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PROPOSAL

from:	European Commission
dated:	6 October 2008
Subject:	Proposal for a Directive of the European Parliament and of the Council on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Directive 86/613/EEC

Delegations will find attached a proposal from the Commission, submitted under a covering letter from Mr Jordi AYET PUIGARNAU, Director, to Mr Javier SOLANA, Secretary-General/High Representative.

Encl.: COM(2008) 636 final



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 3.10.2008
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2008/0192 (COD)

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

**on the application of the principle of equal treatment between men and women engaged
in an activity in a self-employed capacity and repealing Directive 86/613/EEC**

{SEC(2008)2592}
{SEC(2008)2593}

(presented by the Commission)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

Grounds for and objectives of the proposal

The aim of this proposal is to change the Community legal framework concerning the application of the principle of equal treatment between women and men for self-employed workers and their spouses. This proposal will repeal Directive 86/613/EEC¹ and will be applicable as regards those aspects not covered by Directives 2006/54/EC, 2004/113/EC and 79/7/EEC, in order to implement more effectively the principle of equal treatment between women and men engaged in an activity in a self-employed capacity, or contributing to the pursuit of such an activity.

The Commission announced a review of Directive 86/613/EEC in its legislative work programme for 2008 (forward programming 2008, item 2008/EMPL/021).

General context

In its Report² on the implementation of Directive 86/613/EEC, the Commission concluded that the practical results of the implementation of the Directive were ‘not entirely satisfactory when measured against the prime objective of the Directive, which was a general improvement in the status of assisting spouses.’

In its Roadmap for equality between women and men³, the Commission announced that in order to improve governance of gender equality, it would ‘review the existing EU gender equality legislation not included in the 2005 recast exercise (...) with a view to updating, modernising and recasting where necessary’. Directive 86/613/EEC was not included in the recasting exercise.

In December 2007⁴, the Council called on the Commission to ‘consider the need to revise, if necessary, Council Directive 86/613/EEC in order to ensure the rights related to motherhood and fatherhood of self-employed workers and their helping spouses.’

The European Parliament has consistently called on the Commission to review the Directive⁵, in particular to improve the situation of assisting spouses in agriculture.

¹ Council Directive 86/613/EEC 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 (OJ L 359, 19.12.1986, p. 56).

² 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 - COM(94) 163.

³ Communication from the Commission to the Council, the European Parliament, the European Economic and Social committee and the Committee of the Regions *A Roadmap for equality between women and men* - COM(2006) 92.

⁴ 4 December 2007 (Document SOC 385).

⁵ See the last report adopted by the European Parliament on 12 March 2008 on the situation of women in rural areas of the EU (2007/2117(INI), *rapporteur* Christa Klass, A6-0031/2008).

The 2000 Lisbon European Council set a strategic goal for the EU to transform it into 'the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion'.

To achieve its strategic goal of promoting more and better jobs and offering equal opportunities for all, the Union needs to increase entrepreneurship in general and women's entrepreneurship in particular. This has been acknowledged in the Commission Communications 'Think Small First'⁶ and 'Renewed Social Agenda'⁷.

Existing provisions in the area of the proposal

Directive 86/613/EEC covers two different categories of persons, 'self-employed workers' and their 'assisting spouses'. The legal situations for these two categories of persons are different.

For **self-employed workers**, other legal texts implementing the principle of equal treatment between women and men are applicable in certain areas. Discrimination based on sex is prohibited in social security and other elements of social protection (Directive 79/7/EEC), occupational social security schemes (Directive 86/378/EEC), conditions for access to self-employment (Directives 2002/73/EC and 2006/54/EC) and access to and supply of goods and services (Directive 2004/113/EC).

As far as '**assisting spouses**' are concerned, Directive 86/613/EEC is the only legal text applicable at EU level.

In 1994 the Commission adopted a report⁸ on the implementation of Directive 86/613/EEC in which it concluded: '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'. The report also stressed the lack of an overall policy for dealing with the situation of assisting spouses and pointed out that "with a view to the recognition of the work of the spouse (...), 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'.

Consistency with other policies and objectives on the Union

The aim of this proposal is totally consistent with EU policies and in particular with the Lisbon Strategy for Growth and Jobs. According to the EC Treaty, the Community aims to eliminate inequalities and promote equality between men and women in all its activities. Gender equality lies at the heart of the Lisbon Strategy: since the gender gap in self-employed activities is wide, bridging the gender gap in the field of entrepreneurship is vital if the EU target for the female employment rate is to be met.

⁶ COM(2008) 394.

⁷ COM(2008) 412.

⁸ 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 - COM(94) 163.

2. CONSULTATION OF INTERESTED PARTIES AND IMPACT ASSESSMENT

Consultation

In preparing this initiative, the Directorate-General for Employment, Social Affairs and Equal Opportunities sought to consult all stakeholders with a potential interest in this matter, both those potentially affected by the initiative and those who would be involved in implementing it.

The Commission accordingly consulted the European social partners, other stakeholders, the Member States and the Advisory Committee on Equal Opportunities for Women and Men.

The organisations consulted expressed divergent views on the review of this Directive. Trade unions and agriculture organisations are in favour of amending the Directive and improve gender equality for self-employed workers and assisting spouses.

The organisation representing agricultural organisations supports equal rights for equal commitment for all partners in farm businesses. On the other hand, organisations representing SMEs and sectoral employers are mostly concerned about the potential costs of any changes and opposed to any changes that would increase social security contributions.

The Advisory Committee on Equal Opportunities for Women and Men (composed of representatives of Member States, European social partners and NGOs), which was also consulted, is of the opinion that the Directive should be amended in order to give assisting spouses a clear professional status, with coverage by social protection schemes, and to provide for paid maternity/paternity leave for self-employed workers and assisting spouses.

The European Women's Lobby supports the opinion of the Advisory Committee on Equal Opportunities. The Confederation of Family Organisations in the European Union (COFACE) strongly advocates a revision of Directive 86/613/EEC to give self-employed women a maternity leave of a long enough duration to ensure the proper course of a normal pregnancy and physical recovery of the mother after a normal childbirth and to oblige Member States to recognise the contribution of assisting spouses in the family business and to ensure that they benefit from the same level of social protection as the self-employed workers.

The position of Member States is also far from unanimous, some asking for an improvement of the EU legal framework, others stating that they do not see a need to review national legislation on the issues covered by the Directive or the EU legal framework.

The Commission has taken into account, as far as possible, the positions expressed during the consultation, by limiting the intervention to what is absolutely necessary to implement the principle of equal treatment and by assessing carefully the costs and benefits of the different policy options.

Collection and use of expertise

In view of the need to review Directive 86/613/EEC, the Commission asked the Network of Independent Legal Experts on the application of Community Law on equal treatment between men and women to produce a report on the implementation of the Directive, on its loopholes and weaknesses and on ways to improve it⁹.

A study¹⁰ was commissioned to provide an overview of the situation in the Member States and to assess the costs and benefits of various policy options.

Other studies have been extensively used, in particular *Good practices on social protection of new entrepreneurs and assisting partners and the impact on business creation*¹¹.

Impact assessment

The Impact Assessment Report looked at whether a review of Directive 86/613/EEC would be beneficial, in the light of its objectives, which were mainly to improve the application of the principle of equal treatment between women and men and increase participation of women in self-employed activities.

Three main policy options were identified: no action at EU level, non-binding measures and an amendment to Directive 86/613/EEC.

The report then looked at the impact of the three options. For that purpose, the option to amend the Directive was divided into four further policy options (which are not mutually exclusive):

- improving protection in the event of maternity
- providing leave to care for family members
- recognising the contribution of assisting spouses
- giving national equality bodies competence in the field.

After analysing the impact of each option, the report concluded that the option of not taking any new action at EU level would not meet any of the objectives. It also concluded that non-binding measures should be maintained and developed but were not an alternative to amending the Directive. Revising the Directive was considered to be the sole option that could meet the objectives.

In terms of costs, the impact assessment report came to the conclusion that the costs of the option to grant female self-employed workers maternity leave were low for the 8 Member States which do not already provide for this. The implementation of this option could be neutral for social security if it was entirely paid by the self-employed workers themselves. In that case, the maximum increase in contributions to the social security systems would remain

⁹ The study is available at:
http://ec.europa.eu/employment_social/gender_equality/legislation/report_draft2.pdf.

¹⁰ Not yet available on line.

¹¹ This study is available at: http://ec.europa.eu/enterprise/entrepreneurship/craft/craft-studies/documents/social_protection_final_report_en.pdf.

low (from 0.05% in Lithuania to 1.75% in Bulgaria). In practice, the funding of social security comes from different sources (contributions from the self-employed workers and taxation) and therefore the costs would be spread between Member States and self-employed workers.

In any case, the financial impact of the measure can also be reduced by leaving self-employed women the choice to benefit (or not) from maternity leave.

Concerning the option to grant assisting spouses the same level of protection as self-employed workers, the costs for social security schemes could be neutral in at least two cases: if they are entirely passed onto self-employed workers through a proportional increase of their contributions or if Member States opt to impose a distribution of the benefits and contributions within the family business which reflects the percentage input of the self-employed worker and the assisting spouse to the family business. In the latter case, the measure could be neutral in terms of costs and contributions for the social security scheme.

In any case, the financial impact of the measure can also be reduced by leaving assisting spouses the choice to join (or not) the social security scheme applicable to self-employed workers.

The report came to the conclusion that the option that best met the objectives was a proposal for a directive amending Directive 86/613/EEC. Taking into account the costs of the possible options for Member States and self-employed workers the preferred approach comprises:

- providing for a possibility of a period of maternity leave for self-employed women,
- recognising the contribution of assisting spouses to the family business by providing them with the possibility of social protection equivalent to that of their self-employed partners, and
- giving national equality bodies competence in cases of discrimination.

3. LEGAL ASPECT

Legal base

In the original Treaty of Rome, Article 119 EC did not apply to self-employed workers. This situation changed with the entry into force of the Amsterdam Treaty. The new paragraph 3 of Article 141 EC now applies to 'matters of employment and occupation' and therefore covers self-employed workers.

Because of this limitation in the scope of Article 119 of the Treaty of Rome, Directive 86/613/EEC was adopted under Articles 100 and 235, two 'residual' legal basis allowing the Council to adopt directives for the approximation of such laws of Member States as directly affect the establishment or functioning of the common market or when an action by the Community has proved to be necessary to attain one of the objectives of the Community and the Treaty has not provided the necessary powers.

However, the present proposal can now be based on the specific legal base, i.e. Article 141 EC.

Subsidiarity and proportionality

Article 2 of the EC Treaty provides that promoting equality between men and women is part of the tasks of the European Community.

The low participation of women in self-employment is a matter of gender inequality: women are not equal in the sense that where family responsibilities seem to have a negative impact on women's participation in entrepreneurship as compared to men.

As far as assisting spouses are concerned, the lack of coverage by social security and the non-recognition of their contribution to the family business give some businesses an unfair competitive advantage, so this initiative would ensure a level playing field throughout Europe.

The EU has already in place Directive 86/613/EEC covering the matters touched upon by this proposal. An EU legal instrument is the only way to ensure a level playing field in Europe. Strongly divergent national legislations, in particular concerning the status of assisting spouses, could lead to an unfair competitive advantage of businesses where the level of protection is lower or inexistent.

This proposal goes no further than necessary to ensure that the aim of the initiative is met.

The proposed Directive is a minimum standards instrument and would set out basic minimum standards whilst allowing those Member States which wished to go further to do so. In particular, the Directive will not require that all assisting spouses are granted the same social security protection as self-employed workers, but that assisting spouses can, **at their request**, benefit from at least an equal level of protection as self-employed worker. Member States will remain competent to establish the level of contributions and all the arrangements concerning benefits and payments, provided the minimal prescriptions of this Directive are complied with.

This proposal therefore respects the principles of subsidiarity and proportionality, as it is taken at the appropriate level and does not go beyond what is absolutely necessary at EU level in order to achieve the objectives set for the initiative.

Choice of instrument

Since the aim is to replace an existing Directive, a directive is the most appropriate legal act to do so.

Furthermore, a directive is, in any case, the appropriate instrument that ensures a coherent minimum level of protection in all Member States, while allowing each Member State to decide on the best way to implement the rules.

Correlation table

The Member States are required to communicate to the Commission the text of national provisions transposing the Directive as well as a correlation table between those provisions and the Directive.

European Economic Area

This is a text of relevance to the European Economic Area and the Directive will be applicable to the non-EU Member States of the European Economic Area following a decision of the EEA Joint Committee

4. BUDGETARY IMPLICATIONS

The proposal has no implications for the Community budget.

5. DETAILED EXPLANATION OF THE SPECIFIC PROVISIONS

Article 1:

Article 1(1) is equivalent to Article 1 of Directive 86/613/EEC. It sets out the purpose of the Directive, i.e. to put into effect the principle of equal treatment between men and women engaged in self-employed activities. The Directive covers only those aspects not already covered by Directives 2006/54/EC and 79/7/EEC.

Article 1(2) sets the personal scope of the Directive. It is the same as in Article 2 of Directive 86/613/EEC: it covers self-employed workers and assisting spouses.

Article 1(3) clarifies that this Directive does not cover the matters covered by Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services. In particular, Article 5 of Directive 2004/113/EC remains applicable to the contracts of insurance and related financial services.

Article 2:

Article 2 regroups all the definitions of the terms used in the Directive. The definitions of 'self-employed workers' and of 'assisting spouses' are taken from Article 2 of Directive 86/613/EEC. The definition of 'assisting spouses' is amended: the words 'assisting' and 'or life partners' are added. The amendment aims to cover all persons recognised as 'life partners' by national law and regularly participating in the activities of the family business, irrespective of marital status. In order to remove ambiguity, 'partner' is replaced by 'business partner'.

The definitions of 'direct discrimination', 'indirect discrimination', 'harassment' and 'sexual harassment' are drawn from existing Community law and do not depart from previously agreed approaches in any way. The concepts of direct and indirect discrimination and sex-based and sexual harassment are identical, *mutatis mutandis*, to those contained in Directives 2000/43/EC, 2000/78/EC, 2002/73/EC, 2004/113/EC and 2006/54/EC.

Harassment on grounds of sex and sexual harassment do not occur solely at the workplace, but also in other areas of an individual's life, including in the context of self-employed activities. As in Directive 76/207/EEC and 2006/54/EC, the two concepts are defined separately because they are distinct phenomena. Harassment based on sex consists of unfavourable treatment of a person related to their sex, though it need not be of a sexual nature. Sexual harassment consists of unwanted physical, verbal or non-verbal conduct of a sexual nature.

Article 3:

Article 3(1) sets the meaning of the principle of equal treatment for the purpose of this Directive. It is inspired on Articles 3 and 4 of Directive 86/613/EEC. This provision prohibits any direct or indirect discrimination in relation to the establishment, equipment or extension of a business or the launching of any other form of self-employed activity.

Article 3(2) makes it clear that both forms of harassment are deemed discrimination on grounds of sex and therefore prohibited.

Article 3(3) indicates that an instruction to discriminate as such is deemed discrimination. A similar provision already exists in Directives 2000/43/EC and 2000/78/EC based on Article 13 EC and in Directive 2006/54/EC, based upon Article 141(3) EC and 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.

Article 4:

This provision concerns positive action. Following the model of existing Directives, in particular Directive 2004/113/EC, it confirms that the Member States may maintain or introduce specific measures to compensate for certain disadvantages suffered by individuals of either sex in the area covered by the Directive. Such measures must be shown to be necessary, must be focused on overcoming a specific disadvantage and must be limited in time, being in force no longer than is necessary to deal with the problem identified. For example, women have traditionally experienced greater problems than men in starting up businesses as the result of a range of factors, including the difficulty of raising venture capital and gaining support for the development of business ideas. While the application of the principle of equal treatment is likely to help with this situation, it is unlikely to be sufficient on its own to overcome the disadvantages faced by women in this area. The Commission believes that this Directive should not prohibit the possibility of introducing measures to bridge the gender gap in terms of entrepreneurship in the Member States and that the Member States must therefore be allowed to make such derogation from the principle of equal treatment. Of course, in line with the jurisprudence of the Court of Justice with regard to positive action, these measures may not end up in attributing automatically and unconditionally advantages to women when women and men are qualified.

Article 5:

Article 5 is similar to Article 5 of Directive 86/613/EEC. The main change is the insertion of the words 'or life partners' to make clear that it covers persons recognised as "life partners" of the self-employed worker by national law irrespective of marital status.

Article 6:

Article 6 is similar to Article 6 of Directive 86/613/EEC. The new provision stipulates that assisting spouses must, at their request, benefit from at least an equal level of protection as self-employed workers. It does not stipulate that self-employed workers are to be covered by any specific social security system. It simply makes it an obligation for assisting spouses to be able, if they so decide, to join the same social security protection applicable to the self-employed worker. Under this Article, the decision to join or not is to be taken by the assisting spouses, Member States are only required to make the choice possible. Member States remain competent to establish the level of contributions and all the arrangements concerning benefits and payments, provided the minimal prescriptions of this Directive are complied with.

Article 7:

Article 7 substantially amends Article 8 of Directive 86/613/EEC. Under the latter as it stands, the Member States are 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 and be entitled to cash benefits under a social security scheme or any other public social protection system.

Article 7(1) states that female self-employed workers and assisting spouses should be entitled, at their request, to maternity leave as provided for in Directive 92/85/EEC.

According to Article 7(2) and (3), such maternity leave is to be paid at a rate at least equivalent to the payment received in the event of sickness, subject to any ceiling laid down by national law. If the person in question does not benefit from sickness allowance, the payment should be equivalent to any appropriate allowance established at national level.

In order to take the specificities of self-employed activities into account, Article 7(4) gives self-employed women as far as possible the option of temporary replacement services as an alternative to the financial allowance. This would allow self-employed women to take their maternity leave and pursue their business activity, through a temporary replacement.

Article 8:

Article 8 relates to the defence of rights enabling the obligations under the Directive to be enforced. In particular, it gives people who believe they have suffered discrimination with the possibility of pursuing their claims through administrative and/or judicial proceedings to enforce their right to equal treatment.

The right to legal protection is further reinforced by the possibility of allowing organisations to exercise such rights on behalf of a victim.

Article 9:

Article 9 deals with compensation and reparation. Member States are required to ensure that there is provision in national law for real and effective compensation or reparation, as is the case in existing Directives based on Articles 13 EC and 141 EC.

Article 10:

Article 10 requires Member States to designate national bodies for the promotion of equal treatment in the fields covered by the Directive. It replicates similar provisions of Directives 2000/43/EC, 2002/73/EC, 2004/113/EC and 2006/54/EC.

It provides for a framework for such national bodies, which are to act independently to promote the principle of equal treatment. The Member States may decide that such bodies are to be the same as those provided for in Council Directive 2002/73/EC – and thus now 2006/54/EC - for the labour market and/or in Council Directive 2004/113/EC for access to goods and services. The Member States are free to provide for their establishment at regional or local level, provided that their whole territory is covered by such arrangements.

The proposal for a Directive lays down a number of requirements for such bodies in the Member States, along the lines of what is already set out in the Directives mentioned above.

Article 11:

Article 11 is a standard provision on the need for transparency and to ensure information on the provisions in the field covered by the Directive are brought to the attention of the persons concerned.

Article 12:

This provision is a standard clause establishing that the transposition of the Directive into national law cannot be the motive for a reduction of the level of protection already existing in national law for the persons and matters covered by the Directive.

Article 13:

This provision sets out the procedures for monitoring and reporting on implementation of the principle of equal treatment. The reporting procedures require the Member States to report to the Commission [six years after adoption] and the Commission to report to the European Parliament and the Council one year later.

The impact of the Directive will therefore be carefully assessed and any adjustments needed to the legal framework can then be proposed in a good time.

Article 14:

This provision sets out the procedures for the implementation of the Directive. The Commission proposes that the Member States should in general have two years to transpose the Directive into national law and an additional [two] years to comply with Article 6, dealing with assisting spouses.

In line with recently agreed practice, this Article requires the Member States to notify the text of their national provisions transposing the Directive, together with a correlation table between those provisions and the Directive.

Article 15:

This provision repeals Directive 86/613/EEC from the date set in Article 13 for the implementation of the Directive by Member States.

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Directive 86/613/EEC

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 141(3) thereof,

Having regard to the proposal from the Commission¹²,

Having regard to the opinion of the European Economic and Social Committee¹³,

Having regard to the opinion of the Committee of the Regions¹⁴,

Acting in accordance with the procedure laid down in Article 251 of the Treaty,

Whereas:

- (1) Council Directive 86/613/EEC 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 motherhood¹⁵ ensures application in 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 activity. As far as self-employed workers and assisting spouses are concerned, Directive 86/613/EEC has not been very effective and its scope should be reconsidered, as discrimination based on sex and harassment also occur in areas outside salaried work. In the interest of clarity, Directive 86/613/EEC should be replaced by this Directive.
- (2) In its *Roadmap for equality between women and men*¹⁶, the Commission announced that in order to improve governance of gender equality, it would review the existing EU gender equality legislation not included in the 2005 recast exercise with a view to updating, modernising and recasting where necessary. Directive 86/613/EEC was not included in the recasting exercise.

¹² OJ C , p. .

¹³ OJ C , p. .

¹⁴ OJ C , p. .

¹⁵ JO L 359, 19.12.1986, p. 56.

¹⁶ COM(2006) 92.

- (3) In the Council conclusions ‘Balanced roles of women and men for jobs, growth and social cohesion’¹⁷, the Council called on the Commission to consider the need to revise, if necessary, Council Directive 86/613/EEC in order to ensure the rights related to motherhood and fatherhood of self-employed workers and their helping spouses.
- (4) The European Parliament has consistently called on the Commission to review the Directive 86/613/EEC, in particular to improve the situation of assisting spouses in agriculture.
- (5) In its Communication ‘*Renewed Social Agenda: Opportunities, access and solidarity in 21st century Europe*’¹⁸, the Commission has affirmed the need to take action on the gender gap in entrepreneurship as well as to improve the reconciliation of private and professional life.
- (6) There are already a number of existing legal instruments for the implementation of the principle of equal treatment which cover self-employment activities, in particular Council Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security¹⁹ and Directive 2006/54/EEC of the European Parliament and of the Council on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)²⁰. This Directive should therefore not apply to the areas already covered by other directives.
- (7) The Directive should apply to self-employed workers and assisting spouses, as both participate in the activities of the business.
- (8) The Directive should not apply to matters covered by other Directives implementing the principle of equal treatment between men and women, notably Directive 2004/113/EC. In particular, Article 5 of Directive 2004/113/EC on insurance and related financial services remains applicable.
- (9) To prevent discrimination based on sex, this Directive should apply to both direct and indirect discrimination. Harassment and sexual harassment should be considered discrimination and therefore prohibited.
- (10) Member States may, under Article 141(4) of the Treaty, maintain or adopt measures providing for specific advantages, in order to make it easier for the under-represented sex to engage in self-employed activities or to prevent or compensate for disadvantages in their professional careers. In principle, the measures aimed at achieving equality in practice should not be seen as in breach of the legal principle of equal treatment between women and men.
- (11) In the area of self-employment, the application of the principle of equal treatment means that there must be no discrimination in relation to the establishment, equipment or extension of a business or any other form of self-employed activity.

¹⁷ 4 December 2007 (Document SOC 385).

¹⁸ COM(2008) 412.

¹⁹ OJ L 6, 10.1.1979, p. 24.

²⁰ OJ L 204, 26.7.2006, p. 23.

- (12) It is necessary to ensure that there is no discrimination based on marital or family status as regards the conditions for setting up a company between spouses or life partners when recognised by national law.
- (13) In view of their contribution to the family business, assisting spouses should be entitled, at their request, to benefit from at least an equal level of protection as self-employed workers, under the same conditions applicable to self-employed workers, notably on contributions. Member States should be required to take the necessary measures to make that choice possible. In any case, the level of protection of self-employed workers and assisting spouse can be proportional to the rate of participation in the activities of the family business.
- (14) The economic and physical vulnerability of pregnant self-employed workers and assisting spouses makes it necessary for them to be granted the right to maternity leave, part of which should be considered mandatory. Member States remain competent to establish the level of contributions and all the arrangements concerning benefits and payments, provided the minimal prescriptions of this Directive are complied with. To take into consideration the specific situation of self-employed workers and assisting spouses, they should be given the final choice on whether or not benefit from maternity leave.
- (15) In order to take the specificities of self-employed activities into account, female self-employed workers and assisting spouses should be able to choose, as far as possible, between a financial allowance and a temporary replacement during maternity leave.
- (16) Enhancing the efficiency and effectiveness of welfare systems, notably via improved incentives, better administration and evaluation and the prioritisation of spending programmes, has become crucial to ensure the long-term financial sustainability of European social models. When devising the measures needed to implement this Directive, Member States should pay special attention to improving and securing the quality and long-term sustainability of their social protection systems.
- (17) Persons who have been subject to discrimination based on sex should have adequate means of legal protection. To provide more effective protection, associations, organisations and other legal entities should be empowered to engage in proceedings, as Member States so determine, either on behalf or in support of any victim, without prejudice to national rules of procedure concerning representation and defence before the courts.
- (18) Protection from discrimination based on sex should be strengthened by the existence of a body or bodies in each Member State with competence to analyse the problems involved, to study possible solutions and to provide practical assistance to the victims. The body or bodies may be the same as those with responsibility at national level for the defence of human rights or the safeguarding of individuals' rights, or the implementation of the principle of equal treatment. In exercising their powers and fulfilling their responsibilities under this Directive, these bodies should operate in a manner consistent with the United Nations Paris Principles relating to the status and functioning of national institutions for the protection and promotion of human rights.
- (19) Since the objectives of the action to be taken, namely to ensure a common high level of protection from discrimination in all the Member States, cannot be sufficiently

achieved by the Member States and can be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in the same Article, this Directive does not go beyond what is necessary in order to achieve those objectives,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Subject matter and scope

1. This Directive lays down a framework for putting into effect in Member States the principle of equal treatment 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 2006/54/EC and 79/7/EEC.
2. This Directive covers self-employed workers and assisting spouses.
3. The implementation of the principle of equal treatment between men and women in the access to and supply of goods and services remains covered by Directive 2004/113/EC.

Article 2

Definitions

1. For the purposes of this Directive, the following definitions shall apply:

- (a) 'self-employed workers': 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) 'assisting spouses': the spouses or, life partners of self-employed workers, when recognised by national law, , not being employees or business 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.
- (c) 'direct discrimination': where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation;
- (d) 'indirect discrimination': where an apparently neutral provision, criterion or practice puts persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary;
- (e) 'harassment': where unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of that person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment;
- (f) 'sexual harassment': where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.

Article 3
Principle of equal treatment

1. The principle of equal treatment means that there shall be no discrimination whatsoever on grounds of sex, either directly or indirectly, by reference in particular to marital or family status, in particular in relation to the establishment, equipment or extension of a business or the launching or extension of any other form of self-employed activity.
2. Harassment and sexual harassment shall be deemed to be discrimination on grounds of sex and therefore prohibited. A person's rejection of, or submission to, such conduct may not be used as a basis for a decision affecting that person.
3. An instruction to discriminate against persons on grounds of sex shall be deemed to be discrimination.

Article 4
Positive action

With a view to ensuring full equality in practice between men and women, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to sex.

Article 5
Establishment of a company

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 establishment of a company between spouses or life partners, when recognised by national law, are not more restrictive than the conditions for the establishment of a company with other persons.

Article 6
Social protection for assisting spouses

Member States shall take the necessary measures to ensure that assisting spouses can, at their request, benefit from at least an equal level of protection as self-employed workers under the same conditions applicable to self-employed workers.

Article 7
Maternity leave

1. Member States shall take the necessary measures to ensure that female self-employed workers and assisting spouses can, at their request, be entitled to the same period of maternity leave as provided for in Directive 92/85/EEC.
2. In order to ensure that persons as referred to in paragraph 1 can exercise their rights as recognised in this Article, Member States shall take the measures to ensure that they receive an adequate allowance during their maternity leave.

3. The allowance referred to in paragraph 2 shall be deemed adequate if it guarantees income at least equivalent to that which the person concerned would receive in the event of a break in her activities on grounds connected with her state of health or, if not applicable, any equivalent allowance established by national law, subject to any ceiling laid down under national legislation.

4. Member States shall take the necessary measures to ensure that female self-employed workers and assisting spouses have access as far as possible to services supplying temporary replacements or to any existing national social services, as an alternative to the allowance referred to in paragraph 2.

Article 8

Defence of rights

1. Member States shall ensure that judicial or administrative proceedings, including, where Member States consider it appropriate, conciliation procedures, are available for the enforcement of the obligations under this Directive are available to all persons who consider they have sustained loss or damage as a result of a failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.

2. Member States shall ensure that associations, organisations and other legal entities which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with may engage, on behalf or in support of the complainant, with his or her approval, in any judicial or administrative proceedings provided for the enforcement of obligations under this Directive.

3. Paragraphs 1 and 2 shall be without prejudice to national rules on time limits for bringing actions relating to the principle of equal treatment.

Article 9

Compensation or reparation

Member States shall introduce such measures into their national legal systems as are necessary to ensure real, effective compensation or reparation, as Member States so determine, for the loss or damage sustained by a person as a result of discrimination within the meaning of this Directive, such compensation or reparation being dissuasive and proportionate to the loss or damage suffered. Such compensation or reparation shall not be limited by a prior upper limit fixed.

Article 10

Equality bodies

1. Member States shall designate and make the necessary arrangements for a body or bodies for the promotion, analysis, monitoring and support of equal treatment of all persons without discrimination on grounds of sex. Such bodies may form part of agencies entrusted at national level with the defence of human rights or the safeguard of individuals' rights, or the implementation of the principle of equal treatment.

2. Member States shall ensure that the tasks of the bodies referred to in paragraph 1 include:

(a) providing independent assistance to victims of discrimination in pursuing their complaints of discrimination, without prejudice to the rights of victims and of associations, organisations and other legal entities referred to in Article 8(2);

(b) conducting independent surveys on discrimination;

(c) publishing independent reports and making recommendations on any issue relating to such discrimination.

Article 11

Dissemination of information

Member States shall ensure that the provisions adopted pursuant to this Directive, together with the relevant provisions already in force, are brought by all appropriate means to the attention of the persons concerned throughout their territory.

Article 12

Level of protection

The implementation of this Directive shall under no circumstances constitute grounds for a reduction in the level of protection against discrimination already afforded by Member States in the fields covered by this Directive.

Article 13

Reports

1. Member States shall communicate all available information concerning the application of this Directive to the Commission by [6 years after adoption].

The Commission shall draw up a summary report for submission to the European Parliament and to the Council no later than [7 years after adoption]. Where appropriate, that report shall be accompanied by proposals for amending this Directive.

2. The Commission's report shall take the viewpoints of the stakeholders into account.

Article 14

Implementation

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [2 years] at the latest. They shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. In order to take account of particular conditions, Member States may, if necessary, have an additional period of [2 years] to comply with Article 6.

3. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 15

Repeal

With effect to [deadline for implementation], Directive 86/613/EEC shall be repealed.

Article 16

Entry into force

This Directive shall enter into force on the 20th day following its publication in the Official Journal of the European Union.

Article 17

Addressees

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament

The President

For the Council

The President