ARE PENSION SCHEMES DISCRIMINATORY IN EU MEMBER STATES?

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Abstract

The purpose of the paper is that of highlighting the most relevant features of direct and indirect gender discrimination and age discrimination, in the statutory and occupational old-age pension systems. The aim is to offer a contribution to the reflection on the effectiveness of gender and age equality legislation in the field of old-age pensions.

Keywords: age discriminations, gender discriminations, Romania

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Introduction

Occupational schemes are deeply involved in the processes of reforming old-age pensions and are increasingly run according to insurance principles and thus under the criteria of capitalization: this might give rise to many gaps in terms of social protection, especially when non-standard working patterns, mainly taken up by women, are concerned.

Gender Discriminations

Comparing old-age pension models in the perspective of gender equality: the traditional Three-Pillar Model vis-à-vis the World Bank Model

The traditional Three-Pillar Model, upon which EU Directives 79/7/EEC and 2006/54/EC are based, is made up of a statutory public pillar, an occupational pillar and a private insurance pillar. The countries which are organized according to this pillar are: Cyprus, Denmark, Finland, France, Greece, Luxembourg, Malta, Norway,

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Portugal, Turkey, Sweden, Ireland, Austria, the Netherlands, Belgium, the UK, Liechtenstein, Italy, Spain, Germany, and the Czech Republic[1].

The choice of the Three-Pillar Model per se is irrelevant as far as gender equality is concerned. Indeed, what do matter are rather the features of the various schemes, statutory and occupational, used in the Three-Pillar Model. This especially in relation to the different working patterns of men and women in the labour market and to the pay gap that exists between them that are both mirrored by the pension system.

Many Central and Eastern European Countries have chosen, on the other hand, the World Bank Model (WBM) rather than the Three-Pillar Model. The WBM is made up of the following pillars: a first mandatory public pillar; a second privately managed mandatory savings pillar; a third pillar made up of additional private pensions savings and occupational pensions, which has been used in order to better represent the latest pension reforms. The WBM Countries are: Bulgaria, Lithuania, Estonia, Latvia, Slovakia, Croatia, Slovenia, Poland, Hungary, FYR of Macedonia, Romania and Iceland[2].

In particular, there was a paradigmatic shift in many Central and Eastern European countries after the collapse of communism, when the strong idea of redistribution and the egalitarian attitude of the pension system turned into pension self-care via privately managed pension funds. Within this process, the original statutory system was generally transformed into a three-pillar model with the co-operation of the World Bank (and of the International Monetary Fund)[3].

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[1] *Although some literature classifies the Czech Republic as a WBM system (see H. Vaandrager, 'Adopting a regional approach to occupational pensions in Central and Eastern Europe', AEGON Global Pension (2009)), the national expert defines it as a Three-Pillar Model system.*

[2] *Although attention is regularly given to the Central and Eastern European countries when we are discussing the WBM, according to its definition the pension system of Iceland belongs to this group as well. In this case the first pillar is a tax-financed public plan, which provides for a flat rate or means-tested basic pension for all; the second pillar is a mandatory occupational or private, but publicly regulated, funded pension scheme; the third pillar is a voluntary funded pension scheme.*

[3] *See also Alfio Cerami: Social Policy in Central and Eastern Europe, Universität Potsdam, Lit and Peter Vanhuysse: Devide and Pacify, CEU Press.*

According to the national reports, the WBM pillar system per se may be useful for gender equality purposes, provided that the mainly indirectly discriminatory features within each system are abolished by taking into account the real situation of women in the labour market. The most significant problem of this system is that it often transfers the differences between the wages of women and men to the pensions.

Employees in low-paid and precarious jobs, among whom women are disproportionately over-represented, cannot afford to save much and often fail to do so even if the law has supposedly made retirement savings schemes mandatory. For most of them the voluntary private pillar is practically useless.

Advantages reserved for women with regard to child care, a lower retirement age and service period requirements are rooted in the previous pension system, where these preferences served as balancing elements for women's pension rights. After the change of regimes, many countries recognized that these factors result in negative effects as well.

The main difference between the Three-Pillar Model and the WBM rests in the second pillar, which is occupational, in the one model, and privately managed, mandatory and financed by a share of social security contributions, in the other. Here the main doubt as regards gender equality legislation based on the three-pillar model is whether the privately managed and publicly financed, mandatory WBM schemes can be classified as a second tier of the first pillar and so included under Directive 79/7/EEC, or as private insurances consequently regulated by Directive 2004/113/EC.

General trends: old-age pension reforms and their impact on gender equality - WBM Countries

Countries of the WBM have to face similar demographic and structural problems as the nations with the Three-Pillar Model, such as the ageing population, changing family patterns, the lowering of the fertility rate and financial sustainability.

Moreover, besides the classic and well-known factors, the effects of the current financial crisis have to be managed as well. We can see that in this difficult economic situation old-age pension reforms give priority to financial aspects rather than to gender equality, and women are quite vulnerable because they are more dependent on the statutory system (this happens, for example, in Iceland, Slovenia, and Lithuania).

The national systems' answer to maintaining the balance between ageing and financial sustainability is to regularly increase the retirement age (Estonia, Hungary, Romania, FYR of Macedonia, and Latvia from 2012, for example). Even though the increase in the pensionable age is not as yet linked to equalization, as most of the WBM Countries still maintain differences in the age of retirement for men and women.

Another feature, which is common in the Three-Pillar Model Countries, is the shift from DB to DC/NDC schemes (see Appendix) and, more generally, the strengthening of the link between pension benefits and contributions (Slovenia, Bulgaria, and Romania). Slovenia is a case in point: as from 2015, the contributions paid by the insured person to the first pillar will be recorded in his/her personal pension savings account; personal pension savings accounts shall be virtual, because the system will maintain its PAYG nature and the contributions of active workers will still be used to pay the pension of retired workers. In this context, it is considered necessary to introduce a strong redistributive element (the zero pillar), which would provide everyone with a universal pension at 65 years of age.

All the WBM countries, however, have realized the shift to DC schemes by introducing the privately managed, mandatory second pillar/second level of the first pillar schemes: it is important to stress that the significance of the new schemes will definitely increase in the forthcoming years, as the WBM system was introduced around the new millennium and the first payments are only now being made.

We can also witness an increase in the required minimum contribution periods (for example, in Romania and Slovakia) and higher contribution levels (FYR of Macedonia, for instance); there is also a general decrease in the replacement rate between wages and pensions.

The pension calculation based on lifelong earnings rather than on the last working years or on the best selected year of employment has been introduced (Bulgaria, Romania), like in many Three-Pillars Model countries. Although disparities in the labour market are not eliminated at the stage of accumulating pension assets, pension systems tend to compensate them at the time of calculating the benefits. This is probably the case as regards the nonapplication of different life expectancy factors in the first-pillar statutory schemes. In Poland, for example, the application of uniform life expectancy rates will increase benefits for women at the expenses of men. On the other hand, the application of gender-related actuarial factors is very much debated in relation to the second pillar/second tier schemes.

Age Discriminations

As I previous mentioned there are more criteria of discrimination that gender, one of there is age.

Currently pension schemes are covered by the Equal Treatment Directive 2006/54/EC (available in all EU member states) which basically makes it unlawful to discriminate against employees because of their age.

The law covers all types and all aspects of occupational pension schemes and applies to active members, deferred members and pensioners. Personal and stakeholder pension schemes are affected but only by reference to the employer contributions made on behalf of employees.

This means employee contributions to a group personal pension or stakeholder scheme may vary according to age but employers should avoid 'indirect discrimination'. For example, it is unlikely to be appropriate for employers to prescribe different rates of employee contribution at different ages to qualify for the same employer contribution, unless the difference can be objectively justified.

The law does not cover the state pension, National Insurance rebates into contracted out schemes, pension sharing on divorce or annuities purchased from insurance companies.

Employment Retirement Ages

In almost all member states, employers are no longer able to force employees to retire at any age unless the retirement can be objectively justified. Employers can have their own non-statutory retirement ages – referred to as an Employer Justified Retirement Age (EJRA) – but these must be objectively justified.

The previous Regulations allowed employers to set a default retirement age (DRA) which allowed them to force employees to stop working at age 65 or higher. Now that the DRA has disappeared and more people work past age 65, employers will have to decide what pension scheme benefits they want/have to provide for those working on. We may see more employers consulting with their legal and pension advisers on flexible retirement options under their rules to cater for this.

Pension Scheme Retirement Ages

A default retirement age at which employers could force their employees to stop working is different from a ‘normal retirement age’ in a pension scheme, which is the age when members can normally take pension benefits without needing employers’ or scheme trustees’ consent. Or simply, the age at which employers expects the majority of their workforce to retire. The Business Innovation and Skills department has confirmed that “...the removal of the DRA does not affect occupational pension schemes. The absence of a DRA does not affect the setting of a ‘normal retirement age’ or ‘normal pension age’ for the purposes of occupational pension schemes.”

However, employers will have to consider allowing continued accrual of benefits past the normal retirement age. For Defined Benefit schemes, this might be in addition to or instead of existing provisions that actuarially increase benefits on late retirement. In addition, for group personal pensions and stakeholder schemes, an employer probably has to contribute to such schemes for as long as the employee works for them – their contributions cannot stop at the normal pension age set on the policy if the employee continues to work past that normal pension age, unless once again there is objective justification.

Insured Benefits (Non-Pensions)

The Government in almost all EU member state did take account of submissions to consultation regarding insured benefits (income protection, life assurance, sickness insurance, accident insurance, private medical cover) where it’s been argued that if no age restriction was to apply to these benefits, the cost of cover for employers would rise considerably. In such cases, employers might cease to offer such benefits to all staff regardless of age. Because of this, the government has introduced an exception to the principle of equal treatment on the grounds of age for group risk insured benefits provided by employers. This means that employers can still apply age restrictions to such schemes.

Objectively Justified

An objective justification allows an employer to set requirements that are discriminatory. The direct/indirect discrimination must pursue a legitimate aim, such as business needs and efficiency, health and safety reasons and particular training requirements. Each case will be considered on its merits and appropriate evidence will need to be provided to support the objectively justified claim. For example, if the aim is to encourage staff loyalty, then there should be evidence to show that the discrimination is actually doing it. Any employer seeking to use 'objective justification' should consider taking advice from an expert in employment law, as well as appropriate ongoing actuarial and pensions advice. In practice, for all but the largest employers, the cost of this will often outweigh any benefits.

Exemptions

Unless there is a specific exemption under the law, age discrimination will only be lawful if it can be objectively justified as outlined above.

Three important exemptions for money purchase schemes (occupational and personal and stakeholder) are as follows:

• Age-related contributions are allowable – provided the aim is to yield equal emerging benefits or to make 'more nearly equal' the benefit.

• Earnings-related contributions are allowable – despite any inequality which might arise due to the fact that older workers tend to earn more.

• Equal rates of contributions to money purchase schemes, irrespective of age, are allowable despite any inequality in the emerging benefits.

However, if the employer goes ahead with the four bands without drawing up projections that confirm:

• broadly similar emerging benefits and/or

• without obtaining actuarial evidence that this contribution structure is aiming to provide an equal or more nearly equal benefit, they lay themselves open to possible future challenge by an employee.

Some other age-related provisions that remain Permissible Under The Equal Treatment Directive 2006/54/Ec For Occupational Pension Schemes Are:

• Minimum and maximum ages for admission to a scheme.

• Age criteria in actuarial calculations, for example, to take account of early and late retirement.

• Reduction in a spouse's pension on the basis of a difference in age between the member and the spouse.

Automatic Enrolment

Some employers will currently have more than one pension scheme in place for (some of) its employees and automatic enrolment will probably lead to many additional employers having different schemes for different sections of their workforce. The employer will need to be mindful of both direct and indirect age discrimination and, as long as the legislation is not breached, there is no requirement to put all staff into the same scheme.

Pension System In Romania

The entire pension system in Romania has undergone significant changes over the last decade. The three-pillar model set up as the basis of the system currently represents all of reforms structurally linked to pensions. During the past five years there has been an analysis of the viability of the pension system, with the accent being placed on the public pension system.

Despite the Government's ambitious objectives relating to the reform of the social security field, unfortunately this analysis did not seem to point to a consistent and coherent reform pattern and was not able to offer a solution to the demographic decline and the lack of any solution to address the increase in the amount of pensions. The number of legal changes adopted over the last decade is significantly high[4], thereby contributing to the increasing hesitation in clarifying the legal provisions relating to the pension system and leading to confusion among an entire segment of the population, i.e., pensioners. Consequently, the reforms undertaken in the pension field, even if they have not so far targeted the fundamental principle of the equity of the system, will be continued and taken to their

[4] There are 38 laws, 40 governmental ordinances, 51 governmental decisions and 32 other types of legal norms such as instructions by the Minister of Labour.

conclusion in order to assess the viability of the pension system and to take the changes to the next level.

The Romanian pensions system, as set up by the existing legal framework, contains a mandatory funded scheme under Pillar II[5]. Pillar II includes privately managed obligatory pensions. The mechanism for these pensions consists of reducing the individual contribution rate and transferring the resulting amounts to the privately managed pension funds.

Summary

In all member states it is obvious that women pensioners run higher poverty risks than men as a consequence of the inequalities existing between men and women in the labour market. These differences in work patterns are then mirrored, often in the form of indirect gender discrimination, by the pension schemes. All the more so when: the pension system is based on the lifetime employment record of the claimants; the schemes are based on actuarial principles (which means the use of gender-related actuarial factors); there is a strong link between benefits and contributions (such as there is in the defined contributions schemes, for example); benefits are earnings related.

This is a complex area and employers, trustees and advisers should be fully aware of the age and gender equality legislation and the objectively justified rules and the exemptions that apply. Advisers can provide very important guidance for employers and trustees by checking that existing schemes satisfy the law and by recommending appropriate structures for new schemes that are fully compliant as well as meeting the needs of the employer and its workforce.

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[5] *The mandatory funded scheme is addressed by Law No. 411 of 2004 as modified and completed by Law No. 23 of 2007.*

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Appendix

Technical concepts

The Pay-as-you-go schemes (PAYG) are those where the payment of contributions by the pensioners are relevant for qualifying conditions and pension amount purposes, but pensions are then actually paid out of the contributions by active workers.

The funded schemes provide for pensions paid by the contributions accumulated over the years by the pensioners themselves, according to the criterion of capitalization.

Schemes with defined contributions (DC) are those in which the total amount of the pension is not predetermined, but depends upon factors such as the number of contributions accumulated or the results of the management of the resources set aside by means of periodical contributions; contributions to these schemes are, on the other hand, predetermined.

The notional defined contribution schemes (NDC) give participants a hypothetical account containing all contributions made over their working lives, credited at a certain rate of return; at the time of retirement, pension benefits are calculated taking into consideration the contributions accumulated in the notional account and the life expectancy factor.

Schemes with defined benefits (DB) are those where the intended total pension payment is established a priori: for this prearranged total the contribution is periodically adjusted according to factors such as the variations in the general economic situation, the variations in the profits of the investments of capital made by the fund and so forth.

Pensionable income is the wages upon which the pension amount is calculated. Career/contribution/insurance periods for the purpose of pension calculation are normally the number of yearly wages/contributions or insurance years upon which pensions are calculated.

Pensionable age is synonymous with the age of retirement that is the age at which a pension can be claimed.

Minimum qualifying conditions are those requirements which have been set for access to pension rights. Among them the following may be relevant: the service/career periods, that is the total length of employment; the insurance period, that is the number of the claimant's insured years; the contributions period, that is the number of contributions paid into the pension fund.

Coefficient of transformation can be used in pension calculation to represent the average remaining life expectancy of the claimant.

Figurative/notional contributions, which are also called contribution credits, are contributions virtually but not effectively paid by the insured person: contribution crediting is generally recognized in cases of unemployment, sickness, caring periods, and so forth; normally, in this case contributions are paid out of the State budget.

Full pension is the maximum amount of pension which is payable.

The replacement rate between wages and pensions is the difference which exists in the individual wages and pension amount.