men, women will receive lower retirement benefits. In these circumstances the directive encourages employers to contribute more money to women's benefit plans so that men's and women's ultimate benefit payments will be more equal.¹⁷⁰

Directive 86/378 also requires employers to give men and women equal access to occupational benefits in many situations.¹⁷¹ First, employers may not exclude one sex from participating in a benefit scheme.¹⁷² Second, employers must make benefit schemes equally obligatory or optional for both sexes.¹⁷³ Third, employers may not admit men and women to benefit schemes at different ages or after different terms of service.¹⁷⁴ Fourth, workers, as well as employers, cannot be required to contribute more to a benefit plan for the advantage of one sex.¹⁷⁵ Fifth, the state cannot discriminate between the sexes when distributing discretionary benefits.¹⁷⁶

2. Survivor and Family Benefits

Directive 86/378 does not completely equalize survivor and family benefits between men and women. Directive 86/378 apparently equalizes men's and women's occupational survivor and family benefits in some circumstances.¹⁷⁷ Employers are not required to equalize survivor benefits between men and

¹⁶⁴ *Id.* at art. 6(1)(g).

¹⁶⁵ *Id.* at arts. 6(1)(d), (h), (j).

¹⁶⁶ *See id.* at art. 6(1)(h).

¹⁶⁷ *See id.* at art. 6(1)(j).

¹⁶⁸ *Id.* at art. 6(1)(d).

¹⁶⁹ *Id.* at art. 6(1)(h). Employers can only discriminate between the sexes on the basis of actuarial factors in contribution-defined benefit plans. Contribution-defined benefit plans are those plans to which workers contribute money. Curtin, *Occupational Pension Schemes and Article 119: Beyond the Fringe?* 1987 COMMON MKT. L. REV. 215, 225.

¹⁷⁰ Directive 86/378, *supra* note 13, at art. 6(1)(h).

¹⁷¹ *Id.* at arts. 6(1)(a-c), (e), (i), 6(2).

¹⁷² *Id.* at art. 6(a).

¹⁷³ *Id.* at art. 6(b).

¹⁷⁴ *Id.* at art. 6(c).

¹⁷⁵ *Id.* at art. 6(i).

¹⁷⁶ *Id.* at art. 6(2).

¹⁷⁷ *See id.* at arts. 4(b), 5(1).

women until another directive equalizes statutory survivor benefits.¹⁷⁸ Additionally, employers may pay men and women unequal occupational survivor and family benefits unless these benefits constitute pay.¹⁷⁹

3. Individual Retirement Benefits

Directive 86/378 also does not completely equalize individual pension benefits between men and women. Directive 86/378 prohibits employers from retiring men and women at different ages.¹⁸⁰ Employers, however, may impose unequal pensionable ages for men and women.¹⁸¹ This inequality may continue to exist until pensionable ages are equalized in statutory schemes.¹⁸²

4. Provisions Which Implement Directive 86/378

Member states must implement these provisions through action prescribed in Directive 86/378.¹⁸³ Member states must revise any laws and rules which perpetuate unequal occupational benefits by July 30, 1989.¹⁸⁴ The member states have until January 1, 1993 to revise all unequal occupational schemes.¹⁸⁵ Additionally, the member states must give aggrieved persons access to the national court system and protection against retaliatory dismissals.¹⁸⁶ The states, however, are not required to reimburse benefits which were distributed unevenly before Directive 86/378 was adopted.¹⁸⁷

C. *The Commission's Proposal for a Third Social Security Directive*

The Commission submitted a proposed directive to the Council on October 27, 1987.¹⁸⁸ The proposal is presently pending before the Council. If this

¹⁷⁸ *Id.* at art. 9(b).

¹⁷⁹ *Id.* at art. 4(b). Article 4(b) states that this directive applies to family and survivor benefits if those benefits constitute pay. Article 4(b) states:

This Directive shall apply to: . . .

(b) occupational schemes which provide for other social benefits, in cash or in kind, 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.

Id.

¹⁸⁰ *Id.* at art. 6(f).

¹⁸¹ *Id.* at art. 9(a).

¹⁸² *Id.*

¹⁸³ *See id.* at arts. 7, 8, 10, 11, 12, 13.

¹⁸⁴ *Id.* at art. 12. Article 12 states: "Member States shall bring into force such laws, regulations and administrative provisions as are necessary in order to comply with this Directive at the latest three years after notification thereof. They shall immediately inform the Commission thereof." *Id.* (footnote omitted). The member states were notified of Directive 86/378 on July 30, 1986. *Id.* at n.1.

¹⁸⁵ *Id.* at art. 8(1).

¹⁸⁶ *Id.* at arts. 10, 11.

¹⁸⁷ *Id.* at art. 8(2).

¹⁸⁸ *See* Directive Proposal, *supra* note 14.

proposal is adopted, the Commission will have completed its efforts to equalize statutory and occupational social security benefits.¹⁸⁹

1. The Scope of the Proposed Directive

The proposed directive enlarges the eligible population and types of benefits which employers must equalize between the sexes. Under the proposed directive, employers must pay workers' survivors and dependents equal benefits.¹⁹⁰ Additionally, employers must pay both statutory and occupational types of family, survivor, and individual pension benefits on an equal basis to men and women.¹⁹¹ This includes benefits which were specifically excluded from the scope of the previous two directives.¹⁹² Finally, the proposed directive requires employers to pay social assistance benefits on an equal basis when those benefits supplement or replace social security benefits.¹⁹³

2. Survivor and Family Benefits

The proposed directive will equalize survivor benefits between men and women.¹⁹⁴ Employers, for example, will be required to give widows and widowers equal benefits if the proposal is adopted. Employers will also be required to help women establish widowers' pension funds.¹⁹⁵

The proposal also recommends equality for other survivors. Under the proposal, for example, employers will pay surviving children equal benefits without considering the child's gender or the gender of the deceased parent.¹⁹⁶ Likewise, employers will pay other survivors equal benefits without considering the gender of the survivor or the gender of the deceased.¹⁹⁷

The proposed directive also equalizes family benefits. Under the proposal, employers will pay equal children's benefits without considering the gender of

¹⁸⁹ *Id.* at 2.

¹⁹⁰ *Id.* at art. 2(d).

¹⁹¹ *Id.* at arts. 3(a), (b).

¹⁹² *See id.* at art. 3(c).

¹⁹³ *Id.* at art. 3(d).

¹⁹⁴ *Id.* at art. 4(a).

¹⁹⁵ *See Newstead v. Department of Transport and H.M. Treasury*, 1988 E. Comm. Ct. J. Rep. —, 51 Comm. Mkt. L.R. 219 (1988). The Court found that the plaintiff's pension plan did not violate Community law even though it was not equally available to men and women and did not require them to make equal contributions. *Id.* at 237, 242. The European Court found no violation of Community law because Directive 76/207 did not apply to social security benefits. Directives 79/7 and 86/378 excepted survivors' pensions from equal treatment. *Id.* at 241. Since the proposed directive deletes the exception of survivors' pensions from equal treatment in occupational and statutory schemes, the court should find the pension plan in *Newstead* to violate Community law if the proposed directive is adopted. *See Directive Proposal*, *supra* note 14, at art. 12.

¹⁹⁶ Directive Proposal, *supra* note 14, at art. 5.

¹⁹⁷ *Id.* at art. 6.

the child or the parent.¹⁹⁸ Parents include natural parents or other people who provide primary support and care for the child.¹⁹⁹ When the parents live together, the mother receives the benefits unless the parents otherwise notify the government. If parents are divorced, the parent who is actually caring for the child will receive the benefits.²⁰⁰

The proposed directive also recommends that employers pay equal benefits for dependent adults. The proposed directive requires employers to pay all dependent adults equal benefits without considering the gender of the dependent or the person supporting them.²⁰¹ The directive only requires employers to pay these benefits to adults who have not received individual entitlements through their national governments.²⁰²

As an alternative to traditional survivor and family benefits, the proposed directive urges employers to give all spouses equal, individual benefits.²⁰³ The proposed directive, for instance, recommends that employers give surviving spouses benefits before retirement to help them adjust to life as a single parent or person.²⁰⁴ Additionally, the proposal recommends that employers pay surviving spouses with dependent children temporary benefits to help support their children.²⁰⁵ Finally, the proposal recommends that employers pay each person his or her own health and retirement benefits.²⁰⁶

3. Individual Retirement Benefits

The proposed directive will equalize pension benefits between men and women more completely than the first two directives. First, the proposal recommends that men and women have equal pensionable ages.²⁰⁷ Pension benefits may be unequal, however, to account for actuarial differences between the sexes.²⁰⁸ Second, the proposal recommends that employers pay people who rear

¹⁹⁸ *Id.* at art. 7(1)(a).

¹⁹⁹ *Id.* at art. 7(2).

²⁰⁰ *Id.* at art. 7(3).

²⁰¹ *Id.* at art. 8.

²⁰² *Id.* at art. 10(2).

²⁰³ *Id.* at art. 4(b).

²⁰⁴ *Id.* at art. 11.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.* at art. 9(1).

²⁰⁸ *See id.* at art. 12(b). Article 12(b) deletes articles 9(a) and 9(b) from Directive 86/378. Article 9(a) allows pensionable ages between men and women to remain unequal in occupational social security schemes. Article 9(b) allows survivors' pensions to remain unequal between men and women. *See* Directive 86/378, *supra* note 13, at arts. 9(a), (b). Article 12(b) of the proposed directive, however, does not delete article 9(c) from Directive 86/378. Article 9(c) of Directive 86/378 allows employers to compel men and women workers to contribute unequal amounts to occupational (contribution-defined) benefit plans based on actuarial differences between the sexes. Directive Proposal, *supra* note 14, at art. 9(c).

children equal pension benefits regardless of their sex.²⁰⁹ The proposal will require, however, that these parents prove that they interrupted their careers for their children before receiving such benefits.²¹⁰

The proposal also recommends equal treatment for men and women in pension plans that do not have a set pensionable age. Employers who allow workers to decide their own pensionable age must allow both sexes to participate in the program on equal terms.²¹¹ Other employers who vest employees with pensions after a specific number of working years must require the same number of years to be completed by both sexes.²¹²

4. Provisions Which Implement the Proposed Directive

This proposed directive provides that member states implement this proposal through the previous two directives.²¹³ Specifically, member states must abolish all laws that perpetuate inequality in statutory and occupational social security benefits.²¹⁴ Member states must enact positive legislation to equalize social security benefits.²¹⁵ Finally, member states must give men and women access to the courts and provide them with protection from retaliatory dismissals.²¹⁶

V. THE SOCIAL SECURITY MEASURES AND ARTICLE 119

The Council's adoption of a proposal for a third directive will complete the EEC's attempts to equalize social security benefits between men and women.²¹⁷ This proposal will improve current laws by eliminating inequalities based on sex relating to survivor, family, and individual pension benefits.²¹⁸ Currently,

²⁰⁹ Directive Proposal, *supra* note 14, at art. 10(1).

²¹⁰ *Id.*

²¹¹ *Id.* at art. 9(3)(a).

²¹² *Id.* at art. 9(3)(b).

²¹³ *See id.* at art. 13(1).

²¹⁴ *See id.* The Directive Proposal will be implemented by reference to the implementing provisions of the first two directives. Specifically, article 13(1) states, "Articles 5 and 6 of Directive 79/7/EEC and Articles 7, 10 and 11 of Directive 86/378/EEC shall apply to the matters covered by this Directive." *Id.*

Article 5 of Directive 79/7 directs all member states to abolish all legislation and rules which are contrary to the principle of equal treatment. Directive 79/7, *supra* note 13, at art. 5. Article 6 of Directive 79/7 directs member states to give aggrieved persons access to the court system. *Id.* at art. 6.

Article 7 of Directive 86/378 directs member states to equalize men's and women's occupational benefits that are administered through compulsory benefits arrangements. Article 7 also prohibits member states' administrative bodies from approving discriminatory benefit schemes. Directive 86/378, *supra* note 13, at art. 7. Articles 10 and 11 direct member states to give aggrieved persons access to the national court system and protection against retaliatory dismissals. *Id.* at arts. 10, 11.

²¹⁵ *See* Directive Proposal, *supra* note 14, at art. 13(1); *see supra* note 214 and accompanying text.

²¹⁶ Directive Proposal, *supra* note 14, at art. 13(1).

²¹⁷ Directive Proposal, *supra* note 14, at 2 (explanatory forward).

²¹⁸ *See supra* notes 194-212 and accompanying text.

the Council has not enacted this measure because member states are experiencing problems financing such benefits for women.²¹⁹

A. *Survivor, Family, and Individual Retirement Benefits*

Unless the Council enacts the third social security provision, men and women will continue to obtain unequal survivor benefits. Directives 79/7 and 86/378 do not attempt to equalize survivor benefits between men and women.²²⁰ Employers, therefore, are not required to pay the spouses and dependents of workers equal benefits. In one case, for example, children of a deceased mother collected £400 in survivor benefits.²²¹ Under the same scheme these children would have collected £13,000 if their father had died.²²² The proposed directive would eliminate such inequalities because it specifically equalizes survivor benefits for men and women.²²³

Additionally, if the Council adopts the third social security provision, men and women will receive more equal family benefits than they receive under article 119 and the first two directives. Directives 79/7 and 86/378 do not guarantee dependents of working men and women equal family benefits because dependents are not part of the working population.²²⁴ Through Directive 79/7, men and women do not receive equal family benefits for dependent spouses.²²⁵ Under Directive 86/378, men and women are not paid equal family benefits for dependents unless those benefits constitute pay to the worker.²²⁶ The language of this provision is similar to that of article 119.²²⁷ The European Court, therefore, may apply the same narrow definition of pay to this provision that the Court applied to equal pay cases under article 119. If the Court applies the article 119 definition of pay to Directive 86/378, men and women will not receive more equal occupational family benefits than they presently receive under article 119. The proposed directive would eliminate such inequalities in family benefits because it specifically equalizes family benefits between men and women.

Finally, unless the Council enacts the third social security provision, men and women will continue to obtain unequal pension benefits. Directives 79/7 and 86/378 do not equalize the age at which men and women become eligible for

²¹⁹ Telephone Interview with Barbara Sloan, *supra* note 51.

²²⁰ See *supra* notes 122–23, 177–78 and accompanying text.

²²¹ *EEC Directive Falls Short of Pensions Sex Equality*, Financial Times (London), June 10, 1936, at 13, col. 3.

²²² *Id.*

²²³ See *supra* notes 194–97 and accompanying text.

²²⁴ See Directive 79/7, *supra* note 13, at art. 2; Directive 86/378, *supra* note 13, at art. 3.

²²⁵ See *supra* notes 124–31 and accompanying text.

²²⁶ See *supra* notes 177–79 and accompanying text.

²²⁷ Compare *supra* note 68 with *supra* note 179.

pension benefits.²²⁸ Employers, therefore, may continue to calculate and distribute pension benefits on an unequal basis between men and women, as did the employer in *Burton v. British Railways*.²²⁹

Additionally, women may find that they cannot contribute to pension plans after they reach their pensionable age.²³⁰ Although employers are required to retire men and women at the same age, employers are not required to pay men and women pension benefits at equal ages.²³¹ Employers, therefore, may continue to set women's pensionable ages at sixty even though the women do not retire until they are sixty-five. Since employers can treat men and women differently based on unequal pensionable ages, they may prevent women from contributing to pension schemes at age sixty even though they cannot retire women until the age of sixty-five. If this is permitted, women will be prevented from contributing to pension plans for five of their working years. Women, therefore, will accumulate smaller pension funds and collect lower monthly pension benefits than men.²³² Such inequalities would be impermissible if the Council enacted the proposed directive because it specifically equalizes pensionable ages between men and women.²³³

Couples and individuals who do not maintain a two-parent household supported by a man are economically disadvantaged because survivor, family, and pension benefits are not paid equally to men and women under Directives 79/7 and 86/378. Employers, for example, are not required to provide men with survivor or pension benefits.²³⁴ Both spouses, however, are provided family pensions and benefits when a male supports the family.²³⁵

Single-parent households headed by women will also suffer economic disadvantages. An increasing number of families are adversely affected by these inequalities because divorce rates in the EEC have risen dramatically over the past decade.²³⁶ Children of single-parent households suffer most because the directives give children fewer benefits for their working mother than for their working father.²³⁷

Even though the Council has not adopted the social security proposal, most member states recognize that men and women need more equal social security benefits. Some states, for example, have begun equalizing survivor and family

²²⁸ See *supra* notes 132-50, 180-82 and accompanying text.

²²⁹ See *supra* notes 136-41 and accompanying text.

²³⁰ See Curtin, *supra* note 169, at 253.

²³¹ See *supra* notes 136-41 and accompanying text.

²³² See Curtin, *supra* note 169, at 253.

²³³ See *supra* notes 207-12 and accompanying text.

²³⁴ Laurent, *European Community Law and Equal Treatment for Men and Women in Social Security*, 121 INT'L LAB. REV. 373, 376 (1982).

²³⁵ *Id.*

²³⁶ WOMEN IN THE EUROPEAN COMMUNITY, *supra* note 2, at 11.

²³⁷ See *supra* notes 221-22 and accompanying text.

benefits even though the enacted Community directives do not require them to do so.²³⁸ Most member states, however, do not completely equalize survivor and family benefits.²³⁹ Some member states currently only propose to equalize these benefits in the future.²⁴⁰ Additionally, some member states do not intend to equalize men's and women's individual pension benefits.²⁴¹ Thus, men and women will not be guaranteed equal survivor, family, and pension benefits unless the Council adopts the proposal for a third social security measure.

B. *Private and Public Employees*

The third social security measure does not guarantee all men and women equal social security benefits. Men and women working for private employers, for example, will not receive equal social security benefits. These men and women will not receive equal benefits because the three social security measures are not directly enforceable against private individuals.²⁴²

Men and women working for private employers are also generally unable to obtain equal social security benefits through article 119. Individuals may attempt to obtain equal benefits through article 119 because it is directly enforceable against private employers.²⁴³ The European Court, however, only allows men and women to obtain equal social security benefits through article 119 in a narrow set of circumstances.²⁴⁴ Given the Court's narrow interpretation of article 119 and the failure of the social security measures to have direct effect against private employers, men and women working in the private sector will be unable to obtain equal benefits. This will be the case unless the Community or the member states enact legislation to supplement the first three social security measures.

Additionally, men and women working for public employers may not consistently receive equal benefits through the social security measures. Presently, Directive 79/7 is the only social security measure which has direct effect against the member states.²⁴⁵ The Commission, however, has not aggressively enforced

²³⁸ Commission Report on Equal Opportunities, *supra* note 32, at 20–23. Belgium, Denmark, the Netherlands, the United Kingdom, Luxembourg, Greece, France, and the Federal Republic of Germany have made changes or proposals to equalize survivors' and family benefits. *Id.*

²³⁹ *See id.*

²⁴⁰ *See id.*

²⁴¹ Commission Report on Equal Opportunities, *supra* note 32, at 22. The United Kingdom, for example, specifically declined to equalize retirement ages and pension benefits. The United Kingdom attributes its refusal to equalize retirement ages to financial problems. *Id.*

²⁴² *See supra* notes 41–47 and accompanying text.

²⁴³ *Id.*

²⁴⁴ *See supra* notes 89–112 and accompanying text.

²⁴⁵ *See supra* note 46 and accompanying text.

Directive 79/7.²⁴⁶ In comparison, the Commission has taken action for member states' violations of Directive 75/117 and Directive 76/207.²⁴⁷ Even so, member states' implementation of the principle of equal treatment has been slow.²⁴⁸ The Commission probably can expect member states to violate the social security measures given their slow implementation of the other equality measures. Without adequate enforcement procedures men and women employed in the public sector may not actually receive equal social security benefits.

C. Actuarial Differences Between Men and Women

Under the third social security measure employers may provide unequal pension benefits to men and women if the discrepancy is based on actuarial

²⁴⁶ The Commission instituted infringement proceedings in 1980 against Belgium, Denmark, France, Ireland, Italy, and the United Kingdom for violating Directive 76/207. COMMISSION OF THE EUROPEAN COMMUNITIES, FOURTEENTH GENERAL REPORT OF THE ACTIVITIES OF THE EUROPEAN COMMUNITIES IN 1980, at 130 (1981). See Directive 76/207, *supra* note 37.

The Commission instituted infringement proceedings in 1982 against all the member states except Greece for violating Directive 76/207. This same year, the Commission took Belgium, Italy, and the United Kingdom before the European Court for uncorrected violations of that directive. COMMISSION OF THE EUROPEAN COMMUNITIES, SIXTEENTH GENERAL REPORT ON THE ACTIVITIES OF THE EUROPEAN COMMUNITIES IN 1982, at 131 (1983).

The Commission instituted new infringement proceedings in 1983 against Belgium, France, Ireland, and Luxembourg for violating Directive 76/207. The Commission also brought Denmark to the European Court for on-going violations under Directive 75/117. COMMISSION OF THE EUROPEAN COMMUNITIES, SEVENTEENTH GENERAL REPORT ON THE ACTIVITIES OF THE EUROPEAN COMMUNITIES IN 1983, at 141-42 (1984). See generally Directive 75/117, *supra* note 35. Additionally, the Commission took action against France in 1988 for violating Directive 76/207. *Commission v. French Republic*, 31 O.J. EUR. COMM. (No. C 199) 12 (1988).

Directive 79/7 has been directly effective against member states since 1984. The *Official Journal of the European Communities (Official Journal)*, however, does not list any infringement proceedings before the European Court against member states in 1984. Additionally, the Commission did not announce in its annual report that it initiated infringement proceedings against member states between 1985-87 for breaching Directive 79/7. See COMMISSION OF THE EUROPEAN COMMUNITIES, NINETEENTH GENERAL REPORT ON THE ACTIVITIES OF THE EUROPEAN COMMUNITIES IN 1985, at 181-82 (1986); COMMISSION ACTIVITIES 1986, *supra* note 50, at 203-04; COMMISSION ACTIVITIES 1987, *supra* note 48, at 187. Additionally, the *Official Journal* does not list any infringement proceedings before the European Court against member states in 1988.

The European Court, however, is currently considering other issues involving Directive 79/7. Reference for a preliminary ruling by the Raad van Beroep, Groningen, by judgment of that court of 29 March 1988 in the case of M.A. Bernsen-Gustin v. Bestuur der Sociale Verzekeringsbank, 31 O.J. EUR. COMM. (No. C 132) 6 (1988) (Case 106/88). Case 106/88 asks whether a person who has not been self-employed or worked outside the home is a person entitled to equal benefits under article 2 of Directive 79/7. *Id.*; Reference for a preliminary ruling by the Raad van Beroep, Utrecht, by judgment of that court of 12 February 1988 in the case of J.E.G. Achterberg (née Riele) v. Sociale Verzekeringsbank, Amsterdam, 31 O.J. EUR. COMM. (No. C 72) 7 (1988) (Case 48/88). Case 48/88 asks the European Court to determine whether people are part of the working population if they can no longer work due to the risks in article 3 of Directive 79/7. This case also asks the European Court whether vested rights under a pension plan which violates Directive 79/7 must be equalized between men and women receiving these benefits after Directive 79/7 became directly effective. *Id.*

²⁴⁷ See *supra* note 246 and accompanying text.

²⁴⁸ See WOMEN IN EUROPEAN COMMUNITY, *supra* note 2, at 22-26.

differences between the sexes.²⁴⁹ The EEC's Equal Opportunities Commission criticizes this exception because characteristics other than gender, such as nationality, have a greater impact on mortality rates.²⁵⁰ A worker's smoking habit, profession, or weight may also affect longevity more than gender affects longevity.²⁵¹ These characteristics, however, are not factored into the calculation of pension benefits. Under the proposed directive, this inequality would continue because employers can require men and women to contribute unequal amounts to contribution-defined benefits based on actuarial differences between the sexes.²⁵² Since many factors affect mortality rates, employers should not pay unequal pension benefits based solely on actuarial differences between the sexes.

D. *Part-Time Workers*

Finally, the social security measures and article 119 give part-time workers inadequate opportunities to claim equal social security benefits.²⁵³ Failure to protect part-time workers usually affects women since they comprise 90 percent of the part-time work force.²⁵⁴ Through article 119 and the social security measures, part-time workers may attempt to claim equal pay and benefits by proving that their employer indirectly discriminates against them.²⁵⁵ As demonstrated by the *Jenkins* case, however, part-time workers rarely obtain equal pay through article 119 by claiming to be victims of indirect sex discrimination.²⁵⁶ Part-time workers can expect to have similar difficulties obtaining equal

²⁴⁹ See *supra* note 208 and accompanying text.

²⁵⁰ *Women Stay Caught in the Pension Trap*, Financial Times (London), June 14, 1986, at 5, col. 1.

²⁵¹ Curtin, *supra* note 169, at 226.

²⁵² See *supra* note 208 and accompanying text.

²⁵³ See, e.g., *Jenkins v. Kingsgate Ltd.*, 1981 E. Comm. Ct. J. Rep. 911, 31 Comm. Mkt. L.R. 24 (1981); see *Bilka-Kaufhaus GmbH v. von Hartz*, 1986 E. Comm. Ct. J. Rep. —, 46 Comm. Mkt. L.R. 701, 720 (1986). A proposal for part-time work was submitted to the Council in 1983. Amended Proposal for a Council Directive on Voluntary Part-time Work, 26 O.J. EUR. COMM. (No. C 18) 5 (1983). This proposal would give part-time workers some additional rights to social security benefits. This proposal, however, would not give part-time workers rights to social security benefits if they did not qualify for such benefits by earning a threshold amount in pay. *Id.*

Article 3(1) of the amended proposal states: "Part-time workers shall be covered by statutory or occupational social security schemes. Their contributions to and benefits from such schemes shall be made on the same basis as for full-time workers, taking into account the hours of work of the part-time workers and/or the remuneration received." *Id.* at art. 3(1).

Article 3(2) of the original proposal states: "Member States shall be exempt from applying the provisions of paragraph 1 to part-time workers whose working hours and/or remuneration are below the threshold of eligibility for statutory or occupational social security schemes." *Id.* at art. 3(2).

The Council has not produced any follow up measures for this proposal. Telephone Interview with Jonathan Fink, Intern of Library of Press and Information, Academics Department, Delegation of the Commission of the European Communities in Washington D.C. (Feb. 15, 1988).

²⁵⁴ Memorandum on the Reduction and Reorganization of Working Time, COM (82) 809 final, at 17.

²⁵⁵ See *supra* notes 81-87 and accompanying text.

²⁵⁶ See *supra* notes 84-88 and accompanying text.

social security benefits through the three social security provisions.²⁵⁷ The Council's failure to grant part-time workers more effective rights perpetuates sex discrimination in the social security area since a disproportionate amount of women work part-time. The Council, therefore, should consider adopting legislation to ensure that part-time workers receive equal treatment in the social security area.

VI. CONCLUSION

The EEC is striving to improve the position of women through measures which equalize economic and social opportunities between men and women. As a part of its efforts to improve the position of women, the EEC has adopted two directives which equalize some social security benefits between men and women. The EEC is currently considering a third directive to equalize social security benefits between men and women. This third measure will equalize survivor, family, and individual retirement benefits between men and women.

Although the proposed directive would significantly increase benefits for some working women, the EEC should continue to equalize benefits for men and women by implementing more measures beyond the third social security proposal. In particular, the EEC should continue to equalize social security benefits for men and women who work for private employers and who work part-time. The EEC, moreover, should provide for better enforcement procedures to ensure that member states comply with these social security measures. By adopting the proposal and additional measures, the EEC will improve the economic and social position of women by providing them with more complete equality in the social security area.

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²⁵⁷ See Directive 79/7, *supra* note 13, at art. 4(1); see Directive 86/378, *supra* note 13, at art. 5(1). These provisions, like article 119, protect workers against indirect discrimination. For example, they define sex discrimination as direct or indirect discrimination based on gender, marital status, or family circumstance. *Id.* Article 1 of the proposed directive incorporates these definitions of equal treatment. See Directive Proposal, *supra* note 14, at art. 1.