



Opinion on
The Revision of Directive 86/613/EEC on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self employed capacity, and on the protection of self-employed women during pregnancy and motherhood



Advisory Committee
on
Equal Opportunities for Women and Men

The opinion of the Advisory Committee does not necessarily reflect the positions of the Member States and does not bind the Member States.



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Background

A Working Group was set up following the decision of the Advisory Committee at its meeting of 16 November 2007 to prepare an opinion on Directive 86/613/EEC. In particular, the working group was asked to consider the following issues:

- How to improve the provisions on the protection of maternity (for self-employed and helping spouses)
- How to recognise the work of assisting spouses
- How to provide leave to care for family members and paternity leave
- Any other options of improvement.

This Directive was adopted in 1986 and covered 12 EU Member States. Since then, the EU has more than doubled and the Directive has never been revised. The implementation report carried out by the Commission in 1994¹ highlighted a number of issues which the Advisory Committee believes are equally relevant today. The main point stressed at that time relates to the failure of the Directive, due to the lack of obligation on the part of Member States, to undertake action to clarify the professional status and subsequent social security entitlements of assisting spouses.

Transposition of the Directive into national law did not require amended legislative texts due to the absence of obligations by the Member States. Therefore, women, particularly those engaged in an “assisting” role in economic activities alongside their male partner (husband/concubine) continue to be left outside social protection systems during pregnancy and motherhood and at other moments in the life-cycle (for example retirement, separation, divorce, bankruptcy or death of husband/partner). This concerns women engaged in agriculture, trade² and assisting spouses of other self-employed professions, including the medical professions (self-employed doctors and specialists), the legal profession (self-employed lawyers), self employed entrepreneurs in the building and construction industry and other manual professions in which women provide the necessary administrative backup work without being either in joint ownership and/or an employee of the business.

¹ Commission of the European Communities, Report from the Commission on the implementation of the Council Directive of 11 December 1986 on the application of the principle of equal treatment between women and men engaged in an activity, including agriculture, in a self-employed capacity and on the protection of self employed women during pregnancy and motherhood (86/613/EEC), COM(94) 163 final, 15.09.1994

² Many assisting spouses work in restaurants, shops, owned by their husbands/partners





While the Directive establishes the rule of the application of the principle of equal treatment to self-employed and assisting spouses, it does not create any direct right to compulsory social security coverage or to protection in cases of maternity and in this context, the Advisory Committee is of the opinion that the principle of equal treatment is not met.

The Directive addresses two categories of workers: firstly those engaged in self-employed activities pursuing a gainful activity for their own account, including farmers and the liberal professions, for which not all Member States require compulsory social security protection and, secondly the partners or 'spouses' of these self-employed workers, the majority of whom are women, which the Directive acknowledges by reference to the terms 'spouse' and 'wife'.

The Directive has never been amended nor updated despite the body of Directives that were adopted since 1986 in the area of equality between women and men. Therefore, there is an urgent need not only to update the Directive in order to reflect the reality of self-employed and assisting spouses but also to ensure that this invisible category of workers benefit from equality legislation particularly in matters of social protection and that the objective of the Directive itself is met to improve the status of assisting spouses in the context of an enlarged EU.

How to improve the provisions on the protection of maternity (for self-employed and helping spouses)

It is difficult to ascertain the numbers of women who fall outside social security protection systems. The nature of the problem itself and, given that Member States are not obliged to provide compulsory social security protection, they remain invisible. A lack of data and statistics on the numbers of women who have opted for coverage voluntarily as provided for in the Directive, coupled with the lack of data of the actual number of women who could be covered (again on a voluntary basis) impedes upon identifying the scope of the problem in terms of the overall numbers and percentage of women who are not protected. Therefore, the Advisory Committee strongly insists on the need for more visibility in terms of data and statistics in order to understand the scope of the problem, the take-up rate of the voluntary measures provided for in the Directive and the numbers of women unprotected.



The scarce data that does exist show, for example in France³, that among the 91% employed in agriculture in 2006 with the status as “assisting spouse”⁴, this represented in real figures 61,521 women and 6,121 men. The total number of spouses (all categories) in 2005⁵ was 247.000 of which only 28% were affiliated to the social security system. The number of women with an employee status is rising on an average of 1% per year since 1999, with variations according to the sector of production. The average hourly wage varied in 2005 between 9- 11€/hour, depending on the sector.⁶ Only 34% of women, against 83% of men, have 40 years of activity in agriculture. Women heads of exploitation represented one quarter of the total number in 2005 and this figure has remained stable since 1999.⁷ Data from the Netherlands⁸ reveal that 97% of assisting spouses have no social protection. However, new legislation expected to come into force in July 2008, will grant a replacement income for maternity leave to female entrepreneurs.⁹ In 2006, Portugal¹⁰ had 90 000 “non remunerated family workers”, 62.7% of which were women. This category of workers represented the highest feminisation rate when compared with the other categories of women workers with the status: “employed”, “self-employed” and “employers”.

In light of the absence of data, the Advisory Committee urgently calls for reliable data and statistics from all Member States which will provide a more accurate picture of the situation of assisting spouses including the numbers of women with and without social security protection. The compilation of such data will necessitate the compulsory registration of assisting spouses in all Member States.

The Advisory Committee stresses that it is regrettable that self-employed workers are not obliged to have compulsory social protection cover in all Member States. The Advisory Committee however strongly advises that in those Member States where social protection is compulsory for self employed workers that assisting spouses be automatically covered under existing systems.

3 Commission Nationale des Agricultrices, Assemblée Générale 13/12/2007 « L’installation des femmes en agriculture »

4 France created a new category (conjoint collaborateur) for spouses of self-employed workers, but they must voluntarily opt for this status.

5 Santé, famille, retraite, services , Direction des études, des répertoires et des statistiques, « Les femmes dans l’agriculture en 2005 », décembre 2007

6 Op cité

7 It should also be noted that the general level of women’s entrepreneurship across the EU remains stagnant at 30%

8 Provided by the Women’s Committee of COPA, (Beleidsadviseur Vrouw & Bedrijf/Internationale Samenwerking)

9 The replacement income for a period of 16 weeks will be based on the equivalent of the minimum wage on the basis of 1225 hours/year worked. For women who have less than the required number of hours, a basic payment on the previous year’s income will be taken into consideration.

10 Portuguese Inquiry on Employment – average data for 2006, provided by Isabel Romão Coordenadora da Unidade para as Relações Internacionais



The Advisory Committee wishes to point out there are a number of underlying contradictions in maintaining assisting spouses without social protection. Firstly, the cost factor needs to be weight within a broader economic framework. By assuming that it is too costly to provide mandatory cover to assisting spouses in social security protection schemes, is in fact a false 'saving'. Many women that are not covered by social protection systems while engaged alongside their male partner in self-employed activities, including agriculture, often require financial assistance in the form of payments provided by collective solidarity funds later in their lives due to the fact that they have no contributions to social security systems and are therefore excluded from state pensions and other complementary forms of pension schemes. For example, in France, in the area of agriculture, the average monthly pension paid to assisting spouses that have contributed to social security systems, represents 304,94€/month against 147,85€/month for widows on the basis of derived rights. For the category "family members" which includes women who do not opt for a "assisting spouse" status, the monthly pension rate on the basis of direct rights (contributions paid) is 60,08€/month.¹¹

The "savings" that are made earlier in their lives are in fact attributed as an item of expenditure to the whole of society later in life, hence shifting the financial burden from economic generating activities throughout the working life to compensation paid through funds at minimal levels later in life. This contributes to the feminisation of poverty in old age, due to excessive low levels of non contributory pension schemes. Rendering social protection coverage of self-employed and assisting "spouses" compulsory should therefore be considered as a long term investment that will contribute to ensuring a safety net of coverage particularly in the later stages of the life-cycle.

Another contradiction that the Advisory Committee wishes to point out relates to the issue of undeclared work. All employers condemn any form of undeclared or illegal work. However, the non-binding registration and protection of assisting spouses can be seen as an endorsement of work that is carried out in the informal economy and can be deemed as a form of illegal work.

How to recognise the work of assisting spouses

Assisting spouses are part of the informal economy and their contribution to economic growth and development is invisible and unknown. It is the view of the Advisory

¹¹ Groupe de travail – retraite ministère agriculture 120308 – Statistiques 2007 Mutuelle Sociale Agricole (MSA)



Committee that compulsory registration of assisting spouses is urgently required to avoid loopholes in valuing the work and the real contribution of these invisible workers. Compulsory registration should also - while respecting the principle of subsidiarity - lead to compulsory social security protection with the possibility of voluntary opt-out clause and not the contrary as currently is the case within the Directive. Such compulsory coverage should include income replacement during maternity leave following pregnancy at a level decided by member states for example, when possible, at the rate equivalent to the national minimum wage. In situations of separation, divorce and/or widowhood, the assisting spouse should be entitled to either claim benefits immediately (widowhood for example) or be entitled to carry the contributions with her so that these are counted as contributory years particularly towards the pension.

Without the vital input of assisting spouses, there is a strong likelihood that self-employed activities would not be sustained, whether it is within agriculture or in any other area of self-employment. Therefore, on the basis that the majority of assisting spouses are women, maintaining them in the informal economy should be considered as a form of indirect gender discrimination which is contrary to the EU's objective of equality between women and men and contrary to article 3 of the Directive itself which specifically mentions " [...] *the absence of all discrimination [...] directly or indirectly, by reference in particular to marital or family status.*"

On the basis of the scope of change since the Directive was adopted (1986), socio-cultural norms have also changed. It is therefore the opinion of the Advisory Committee that the Directive needs to reflect these changes by adding alongside the terms "wife" and "marital status" extension of the provisions of the Directive to non-married and same-sex couples. Many Member States recognise unmarried couples while others recognise same-sex relationships (including marriage) and therefore the Directive should refer to these in recognition of their contribution to the economic sustainability of self-employed activities including in agriculture.

While the scope of the Directive does not address issues of equality in ownership, it is the view of the Advisory Committee that this issue should be further explored in the context of national legislation. By recognising the legal ownership of one of the partners only, the assisting partner remains either invisible or, in cases where they opt for an employee status, are in a relationship that is both intimate and subservient, which goes against the intended objective of the Directive itself which consisted in clarifying the particular situation of



assisting spouses. The “particular situation” in this context should be understood as a partnership that extends beyond economic gains and contributes to the well-being of the two adults of the partnership and of their off-springs.

Derived rights are not, in the view of the Advisory Committee, an option due to the dependency factor in which women's rights are derived from their husband/partner, which is contrary to equality between women and men. In relation to derived rights the term “dependent person” is associated.

How to provide leave to care for family members and paternity leave

The nature of self-employment, including in agriculture, represents a-typical working time and patterns in so far as the division between work time and rest time is often blurred. In this context, existing child care and dependent care structures which are generally insufficient in most Member States as testified in reporting on the Barcelona Targets on Child Care¹², are unlikely to respond to the specific needs of combining self-employed activities with family life. Therefore, the Advisory Committee proposes that further initiatives are taken, including possibilities for financial compensation, to provide care facilities which correspond to their particular area of activity and the working patterns of the self-employed and their assisting spouses/unmarried partners. The level of the benefit could be the legal minimum wage, unless the actual earnings are less than that amount

The Advisory Committee believes that future decisions on new measures concerning the maternity leave of self-employed workers and assisting spouses/unmarried partners living as a couple should take into consideration the outcome of the current consultations between Social Partners relating to measures to reconcile professional, family and private life. Some member states do not believe that there should be further EU legislation in the area of maternity/paternity/parental leave. The majority of the Advisory Committee believes that any new and amended measures in terms of Directives should also be applicable to self-employed workers and assisting spouses/unmarried partners living as a couple and that the principle of two weeks leave after child birth as in other forms of maternity leave should also be applied to self-employed and assisting spouses.

¹² Report on the 2007 Cambridge Review of the National Reform Programmes, EMCO/27/141107/EN-Final-rev1 states that the Barcelona targets are not met by most Member States.



The Advisory Committee also proposes that the Structural Funds be used as a means of funding pilot and innovative projects for childcare/dependent persons care to meet the needs and the working patterns of the self-employed that require more flexible means of replacement and care services.

Any other options of improvement

The Advisory Committee proposes that action is taken, to ensure that the costs of compulsory social security protection for both the self-employed worker and assisting spouses/unmarried partners living as a couple are covered.

In the context of a rapid changing economy, self-employment will continue to grow and expand and assisting spouses/partners will continue to play a vital role in sustaining businesses and adapting to changing economic environments. Therefore, it is crucial that self-employed workers and assisting spouses/unmarried partners are provided with opportunities to remain competitive, notably through training opportunities and representation in professional organisations. The Advisory Committee believes that the Member States have an important role to play in facilitating this and in the visibility of self-employed and their assisting spouses/unmarried partners.

Recommendations of the Advisory Committee

A. Legal Aspects – EU legislation

- Assisting spouses are given every possibility to obtain a clear professional status.
- Compulsory registration of assisting spouses is systematically carried out, while respecting the principle of subsidiarity, to ensure social security protection with the possibility of voluntary opt-out clause.
- Alongside the terms "wife" "marital status"; "unmarried partner living as a couple" and same-sex couples is added.
- Assisting spouses are given every possibility to be covered under existing systems in Member States where compulsory social protection is in place for self-employed workers.



- Financial compensation, be made available for the self-employed and their assisting spouses to enable them to find suitable replacement measures for child and dependent person care.
- Provisions for paid maternity/paternity leave be made available for self-employed and assisting spouses, on the same basis as for other employers and employees, according to national laws, practices and traditions.

B. Non Legal aspects

- Reliable data and statistics, based on homogeneous criteria for data collection are available in all Member States. The compilation of such data will necessitate the compulsory registration of assisting spouses in all Member States.
- While the scope of the Directive does not cover equality in ownership, this issue should nevertheless be further explored in the context of national legislation.
- The Structural Funds be used as a means of funding projects for childcare/dependent persons care, particularly in rural areas.
- Accessibility to training opportunities and professional representation is facilitated as a means of remaining competitive.

C. Other actions as appropriate.

According to the Treaty Establishing the European Community, income taxes are not subject to harmonization, with the exception of these cases where it is necessary for proper functioning of the Internal Market and compliance with the Treaty freedoms. In full recognition of the principle of subsidiarity in matters relating to taxation, the Advisory Committee nevertheless proposes that within the framework of national legislation on taxation, possibilities of tax incentives are explored at national level to ensure that the costs of compulsory social security protection for both the self-employed worker and assisting spouses/unmarried partners living as a couple are covered.