

COMMISSION OF THE EUROPEAN COMMUNITIES

COM(94) 163 final

Brussels, 15.09.1994

REPORT FROM THE COMMISSION

ON THE IMPLEMENTATION OF
COUNCIL DIRECTIVE OF 11 DECEMBER 1986
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.
(86/613/EEC)

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Introduction

On 11 December 1986 the Council adopted a Directive 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.

Article 12 of that Directive required Member States to bring into force the laws, regulations and administrative provisions necessary to comply therewith not later than 30 June 1989. However, for a Member State which, in order to comply with Article 5, had to amend its legislation on matrimonial rights and obligations, the deadline was extended until 30 June 1991.

Article 13 requires Member States to forward to the Commission all the information necessary to enable it to draw up a report on the application of the Directive. To this end a questionnaire was sent to the Member States in February 1991. Replies to this questionnaire were received from the Member States between 1991 and 1993. It should be noted that there may have been recent developments within Member States since then which have not been taken into account.

This report is based upon these replies, research by the Commission network on the implementation of the equal opportunities Directives and contributions from the members of the Advisory Committee on Equal Opportunities for Men and Women.

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PART I : Main Objectives and Provisions of Directive 86/613/EEC

Although the earlier Directives on equal treatment between men and women (76/207/EEC and 79/117/EEC) were fairly broad in scope, they did not take sufficient account of the specific and special situation of self-employed men and women and in particular the situation of self-employed workers whose professional status is unclear (neither partners nor employees). The 1986 Directive sought to identify the specific contribution of the self-employed to the family income, to give assisting spouses a clearly defined professional status and, by extension, to establish their social security entitlements.

The Directive covers:

- (a) Self-employed workers, i.e. all persons pursuing a gainful activity for their own account, under the conditions laid down by national law, including farmers and members of the liberal professions. (Article 2(a)).
- (b) Their spouses, not being employees or partners, where they habitually, under the conditions laid down by national law, participate in the activities of the self-employed worker and perform the same tasks or ancillary tasks. (Article 2(b)).

The spouse of a self-employed worker who habitually participates in his or her economic activity will normally fall into one of the following three categories:

- . a person engaged in the same activities as his/her spouse as a partner or shareholder in a company
- . a person participating in the activities of his/her spouse and receiving payment in return (employee status).
- . an employed person who participates habitually in the activity of his/her self-employed spouse without payment and without status.

In addition, France has created a new category ('conjoint collaborateur') for spouses of self-employed workers in the commercial and craft sectors¹

¹ Although this term describes more accurately the contribution that the spouse actually makes to the economic activity business, we feel that for the sake of clarity the term should only be used in relation to the specific status provided for in French law. Spouses within the meaning of Article 2(b) of the Directive will be referred to as "assisting spouses" for the purposes of this report.

The Directive employs the standard definition of the principle of equal treatment, used in the other Equality Directives, that there must be no discrimination on grounds of sex, either directly or indirectly, by reference in particular to marital or family status. (Article 3)

Article 4 of the Directive requires the Member States to take the measures necessary to abolish any national provisions which are contrary to the principle of equal treatment as defined in Directive 76/207/EEC. Particular reference is made to the establishment, equipment or extension of a business or the launching or extension of any other form of self-employed activity, including access to financial facilities.

Article 5 obliges Member States to ensure that the conditions for formation of a company between spouses are no more restrictive than those applying to persons who are not married.

Article 6 deals with social security cover for the assisting spouse. It provides that where a contributory social security scheme exists, Member States must ensure that assisting spouses may make voluntary contributions to a scheme where they are not already covered by the social security scheme of the self-employed spouse

Article 7 places a general obligation on the Member States to examine how recognition of the work of assisting spouses may be encouraged and to consider any appropriate steps to do so. It should be pointed out, though, that this does not oblige the Member States to take any specific action, or indeed any action at all.

Article 8 requires the Member States to consider the question of pregnancy and maternity assistance for female self-employed and the wives of the self-employed in the form of temporary replacements or publicly-funded cash benefits. As with Article 7, the obligation is to consider, but not necessarily to take any action in this regard.

Article 9 obliges the Member States to ensure that the rights conferred under this Directive may be upheld in the courts, possibly after recourse to other competent authorities.

Article 10 requires Member States to engage in a certain amount of publicity. They must bring to the attention of bodies representing the self-employed and vocational training centres measures adopted under the Directive as well as all relevant measures already in force.

PART II : Review of the situation in the individual Member States

Overview.

In their replies to the Commission's questionnaire the Member States emphasized the issue of equality between men and women. Equality before the law in respect of the establishment, equipment or extension of a business or the launching or extension of any other form of self-employed activity, including financial facilities, exists in all Member States (Article 4). However, little or nothing was said about the specific objective of the Directive, namely to rectify a situation which largely affects women, namely the lack of professional status for spouses working in family businesses, including agriculture.

Some Member States stressed that the main feature of self-employed activity was its sheer diversity and that the individuals concerned should be left a large measure of freedom.

Most Member States indicated that it had not been necessary for them to amend or adapt their national legislation in order to implement the Directive.

In general, the formation of a company between spouses is possible. Nevertheless, there are certain restrictions regarding property rights arising out of a matrimonial relationship (Luxembourg, Portugal) and possession of diplomas (Germany and France). The formation of a company between spouses confers rights on the unpaid marriage partner. However, very few self-employed couples opt for this solution. (Article 5)

As regards social security protection (Article 6), most Member States grant only limited social security rights (sickness benefit, old age pension), and any such entitlements are based on derived rights or payment into private insurance schemes, which are always more costly for the person concerned. Denmark is the only country where the spouse of the self-employed worker is protected against all contingencies (including unemployment).

Member States were asked to examine under what conditions recognition of the work done by the spouse might be encouraged and to take all appropriate steps. By and large the Member States felt that there was no need for new initiatives to encourage such recognition. However, certain countries such as Denmark and Belgium have taken steps to mitigate the adverse effects of tax legislation on the wage paid to the spouse by the self-employed worker. (Article 7).

As regards the provision of assistance in cases of absence due to pregnancy or maternity (Article 8), some Member States have improved conditions for women during and after pregnancy, mainly through the granting of allowances. On the other hand, the only countries which allow genuine access to replacement services are France, Germany and the Netherlands. Sometimes, the profession organizes relief services to cover a number of contingencies, such as illness, motherhood, holidays, absence for training or trade union duties (mainly in agriculture). Motherhood and sickness have priority when it comes to the supply of replacement services. However, the situation of female self-employed workers, both during pregnancy and after giving birth, is still generally very difficult, particularly for those on low incomes or who live in rural areas where private services are underdeveloped.

It would appear that recourse to the judicial process is available to persons covered by the Directive through the ordinary courts responsible for dealing with such cases (Article 9).

As regards the duty of Member States to inform bodies representing the self-employed and vocational training centres of measures adopted under the Directive or indeed already in place (Article 10), it emerges that only France and the United Kingdom have introduced a targeted information policy. Otherwise, Member States do not provide the persons concerned by the Directive with proper, targeted and systematic information. Many spouses of self-employed workers are unaware of national enabling measures or legislation dealing with the subject matter covered by the Directive. Certain countries such as Portugal and Denmark have done nothing to provide information (only publication in the Official Gazette or equivalent national publication); others have informed groups representing self-employed workers.

A summary of the situation in the individual Member States, based on information available as at mid-1993, follows.

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1. BELGIUM

ARTICLE 4

This provision of the Directive is covered by the Law of 15 December 1970 (as amended) and the various enabling decrees relating to the carrying out of professional activities in small and medium-sized businesses in the crafts and trade sectors.

The provisions relating to access to the various types of self-employed activities contain nothing which discriminates against women.

ARTICLE 5

There is nothing in the consolidated company laws of 1935 (as amended) that makes it difficult for spouses who have pooled their property to form a company. Moreover, the Law of 1 April 1987 amending Article 1401 of the Civil Code made it easier for spouses married under the communal property arrangements, without any assets of their own, to form a company.

What this measure did was dissociate the asset value of shares held in common from the rights of a person acting in the capacity of a partner in a company where all the shares are registered, and categorize these rights as personal entitlements.

ARTICLE 6

Under Article 7(1) of the Royal Decree No 38 of 27 July 1967 defining the social status of self-employed workers, the wife or husband of a self-employed worker was not entitled to social security benefits as a helper. The spouse was protected as regards health care (major risks) and survivor's pension benefits under the self-employed worker's social security scheme (derived rights).

A Law of 14 December 1989 amended the abovementioned Article 7(1) and since 1 January 1990 the husband or wife of a self-employed worker has been able to join that worker's social security scheme voluntarily. However, this only applies to compulsory sickness insurance (major risks) and invalidity allowances. In addition to maternity allowance (see below), the spouse will be entitled to a disability allowance of BFR 481/day after a period of three months, rising to BFR 594/day after one year's invalidity.

This allowance is the same as that payable to the self-employed worker in the event of disability or invalidity. To insure against minor health risks, the self-employed worker will have to pay a supplementary contribution to cover his/her spouse.

ARTICLE 7

As from the 1989 tax year, an assisting spouse who does not have a separate professional income of more than Bfr 350 000 per year may enter on his/her tax return a salary corresponding to the normal value of his/her services as a helper. However, this remuneration may not exceed 30% of the net income of the self-employed worker unless proof of a special form of assistance can be supplied.

ARTICLE 8

The Law of 14 December 1989 and the Royal Decree of 24 January 1990 referred to above make provision for a maternity grant of Bfr 30 000 during the period of maternity leave (three weeks) both to wives of self-employed workers in their capacity as assistants and to self-employed female workers. Wives of self-employed workers may only claim the maternity grant:

- * if they have paid into the scheme for a qualifying period of 12 months
- * if they have paid into the scheme for at least two years (or have undertaken to remain members for a period of at least two years).

ARTICLE 9

No particulars given.

No additional information on the implementation of the provisions of this Article was forthcoming.

ARTICLE 10

The new laws and regulations were brought to the attention of the social insurance funds for self-employed workers in Note P 720b/90/7 of 27 February 1990. These social insurance funds were set up at the instigation of interprofessional or professional organizations and their task is to inform their members and advise them of their obligations and rights (Article 20(1) of Royal Decree No 38 of 27 July 1967).

CONCLUSIONS

Belgium has adopted a number of measures in order to comply with the Directive and, in particular, has adapted its tax legislation so as to encourage recognition of the work done by the assisting spouse. However, it should be pointed out that these changes will primarily benefit the better-off spouses, since the remuneration which they are allowed to claim will be expressed as a percentage (maximum 30%) of the net income declared by the self-employed worker.

If the business makes little or no profit the spouse will only receive a minimum share.

The tax legislation also puts up other obstacles to full recognition of the spouse's status. Although a person can in theory employ his/her spouse, the tax system acts as a disincentive since Article 45(8) of the income tax code² does not allow the spouse's salary to be claimed against tax as professional charges. Other family helpers are not affected by this restriction.

With regard to Article 6, spouses are not be covered in every case by the social security arrangements of self-employed workers, since cover is limited to sickness and invalidity. However, they are covered, like any spouse living under the same roof, for old age via their spouse's entitlements (survivor's pension) and for minor health risks if the self-employed worker contributes to such a scheme.

² Professional charges include payments to members of the taxpayer's family other than his spouse working with him, providing such payments do not exceed a normal salary or wage

2. DENMARK

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ARTICLE 4

This Article has been implemented by paragraph 5. of Law No 686 of 11 October 1990 on equality of treatment. Under this provision, anyone who controls access to a profession, the establishment or extension of a business or any other form of professional activity, including financial facilities, must abide by the principle of equal treatment. However, the Ligestillingsradet (the Danish equal opportunities board) has pointed out that, in certain cases, self-employed women are still encountering practical difficulties in getting a loan in order to start their activities.

ARTICLE 5

The formation of a company between spouses does not appear to cause any problems, although the Commission has not been given any details.

ARTICLE 6

Social security in Denmark is financed from tax revenue. Persons covered by social security arrangements only need to pay contributions if they wish to claim addition benefits.

Assisting spouses are covered by the social security system, in the same way as the self-employed workers, against illness, invalidity, old age and maternity risks. They may voluntarily insure themselves against the risks of unemployment and industrial accident.

Health: persons covered by the Directive are entitled to free medical services and to cash benefits from the third month of incapacity for work. If they have contributed to a voluntary insurance scheme, they will be covered from the first day of their illness. The benefit paid depends on the profit of the business as communicated by the tax authorities. No distinction is made between a self-employed person and his/her spouse as far as the payment of the daily allowance is concerned.

ARTICLE 7

The Law of 16 March 1989 introduced a new amendment into the tax legislation allowing a couple to choose the status of employee or co-worker for the assisting spouse. The purpose of this amendment is to give the co-worker greater independence and make it easier for him/her to obtain social benefits.

ARTICLE 8

Self-employed women and wives assisting self-employed workers are entitled to four weeks' maternity leave prior to the birth and up to 24 weeks after. While on maternity leave the woman receives a daily allowance from the local authorities. The amount depends on her income and there is a ceiling of Dkr 2 506 per week. If the woman has subscribed to a voluntary insurance scheme she receives an additional minimum allowance of Dkr 1 671 per week, which is paid independently of income.

There is no provision for services supplying temporary replacements.

ARTICLE 9

Equality of treatment cases are heard by the ordinary courts. According to the legal staff, no cases have been brought to court under this Directive.

In Denmark the Ligestillingsradet plays a very important role in implementing the principle of equal treatment between men and women. The purpose of this body is to promote equal opportunities and it is empowered, on its own initiative, or at the request of a third party, to investigate situations which fall within the scope of the law.

ARTICLE 10

It would appear that no specific information on the Directive has been passed on to the vocational training bodies or groups representing self-employed workers.

3. GERMANY

General comment: The Federal Government maintains that the transposition of the Directive into national law requires no amendment to German laws or regulations.

ARTICLE 4

There are no differences on grounds of sex when it comes to the establishment, organization or expansion of a company, or the taking up or extension of any other form of self-employed activity. Members of the liberal professions (lawyers, solicitors, accountants, doctors, etc.) are governed by conditions restricting access based on legal provisions. These restrictions vary from one profession to another (nationality, quotas, consideration of need, qualifications obtained, etc.). The restrictions are the same for both men and women.

The legal provisions applicable to the launching and extension of a business or any other form of self-employed activity are the same for both sexes. Likewise, there is no distinction for the purposes of vocational guidance, training, further training and retraining.

ARTICLE 5

The launching or extension of a business and the choice of legal form for a number of self-employed activities such as architects, engineers, lawyers, tax consultants, are covered by professional legislation and/or company law.

Where there are laws requiring all partners to have specific qualifications, a spouse may only be a partner if he/she meets the qualifying requirements. Chartered accountants and tax consultants can form a partnership and a private limited liability company.

Wives may, like any other individual, hold shares in such companies even if they are not engaged in the professional activity in question. In such a case, however, they have no influence on the professional decisions taken by these companies.

In all other commercial businesses, spouses receive the same treatment as third parties if they form or join a company.

ARTICLE 6

The German social security system covers:

- sickness
- retirement
- accidents.

Sickness insurance

This insurance covers the risks of sickness, maternity and health care.

Self-employed workers are not normally required to pay into a sickness insurance scheme (the exceptions being those engaged in farming, horticulture, forestry, etc.; the same applies to self-employed artists and writers).

When they have completed a mandatory period of insurance, self-employed workers may decide whether or not they wish to remain insured.

Where an agricultural holding is jointly managed by the spouses, the spouse who is mainly responsible for running the business is considered to be the operator and is required to contribute to the social security scheme. The assisting spouse is insured as a member of the family and does not have to pay contributions.

The spouse insured as a member of the family is eligible for the same health insurance benefits as the spouse who is compulsorily insured.

In the case of sickness insurance for farmers, assistance can only be granted to the spouse who is insured as a member of the family if the rules of the sickness insurance scheme so provide.

With the exception of sickness benefits, the benefits under the compulsory insurance arrangements are generally identical to those paid to voluntary members.

Retirement insurance

This scheme covers risks of invalidity, old age and death.

Insurance of spouses referred to in Article 2(b) is covered by the general provisions applicable to retirement insurance. Any member employed by his spouse is therefore required to take out insurance. A person who is a co-worker in his/her spouse's business can apply for compulsory insurance provided that this is not already a legal requirement (as is the case for craft workers).

Spouses both working in the same business are free to decide whether to pay contributions in order to be entitled to benefits for both spouses.

Moreover, the scheme allows the surviving spouse to continue to acquire entitlements to a widow's pension by the payment of contributions even after the operator's death. These contributions by the surviving spouse give rise to personal entitlements even if the surviving spouse continues to carry on the activities of the deceased operator.

The rules on compulsory retirement insurance are also applicable to farmers and their spouses.

Company provident schemes

Members of liberal professions with their own governing body (e.g. lawyers, doctors, architects) are normally required to insure themselves against disability and old age with public insurance and provident schemes, whether they are employees or self-employed. Membership of a professional institute is the determining criterion in this case. People who do not belong to a professional group do not have access to this branch of social security. However, the social security system is so structured as to enable an assisting spouse who is not a member of a professional institute to enjoy the same opportunities as the assisting spouses of other self-employed workers, which means entitlement to compulsory insurance under the state retirement insurance scheme through the conclusion of an employment contract with the other spouse or through voluntary contributions.

Retirement insurance schemes for farmers

The retirement pension for a married farmer is 50% more than for an unmarried person because he receives a supplementary amount for his spouse.³ The Law of 20 December 1985 requires pension funds, in respect of new cases, to pay one-third of the total sum direct to the assisting spouse. The only condition is that the spouse's main activity should have been helping in the work of the farm as an assisting spouse.

Accident insurance

This scheme covers industrial accident, invalidity and death. Membership of this insurance scheme is open to anyone. Spouses of farmers, like the farmers themselves, are legally insured.

ARTICLE 7

According to the German Government, it is neither necessary nor possible to improve the position of the spouses.

³ Article 4(1) of the Law on old-age pensions for farmers

ARTICLE 8

Women covered by a sickness insurance scheme are entitled to various cash benefits in the case of pregnancy or motherhood. This also applies to co-insured persons. Since 1 January 1986 sickness insurance funds are authorized to grant assistance to a woman farmer for a period of eight weeks (12 weeks in the case of multiple pregnancy or premature delivery) from the time of confinement, if the running of the farm is threatened.

This assistance can take the form of providing a replacement to run the farm in her absence or refunding the cost of hiring a replacement.

Sickness fund rules may provide for the grant of a similar amount of assistance and a household allowance in the case of maternity to the wife of an insured farmer.

ARTICLE 9:

The German legal system guarantees full legal protection. Cases of discrimination can therefore be heard by the ordinary courts.

ARTICLE 10:

Information has been sent to a number of organizations dealing with self-employed women and wives of self-employed workers.

Conclusions

According to the replies to the questionnaire, German legislation does not appear to present any anomalies. It is possible for one of the spouses to employ the other spouse with the status of employee. A range of different possibilities for setting up a business is available to the spouses.

Any restrictions which exist are based on criteria such as training and aptitude rather than gender. Even if a couple decides not to draw up a contract and if the spouse prefers to work in the business without a particular status, he/she can contribute voluntarily to the German social security system.

This legislation does not apply to work done by the spouse or members of the close family living under the same roof unless the business or part of it is located in the family home.

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4. Greece

General Comment: The replies from Greece mainly concerned that part of the Directive dealing with social protection (Articles 6 and 8).

ARTICLE 4

Legislation on the launching or extension of a business does not discriminate on the grounds of gender.⁴ Law 1329/83 establishes equality between husband and wife in the area of family law (decisions on property, loans, etc.).

ARTICLE 5

Spouses may launch a business and they are not subject to any specific conditions.

ARTICLE 6

Greece classifies socio-economic activities in a rather unusual way. Some classes of self-employed workers in towns are covered - like employees - by the general social security system (IKA). There is also a parallel agricultural scheme (OGA) which not only covers everyone working in the agricultural sector (employed or not) but also covers every self-employed worker in a commercial or business activity in a village of fewer than 2 000 inhabitants. More particularly, all self-employed workers covered by the social security system fall into one of the following two categories:

* those with a professional qualification (doctors, engineers, lawyers, etc.).

The main insurance schemes are the lawyers' fund, the TSMEPE (fund for engineers and civil servants) and the TSAY (medical workers' retirement insurance fund).

* other self-employed activities (industry, business)

There are two main types of insurance plan: the TAE (businessmen and women's insurance fund) and the TEBE (Greek fund for professional and industrial workers).

All risks, i.e. retirement, invalidity, industrial accident, sickness and death, are covered by the abovementioned insurance schemes.

⁴ Law of 14 April 1984 on equality in respect of employment legislation.

Assisting spouses are required to join the general social security scheme (IKA)⁵ if they are not compulsorily or voluntarily covered for such work in one of the other main social security bodies.

Although the abovementioned persons are obliged to join the scheme, membership is not automatic. This means in order for membership of the scheme to take effect or cease a written notification is required from the insured member or the person for whom the work is carried out.

Self-employed workers are covered for all risks, retirement, sickness (benefits in cash and in kind), invalidity and death. The retirement insurance contribution is very low (Dr 15 000/month). A complementary retirement insurance scheme for farmers was introduced in 1989.⁶

The agricultural scheme (OGA) pays neither a daily allowance to farmers in the event of an accident or illness, nor unemployment benefits.

ARTICLE 7

No information was forthcoming on this Article.

ARTICLE 8

Self-employed women and the wives of self-employed workers are entitled to maternity leave and receive allowances (Dr 50 000 under the OGA scheme). There is no service providing temporary replacements.

ARTICLES 9-10

No information was forthcoming on these articles.

⁵ Article 1(1) of Law No 1759/88.

⁶ Women in Agriculture, Cahiers de femmes d'Europe, October 1988, Nos 27-28. The amount varies from Dr 3 680 to 10 400 per month.

5. Spain

Preliminary remark: the Spanish Government admitted in its communication to the Commission that the law of the Balearic Islands (matrimonial law) does not comply with the principle of equality of treatment as defined in the Directive.

ARTICLE 4

Article 14 of the Spanish Constitution states that "All Spaniards are equal before the law, without any discrimination for reasons of birth, race, sex, religion, opinion or any other personal or social condition or circumstance".

Furthermore, Article 35(1) of the Constitution states that: "All Spaniards have the right to work, to the free selection of profession or office, [...] while in no case can there be discrimination for reasons of sex".

The formalities necessary for access to professions or the taking up of a self-employed activity do not discriminate on grounds of sex.

In this connection the Spanish Government notes that, according to the statistics for 1989, the number of women receiving training in all the programmes within the FIP plan (Plan for Training and Integration into Working Life) was slightly higher than the number of men (50.5% as against 49.5%). However, given that women find access to the labour market more difficult, Royal Decree No 1618 of 14 December 1990 laying down the rules for the FIP provides for a programme aimed at women wishing to resume professional activities, to ensure that they can be trained for those activities where they are under-represented or to facilitate the professional re-integration of women who have family responsibilities and encounter specific difficulties in finding a job.

ARTICLE 5

A number of changes have been made to Spanish commercial law in order to take account of Community company law Directives.

A company under Spanish law is "a contract by which two or more persons agree to pool money, property or an industry with a view to sharing the eventual profits".

There is nothing to stop two spouses forming a commercial company. The property thus put into the company can either be held in common or be the individual property of each spouse.

In the case of divorce, spouses within the meaning of Article 2(b) can obtain financial compensation on the grounds of professional activity in the company of the self-employed spouse. Article 97 of the Civil Code states that if separation or divorce leads to an economic imbalance for one spouse compared to the other, involving a deterioration in the situation which prevailed during the marriage, he/she is entitled to a pension fixed by a decision of the Court, taking account *inter alia* of (...) collaboration, through work, in the commercial, industrial or professional activities of the other spouse.

ARTICLE 6

Self-employed activities are not included in the scope of the general rules on social security. A self-employed person must join or register in one of the following special schemes:

- * the special scheme for self-employed workers includes workers in industry and services, the liberal professions and the like, and those engaged in agriculture, provided that their activities do not exceed a specified extent;
- * the special scheme for agricultural workers includes everyone pursuing a self-employed activity in agriculture, forestry, or livestock rearing as his main source of income enabling him to meet his/her needs and those of the dependent members of his/her family;
- * the special scheme for seafarers includes all self-employed seafarers regardless of sex, provided that this self-employed activity constitutes their main source of income.

The three abovementioned special social security schemes include within their scope the husband/wife of the self-employed worker provided he/she habitually participates personally and directly in carrying out the tasks involved in the activities in question. The other conditions laid down by the special schemes for seafarers and farmers are cohabitation and economic dependency of the spouse on the self-employed worker. In addition, the special scheme for farmers stipulates that the output from the agricultural activity must contribute appropriately to the livelihood of the farming family of which the worker is a member (Decree No 2530 of 20 August 1970).

These same decrees make membership of the special schemes compulsory; the spouse of a self-employed worker who participates in the latter's activity and who lives under the same roof and is dependent on the self-employed worker is not considered as an employee and must therefore pay into the special scheme which applies to the self-employed activity carried out.⁷ In such cases the assisting spouse will be entitled to the same social benefits as the self-employed worker.

7 Law No 5 of 29 June 1990 on budgetary, financial and fiscal measures.

The special schemes described above cover the following benefits/allowances.

Table showing the main contributory schemes described in the Commission's expert report on the situation of self-employed workers in Spain as at November 1991

<u>Cover Provided</u>	I	II
	<u>Industry and Services</u>	<u>Agriculture</u>
Sickness allowance	1	2
Convalescence grant	2	2
Maternity allowance	1	2
Industrial accident and sickness benefit	2	2
Unemployment benefit	No	No

- 1 = Compulsory membership
- 2 = Optional membership

ARTICLE 7

The Spanish Government has forwarded its programme on the promotion of self-employed activity.⁸ The aim of this programme is to promote and give financial assistance to projects which enable people registered with employment agencies to set up as self-employed workers. The Spanish Government ensures that the principle of equality of treatment is fully respected in this programme.

ARTICLE 8

Self-employed women and the wives of self-employed workers referred to in Article 2(b) are entitled to health care benefits in the case of maternity.⁹ Law No 3 of 3 March 1989 extended the duration of maternity leave from 14 to 16 weeks.

⁸ This programme is set out in Ministerial Decree of 21 February 1986 which proposes various job creation assistance programmes.

⁹ These benefits include medical services (medical examinations, medical assistance during confinement, hospitalization in approved hospitals), pharmaceuticals (for all medicines either free of charge or subject to a financial contribution) and cash benefits (allowance equivalent to 75% of the monthly contribution of the worker; this allowance is higher in the case of a multiple birth).

The granting of maternity benefits is subject to women being registered with the social security scheme, and contributions have to be paid for a minimum period of 180 days during the year prior to confinement. In addition, payment into the scheme must begin at least nine months before the presumed date of confinement.

An assisting spouse who is neither paying into nor registered with a scheme is entitled to health care benefits alone.

However, in the special scheme for farmers, the self-employed worker has to have paid additional voluntary contributions specifically to insure against temporary disability. This means that, unless the self-employed agricultural worker pays into a plan insuring against temporary disability, his wife (Article 2(b)) will receive no health care benefits or any other benefits.

Spanish legislation makes no provision for relief services for women during the period when they stop work for maternity, nor for social services to take account of the fact that the wife of a self-employed worker is incapable of working.

Article 9

Article 2 of the law on working procedures, approved by Royal Legislative Decree No 521 of 27 April 1990, states that 'The judicial bodies responsible for enforcing social legislation must be aware of the litigious issues which can arise ... in the area of social security'.

Any person with a subjective right or a legitimate interest may bring an action before the courts (Article 17 of the abovementioned law).

Moreover, a person claiming discrimination on grounds of sex may require the defendant to substantiate the objective grounds for the measure adopted and demonstrate its appropriateness in relation to the objectives. The judge may seek the opinion of the competent public bodies (Article 25.3).

In parallel with these means of redress under social legislation, violation of rights recognized by the Constitution trigger the relevant constitutional mechanisms for guaranteeing the rights of the individual.

ARTICLE 10

Vocational training:

The information has been forwarded nationally by the General Council for Vocational Training set up by Law No 1 of 7 January 1986. This advisory body assists the government in framing vocational training regulations. It comprises the most representative trade union and employers' organizations and representatives of the administration.

At provincial level, information is forwarded by the provincial vocational training commissions and by the provincial vocational training monitoring committees set up respectively by the Order of 21 June 1990 and by Royal Decree No 1618 of 14 December 1990.

The National Institute for Employment also sends information to training centres.

Conclusions:

1. Article 7 of the General Law on Social Security (Law No 2065/74 of 30 May 1974) expressly states that the wife of an entrepreneur cannot be regarded as a worker unless she can prove the contrary (despite the fact that this status is accepted without proof in the case of other members of the family). The wife therefore cannot personally join a social security scheme and can only benefit in the form of derived rights, i.e. through her husband.

It would appear that under employment law an entrepreneur can employ his wife as a salaried employee, whereas under social security law this status is not recognized. This is a contradiction which in fact prevents a wife from helping her husband as a salaried employee in his business.

The equal opportunities plan for 1988-90 approved by the Government in 1987 includes among its recommendations (1.11.1) "examination of the possibility of amending Article 7.2 of the general law on social security".

2. The wife of a farm manager who is not paying into a scheme to insure against temporary disability cannot claim medical assistance in the case of maternity.

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6. France

With regard to craft, industrial and commercial activities:

Law No 82-596 of 10 July 1982 improved the status of the spouses of craftsmen and tradesmen participating in the activities of the business by allowing them to choose one of three options:

- * salaried status
- * partnership status
- * assisting spouse ('collaborateur') status¹⁰

Despite these various options, and in particular the status of collaborateur, which combines recognition with a limited cost to the business, it is estimated that 80% of the spouses of people working in craft, industrial or commercial professions have not opted for a specific status.

ARTICLE 4

No information was forthcoming on this point.

ARTICLE 5

It is perfectly possible for spouses to form a company. The conditions under which such a company is formed are the same for both married and unmarried couples (for instance, possession of a relevant diploma).

There is an exception to the possibility for spouses to form a company, for reasons given by the French Government. Article 1 of Law No 62-1971 of 8 August 1962 states that two spouses alone cannot form a jointly-managed agricultural association (GAEC) as partners; on the other hand, a married couple may form a GAEC if a third partner is involved.

If the spouses are absolutely determined to form an agricultural company on their own, they are allowed to set up a limited liability agricultural holding (EARL) under Law No 85-697 of 11 July 1985.

In order to give married couples a greater incentive to set up companies, Décrée No 88-198 on start-up aid for young farmers now allows two young farmers' grants per household if the spouses are both managers within a company constituted under civil law, an agricultural company or an EARL.

ARTICLE 6

Spouses who have chosen the status of collaborateurs (craft, industrial or commercial professions) may voluntarily join an old-age pension insurance scheme for self-employed workers in order to acquire their own pension entitlements. They are also offered the opportunity (subject to certain conditions) to purchase the rights acquired during certain periods of activity prior to their joining the voluntary insurance scheme.¹¹

¹⁰ See footnote (1) above

¹¹ Decree No 86-100 of 4 March 1986.

Since the adoption of Law No 89/1008 of 31 December 1989 (Article 17) a spouse assisting a partner in a single-member limited liability undertaking (EURL) now has social rights with regard to maternity and old-age pension. In fact, the maternity benefits are the same as those for an assisting spouse listed in the businesses and companies register or in the trades directory.

As far as retirement pension is concerned assisting spouses may voluntarily pay into an old-age pension scheme of which the spouse, as sole partner, is a member.

An implementing decree (No 91-897) of 5 September 1991 stipulates that assisting spouses must be able to join a voluntary old-age pension scheme, declare on their honour that they are actually and habitually participating without payment in the self-employed activity of the partner and that they are not personally covered by a compulsory old-age pension insurance scheme. The contributions of these spouses are calculated either on the basis of one-third of the social security ceiling or according to the professional income of the head of the undertaking up to the social security ceiling, at their own choice. Although the spouse of a single partner in an EURL enjoys social rights in respect of maternity and old age pension, she is not however considered to be an assisting spouse ("collaborateur") within the meaning of the law of 10 July 1982 (or in other words cannot be a co-worker in the EURL, which is a corporate entity). Hence the spouse of a single partner in an EURL has no professional rights resulting from the adoption of the status of co-worker as he/she will be deemed not to have the necessary powers. Nor will he/she be entitled to take part in elections to the Chambers of Trade or Commerce and Industry.

Decree No 89-628 of 24 July 1989 introduced the possibility for spouses assisting members of the liberal professions to join a liberal professions old-age insurance scheme voluntarily and to constitute their own entitlements to retirement benefits. This possibility is also open to spouses of lawyers as from 17 March, 1993 (Decree n° 92-425 OJ 24.3.93).

A farmer's spouse who has not chosen a specific status is not considered, from the point of view of social legislation as it applies to agriculture, as pursuing a professional activity, even though the person is participating in the work of the agricultural holding, and as such is not insured in her own right. The de facto social rights of the spouses of farmers are determined according either to their family situation, which entitles them to cash benefits under the sickness insurance scheme for maternity without having to pay contributions, or a presumption that they are participating in the work, which entitles the spouse to a lump sum retirement pension provided that the farm manager pays an individual old-age pension insurance contribution (the lump-sum retirement pension is FF 15 120 per year in 1992).

On the other hand, a spouse who cannot show proof of personal professional income and is not insured in her own right can draw neither invalidity pension nor the proportional retirement benefit to which a farmer is entitled.

This means that many entitled spouses who actually participate in the work of the holding do not gain full recognition for their work in the form of personal entitlements. A measure has therefore recently been introduced to improve the retirement pension entitlements of spouses of agricultural workers who have not opted for a specific status.

Article 12 of Law 91-1407 of 31 December 1991 on social contributions in agriculture and introducing the early retirement scheme for farmers implemented by Decree No 92-1111 of 2 October 1992 now allows a married couple running a farm to opt to share the proportional retirement points which are at present only attributed to the spouse who manages the undertaking. The same Decree also specifies that a married couple may opt to share the proportional retirement points where the spouse of a farm manager does not belong to another retirement scheme by virtue of the pursuit of a professional activity and is not disabled.

The application to take up the option of sharing the points must be signed by both spouses. The option is valid for one year and is automatically renewed. Points are shared out annually and this allocation is final. The arrangement is terminated either at the request of both spouses or automatically if one of the spouses no longer meets the qualifying conditions.

ARTICLE 7

Assisting spouse status

In order to qualify for this status, the spouse must provide evidence to that effect, requesting that the words 'assisting spouse' be entered in the trades or business register alongside the entry for the owner of the undertaking. He/she must then "actively participate in his/her spouse's activity without remuneration and without exercising any other professional activity" (Article 8, Chapter III of Law No 82-596 of 10 July 1982).

This gives the spouse certain professional and social rights.

* Professional rights

1. The assisting spouse is deemed to have received from the manager of the undertaking the authorization to carry out on this person's behalf the necessary administrative activities involved in its running.
2. He/she may vote and stand for election in elections for chambers of commerce, chambers of trade and pension insurance funds.

*Social rights: See Articles 6 and 8.

ARTICLE 8

Sickness/maternity insurance for all female self-employed workers in non-agricultural professions:

The Law of 10 July 1982 and its implementing Decree of 31 December 1982 introduced the maternity grant and an allowance enabling the women concerned to be replaced by paid staff, both in the case of women personally pursuing an industrial, commercial or craft activity or liberal profession and personally contributing to a self-employed workers' scheme, and for wives assisting industrialists, traders, craftsmen or members of the liberal professions. They also receive a flat-rate maternity grant equal to FF 5 790 (as at 1 July 1992) and, if they have themselves replaced by salaried staff, a concurrent relief allowance which is payable for a maximum of 28 days.

Sickness/maternity insurance for self-employed women in agriculture:

All women working in the agricultural holding and carrying out agricultural work are entitled to relief services organized by the profession, regardless of their legal status. They may have themselves replaced, in the event of maternity, by salaried staff for a maximum period of 56 days; the amount of the relief grant payable to them is equal to 90% of the cost (the remaining 10% being the contribution of the female agricultural worker).

The replacement cost ceiling to which this 90% figure applies was set on 27 July 1992 at:

- FF 478.40 per day of full-time replacement,
- FF 58.24 per hour of replacement where the service is provided for less than eight hours per day.

ARTICLE 9

No information was forthcoming on this article.

ARTICLE 10

1988: Production of an information video (lasting 20 minutes) describing the situation of women in a rural environment, aimed at informing and raising the awareness of local decision-makers and people living and working in the countryside about the involvement of women in the rural economy and their role in every area of rural development.

October 1992: Launching of an information campaign to increase awareness of the rights of spouses of craftsmen and traders. An information file on the rights of craftsmen and traders' wives appeared in the magazine published by the pension funds for craft workers ("contact AVA" and for traders ("ORGANIC Information"). The campaign is aimed at all craftsmen and tradesmen in France.

In March 1993 a guide to the rights of women farmers in France was published by the National Information Centre for Womens' Rights.

7. Ireland

ARTICLE 4

The Employment Equality Act (1977) prohibits discrimination on grounds of sex or marital status as regards access to employment, vocational training or professional experience. Section 6 of the Act makes it illegal to discriminate in respect of access to vocational training courses or the manner in which training courses and all other types of training are advertised (except in the case of positive action - Section 15)

ARTICLE 5

The provisions of the Companies Acts from 1963 to 1990 make no distinction as between men and women.

A married couple may be members of a company and, according to the Companies Registration Office, a large proportion of all registered companies are formed by married couples.

ARTICLE 6

Self-employed contributors to retirement pension schemes automatically acquire entitlement to an adult dependent's allowance in respect of their spouse. This allowance may be paid directly to the pensioner as part of the pension or the adult dependent may apply to have the allowance paid directly to him/her.

The Social Welfare Act exempts assisting spouses from compulsory social insurance as self-employed contributors. This suggests that they are unable to take out voluntary insurance.¹²

ARTICLE 7

The National Pensions Board, which was set up to advise the Minister for Social Welfare on pensions policy generally, is currently examining the feasibility of extending compulsory social insurance cover for pensions to assisting relatives (including spouses) who directly or indirectly assist an employed or self-employed person in earning the household income and/or who are mainly dependent on that income.

ARTICLE 8

Female self-employed workers and the wives of self-employed workers have no access to temporary replacement services and are not entitled to cash benefits when interrupting their activity owing to pregnancy and motherhood.

¹² Unless they previously had been in receipt of an income which was subject to compulsory social insurance. In that case they are entitled to maintain their pension cover by paying contributions on a voluntary basis.

ARTICLE 9

Individuals who consider that they have been discriminated against may take their cases to the Labour Court, which then decides whether to refer the matter to an Equality Officer for investigation and the issue of a recommendation, or to an industrial relations officer for conciliation.

The latter option is rarely used. The trade unions and the Employment Equality Agency can take cases to court on behalf of an individual or group collectively.

ARTICLE 10

All vocational training centres have been informed about the rules on equal opportunities so that they may apply them in all training programmes. The training and employment authority (FAS) actively encourages women to take up the full range of training opportunities available, particularly in non-traditional areas.

Conclusions

1. Assisting spouses (male or female) are only protected via the self-employed worker. They cannot contribute voluntarily in order to increase their entitlements, which are confined to retirement benefits.
2. No steps have been taken to entitle female workers an allowance during motherhood; there does not appear to be any replacement service.
3. Article 10 not only stipulated that vocational training centres should be informed; it also referred to bodies representing self-employed workers and their spouses, and these bodies have not been informed.

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8. Italy

The Italian Government points out that the Directive lays down principles for which there is no equivalent in Italian law. There are many different forms of self-employed activity, whose common feature is the lack of fixed rules, but there is no inequality of treatment between men and women.

Article 4

Italian law prohibits all discrimination on grounds of sex as regards access to and the pursuit of the various forms of activity in a self-employed capacity. This principle is enshrined in Law No 66 of 9 February 1963.

Article 5

The family enterprise

This concept was introduced by Law No 151 of 19 May 1975, supplemented by Law No 903 of 9 December 1977.¹³ This law stipulates that self-employed women habitually engaged in an activity in the family business are entitled to represent the business on the statutory bodies of cooperatives, consortia and all other forms of association.

Article 230a of the Civil Code provides inter alia that, unless a different relationship can be identified, a family member¹⁴ habitually pursuing a professional activity within the family or within the family enterprise¹⁵ is entitled to maintenance in keeping with the situation of the family assets (means-tested benefits?) and a share in the profits of the family business and in the property acquired with such profits and in any extension of the business, and also in respect of goodwill, in proportion to the quantity and quality of the services rendered. Decisions concerning the use of profits and extensions to the business, and those pertaining to extraordinary administration, production policy and termination of activity, are taken, by majority, by the family members participating in the said enterprise.

Work done by the spouse of a self-employed worker seems to be broadly covered by this article, which acknowledges the spouse's right to participate in the profits of the business in proportion to the quality and quantity of work done and which emphasizes the principle that a woman's work is equivalent to that of a man.

As far as agriculture is concerned, tacit family groups are governed by customary practice, but such practice is not at variance with the abovementioned provisions.

13 On equality of treatment between men and women as regards employment.

14 Family member means spouse, relatives up to the third degree and relatives by marriage up to the second degree.

15 Family business means an enterprise in which the spouse, relatives up to the third degree and relatives by marriage up to the second degree collaborate

Liberal professions

Attention must be drawn, however, to a ruling of the Appeal Court of 19 May 1987, No 3287, which devalues the work carried out by a person to assist his/her spouse in a liberal profession. This ruling and the resultant case-law equate this professional activity with work done free of charge ("affectionis causa"). Article 230a does not apply to the liberal professions since they (lawyers, solicitors) are not considered as businesses. In such a case common law applies.

The adoption of the Directive has led to a change in the interpretation of the case-law of lower courts and the legal theory governing the provisions of the Civil Code and to an extension of protection for activities carried out in a family structure which is not organized as a business. In spite of the existence of the Directive, the prevailing interpretation (Appeal Court) remains one of a presumption that the professional activity is carried out free of charge in every case where the persons concerned have conjugal ties, particularly where they cohabit.

Article 8

The Law of 11 December 1990 (No 379) introduced a maternity allowance for self-employed women in the liberal professions. These women receive funds from a social insurance scheme representing 80% of five-twelfths of the amount earned and declared in their tax returns during the two previous years, for a period of five months (two months before the birth and three months afterwards).

Law No 546 of 29 December 1987 already introduced a maternity allowance for self-employed women.

Article 10

Law No 125 of 10 April 1991 (positive actions to achieve equality between men and women at work) shifted the onus of proof in favour of the worker who considers him or herself wronged by discriminatory behaviour (Article 4(5)).

Conclusion

1. In Italy the question of recognition of the work of a spouse is subordinated to the concept of a family business. This does not appear to be conducive to the acquisition of personal social security entitlements.

Unfortunately, this concept only applies if an enterprise has been duly formed. Spouses of self-employed persons in the liberal professions are therefore excluded.

2. Italy has not notified the Commission of any specific measures to inform those concerned by the Directive about its provisions.

9. Luxembourg

General Comment: The replies from Luxembourg did not deal with Articles 7, 9 and 10.

ARTICLE 5

Spouses are allowed to form a company subject to Article 181(2) of the amended law of 10 August 1915 on commercial companies. This article enables spouses to be partners in a limited liability company unless the articles of association of the company alter the matrimonial property arrangements agreed between the spouses. This restriction applies whatever the matrimonial property arrangements in question.

ARTICLE 6

Persons participating in a non-industrial, commercial and agricultural activity of their self-employed spouse are in principle insured under a compulsory insurance scheme for sickness and pension provision. Failing this they are entitled to cash benefits as co-insured persons.

At the request of the person concerned, the fund committee may waive the requirement for the assisting spouse to contribute unless the insured person is a farmer. Consequently, spouses covered by the Directive receive sickness, accident, invalidity, old age and survivor's benefits.

In the event of disability, the spouse's cash benefits are suspended until the first day of the fourth month following the month in which the incapacity for work was declared. This allowance is equal to the basis for assessing contributions and may not exceed five times the minimum reference wage.¹⁶

ARTICLE 8

The law of 27 July 1992 reforming the sickness insurance and welfare sector extends the entitlement to a maternity grant to women engaged in a self-employed activity.¹⁷

The spouse must be at least 18 years old and be chiefly employed in that capacity. The same rules are applied to partners who habitually take part in the day-to-day management or who, individually or with their spouse, hold more than half of the shares in the undertaking.

The allowance corresponds to the assessment base but must not exceed five times the minimum social wage and is paid for eight weeks before and eight weeks after confinement. This measure, which places female self-employed and salaried workers on an equal footing as regards the type of benefit during maternity leave, will come into force on 1 January 1994.

16 Article 12 of the Law of 27 July 1992 reforming sickness insurance and welfare.

17 Articles 1, 5 and 25.

The requirement for the wife to contribute may be waived at her request, unless she holds more than half of the shares or is assisting in an agricultural holding. The waiver may only be granted in conjunction with the waiver for pension insurance.

There is no provision for replacement services.

Conclusions:

1. It is unfortunate that, although Luxembourg has introduced a compulsory insurance scheme for spouses within the meaning of Article 2(b), there is no effective mechanism to enforce this obligation.

In the absence of a genuine policy to inform and increase the awareness of self-employed spouses of their entitlements, the usefulness of compulsory insurance is open to question.

2. In 1994 the wives of self-employed workers who habitually participate in the business or the holding will be entitled to a real maternity allowance and not just the lump sum allowance which has been paid in the past to all women domiciled in Luxembourg. They will be recognized as full members of the workforce.

10. Netherlands

ARTICLE 4

There is no discrimination on grounds of sex in respect of access to, or the establishment and extension of a business.

ARTICLE 5

The formation of a company between spouses is not subject to any specific conditions applicable only to married couples.

ARTICLE 6

All Dutch citizens have to contribute around 30% of their income in addition to income tax in order to be entitled to benefits under the national health system (Ziekenfonds). Workers earning above a certain level are required to take out a private insurance.

Self-employed workers and their spouses are, like all Dutch citizens, covered by the national insurance scheme or a private insurance. They are entitled to retirement pension, invalidity pension and survivor's pension as well as family allowances.

Workers who change their status from employee to self-employed are also allowed to contribute on a voluntary basis.

ARTICLE 7

In 1985 a committee was set up to look at the question of women assisting self-employed spouses. This committee was made up of representatives of the government, small and medium-sized businesses and the farming sector. Its task was to identify the problems related to the status of women assisting self-employed spouses in the areas of civil and fiscal legislation, education and social security. Unfortunately the findings of this committee have not been passed on by the Dutch authorities.

ARTICLE 8

Under sickness insurance legislation, women are entitled to 16 weeks leave. If after 16 weeks they are still incapable of working, their leave may be extended to 52 weeks.

There is a national association covering all replacement services in the Netherlands.

There is also the possibility of contributing to a private insurance plan, the cost of which will vary according to the services offered. State subsidies are also granted to provide lower-cost replacement services in the case of sickness, accident, maternity, holiday and training.

ARTICLE 9

No information

ARTICLE 10

Letters and circulars have been sent to the bodies representing self-employed workers and vocational training centres, informing them of the importance of the Directive.

Conclusion

Dutch legislation appears to conform to the Directive. It is nevertheless to be regretted that an assisting spouse still cannot be employed by the self-employed spouse he/she is assisting. Under Dutch legislation there has to be a dependent relationship in an employment contract, but this is considered undesirable between spouses.¹⁸

Access to vocational training is open to both young men and young women but the evidence, at least in the agricultural industry, is that fewer girls are taking up training schemes and that things are moving slowly.

¹⁸ Parliamentary Acts 1988-1989 No 19622-13.

11. Portugal

ARTICLE 4

In Portugal there is no discrimination, either *legally* or *de facto*, in respect of access to training or the establishment, equipment or extension of a business or the launching or extension of any other form of self-employed activity.

ARTICLE 5

The regulations governing spouses' joint property are precise and clear and leave a large measure of freedom to a husband and wife who wish to form a company together or to both hold shares in a company.

For overriding reasons of public policy relating to the protection of the household's estate and the need to prevent one spouse from having an unfair advantage over the other, the only restriction imposed is that only one of the spouses may assume unlimited liability.

Nonetheless, it is generally understood that this restriction does not apply when the couple have a pre-marriage agreement dividing their property (Article 1735 of the Civil Code).

Where, because of the matrimonial property regime, the shareholding in the company is common to both spouses, the shareholder is deemed to be the spouse who concluded the partnership agreement, or, if the shareholding was acquired subsequently, the spouse through whom the shareholding in the company was made over to the couple.

However, this does not prevent the shareholder's spouse from exercising the administrative powers provided for in civil law, if the spouse who is the shareholder is unable to exercise them for whatever reason, nor does it affect the rights of the shareholder's spouse over the shareholding in the event of the shareholder's death.

ARTICLE 6

Self-employed workers are insured against illness¹⁹ (optional contribution for occupational illnesses), maternity, invalidity, old age and death.

The spouses referred to in Article 2(b) of self-employed workers pursuing an activity on their own account are protected by the social security system of the self-employed worker and covered for the same risks. In cases other than that of a spouse of an entrepreneur working for his own account, the spouses referred to in Article 2(b) can pay into a voluntary scheme which covers them for old age, invalidity and death.

ARTICLE 7

No information on the measures taken.

¹⁹ Health benefits are not part of the social security system. They are provided to all residents under the national health service.

ARTICLE 8

Self-employed female workers are entitled to 90 days' maternity leave plus a maternity allowance provided that they have been contributing for at least six months (not necessarily consecutively) and have declared their earnings.

By contrast, a wife assisting a self-employed worker cannot enjoy the same protection through that worker's insurance scheme and cannot contribute voluntarily to cover the contingency of motherhood.

There are no services supplying temporary replacements or social services to deal with the problem of the assisting wife being unable to work.

ARTICLE 9

The ordinary courts have jurisdiction in respect of disputes on questions of equality of treatment under the Directive.

There are two commissions in Portugal - the Commission for Equality and Women's Rights, which reports to the Prime Minister, and the Commission for Equality in Employment at the Workplace, which is attached to the Ministry for Employment. These are not appeal bodies but administrative committees with advisory powers.

The rights of collective pursuit of claims may be conferred on representative groups by individuals. There is no such provision for trade unions or other groups in general.

ARTICLE 10

The only source of information on the existing or adopted texts implementing this Directive is publication in the Official Gazette. This is the normal means of publicising a new law. However, no other steps were taken to bring this information to the attention of bodies representing self-employed workers and vocational training centres as required by this Article of the Directive.

Conclusions

1. Article 8 has not led to any legislation being adopted in this area.
2. Although the Official Gazette is the standard means of publicising legislative measures, it must still be noted that Article 10 envisages a more active information strategy aimed at those most concerned by this Directive.

12. United Kingdom

INTRODUCTION

The United Kingdom takes the view that the principle of equal treatment was already established in UK law prior to the adoption of the Directive and that, therefore, it has not been necessary for British law to conform to the Directive's provisions.

No specific legislative measures were needed to implement the provisions. The United Kingdom considers that there is no need for any further initiatives in this area.

ARTICLE 4

The Sex Discrimination Act of 1975 and the Equal Pay Act of 1970, and the equivalent legislation in Northern Ireland, established the principle of equal treatment under British law. There is legislation in place prohibiting discrimination on grounds of sex for each self-employed category, including agriculture, in access to the professions, vocational training and in-service training, vocational guidance, retraining and, where appropriate, promotion.

United Kingdom legislation ensures equal treatment in respect of the establishment, extension and equipment of a business. Furthermore, advice and vocational training as well as financial assistance are available to those starting up a business regardless of sex.

Spouses who are not partners have equal rights. Male and female spouses have the same rights and obligations. Where the spouses are partners their rights and obligations are determined, as in all partnerships, by their partnership agreement and by the Partnership Act of 1890 which places no obstacle to the provision of equal rights. There is no de facto inequality in this area.

ARTICLE 5

No change to UK legislation was necessary in order to ensure compliance with this part of the Directive. Companies may be set up by spouses on an equal footing and the funds used by the two spouses may be common property. There are no indirect obstacles to the formation of a company by spouses (the relevant legislation is the 1985 Companies Act).

There are no provisions in UK legislation which would prevent the company from continuing its business in the case of death or divorce and the dissolution of the marriage has no adverse legal consequences for the activity of the company or the rights of the participating spouses. The United Kingdom adds a rider that divorce may have unfavourable practical consequences "if the couple feel unable to continue working together", but acknowledges that there is no legal remedy for this problem.

ARTICLE 6

The United Kingdom has a contributory social security system for self-employed workers which covers the contingencies of sickness, maternity, retirement and death. This system includes the protection of spouses referred to in Article 2(b) of the Directive. The risks for these individuals are covered by the old age pension and widows' benefit. The benefits are calculated according to the husband's contributions. In the case of the old age pension, a married women who has never contributed can receive a pension from the age of 60 based on her husband's contributions providing he is receiving his own retirement pension (retirement age for men is 65). The married women's pension is equal to 60% of her husband's basic state pension.

There is also a contributory voluntary social security scheme which is accessible to both women and men (for retirement insurance and, in the case of women, for a survivor's pension).

ARTICLE 7

The United Kingdom authorities are currently looking into the measures to be taken on the basis of Article 7 (as they were already doing in 1989). Taking agriculture as an example, the United Kingdom stresses that "the fact that farmers' wives make a significant contribution to the farm business in many instances is already widely recognized".

The Government considers that other initiatives in this area are unnecessary.

ARTICLE 8

Self-employed women may be entitled to maternity benefit under the national social security scheme provided they meet the qualifying conditions. The maternity allowance is currently £40.60 per week for up to 18 weeks.

Self-employed women do not have a right to maternity leave as such since, in the United Kingdom, this is a right granted to employees by employers and a self-employed woman cannot grant the right against herself. The information provided does not refer to a maternity allowance or maternity leave for the wives of self-employed workers - presumably because no such rights exist.

Self-employed women are not entitled to a relief allowance. In agriculture, relief services exist in the private sector. According to figures for 1990, there are 55 000 self-employed women in the United Kingdom receiving maternity benefit each year.

ARTICLE 9

Every individual has the right to seek legal redress. The competent body will depend on the type of judicial recourse chosen - it could be a court of law, an industrial tribunal or a social security tribunal.

There are two equal opportunities commissions in the United Kingdom, one for Great Britain and the other for Northern Ireland. They have powers to conduct investigations and provide advice and assistance for individuals who consider themselves discriminated against.

There is no simplified procedure, even though industrial tribunals have a less formal procedure than the ordinary courts of law. There is no possibility for collective redress. No separate records are kept of the numbil sanctions.

ARTICLE 10

The adoption of the Directive was announced in Parliament in 1986 and copies of the Directive were sent to organizations representing the self-employed, the Equal Opportunities Commissions, the National Farmers Union and the then Training Agency.

There is also a wide range of public information booklets and leaflets on measures to implement the Directive. The equal opportunities bodies have also produced information on this subject.

The list of organizations representing the self-employed to whom copies of the Directive have been sent is as follows: the Alliance of Small Firms and Self-Employed People, the Association of British Chambers of Commerce, the Association of Independent Business, the Forum of Private Business, the National Chambers of Trade, the CBI Smaller Firms Council, the Union of Independent Companies, the United Kingdom Science Park Association, the National Federation of Self Employed and Small Businesses.

CONCLUSION

Legislation and practice appear to conform to the provisions of Directive 86/613. In general, anyone engaged in a professional activity is considered as being required to register as an employee or a self-employed person, even if their income/profits are too low to pay compulsory contributions.

Consequently, the Government believes that the adoption of ancillary measures for spouses of self-employed persons who assist the worker without being an employee or a partner will be difficult to justify unless comparable measures are applied to the spouses of all workers, whether or not they are employees.

PART III: CONCLUSIONS

1. In strictly legal terms, it appears that Directive 86/613/EEC has been implemented in the Member States. However, the practical result is not entirely satisfactory when measured against the prime objectives of the Directive, which was a general improvement in the status of assisting spouses.
2. Because of the wide range of different rules covered by the Directive, it was extremely difficult to determine whether national legislation complies with Community law. Also, it was not possible within the scope of this report to consider whether Member States had taken all necessary measures to eliminate indirect discrimination, which figures in the definition used in Article 3 of the Directive. A much more detailed and far-reaching survey of national law would be required in order to establish whether such discrimination persists.
3. It is clear that there has been no overall policy for dealing with the situation of assisting spouses as defined in Article 2(b), despite the clear intention of the Directive to bring about an improvement in their professional status.
4. From the review of the situation in the Member States it would appear that there are certain practical problems in implementing the Directive:

- Firstly, the self-employed do not constitute a homogenous group. Consequently, social security arrangements for self-employed persons vary considerably, with compulsory national, general and special schemes co-existing alongside voluntary general, special and private schemes.

With reference to spouses who are not protected under the self-employed worker's social security scheme, it should be pointed out that, for the purposes of social security, a distinction is made between:

- * own rights, that is to say the personal entitlements which the insured person acquires through his own economic activity and residence in a country;
- * derived rights, that is to say the rights which the beneficiary has by virtue of legal or family ties with the holder of own rights.

The Directive left it open for Member States to grant either individual or derived rights to the spouses referred to in Article 2(b). It should be pointed out, nonetheless, that with a view to the recognition of the work of the spouse (Article 7), the only way in which this objective is likely to be achieved is for spouses to be granted social security entitlements in their own right.

In this context, Article 11 of the Commission's Draft Directive of 23 October 1987 (COM (87) 494 final) gives Member States the option to grant own rights as an alternative to derived rights as an incentive to remedy the situation of individuals such as assisting spouses. This draft directive is still pending before the Council.

- Secondly, the terms of the Directive were quite vague and did not specify particular action which could have been taken in certain areas. Instead, Member States were called upon to consider various strategies for improving the situation of the self-employed and their assisting spouses. The lack of direction here may be responsible in part for the minimal response in the Member States.

However, it must be added that even the more straightforward requirements of the Directive, such as the duty to inform the people concerned (which was mandatory even for those countries who considered that their law was already in line with the Directive), do not appear to have been implemented with anything like the necessary vigour.

5. Though not a conclusion as such, it is appropriate to bear in mind that there is a clear message coming from bodies representing the self-employed that the work of assisting spouses must be formally recognised and their social security rights clearly defined.

The European Parliament has also adopted a resolution which refers to the situation of women in agriculture in the Member States (A3 0409/93). The Resolution calls on the Commission and the Member States to try and achieve more for female helpers on farms so as to give them their own rights and not merely indirect entitlements.

6. In light of the foregoing, it is evident that the Commission and the Member States will need to explore the possibilities for further work in this area in order to meet the aims of the Directive and to advance the position of the self-employed and their assisting spouses.

COUNCIL

COUNCIL DIRECTIVE

of 11 December 1986

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

(86/613/EEC)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Articles 100 and 235 thereof,

Having regard to the proposal from the Commission ⁽¹⁾,

Having regard to the opinion of the European Parliament ⁽²⁾,

Having regard to the opinion of the Economic and Social Committee ⁽³⁾,

Whereas, in its resolution of 12 July 1982 on the promotion of equal opportunities for women ⁽⁴⁾, the Council approved the general objectives of the Commission communication concerning a new Community action programme on the promotion of equal opportunities for women (1982 to 1985) and expressed the will to implement appropriate measures to achieve them;

Whereas action 5 of the programme referred to above concerns the application of the principle of equal treatment to self-employed women and to women in agriculture;

Whereas the implementation of the principle of equal pay for men and women workers, as laid down in Article 119 of the Treaty, forms an integral part of the establishment and functioning of the common market;

Whereas on 10 February 1975 the Council adopted Directive 75/117/EEC on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women ⁽⁵⁾;

Whereas, as regards other aspects of equality of treatment between men and women, on 9 February 1976 the Council adopted Directive 76/207/EEC 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 ⁽⁶⁾ and on 19 December 1978 Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security ⁽⁷⁾;

Whereas, as regards persons engaged in a self-employed capacity, in an activity in which their spouses are also engaged, the implementation of the principle of equal treatment should be pursued through the adoption of detailed provisions designed to cover the specific situation of these persons;

Whereas differences persist between the Member States in this field, whereas, therefore it is necessary to approximate national provisions with regard to the application of the principle of equal treatment;

Whereas in certain respects the Treaty does not confer the powers necessary for the specific actions required;

Whereas the implementation of the principle of equal treatment is without prejudice to measures concerning the protection of women during pregnancy and motherhood,

HAS ADOPTED THIS DIRECTIVE:

SECTION I

Aims and scope

Article 1

The purpose of this Directive is to ensure, in accordance with the following provisions, application in the Member States of the principle of equal treatment as between men and women engaged in an activity in a self-employed capacity, or contributing to the pursuit of such an activity, as regards those aspects not covered by Directives 76/207/EEC and 79/7/EEC.

⁽¹⁾ OJ No C 113, 27. 4. 1984, p. 4.

⁽²⁾ OJ No C 172, 2. 7. 1984, p. 90.

⁽³⁾ OJ No C 343, 24. 12. 1984, p. 1.

⁽⁴⁾ OJ No C 186, 21. 7. 1982, p. 3.

⁽⁵⁾ OJ No L 45, 19. 2. 1975, p. 19.

⁽⁶⁾ OJ No L 39, 14. 2. 1975, p. 40.

⁽⁷⁾ OJ No L 6, 10. 1. 1979, p. 24.

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Article 2

This Directive covers:

- (a) self-employed workers, i.e. all persons pursuing a gainful activity for their own account, under the conditions laid down by national law, including farmers and members of the liberal professions;
- (b) their spouses, not being employees or partners, where they habitually, under the conditions laid down by national law, participate in the activities of the self-employed worker and perform the same tasks or ancillary tasks.

Article 3

For the purposes of this Directive the principle of equal treatment implies the absence of all discrimination on grounds of sex, either directly or indirectly, by reference in particular to marital or family status.

SECTION II

Equal treatment between self-employed male and female workers — position of the spouses without professional status of self-employed workers — protection of self-employed workers or wives of self-employed workers during pregnancy and motherhood

Article 4

As regards self-employed persons, Member States shall take the measures necessary to ensure the elimination of all provisions which are contrary to the principle of equal treatment as defined in Directive 76/207/EEC, especially in respect of the establishment, equipment or extension of a business or the launching or extension of any other form of self-employed activity including financial facilities.

Article 5

Without prejudice to the specific conditions for access to certain activities which apply equally to both sexes, Member States shall take the measures necessary to ensure that the conditions for the formation of a company between spouses are not more restrictive than the conditions for the formation of a company between unmarried persons.

Article 6

Where a contributory social security system for self-employed workers exists in a Member State, that Member State shall take the necessary measures to enable the spouses referred to in Article 2 (b) who are not protected under the self-employed worker's social security scheme to join a contributory social security scheme voluntarily.

Article 7

Member States shall undertake to examine under what conditions recognition of the work of the spouses referred to in Article 2 (b) may be encouraged and, in the light of such examination, consider any appropriate steps for encouraging such recognition.

Article 8

Member States shall undertake to examine whether, and under what conditions, female self-employed workers and the wives of self-employed workers may, during interruptions in their occupational activity owing to pregnancy or motherhood,

- have access to services supplying temporary replacements or existing national social services, or
- be entitled to cash benefits under a social security scheme or under any other public social protection system.

SECTION III

General and final provisions*Article 9*

Member States shall introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by failure to apply the principle of equal treatment in self-employed activities to pursue their claims by judicial process, possibly after recourse to other competent authorities.

Article 10

Member States shall ensure that the measures adopted pursuant to this Directive, together with the relevant provisions already in force, are brought to the attention of bodies representing self-employed workers and vocational training centres.

Article 11

The Council shall review this Directive, on a proposal from the Commission, before 1 July 1993.

Article 12

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than 30 June 1989.

However, if a Member State which, in order to comply with Article 5 of this Directive, has to amend its legislation on matrimonial rights and obligations, the date on which such Member State must comply with Article 5 shall be 30 June 1991.

2. Member States shall immediately inform the Commission of the measures taken to comply with this Directive.

Article 13

Member States shall forward to the Commission, not later than 30 June 1991, all the information necessary to enable it to draw up a report on the application of this Directive for submission to the Council.

Article 14

This Directive is addressed to the Member States.

Done at Brussels, 11 December 1986.

For the Council

The President

A. CLARKE

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ISSN 0254-1475

COM(94) 163 final

DOCUMENTS

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Catalogue number : CB-CO-94-176-EN-C

ISBN 92-77-67869-0
