

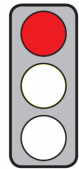
EQUAL TREATMENT OF SELF-EMPLOYED WOMEN AND THEIR ASSISTING LIFE PARTNERS

Status: 05.01.09

MAIN ISSUES

Objectives of the Directive: Improvement of the social protection of self-employed women and persons engaged in the businesses of their life partners.

Groups Affected: Self-employed women and assisting life partners.



Pros: –

Cons: (1) The Proposal is not covered by any legal competence and constitutes an illegitimate intervention into national schemes for social security.

(2) Victims of unequal treatment are to be granted compensation which not only covers damages occurred but is also meant to have a dissuasive effect. This is not compatible with German law.

(3) In connection with punitive damages, class action might lead to malpractice.

CONTENT

Title

Proposal COM(2008) 636 of 3. October 2008 for a **Directive** of the European Parliament and of the Council on the application of the **principle of equal treatment between men and women engaged in an activity in a self-employed capacity** and repealing Directive 86/613/EEC

Abstract

► General Context

- The proposed Directive replaces Directive 86/613 EEC on the equal treatment between men and women engaged in a self-employed activity (Art. 1 (1)).
- Rules on equal treatment shall apply to persons, not being employees or business partners, engaged in the businesses of spouses (Art. 1 (2)).
- Life partners, recognised as such by national law, are to have an equal status as spouses (Art. 2 lit. b).

► Principle of Equal Treatment

- In launching, conducting or extending a self-employed activity, neither women nor men must be discriminated against. Unequal treatment on grounds of family status is also prohibited. (Art. 3 Abs. 1)
- The establishment of a company between spouses or life partners must be subject to the same conditions which apply to the establishment of a company with other persons (Art. 5).
- Gender-based conduct that appears degrading or is intended to appear degrading as well as sexual harassment are deemed to be discrimination (Art. 3 (2); Art. 2 (1) lit. c).
- Member States may adopt further measures to compensate disadvantages linked to sex (so-called “positive action”). This rule also applies if such measures lead to unequal treatment. (Art. 4)

► Social Protection

Member States must ensure that assisting spouses or life partners can, at their request, benefit from at least an equal level of social protection as self-employed workers under the same conditions (Art. 6).

► Maternity Leave

- Self-employed women and assisting spouses or life partners must, at their request, be entitled to the same period of maternity leave as are employees (Art. 7 (1)).
- Member States must ensure “adequate allowance” and, as far as possible, temporary replacement during maternity leave. The women concerned must be free to decide which of these options they wish to choose. (Art. 7 (2) and (4))
- Social allowance is deemed adequate if it is at least equivalent to the income a person would receive in case of absence due to illness. If the person concerned is not entitled to sick pay, the Member State can then offer another equivalent relevant allowance, for which a ceiling may also be laid down. (Art. 7 (3))

► Legal Protection

- All parties concerned must be entitled to enforce their rights stipulated under the Directive before a court or any other competent institution (Art. 8 (1)).
- Associations and organisations having a “legitimate interest” that the provisions of the Directive are complied with must be entitled to sue in the name of the complainant and with his or her approval, as well as to support the complainant during proceedings (Art. 8 (2)).

- Parties injured must be entitled to “adequate” compensation, which may not be limited by an upper limit and, moreover, must have a “dissuasive” effect (Art. 9).

► **Miscellaneous**

- The Directive is to be transposed in at least two years upon taking force (Art. 14 (1)).
- Regarding the provision that assisting spouses or life partners, at their request, should be provided with the same social protection as self-employed (Art. 6), Member States may prolong the transposition period for two years (Art. 14 Abs. 2).
- Upon expiry of the transposition period, the Directive 86/613/EEC will be repealed (Art. 15).

Changes to the Status Quo

- The existing Directive applies to spouses only. The new protection area also comprises life partners, if their family status equals that of spouses under national law.
- To date, Member States have only had to assess whether and how self-employed women or assisting spouses had to be granted maternity protection. The new Directive obliges Member States to grant “adequate social allowances”.
- The obligation to provide assisting spouses or life partners with the same access to social benefits as self-employed persons has not existed in EU law before.
- The right of action in the name of the complainant and the right to support the complainant during proceedings is new.
- To date, Member States have only had to ensure that the parties concerned were entitled to enforce their rights before a court. In future, Member States will also have to provide for compensation. Such compensation serves to compensate for damages suffered and, at the same time, must have a dissuasive effect.

Statement on Subsidiarity

The Commission fears a distortion of competition due to differing social protection of self-employed persons in Member States. According to the Commission, distortion of competition can best be avoided by an EU-wide common legal framework, which would require EU action.

Political Context

The Commission’s Proposal aims to enable more women to engage in self-employed activities. Whereas the percentage of self-employed men amounts to 19%, the number of self-employed women totals 12% only. Around 11% of family businesses rely on the assistance of spouses. The Commission claims that the contribution of assisting spouses is not adequately recognised and relates the extent of recognition to the extent of protection provided by social security schemes. Therefore, the Commission wishes to improve the social protection of assisting spouses. The European Parliament and the Council basically welcomes the project. The European Parliament called the Commission to revise the existing law on 12. March 2008 (Resolution T6-0094/2008).

Legislative Procedure

03.10.08 Adoption by Commission
Open Adoption by European Parliament and the Council, publication in the Official Journal of the European Union, entry into force

Options for Influencing the Political Process

Leading Directorate General:	DG for Employment, Social Affairs and Equal Opportunities
Committees of the European Parliament:	Women’s Rights and Gender Equality (in charge), rapporteur: Astrid Lulling (EEP-ED Group, Lux); Employment, Social Affairs and Equal Opportunities; Industry, Research and Energy; Legal Affairs; Civil Liberties, Justice and Home Affairs
Committees of the German Bundestag:	Labour and Social Affairs (in charge); Legal Affairs; Family Affairs, Senior Citizens, Women and Youth
Decision Mode in the Council:	Qualified Majority (approval by a majority of Member States and at least 255 out of 345 votes; Germany: 29 votes)

Formalities

Competence:	Art. 141 (3) TEC (Equal Treatment between men and women)
Form of legislative competence:	Concurrent legislative competence
Legislative procedure:	Art. 251 TEC (Co-decision)

ASSESSMENT

Economic Impact Assessment

Ordoliberal Assessment

Statutory requirements which relate the launching, conducting or extending of a self-employed activity to a certain gender or family status cannot be reasonably justified. To this end, the explicit prohibition of such provisions is to be appreciated. Certainly the question may be raised whether such requirements exist in any Member State at all; in Germany this is not the case.

The political decision to **grant allowances during maternity leave also to self-employed women is acceptable**, for the health of pregnant women engaged in self-employed activities is no less worth protecting than the health of employees. It is therefore only a matter of consequence to establish an equivalent to statutory sick pay for employees. Thus women would be enabled to take maternity leave, which otherwise might be impossible due to financial reasons.

However, financing labour replacement for pregnant self-employed women would cause extremely high costs to Member States or health insurance companies and, to this end, is to be objected to. Instead self-employed women could invest the equivalent to statutory sick pay into financing such replacement.

The proposed **participation of associations** and other organisations having a “legitimate interest” in **court proceedings** is to be rejected. **In combination with the proposal for “dissuasive compensation”, the abuse of this right of participation cannot be excluded.**

The Commission’s **proposal for “positive discrimination” on grounds of sex**, however, is inconsistent and should therefore be objected. For with such “affirmative action” the legislator would necessarily **reinforce** discrimination instead of combating it as intended. This might lead to **substantial distortion of competition**, e.g. if women are granted support for the establishment of own businesses in the form of targeted subsidies.

Impacts on Efficiency and Individual Freedom of Choice

In proposing to grant the same social protection to assisting life partners of self-employed persons as are granted to self-employed persons, the Commission wishes to bridge an insurance gap. However, in Germany assisting spouses and life partners are already subject to the statutory obligation for health insurance, unless covered in the form of family insurance or the insurance of self-employed spouses. A strict transposition of the proposed Directive might entail the side effect that the statutory health insurance obligation for the assisting life partner must be repealed and that they can choose between either private or statutory health insurance.

Provided the Directive is transposed in Germany in such a way that “**adequate social allowances**” during the maternity of self-employed women **have to be borne by health insurances**, private **health insurances will incur additional costs**. Since most private health insurances neither render maternity payments to women during maternity leave nor compensation for lost wages, costs for privately insured women will increase significantly.

Impacts on Growth and Employment

Significant impacts on growth and employment are not expected.

Impacts on Europe as a Business Location

Significant impacts on Europe as a business location are not expected.

Legal Assessment

Competences

Art. 141 (3) TEC empowers the EU to adopt measures ensuring the equal treatment between men and women in the area of self-employed activities. **Provisions on social security of self-employed persons and their assisting spouses and life partners reach beyond the competences laid down in Art. 141 (3) TEC.** First and foremost they do not affect any labour or employment issues since the group concerned comprises self-employed persons and their assisting life partners. Secondly, the Proposal aims at applying the principle of equal treatment between certain business activities and not at the equal treatment between men and women. The TEC, however, does not provide for any competence for the equal treatment of certain business activities.

Subsidiarity

The Proposal infringes the principle of subsidiarity since Member States can better ensure the social protection of self-employed and their assisting spouses or life partners than the EU. **EU action would not generate any added value.** The design of social security schemes varies in Member States, particularly in view of the protection of self-employed persons and employees. Moreover, Member States have to consider a vast number of factors other than equal treatment in designing their social security schemes. Such **national particularities cannot be considered adequately in EU legislation.**

The Commission's justification that the Proposal would eliminate distortion of competition between Member States is not convincing. Member States continue to decide on their own which social protection is granted. The differences between the systems continue to exist.

Proportionality

A large part of the Proposal is not necessary. **Regarding the equal treatment between men and women, also if self-employed, a comprehensive minimum protection already exists at EU-wide level.** These are in particular the Directives on social security (79/7/EEC), in occupational social security systems (86/378/EEC), access to the conditions for self-employed activities (2002/73/EC and 2006/54/EC) and access to the supply of goods and services (2004/113/EC; cp. [CEP-Policy Brief](#)).

The Commission's proposal to oblige Member States to offer access to temporary labour replacement as an alternative to maternity pay is not appropriate. Such a requirement could only be complied with if social security institutions were to provide a "stock" of an unknown number of experts from all business areas. Alone the costs of creating such a "stock" mean that this cannot even be considered. The limitation that temporary replacement be provided "as far as possible" would only lead to the situation that no replacements are provided at all.

Compatibility with EU Law

The provision on the social security of self-employed persons and their assisting life partners constitutes an intervention into the "basic principles of social security schemes" and is in conflict with Art. 137 (4) TEC, according to which said principles are excluded from EU legislation. What the Commission actually intends is to prescribe to Member States that spouses or life partners should gain access to social security schemes and also how such access should be organised. However, such competence is not at all subject to EU legislation.

Although the wording of Art. 137 (4) TEC only refers to measures laid down in Art. 137 TEC, the protection of national competence could be circumvented – and thus endangered – by merely referring to a competence other than that laid down in Art. 137 TEC. Such circumvention could only be avoided if the protection laid down in Art. 137 (4) TEC were also respected in other areas of competence.

Compatibility with German Law

The proposal to **set compensation so high that a dissuasive effect is achieved is not compatible with German law.** According to German legislation, compensation only serves the purpose to compensate for damages or losses suffered. If the legislator intends to prevent discrimination by deterrent, it has to impose penalties and fines.

The Commission's demand to provide assisting spouses and life partners with the same access to social security schemes as self-employed persons is not compatible with the principles of German social security law. Regarding health insurance, each person is obliged to be insured with a public health service, unless the person concerned is self-employed (§ 2 (1) No. 13, (5) *German Social Security Code V*). This principle, which is an output of the principle of the welfare state, would be infringed without necessity in the case described above.

Alternative Policy Options

The Proposal should not be adopted; instead the rules stipulated under Directive 86/613/EEC should be integrated into already existing directives on social security.

Possible Future EU Action

Currently not evident.

Conclusion

The Proposal to grant to self-employed women financial allowances during maternity leave is acceptable. The proposed financing of a temporary replacement, however, should be waived, since this would lead to disproportionately high costs. Most parts of the Proposal lack grounds for legal competence as laid down in the TEC. Moreover, the Proposal infringes both the principle of subsidiarity and of proportionality. The introduction of compensation which should not only compensate damages suffered but also to have a dissuasive effect is not compatible with German law and might, in connection with class action of associations, lead to malpractice. The proposal for positive actions in order to support the equality of men and women should be dismissed as they, too, constitute discrimination and would entail distortion of competition.