



EUROPEAN NETWORK OF LEGAL EXPERTS
IN THE FIELD OF GENDER EQUALITY

Self-Employed



The implementation of

Directive 2010/41

*on the application of the principle
of equal treatment between men
and women engaged in an activity
in a self-employed capacity*

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Catherine Barnard and Alysia Blackham

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Table of Contents

Members of the European Network of Legal Experts in the Field of Gender Equality	iv
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Part I

Comparative analysis of the implementation of Directive 2010/41 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity

Catherine Barnard and Alysia Blackham

I. Issues raised by the Directive	1
1. Introduction	1
2. The purpose of the Directive	2
3. Personal scope	3
3.1. Introduction	3
3.2. The provisions on personal scope in the equality directives	4
3.2.1 The Recast Directive	4
3.2.2. Directives 2000/43 and 2000/78	5
3.2.3. Directive 79/7 on equal treatment in social security	6
3.2.4. Directive 2004/113	6
3.2.5. The Pregnant Workers Directive 92/85	6
3.3. Directive 2010/41	7
3.3.1. Introduction	7
3.3.2. The rights to social protection and maternity benefits	7
3.3.3. The right to equal treatment	8
4. Duty holder	11
5. Conclusions	11
II. Implementation of Directive 2010/41	12
1. Process of preparing the report	12
2. Transposition of the Directive	12
2.1. Article 1 – Subject matter	12
2.2. Article 2 – Scope	13
2.3. Definition of the self-employed	13
2.3.1. Countries that have copied out the Directive	13
2.3.2. Countries that have a definition of self-employment	13
2.3.4. Countries that do not have a definition of the self-employed	14
2.3.5. Countries that do not have a definition of the self-employed but define the term negatively by reference to employees	14
2.3.6. Countries that do not use the term self-employed but use alternative terms	15
2.3.7. Countries that adopt a sectoral approach	15
2.3.8. Countries with a triple or more approach	15

2.4. Excluded categories of workers	15
2.5. The position of agriculture	16
3. Article 3 – Definitions	16
3.1. Transposition into national law	17
3.1.1. Distinction between direct and indirect discrimination	17
3.1.2. Distinction between ‘harassment’ and ‘sexual harassment’	17
4. Article 4 – Principle of equal treatment	18
4.1. Transposition of Article 4(1)	18
5. Article 5 – Positive action	19
6. Article 6 – Establishment of a company	20
7. Article 7 – Social protection	21
7.1. Social protection for the self-employed	21
7.2. Social protection for spouses of the self-employed	22
8. Article 8 – Maternity benefits	23
9. Article 9 – Defence of rights	23
9.1. Implementation of Article 9	24
9.2. Implementation of Article 9(2)	25
9.3. Equality bodies	26
10. Article 10 – Compensation or reparation	27
11. Article 11 – Equality bodies	28
12. Article 12 – Gender mainstreaming	29
13. Article 13 – Dissemination of information	30
14. Article 14 – Level of protection	31
15. Case law	31
16. Issues regarding the ‘duty holder’	32
17. National statistics	33
18. Any other issues?	33
19. Conclusions	34

Part II

National Law: Reports from the Experts of the Member States, EEA Countries, former Yugoslav Republic of Macedonia and Turkey

AUSTRIA	Martina Thomasberger	35
BELGIUM	Jean Jacqmain	43
BULGARIA	Genoveva Tisheva	50
CROATIA	Nada Bodiroga-Vukobrat	56
CYPRUS	Lia Efstratiou-Georgiades	64
CZECH REPUBLIC	Kristina Koldinská	70
DENMARK	Ruth Nielsen	76
ESTONIA	Anu Laas	81
FINLAND	Kevät Nousiainen	91
FRANCE	Sylvaine Laulom	99
GERMANY	Ulrike Lembke	105
GREECE	Sophia Koukoulis-Spiliotopoulos	116

HUNGARY	Beáta Nacsa	127
ICELAND	Herdís Thorgeirsdóttir	133
IRELAND	Frances Meenan	141
ITALY	Simonetta Renga	150
LATVIA	Kristīne Dupate	157
LIECHTENSTEIN	Nicole Mathé	167
LITHUANIA	Tomas Davulis	171
LUXEMBOURG	Anik Raskin	178
FYR OF MACEDONIA	Mirjana Najcevska	183
MALTA	Peter G. Xuereb	190
THE NETHERLANDS	Rikki Holtmaat	197
NORWAY	Helga Aune	203
POLAND	Eleonora Zielińska	208
PORTUGAL	Maria do Rosário Palma Ramalho	217
ROMANIA	Iustina Ionescu	225
SLOVAKIA	Zuzana Magurová	233
SLOVENIA	Tanja Koderman Sever	241
SPAIN	María Amparo Ballester Pastor	248
SWEDEN	Ann Numhauser-Henning	254
TURKEY	Nurhan Süral	261
UNITED KINGDOM	Aileen McColgan	267
Annex 1		
Questionnaire		275
Annex II		
Bibliography		281

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Part I

Comparative analysis of the implementation of Directive 2010/41 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity

Catherine Barnard and Alysia Blackham*

I. Issues raised by the Directive

1. Introduction

Self-employment is a growing concern in the EU. In 2012, 32.8 million individuals in the EU were self-employed, accounting for 15 % of total EU employment.¹ The numbers of self-employed in the EU28 are depicted in Table 1.

2008	2009	2010	2011	2012	2013
31 183.0	30 849.0	31 090.2	30 832.2	30 855.3	30 561.6

Table 1: Number of self-employed in the EU28 ('000s), 2008–13 (Source: Eurostat²)

At the same time, there is large variation between Member States, with rates of self-employment ranging from 8 % of employed persons in Luxembourg and Estonia to 30 % in Greece (see further below).

Eurofound estimates that 34.4 % of the self-employed in the EU are women. The numbers of female self-employed in the EU28 are shown in Table 2. On average, from 2008-2012 across the EU28 Member States, the share of self-employed women compared to the total number in employment was much smaller than the corresponding share for men: 10 % compared with 18 %.³

2008	2009	2010	2011	2012	2013
9 465.5	9 432.5	9 533.4	9 502.3	9 611.6	9 605.3

Table 2: Number of self-employed women in the EU28 ('000s), 2008–13 (Source: Eurostat)

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¹ V. Kern *Social Protection for Self-Employed Workers* European Parliamentary Research Service 2013.

² See http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=lfsa_esgan2&lang=en, accessed 23 February 2015.

³ European Institute for Gender Equality *Gender Equality and Economic Independence: Part-Time Work and Self-Employment - Review of the Implementation of the Beijing Platform for Action in the EU Member States* (2014) at pp. 33-34, available via <http://eige.europa.eu/content/document/gender-equality-and-economic-independence-part-time-work-and-self-employment-report>, accessed 27 February 2015.

Self-employment is associated with a number of risk factors: in recent surveys, 18 % of the self-employed have been classified as poor, compared with 6 % of employees.⁴ Further, median working hours for the self-employed are approximately 5 to 13 hours more per week than for employees.⁵ In 2013, the number of self-employed women with employees was 2 299 400 (compared with 6 514 900 for men).

Directive 86/613 was adopted to give some rights of equal treatment to the self-employed.⁶ This Directive was repealed and replaced by Directive 2010/41.⁷ This report looks first at some of the issues of interpretation raised by Directive 2010/41 and then its implementation by the Member States.

In the course of preparing this report, it became increasingly clear that ambiguity lies at the heart of Directive 2010/41. This ambiguity concerns the two central questions:

- What is the Directive intended to achieve?
- To whom does it apply?

At a formal level, it is of course possible to answer these questions simply by referring to the relevant provisions of the Directive. However, at a deeper level the answers become more opaque and interconnected. These ambiguities help to explain the ambivalence of the States to the question of implementation and the general lack of clarity over the fit between the implementation of Directive 2010/41 with the implementation of other EU equality measures. In this section we attempt to discuss some of the ambiguities and uncertainties.

2. The purpose of the Directive

Article 1 of the Directive says:

1. This Directive lays down a framework for putting into effect in the 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. 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.

This suggests that the Directive is intended to:

- put into effect the principle of equal treatment between men and women engaged in an activity in a self-employed capacity; and
- plug the gap left by the Recast Directive 2006/54,⁸ the Social Security Directive 79/7,⁹ and the Goods, Facilities and Services Directive 2004/113.¹⁰

⁴ European Commission 'Self-Employment in Europe' *European Employment Observatory Review*, September 2010, at p. 26. See <http://ec.europa.eu/social/BlobServlet?docId=6137&langId=en>, accessed 23 February 2015.

⁵ European Commission 'Self-Employment in Europe' at p. 26.

⁶ 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 of 19 December 1986, pp. 56-58.

⁷ Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC, OJ L 180, 15.7.2010, pp. 1–6.

⁸ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) OJ L 204 of 26 July 2006, pp. 23-36.

⁹ Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security OJ L 6 of 10 January 1979, pp. 24-25.

Looking first at the equal treatment principle, although the title of the Directive and Article 1(1) suggest equal treatment lies at the core of Directive 2010/41, the accompanying documents suggest that this may not, in fact, be the case. Take, for example, the Commission's original proposal.¹¹ The first two pages describe 'general context'. This refers to the Commission's report on the implementation of Directive 86/613/EEC where 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*' (emphasis added).¹² It also noted that in December 2007,¹³ 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' (emphasis added).¹⁴ In addition, it said that the European Parliament had consistently called on the Commission to review the Directive,¹⁴ in particular to improve the situation of *assisting spouses* in agriculture. Finally, the document notes that 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'.

These observations suggest that the main goals of Directive 2010/41 are in fact:

- encouraging female entrepreneurship;
- protecting assisting spouses and life partners; and
- providing maternity rights to female self-employed workers and spouses and life partners of self-employed workers.

While this is all to be done *with a view to* delivering equal treatment of the self-employed (or to use the language of Article 1(1) of the Directive 'putting into effect in the 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'), equal treatment is not the core of the Directive. This suggests that Articles 7 and 8 on social and maternity protection are in fact the key provisions of Directive 2010/41.

3. Personal scope

3.1. Introduction

The other question raised by Directive 2010/41 is its personal scope: who are the beneficiaries of the equality principle and the rights to social and maternity protection? This is by no means clear. It also raises questions about the relation between Directive 2010/41 and the main equality directives.

As Section II (2.3) below shows, a number of countries recognise a tripartite classification of the personal scope of the relations in the employment field:

- employees;
- (self-employed) workers; and
- self-employed (entrepreneurs).

The first category concerns those who are the usual subject of employment law and are not directly relevant to the discussion for the purposes of this report. The second, 'worker' category includes those who are self-employed but who are

¹⁰ Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services OJ L 373 of 21 December 2004, pp. 37-43.

¹¹ COM(2008) 636 final.

¹² COM(1994) 163.

¹³ 4 December 2007 (Document SOC 385).

¹⁴ 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.

largely dependent on one particular ‘employer’. The third category concerns those self-employed persons who are genuinely self-employed and work for a number of ‘employers’, more naturally called customers or clients. In some systems they might be covered by civil or commercial law and thus outside the realm of employment law.

To which of these groups does Directive 2010/41 apply (3.3 below)? To help answer this question we need to locate Directive 2010/41 within the framework of the other equality directives and consider the personal scope of those Directives (3.2 below). The scope of these equality directives has already been considered in a report produced by the Gender Network in 2012, *The Personal Scope of the EU Gender Equality Directives*, written by Mark Freedland and Nicola Countouris,¹⁵ upon which this report draws.

3.2. The provisions on personal scope in the equality directives

3.2.1 The Recast Directive

The Recast Directive 2006/54 contains three separate provisions concerning personal scope. First, Article 4 concerns **equal pay** and is drafted in the most general terms:

For the same work or for work to which equal value is attributed, direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of remuneration shall be eliminated.

In particular, where a job classification system is used for determining pay, it shall be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of sex.

It took the decision of the Court of Justice in *Allonby*¹⁶ to put some flesh on the bones of Article 4 and its parent, Article 157 TFEU. Drawing on its own definition of ‘worker’ developed in the context of the free movement of workers case law, the Court ruled:¹⁷

For the purposes of that provision, there must be considered as a worker a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration (see, in relation to free movement of workers, in particular cases *Lawrie-Blum*,¹⁸ and *Martínez Sala*¹⁹).

The Court added: ‘The formal classification of a self-employed person under national law does not change the fact that a person must be classified as a worker within the meaning of that article if his independence is merely notional.’²⁰ Thus, the *Allonby* definition does not cover ‘entrepreneurs’ (category 3) but is likely to cover employees and self-employed workers (categories 1 and 2).

Second, Article 6 of Directive 2006/54 contains a different personal scope for the purposes of **equal treatment in occupational social security**. It provides that:

¹⁵ European Network of Legal Experts in the Field of Gender Equality, N. Countouris & M. Freedland *The Personal Scope of the EU Sex Equality Directives*, European Commission 2012, available at http://ec.europa.eu/justice/gender-equality/files/your_rights/personal_scope_eu_sex_equality_directive_final_en.pdf. See also their article in the *European gender Equality Law Review* 2/2013, available at http://ec.europa.eu/justice/gender-equality/document/index_en.htm#h2-9, accessed 5 June 2014.

¹⁶ Case C-256/01 *Allonby v Accrington & Rosendale College* [2004] ECR I-873.

¹⁷ Paragraph 67.

¹⁸ Case C-66/85 [1986] ECR I-2121, Paragraph 17.

¹⁹ Case C-85/96 *Martínez Sala* [1998] ECR I-2691, Paragraph 32.

²⁰ *Allonby* at Paragraph 79.

This Chapter [on equal treatment in social security schemes] shall apply to members of the working population, including self-employed persons, persons whose activity is interrupted by illness, maternity, accident or involuntary unemployment and persons seeking employment and to retired and disabled workers, and to those claiming under them, in accordance with national law and/or practice.

The broad scope, including the reference to the self-employed, is weakened by the exclusions in Article 8 and the deferral options in Article 11.

Third, the personal scope of Chapter 3 of the Recast Directive on **equal treatment as regards access to employment, vocational training and promotion and working conditions** is defined rather differently to Articles 5 and 6. Article 14 provides:

1. There shall be no direct or indirect discrimination on grounds of sex in the public or private sectors, including public bodies, in relation to:
 - (a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;
 - (b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;
 - (c) employment and working conditions, including dismissals, as well as pay as provided for in Article [157] of the Treaty;
 - (d) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations.

Within Article 14 itself there may be differences of scope. For example, Article 14(1)(a) expressly applies to the self-employed as well as to the employed, while Article 14(1)(c) may reflect the *Allonby* definition of personal scope, at least in respect of the reference to pay.

3.2.2. Directives 2000/43 and 2000/78

In respect of the **Race Directive 2000/43**²¹ Article 3 defines the personal scope. It broadly mirrors Article 14 of Directive 2006/54 but with a rather different structure. It provides:

1. Within the limits of the areas of competence conferred on the [Union], this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:
 - (a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion...

Paragraphs (b), (c) and (d) repeat those of Article 14(1) of the Recast Directive. Article 3 of the **Framework Directive 2000/78**²² reflects the content of Article 3 of the Race Directive.

The reference to 'all persons' in Article 3 of both directives might suggest a broader reading of the personal scope than Article 14(1) of the Recast Directive but this was not the approach taken by the British Supreme Court in *Jivraj v*

²¹ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180 of 19 July 2000, pp. 22-26.

²² Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303 of 2 December 2000, pp. 16-22.

Hashwani.²³ The Court concluded that UK law, giving effect to Directive 2000/78, which covers those employed under a contract to do work personally, was governed by the Court of Justice's decision in *Allonby*: 'there must be considered as a worker a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration'. The Court continued: 'Provided that a person is a worker within the meaning of [Article 157(1) TFEU], the nature of his legal relationship with the other party to the employment relationship is of no consequence in regard to the application of that article'. It concluded:

71. The formal classification of a self-employed person under national law does not exclude the possibility that a person must be classified as a worker within the meaning of article 157 TFEU if his independence is merely notional, thereby disguising an employment relationship within the meaning of that article.

3.2.3. Directive 79/7 on equal treatment in social security

Article 2 of Directive 79/7 on equal treatment in social security provides:

This Directive shall apply to the working population – including self-employed persons, workers and self-employed persons whose activity is interrupted by illness, accident or involuntary unemployment and persons seeking employment – and to retired or invalidated workers and self-employed persons.

This reflects the terms of Article 6 of the Recast Directive 2006/54 considered above.

3.2.4. Directive 2004/113

In respect of Directive 2004/113 on equal treatment in access and supply of goods and services, Article 3(1) provides:

Within the limits of the powers conferred upon the [Union], this Directive shall apply to all persons who provide goods and services, which are available to the public irrespective of the person concerned as regards both the public and private sectors, including public bodies, and which are offered outside the area of private and family life and the transactions carried out in this context.

Article 3(4) adds that 'This Directive shall not apply to matters of employment and occupation. This Directive shall not apply to matters of self-employment, insofar as these matters are covered by other [Union] legislative acts.' Article 3(1) therefore suggests that the Directive applies to 'all persons' *supplying* a good or service (it does not apply to recipients of a service).

3.2.5. The Pregnant Workers Directive 92/85

Finally, Article 1(1) of the Pregnant Workers Directive 92/85²⁴ provides:

1. The purpose of this Directive, [...] is to implement measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or who are breastfeeding.

²³ [2011] UKSC 40.

²⁴ Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) OJ L 348 of 28 November 1992, pp. 1-8.

Article 2 adds:

For the purposes of this Directive:

- (a) pregnant worker shall mean a pregnant worker who informs her employer of her condition, in accordance with national legislation and/or national practice;
- (b) worker who has recently given birth shall mean a worker who has recently given birth within the meaning of national legislation and/or national practice and who informs her employer of her condition, in accordance with that legislation and/or practice;
- (c) worker who is breastfeeding shall mean a worker who is breastfeeding within the meaning of national legislation and/or national practice and who informs her employer of her condition, in accordance with that legislation and/or practice.

In *Kiiski*²⁵ the Court said that the legislature, with a view to the implementation of Directive 92/85, intended to give the concept of ‘pregnant worker’ a Union meaning. It continued that this concept had to be defined in accordance with objective criteria which distinguished the employment relationship by reference to the rights and duties of the persons concerned. It said ‘The essential feature of an employment relationship is that, for a certain period of time, a person performs services for and under the direction of another person, in return for which he receives remuneration’. As with *Allonby*, this definition draws directly on the case law on the free movement of persons.²⁶

3.3. Directive 2010/41

3.3.1. Introduction

Having considered the personal scope of the other equality directive, we return to the scope of Directive 2010/41 which is the subject matter of this report. Article 2 of the Directive 2010/41 is headed ‘scope’. It says:

This Directive covers:

- (a) self-employed workers, namely all persons pursuing a gainful activity for their own account, under the conditions laid down by national law;
- (b) the spouses of self-employed workers or, when and in so far as recognised by national law, the life partners of self-employed workers, 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.

It will be argued below that, like the Recast Directive 2006/54, the personal scope of the Directive 2010/41 differs depending on the right engaged. In particular, it will be argued that the Article 2 definitions apply only to the rights to social protection and maternity benefits (3.3.2 below); the right to equal treatment in Article 4 has a different personal scope (3.3.3 below).

3.3.2. The rights to social protection and maternity benefits

The rights to social protection and maternity benefits in Articles 7 and 8 of the Directive apply to those listed in Article 2, i.e. the self-employed workers, their spouses or life partners. The language of Articles 7 and 8 expressly makes this link (e.g. Article 7 provides: Where a system for social protection for self-

²⁵ Case C-116/06 [2007] ECR I-7643, Paragraphs 24-25.

²⁶ The Court cited Case 66/85 *Lawrie-Blum* [1986] ECR 2121, Paragraphs 16 and 17; Case C-176/96 *Lehtonen and Castors Braine* [2000] ECR I-2681, Paragraph 45; Case C-138/02 *Collins* [2004] ECR I-2703, Paragraph 26; Case C-456/02 *Trojani* [2004] ECR I-7573, Paragraph 15; and Case C-392/05 *Alevizos* [2007] ECR I-0000, Paragraph 67.

employed workers exists in a Member State, that Member State shall take the necessary measures to ensure that spouses and life partners referred to in Article 2(b) can benefit from a social protection in accordance with national law.)

This raises the question as to who are 'self-employed *workers*'. Does the phrase apply to the second category ('worker') or does it also apply to the third category (entrepreneurs)? The arguments against such a broad reading are that the reference to 'self-employed *workers*' appears to limit the personal scope and the case law does appear to be coalescing around the *Allonby* approach to 'worker' which is based on some form of subordination. This would suggest that only the second category of individual would benefit from the rights under Articles 7 and 8.

The arguments in favour of a broad reading of Article 2(a) to include (third category) entrepreneurs are:

- that it would fill any gap which may have been left by the other directives;
- that it would fit with the agenda based on encouraging entrepreneurship;
- this may have been the intention of the drafters: the original definition of self-employed workers in Article 2(a) of Directive 2010/41 said '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*', thus suggesting that entrepreneurs would be covered;
- it would be compatible with the idea that equality is a universal value and so should be enjoyed by as many people as possible, a view supported by the reference to '*all persons* pursuing a gainful activity for their own account'.

Further, the reference in Article 2(a) to 'all persons pursuing a gainful activity for their own account' would suggest a broader reading still. A reading of the Directive against the background of health and safety and perhaps Article 33 of the Charter ('everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child') might also indicate a broader understanding of the term 'self-employed worker'.²⁷

Even if the Court of Justice favours a narrow *Allonby* style definition, as it may well do, the reference in Article 2(a) to 'under the conditions laid down by national law' gives the national systems the freedom to extend the protection to entrepreneurs (i.e. those who are genuinely self-employed under the third category) because in these cases the duty holder – i.e. the one paying the social protection or maternity benefits – is not the private party but the State which may decide to assume greater responsibility.

3.3.3. The right to equal treatment

Introduction

So far we have considered the personal scope of Articles 7 and 8 of the Directive. We should like to argue that the equal treatment principle in Article 4(1) has a separate personal scope to that of Articles 7 and 8. Article 4(1) of Directive 2010/41 says that 'there shall be no discrimination whatsoever on grounds of sex ... for instance in relation to the establishment, equipment or extension of a business or the launching or extension of any other form of self-employed activity'. We should like to argue that Article 4(1) applies (primarily²⁸) to the genuine self-employed (category three) but possibly only in respect of access to self-employment, not the exercise of that self-employment.

²⁷ Case C-232/09 *Danosa v LKB Lizings SIA* [2010] ECR I-11405.

²⁸ Presumably life partners etc. would also benefit from the equal treatment principle but the language in which Article 4 is drafted suggests that it is focused mainly on the trigger self-employed person.

The personal scope

While the rights in Articles 7 and 8 are expressly linked to ‘self-employed workers’, this is not the case with respect to Article 4, which makes no reference to the phrase ‘self-employed workers’. Further, Article 1(1) provides ‘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. The reference to ‘self-employed *capacity*’ seems broader than ‘self-employed worker’ and so may well cover category two ‘workers’ and category three entrepreneurs. This broad reading would also be justified by the gap-filling objective of the Directive: to apply ‘as regards those aspects not covered by Directives 2006/54/EC and 79/7/EEC’ (Article 1(1)).

Access v Exercise

While we think that there is a good case to make that the personal scope of Article 4 applies to the genuinely self-employed, we suspect the right to equal treatment may be limited to the self-employed seeking initial access to self-employed activity, not the actual pursuit of (exercising) that activity. This focus on access is largely due to the examples given in Article 4 of Directive 2010/41: ‘for instance in relation to the establishment, equipment or extension of a business or the launching or extension of any other form of self-employed activity’. We accept that the distinction between access and exercise is contested: if a woman is allowed to train and qualify as a plumber but, once qualified, cannot get any clients because she is a woman, is this a case of restrictions on exercise of the profession or, in reality, restrictions on access? Nevertheless, we think that in principle Article 4 focuses only on equal treatment in respect of access in much the same way as Article 14(1)(a) of the Recast Directive. This provides:

There shall be no direct or indirect discrimination on grounds of sex [...] in relation to:

- (a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion.

Once again, Article 14(1)(a) talks about ‘access to ... self-employment’, albeit without the examples contained in Article 4(1) of Directive 2010/41. Countouris and Freedland report that there are at least three different degrees of implementation of Article 14(1)(a).²⁹ Firstly, the majority of the States prohibit discrimination against the self-employed in the sense of protecting persons seeking to have access to a regulated liberal profession or trade. Secondly, a number of legal systems also understand this prohibition to include the conclusion of contracts for personal professional services between the self-employed and a professional user or client. A third group, which includes only a minority of legal systems, extends the protection of Article 14 to the termination of self-employment contracts.

The problems with the access/exercise distinction

Given that in the majority of Member States Article 14(1)(a) covers only protecting the self-employed seeking to have access to a regulated liberal profession or trade then its scope may broadly overlap with Article 4 of Directive 2010/41. If this analysis is correct, then there is a lacuna in the application of the equality principle.

Consider the case of a one-woman, sole trader plumber or a one-man, sole trader taxi driver who advertise their services through traditional means (yellow pages, leaflets etc.) or through online platforms. The female plumbers discover

²⁹ N. Countouris & M. Freedland *The Personal Scope of the EU Sex Equality Directives* at pp. 4-5.

that some male customers are refusing to hire them and the male taxi drivers discover that some female customers are refusing to hire them, in both cases on the grounds of their sex.³⁰ Would the female plumber or the male taxi driver be able to sue those customers for sex discrimination? Directive 2004/113 will not apply because it only covers the case where the provider of the service discriminates³¹ (i.e. where the plumber or the taxi driver refuses to provide their services to clients based on sex), not where the potential recipient of the service discriminates. The emphasis on access means that the plumber/taxi driver could use Article 4(1) of Directive 2010/41 and Article 14(1)(a) of Directive 2006/54 to challenge sex discriminatory restrictions imposed by the relevant professional body which would otherwise stand in their way of being registered to work in their chosen profession, but the plumber/taxi driver could not use the Directives to challenge sex discriminatory decisions taken by potential clients – in just the same way that employers cannot challenge discriminatory decisions made by potential employees.

This was the view taken by the British Supreme Court in *Jivraj*. It said that the Directive would apply only to initial access to employment:³²

[T]he expression ‘access [...] to self-employment or to occupation’ means what it says and is concerned with preventing discrimination from qualifying or setting up as a solicitor, plumber, greengrocer or arbitrator. *It is not concerned with discrimination by a customer who prefers to contract with one of their competitors once they have set up in business.* That would not be denying them ‘access [...] to self-employment or to occupation’.³³ (emphasis added)

Could the equal treatment principle apply to exercise?

Confining the principle of equal treatment to access to the profession means that the EU legislature has taken a decision on the principle that equality law should not intrude so deeply into private contractual relations.³⁴ Yet Directive 2004/113 appears to take a somewhat different approach. It says: ‘An individual who provides goods or services may have a number of subjective reasons for his or her choice of contractual partner. *As long as the choice of partner is not based on that person’s sex*, this Directive should not prejudice the individual’s freedom to choose a contractual partner’ (emphasis added).³⁵ In other words, the law will constrain contractors in their private decision making where their decisions are sex discriminatory.

So, if Directive 2010/41 is really intended to fill in the gaps then this would suggest a broad reading of the personal scope of Article 4(1) to apply to protect

³⁰ There is evidence that race discrimination is occurring in online provision of services: B. Edelman and M. Luca, ‘Digital Discrimination: The Case of Airbnb.com’, HBS Working Paper Number: 14-054 <http://hbswk.hbs.edu/item/7429.html>, accessed 2 March 2015, and also gender discrimination: N. Barasinska and D. Schäfer ‘Is Crowdfunding Different? Evidence on the Relation between Gender and Funding Success from a German Peer-to-Peer Lending Platform’ (2014) 15 *German Economic Review* 436.

³¹ Recital 13 of Directive 2004/113 provides: ‘The prohibition of discrimination should apply to persons providing goods and services, which are available to the public and which are offered outside the area of private and family life and the transactions carried out in this context. It should not apply to the content of media or advertising nor to public or private education.’

³² Paragraph 49.

³³ See also Paragraph 46. It would indeed be surprising that [a customer who engages a person on a one-off contract as, say, a plumber, would be subject to the whole gamut of discrimination legislation] ..., especially given the fact that the travaux préparatoires contained no such suggestion: see the impact assessment in the Commission’s Proposal for the Directive 1999/0225 (CNS), Brussels 1999, which was concerned solely with the position of enterprises of various types. There was no consideration of the effect on individual choice by customers. See also a memorandum from the Commission’s Director General for Employment and Social Affairs to the EU Committee of the House of Lords dated 9 February 2000 to much the same effect.

³⁴ This may also explain why the Directive makes no provision for defending direct discrimination with GORs or equivalent.

³⁵ 14th Recital. See also Article 3(2) of the Directive.

the self-employed against discrimination not only by the State and professional bodies (access) but also by customers or clients (exercise). After all, Article 4(1) provides a non-exhaustive list of examples of the situations where the equal treatment applies and Article 1(1) talks of 'putting into effect in the 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' (emphasis added). Again, reference to the Charter, in particular to Articles 15 and 16, read in conjunction with Article 21, might support a reading of Article 4 to include the prohibition of discrimination in respect of exercise of a self-employed activity as well as initial access to it. This does, however, open up further questions as to how to identify potential clients who have refused to hire a female plumber or a male taxi driver on grounds of their sex and how to prove any claim.

4. Duty holder

If, as we saw above, the material scope of the equal treatment principle of Directive 2010/41 is confined to access to self-employment, then this has implications for duty holders. The Directive will apply to the State and emanations of the State, as well as to qualifications bodies and associations which license/authorise a person to practise as a plumber/taxi driver etc. Crucially, it will not apply to private clients entering into a one-off or short-term relationship with the self-employed person, namely the plumber or taxi driver. That said, as we shall see below, a number of Member States have identified recipients of services as duty holders.

5. Conclusions

The difficulties outlined in this section will have challenged the Member States when implementing Directive 2010/41 and the national courts when applying the Directive. The implementation is variable in quality. In the next part of the report we examine how the Member States have implemented the different provisions of the Directive.

II. Implementation of Directive 2010/41

1. Process of preparing the report

This report considers the implementation of Directive 2010/41 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity. It has been compiled following the receipt of answers to a questionnaire which had been prepared in conjunction with the Commission. The answers were checked for completeness and then subsequently language checked. The draft report was presented to the European Network of Legal Experts in the Field of Gender Equality meeting in Brussels in November 2014; the draft final report was presented to the Commission in December 2014.

2. Transposition of the Directive

Member States were required to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive by 5 August 2012. Where justified by particular difficulties, Member States had the possibility of an additional period of two years (until 5 August 2014) to comply with Article 7 and Article 8 (as regards female spouses and life partners).

A list of legislation transposing the Directive can be found in Annex I. As can be seen from Annex I, most countries did not ask for an extension of the time period for implementing the Directive. However, **France** requested an additional period to comply with Article 7, and **Ireland** sought and obtained permission for the extension of time for the implementation of the social welfare provisions. **Slovenia** extended the time for implementation until 5 August 2014, as did **Greece** and **the United Kingdom**.

2.1. Article 1 – Subject matter

The Directive lays down a framework for putting into effect 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.

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.

Thus, there is a risk of overlap between the different Directives.³⁶

Generally the experts report no overlap between Directive 2010/41 and Directives 2006/54,³⁷ 79/7/EC,³⁸ and 2004/113.³⁹ However, the Scandinavian countries have experienced problems (see e.g. **Finland**, **Iceland**). In **Greece** there is

³⁶ With reference to pp. 9-11 of the *Report on the Personal Scope of the EU Sex Equality Directives* and N. Countouris & M. Freedland '“Work”, “Self-Employment”, and Other Personal Work Relations: Who Should be Protected against Sex Discrimination in Europe' in: European Network of Legal Experts in the Field of Gender Equality *European Gender Equality Law Review No. 2/2013*, European Commission 2013 at pp. 15-20, and in particular at p. 18. Available at: http://ec.europa.eu/justice/gender-equality/files/law_reviews/egelr_2013_2_final_web_en.pdf, accessed 12 March 2015.

³⁷ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) OJ L 204 of 26 July 2006, pp. 23-36.

³⁸ Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security OJ L 6 of 10 January 1979, pp. 24-25.

³⁹ Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services OJ L 373 of 21 December 2004, pp. 37-43.

overlap in the implementing legislation, but there is no case law addressing this point. **Lithuania's** problems have been particularly acute. As the expert explains, there are two relevant pieces of legislation: the EOAWM (dealing with gender discrimination and the implementation of Directive 2010/41) and the Equal Opportunities Act (EOA) (dealing with the other strands but sex was added in 2008). The expert states:

This double coverage of the ground of sex has created misunderstandings with respect to clarity and legal certainty, as both laws regulate the contextually same issue in slightly different ways, and to different extents. The EOAWM is a *lex specialis* but the later EOA is more advanced in terms of coverage, including a precise description of obligations. However, the EOA was not amended to address the principle of equal treatment of self-employed (Directive 2010/41/EU). In fact, the EOA does not even address self-employed persons.

2.2. Article 2 – Scope

This Directive covers:

- (a) self-employed workers, namely all persons pursuing a gainful activity for their own account, under the conditions laid down by national law;
- (b) the spouses of self-employed workers or, when and in so far as recognised by national law, the life partners of self-employed workers, 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.

2.3. Definition of the self-employed

The approach in Article 2(a) makes reference to three EU conditions ((1) those persons (2) who are pursuing a gainful activity (3) for their own account) and then a reference to national law. As we saw in Part A, the question of who is 'self-employed' and indeed 'self-employed worker' is a vexed one and goes to the heart of most labour law systems. The different approaches can be summarised as follows.

2.3.1. Countries that have copied out the Directive

Some countries have simply copied out the provisions of the Directive. **Malta** is a good example: 'self-employed workers...means all persons pursuing a gainful activity for their own account', and then goes on to assimilate to the above 'spouses of self-employed workers not being employees or business partners, where they habitually participate in the activities of the self-employed worker and perform the same tasks or ancillary tasks'. This was also done in **Greece**.

2.3.2. Countries that have a definition of self-employment

In some countries the definition of self-employment can be found in labour legislation. For example, in **Cyprus** Law No. 59(I)/2010 says that the term 'self-employed' covers any employment in Cyprus of a person who is pursuing a gainful activity, provided such activity is not insurable under the First Schedule, Part I under the title 'Employees, Insurable and Non-Insurable Employments'. The First Schedule refers to employment in Cyprus of a person on the basis of a contract of work or training or under such circumstances from which an employer-employee relationship can be derived.

In other countries a definition can be found in the social security legislation. For example, in **Iceland** the Unemployment Insurance Act No. 54/2006 defines a self-employed individual as 'Any person who works at his/her own business or independent activity to the extent that he himself/she herself is obliged to pay tax deductions at source in respect of calculated wages and social insurance tax in

respect in respect of his/her work, either every month or in another regular manner according to rules set by the Director of Internal Revenue on calculated remuneration.'

In another group of countries the tax legislation contains the only or the most comprehensive definition of self-employment. For example, in **Croatia** the labour law rules do not define the self-employed but the Law on Income Tax specifies that self-employed income tax duty holders are: artisans together with four categories of freelancers (or independent contractors): (1) health workers, veterinarians, lawyers, notaries, auditors, architects, insolvency managers, court interpreters, translators, tourist guides, and similar; (2) scientists, writers, innovators, and similar; (3) teachers, pedagogues, and similar; (4) journalists, artists and sportsmen and women; and persons employed in agriculture and forestry.

In the final group of countries entrepreneurship is seen as a matter under the civil code and it is here that a definition can be found. So for example, the **Czech** Civil Code defines entrepreneur as: 'Whoever performs independently on their own account and responsibility of trade or employment in a similar manner with the intent to do so consistently for profit, is considered with regard to this business for entrepreneurs.' The **Liechtenstein** Commercial Code uses similar terminology. In **Italy**, Article 2222 of the Civil Code defines the self-employed as 'persons who commit themselves to make a service or a work totally or mainly by means of their labour and without any subordination towards the customer' and small entrepreneurs as 'small independent farmers, craftsmen, traders and those who professionally perform an activity which is organised mainly with their work and with the work of their family' (Article 2083 of the Civil Code).

2.3.4. Countries that do not have a definition of the self-employed

In some countries, such as **Denmark**, there is no definition of the term self-employed.

2.3.5. Countries that do not have a definition of the self-employed but define the term negatively by reference to employees

In some countries the self-employed are essentially those who are not employees. For example, in **Norway**, a self-employed person is defined as a person not employed by an employer. The definition is not spelled in the text of the law but is evident in practice.

Likewise, in **Portugal** self-employment is a wide concept that includes all forms of employment that do not fall under the definition of an employment contract either in the private sector or in the public sector. The main criteria to identify an employment relationship is the subordinated position of the employee, in the sense that s/he is bound to perform the work according to the instructions of the employer and is also subjected to disciplinary rules and sanctions applied by the employer. If there is no subordination of the worker, he/she is qualified as self-employed, and the professional relationships that he/she establishes as independent contractor are governed by the adequate civil or commercial provisions.

Latvia also follows this pattern and recognises only two categories of persons either 'employees' or 'self-employed'. **Sweden**, too, operates a binary system: the concept of employee is broad in range and covers all dependent work/workers. Swedish law does not provide a specific definition of self-employed people: they may be individual entrepreneurs or partners in a trading partnership or even the owner of a small joint-stock company. The character of self-employed is important mainly for tax and social security purposes. For tax purposes there is a definition of individual entrepreneur (*enskild näringsidkare*) involving 'economic activities carried out in a professional and independent way' (*Förvärvsverksamhet som bedrivs yrkesmässigt och självständigt*). This is interpreted as requiring activities of some importance carried out on a continuous basis and in relation to several customers/clients.

2.3.6. Countries that do not use the term self-employed but use alternative terms

Some countries do not use the term self-employed but use alternative forms. For example, in **Hungary** the terms 'sole proprietor' or 'sole trader' are used, and likewise in **Estonia**, where the acronym 'FIE' (*füüsilisest isikust ettevõtja*; which directly translates to 'natural person entrepreneur') is also used. Likewise, in **Poland** 'entrepreneur' is used. An entrepreneur is a natural person, legal person and/or organisational entity without legal personality, on which the separate law confers legal capacity- pursuing economic activity on its own behalf. Partners in a civil-law partnership (companies) are also considered as entrepreneurs, as far as their economic activity is concerned. This definition encompasses 'small entrepreneurs' or 'business persons'. Likewise, in **Finland** the term entrepreneur is used and this is part of a three-limb approach (see below) which distinguishes between 'employees, comparable to employees, or entrepreneurs'. In the **Netherlands** the Dutch equal treatment legislation uses the term 'liberal professions', which may be narrower in scope than 'self-employment'. In the Dutch interpretation of this concept however, not only are doctors and architects covered but so are freelancers, sole traders, and entrepreneurs.

2.3.7. Countries that adopt a sectoral approach

In some countries, such as **Bulgaria**, there is no general definition of self-employment but there is a definition of the self-employed in particular sectors. In the **Czech Republic** the law generally adopts a sectoral approach, with a general approach as a catch all. For example, Section 9 of the Pensions Act defines self-employment as independent activity in agriculture, trade based on trade licencing act, activity of an associate in a public trade company or in a 'comandite' (a type of company) activity as a free artist, some special activities provided with special authorisation and all other activities performed in the individual's own name and under his or her own responsibility for the purpose of making profit.

2.3.8. Countries with a triple or more approach

A number of countries have recognised that some individuals who may be described as self-employed actually have employee-like qualities. These individuals may receive some recognition in the national systems as, in the case of **Germany**, 'quasi-subordinate' employees, 'workers' in **the United Kingdom**, and *para subordinati* in **Italy**. However, it is often difficult to identify this group in practice. This is certainly the case in **Germany** where the question has been the subject of rather heterogeneous case law. The main criteria are: decisive influence on working conditions, authority to give instructions, competence to delegate the performance of duties, contractual obligations to one or more employers or clients and the comparable need for social protection.

2.4. Excluded categories of workers

Most experts did not identify any excluded categories. Where gaps do exist, this may concern those who fall outside the definitional scope of a provision. So, for example, in the **United Kingdom** there is a risk that 'small entrepreneurs' or 'business persons' will not be covered. So if a contractor finds that her services are dispensed with when she becomes pregnant she will be unable to bring her claim within any provision of the Equality Act 2010 if her contractual engagement does not impose on her a duty to provide her services personally (as distinct from a duty to ensure that the relevant service is provided). A similar issue arises in **Ireland**. The definition of the contract of employment in the Employment Equality Acts provides that a person who personally executes a service falls within the scope of the Act. However, individuals that provide services through a limited liability company are not working 'on their own account' and therefore may not fall within the scope of the Directive.

In a limited number of countries there are obvious, distinct exclusions. For example, in **Belgium** a person who is a member of the board of directors or a chief executive officer in a company which does not employ him/her under an employment contract is a self-employed worker; however, his/her spouse or registered partner is not regarded as an assistant. In **Turkey** an unpaid 'helping' spouse is not a worker so long as this help does not go beyond 'support for family-related reasons'.

2.5. The position of agriculture

In just under half the countries which answered the question, the agricultural sector was excluded from the scope of the implementation of the Directive.

2.6. Recognition of life partners

The majority of the countries surveyed did recognise life partners in varying forms; in **Estonia** a Registered Partnership Act shall enter into force on 1 January 2016. However, a significant minority recognise no form of life partnership (e.g. **Bulgaria, Cyprus, Estonia**).

In respect of those countries which do recognise life partnerships, this takes a number of forms. For example, in **Croatia** a three-year cohabitation or partnership has the same legal effects as legal marriage. Therefore, life partners enjoy the same scope of social protection as spouses. In **the Czech Republic** life partners are recognised if they live together with the self-employed person and have a common household. **Greek** law recognises 'the agreement drawn up by two adults of different sex in person by virtue of a notarised act, by which they organise their life in common (life partnership agreement)'. In order to produce legal effects, this act must be registered with the registry office. In **Luxembourg** life partners have been recognised since 2004. The law covers a domestic community of two people living together as a couple and having made a statement of partnership in front of the registrar of their common place of residence.

In some countries special provision is made only for same-sex couples. For example, in **Denmark** marriage can be entered into by persons of the same sex. The spouse of a self-employed worker can thus be of the same sex as the self-employed person. In the **United Kingdom** the rules cover life partners only where they are married or in a civil partnership.

3. Article 3 – Definitions

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

- (a) '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;
- (b) 'indirect discrimination': where an apparently neutral provision, criterion or practice would put 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;
- (c) '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;
- (d) '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.

3.1. Transposition into national law

Nearly all countries report that the definitions in Article 3 have been correctly transposed into national law. A number of countries have simply copied out the definitions in the Directive (e.g. **Austria, Belgium, Germany, Greece and Italy**). However, **Hungary, Latvia, Poland and Slovakia** report particular difficulties. In **Latvia** the definitions differ mainly because they refer to all six non-discrimination grounds. So reference 'compared with persons of the other sex' is replaced by 'compared with another person'. In particular, the expert notes that the main problem with the correct implementation lies in the fact that Article 3 of the Law on Non-Discrimination of Natural Persons – Performers of Economic Activities provides exceptions which are too broad: direct discrimination can be justified by a legitimate aim when the measures chosen are appropriate and necessary. Directive 2010/41/EU does not allow for any exception. In **Slovakia** the problem lies with the definition of harassment.

3.1.1. Distinction between direct and indirect discrimination

Nearly all countries surveyed recognise the difference between direct and indirect discrimination. In a number of countries the definition in the Directive is copied out. The exceptions to this are **Malta**, and **the Netherlands**. In **Turkey** the concepts of direct and indirect discrimination are defined in line with the EU directives only in relation to disability discrimination. Sexual harassment is not defined in law but in a constitutional court decision. In **Malta** the position is different. There is no express reference to, and no formal distinction in the relevant Act between 'direct' and 'indirect' discrimination. In Article 2 of the EMWA, discrimination is defined as 'less favourable treatment, directly or indirectly' and a provision, criterion or practice etc. In **Greece** the definitions in the Directive are copied out, but there is no awareness of the notion of indirect discrimination in practice and no case law, although there are many instances of such discrimination in practice.

In the **Netherlands** the position is more complex. Before 2011, Dutch equal treatment legislation contained its own (different) definition of direct and indirect discrimination. In November 2011 the equal treatment legislation was amended in order to bring the definitions of direct and indirect discrimination into line with the EU Directives. This amendment was made in response to a request by the European Commission which argued that victims of discrimination were offered less protection than the EU Directives required. However, one difference between the language in the Directives and the Dutch legislation still exists – the word 'distinction' is used instead of the word 'discrimination'. According to the expert, this wording does not, however, have any substantial consequences for the interpretation and application of these definitions.

3.1.2. Distinction between 'harassment' and 'sexual harassment'

For the large majority of the Member States, the distinction between harassment and sexual harassment has been correctly implemented, often because Member States have copied out the words of the Directive. There are, however, some notable exceptions.

In **Croatia**, legislators have opted to use the term 'gender harassment' for 'sexual harassment' due to the linguistic similarities of both terms in the local language. This presents an obstacle to the interpretation of the legal provision by the courts as a person can be subject to both gender harassment unrelated to sexual behaviour and sexual harassment unrelated to gender of a person (in a case of LGBT sexual harassment).

In **Germany** the scope of protection against sexual harassment is limited under Section 3(4) and Section 2 of the AGG: the protection does not cover social security, education and the access to and supply of goods and services. In combination with the very limited personal scope of the AGG concerning self-employed persons, the expert notes that 'the protection against discrimination

remains below expectations'. The limited scope of the definition can also be seen in **Latvia** and **Hungary**: the definitions of harassment and sexual harassment are implemented by one definition, i.e. 'unwanted conduct, including unwanted conduct of sexual nature'. In **Poland** harassment and sexual harassment are both labelled as sexual harassment.

The same can be said of **Malta**: harassment is not expressly defined in the Equality Act. Sexual harassment is defined in Article 9(1) of EMWA by reference to a number of proscribed 'activities', but departing from the strict language of the Directive.

In **the Netherlands** the position is different again. The Dutch definition of harassment is similar to the one in the Directives. However, the Dutch definition of sexual harassment is identical to the definition in the Directives, apart from one single word; the word 'unwanted' is left out by the Dutch legislator, with the purpose of avoiding the situation where the evaluation of the facts would depend on the subjective experiences of the victim. In **Greece** the definitions have been copied from the Directive, but there is no awareness of the distinction in practice and no case law.

4. Article 4 – Principle of equal treatment

1. The principle of equal treatment means that there shall be no discrimination whatsoever on grounds of sex in the public or private sectors, either directly or indirectly, for instance in relation to the establishment, equipment or extension of a business or the launching or extension of any other form of self-employed activity.

4.1. Transposition of Article 4(1)

In some countries Article 4 has been correctly transposed. A number of Member States have copied out the wording of the Directive (e.g. **Austria, Greece**). In a large number of countries there has been no express implementation because the States consider that their existing laws already cover this situation (e.g. **Denmark, Estonia, Finland, France, Iceland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, the United Kingdom**). This has created some problems.

In **the Czech Republic**, Article 4(1) has been transposed in a general way through the Antidiscrimination Act but there is no specific provision which explicitly mentions the principle of equal treatment in connection with self-employed persons. Likewise, in **Norway** the principle of equal treatment is identified but the statute does not explicitly cover the self-employed. In **Slovenia** implementation has not been modified since the implementation of Directive 86/613/EEC. Neither has the Slovenian implementation reflected the protection of self-employed persons in respect of access to self-employment, as set out in Article 14(1)(a) of Directive 2006/54. Likewise, the Directive may not have been properly implemented in **the former Yugoslav Republic of Macedonia**. Since self-employment is not mentioned either in the Labour Law or in the Law on the Prevention and Protection from Discrimination, Article 4(1) has not been transposed at all. The same goes for the issue of adding to the protection for self-employed persons in access to self-employment, as set out in Article 14(1)(a) of Directive 2006/54.

In the **United Kingdom** the combined material scope of the prohibitions on sex discrimination is likely to capture most sex discrimination against the self-employed but it is possible that lacunae exist in view of the non-application of the employment-related provisions to self-employed workers not working under a contract 'personally to execute any work or labour'.⁴⁰ So, for example, a 'freelance' taxi driver will not be regarded as a relevant worker for the purposes

⁴⁰ See *Jivraj* [2011] UKSC 40.

of the employment-related provisions of the Equality Act 2010. If that taxi driver wished to complain of his or her 'termination' by a taxi firm s/he would have to argue that the taxi firm had refused to provide a 'service' or 'facilities' to the taxi driver, or that it amounted to an association from which s/he had been excluded. Such an argument might work in the particular case but it will turn on the facts of the individual case and it may be that some self-employed workers will fall through a gap which would indicate inadequate transposition of both Directives 2006/54 and 2010/41.

Belgium demonstrates the way countries have struggled to ensure equality to the self-employed. In Belgium no steps had been taken to transpose Article 4 of Directive 86/613/EEC, most probably because at the time it was thought there was no extant legal provision which might have been used to hinder a woman in the establishment, equipment or extension of a business. Article 14(1)(a) of Directive 2006/54/EC had been transposed in Articles 5 and 6 of the Gender Act, in the same rather clumsy way (injecting a reference to self-employment into provisions apparently designed for situations of subordinate employment). Nothing more was done to implement Article 4(1) of Directive 2010/41/EU. Therefore, there is no reference to the examples 'the establishment, equipment or extension'. By contrast, the Gender Act (Article 5(2) point 1) went one step further than both directives by mentioning (as a 'condition of access to employment') 'partnership in associations of self-employed persons', because it had been noticed that in various law firms, women used to be accepted as trainees or members, but not as partners.

Finally, in some countries the principle of equal treatment has not been properly implemented. **Lithuania** is an example. Lithuanian legislation does not lay down the principle of equal treatment of self-employed persons, except in the area of social security schemes. In addition, it does not grant explicit rights not to be discriminated against on the grounds of sex for spouses of self-employed persons. An amendment in 2012 provides that the State and municipal institutions and agencies, within their competence, must respect equal rights for women and men when providing public and administration services. This change does not seem to affect the legal approach towards the self-employed.

5. Article 5 – Positive action

Member States may maintain or adopt measures within the meaning of Article 157(4) of the Treaty on the Functioning of the European Union with a view to ensuring full equality in practice between men and women in working life, for instance aimed at promoting entrepreneurship initiatives among women.

In most countries, while positive action is allowed, no such action has been taken in relation to the self-employed. This is the case in **Bulgaria, Cyprus, Czech Republic, Denmark, Hungary, Iceland, Ireland, Latvia, Liechtenstein, Luxembourg, Malta, the Netherlands, Norway, Romania, Slovakia, Slovenia, and the United Kingdom**. In **Greece** there is a constitutional requirement of positive action in favour of women, but no action has been taken for the self-employed. In **Lithuania and Belgium**, positive action is not possible under the existing regulations.

Where positive action has been taken, this has been related to providing financial incentives and subsidies for female entrepreneurs (**Croatia, Spain, Turkey**); preferential treatment for loans for female entrepreneurs to set up or develop a business (**Finland** (discontinued in 2013), **France, Germany, Italy, Poland, Sweden, Turkey**); quotas for women on boards in the public sector (**Portugal**); providing training (**Croatia, Italy, the former Yugoslav Republic of Macedonia, Turkey**) and advice services (**Spain**); tax relief or exemptions (**Poland**) and social security contribution reductions (**Spain**); support, mentoring

and counselling (**Germany, the former Yugoslav Republic of Macedonia**); and family support services (**Germany**).

There is limited evidence regarding the effectiveness of these programmes. In **Croatia**, these measures have benefitted 5 693 female beneficiaries to date. However, other programmes are beset by a lack of funds and bureaucratic hurdles (for example, in **Italy**).

6. Article 6 – Establishment of a company

Without prejudice to the specific conditions for access to certain activities which apply equally to both sexes, the Member States shall take the measures necessary to ensure that the conditions for the establishment of a company between spouses, or between life partners when and in so far as recognised by national law, are not more restrictive than the conditions for the establishment of a company between other persons.

In most countries there has been no specific implementation of Article 6, as there are seen to be no particular barriers or restrictions on the establishment of a company between spouses, or between life partners. This is the case in **Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Finland, France, Hungary, Iceland, Ireland, Italy, Liechtenstein, Lithuania, Luxembourg, the former Yugoslav Republic of Macedonia, Malta, the Netherlands, Norway, Poland, Romania, Slovakia, Slovenia, Spain, Sweden, Turkey, and the United Kingdom**. Article 6 (or its predecessor in Article 5 of the repealed Directive 86/613/EEC) has been specifically transposed in **Greece, Poland and Denmark**.

In most countries, no problems were reported in relation to spouses or life partners establishing a company. However, the reports did note a number of direct or indirect restrictions on companies being established between spouses and life partners. For example, in **Portugal**, restrictions are placed on the type of company and the degree of liability of married shareholders to protect family assets and creditors. In **the former Yugoslav Republic of Macedonia**, there are some restrictions related to the protection of competitiveness in the Law on Trade Companies: spouses 'cannot be elected as members of the supervisory board, that is a controller'.

Even when there are no formal barriers to creating a company between spouses, indirect restrictions may remain. For example, the **German** report noted that regulations on social security, taxes, liability and post-marital maintenance influence the decision of spouses against joint entrepreneurship. Similarly, in **Spain**, couples may be less likely to establish family companies to avoid or reduce social security contributions. Thus, a lack of formal barriers in company law may not be sufficient to promote the establishment of companies between spouses.

Spouses may also experience other barriers in practice. In **Lithuania** during the crisis, the families of major shareholders or business people (including, but not limited to, the self-employed) have come under increased pressure from banks to make additional guarantees to secure the payment of loans.

While there are a number of restrictions in practice, spouses are also granted more favourable treatment in establishing a company in some countries. For example, in **Latvia** there is a specific corporate form for family members to establish a company, though this is not accessible to unmarried couples. In practice this form of entrepreneurship is not widely used: there are only 11 active Family Enterprises, and only 102 have been registered since 1991 (91 have liquidated). In comparison there are 55 002 limited liability companies. In **the Netherlands**, there are special tax regulations to facilitate the founding of a company by a couple (including both spouses and life partners).

Statistics on how many companies have been established between spouses and partners were not available in most countries. In **Bulgaria**, family firms represent about 42 % of companies (perhaps even higher in reality: around 50-60 % according to experts). Family firms are mostly found in the services and trade sector. In **France**, a 2008 report found that 7.5 % of new businesses were established by a couple, with the report concluding that 5 % of businesses created were a 'couple's affair'. However, in **Romania**, the number of family businesses (including those between couples) had dropped from 164 236 in 2004 to 16 979 in 2012.

7. Article 7 – Social protection

1. Where a system for social protection for self-employed workers exists in a Member State, that Member State shall take the necessary measures to ensure that spouses and life partners referred to in Article 2(b) can benefit from a social protection in accordance with national law.
2. The Member States may decide whether the social protection referred to in paragraph 1 is implemented on a mandatory or voluntary basis.

7.1. Social protection for the self-employed

All countries have some system of social protection for self-employed workers. These systems vary considerably from country to country, with some being paid automatically on the basis of residence and financed via broad-based taxation (e.g. **Norway, Sweden, the United Kingdom**), some being mandatory and contribution-based (e.g. **Belgium, Greece, Slovenia, Estonia, Finland, Hungary**), some being voluntary (unemployment insurance), and others being provided in a highly differentiated structure of special legal provisions, independent social security systems, choice of private or statutory insurances and a variety of professional pension funds administered by professional or sectoral associations (e.g. **Germany**). Most schemes covered some combination of old-age and disability pensions and health benefits.

Unemployment protection for self-employed workers was provided in **Croatia, Greece** (where, however, the benefits are well below the poverty threshold and subject to a discriminatory condition: permanent residence), **Hungary, the former Yugoslav Republic of Macedonia, and Sweden**, but not in **Cyprus, Ireland, Latvia, Portugal or the United Kingdom** (except for share fishermen and volunteer development workers employed abroad), and was voluntary in **Denmark, Spain and Romania** (via private insurance). In some countries, the system was different for professionals compared with other self-employed persons, and in **Germany** there are not two separate systems but many different systems, which are quite different in practice. However, in some countries separate systems were very similar in practice (e.g. **France, Italy**) and in **Greece** separate systems were being merged into larger schemes. Agriculture is treated differently in some countries: indeed, in **Poland**, insurance is obligatory for farmers with farms exceeding one hectare, and voluntary otherwise. Many countries have voluntary supplementary social protection for self-employed workers, often available through private providers (e.g. **Bulgaria, Iceland, Luxembourg**; compare **Malta**, where there is no second pillar pension).

In most countries, the self-employed were responsible for their own contributions to the social protection system where required. However, in **Portugal** the beneficiary of 80% or more of the activity of an independent worker was responsible for a small contribution to the social security system, despite the qualification of the worker as an independent worker (Article 168 of the CRCS).

In some countries there remained significant differences in social protection between the employed and the self-employed (e.g. **Lithuania**). This can be exacerbated where social protection is provided on a voluntary or semi-voluntary basis. For example, in **Latvia**, unlike employees (who have to make social

protection contributions in proportion to their real earnings), the self-employed are required to make social insurance contributions related to the minimum statutory salary, irrespective of their real income (similar arrangements are in place in **Estonia**). Any additional contribution is voluntary. Similarly, in **Spain**, self-employed workers declare their own income for determining their monthly contribution. The vast majority (85.7 %) of self-employed workers declare the minimum wage, reducing their monthly contribution and their future benefits. Thus, the self-employed may receive significantly lower social protection than those in employment.

The self-employed are also exposed to other gaps in social protection: in **Slovakia**, the self-employed cannot be insured against employment injuries or occupational diseases, because these kinds of insurance only apply to employees, whose contributions are fully covered by the employer. In relation to sickness insurance, the self-employed are only eligible for sickness benefits if they have paid insurance contributions for over 270 days in the two years before the onset of the incapacity. Employees do not have such a pre-condition.

7.2. Social protection for spouses of the self-employed

In some countries, spouses and life partners were covered by social protection systems prior to the adoption of the Directive, so specific implementation of Article 7 was not required (e.g. **Austria**). However, other countries have explicitly amended their law to comply with Article 7 (e.g. **Estonia, France, Ireland, Romania**).

Spouses and life partners were covered in three key ways in state laws: as dependent workers or employees of the self-employed (e.g. **Cyprus, Finland, France, Malta, Slovenia**); as assisting, participating, helping or collaborating spouses (e.g. **Belgium, Bulgaria, Czech Republic, Estonia, Germany, Ireland, Italy, Poland, Portugal**); or as members of a partnership (e.g. **Ireland**). This division was made explicit in **France**, where spouses were explicitly required to register one of these forms of activity. In **Germany**, assisting spouses are perceived as being dependent employees.

Social protection for spouses (and, sometimes, life partners) was mandatory in most countries, including **Austria, Belgium, Croatia, Cyprus** (not life partners), **Czech Republic, Denmark, Finland, France** (not for spouses of liberal professionals or for life partners), **Germany, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, the former Yugoslav Republic of Macedonia** (not life partners), **the Netherlands, Norway, Poland, Portugal, Spain, and Sweden**. In some countries, the social protection system was a mix of voluntary and mandatory provisions (e.g. **Liechtenstein**). However, this was generally the same for both the self-employed and their spouses. In other countries, this 'mandatory' system consisted of universal, residence-based benefits (e.g. in **Finland, Iceland, Norway, Sweden**), with spouses and life partners having no additional entitlements.

Voluntary systems were in place in **Bulgaria, Estonia, Latvia, Lithuania** (but with some residence-based entitlements), **Luxembourg** (voluntary if not in agriculture), **Romania, Slovakia, Slovenia**, and **the United Kingdom** (though with some residence-based entitlements). In **Belgium**, a voluntary system of social protection for assisting spouses was found by most common consent to be 'insufficient'. The system has been compulsory since 1 January 2006. Indeed, under the voluntary system in **Latvia**, no spouse of a self-employed worker had contributed to the statutory social insurance scheme in 2013, despite approximately 7500 people being helping family members. Thus, there is a sizable group of spouses that lack social protection. Therefore, voluntary systems may have significant limitations.

Schemes that were mandatory for the self-employed worker but voluntary for his/her spouse or life partner existed in **Estonia, Romania, Slovakia, Slovenia** and **the United Kingdom**.

The reports explicitly noted that **Greece** had failed to implement Article 7; however, spouses (not life partners) are mandatorily covered as family workers or dependent family members.

8. Article 8 – Maternity benefits

1. The Member States shall take the necessary measures to ensure that female self-employed workers and female spouses and life partners referred to in Article 2 may, in accordance with national law, be granted a sufficient maternity allowance enabling interruptions in their occupational activity owing to pregnancy or motherhood for at least 14 weeks.
2. The Member States may decide whether the maternity allowance referred to in paragraph 1 is granted on a mandatory or voluntary basis.
3. The allowance referred to in paragraph 1 shall be deemed sufficient if it guarantees an income at least equivalent to:
 - (a) the allowance which the person concerned would receive in the event of a break in her activities on grounds connected with her state of health and/or;
 - (b) the average loss of income or profit in relation to a comparable preceding period subject to any ceiling laid down under national law and/or;
 - (c) any other family related allowance established by national law, subject to any ceiling laid down under national law.
4. The Member States shall take the necessary measures to ensure that female self-employed workers and female spouses and life partners referred to in Article 2 have access to any existing services supplying temporary replacements or to any existing national social services. The Member States may provide that access to those services is an alternative to or a part of the allowance referred to in paragraph 1 of this Article.

Few countries have amended their law to comply with Article 8. However, changes to secure compliance were noted in the reports from **Greece** (only in relation to self-employed women, not spouses or life partners), **Croatia, Ireland** (in respect of assisting spouses or civil partners), **Poland** and **France**.

The requirement of sufficiency in Article 8(3) caused issues for many countries. In some cases, the amount of the allowance was dependent on the self-employed worker's *declared* income, which could be significantly lower than their actual income.

Few countries provided temporary replacement services or national social services, meaning these did not need to be extended to the self-employed and/or their spouses or life partners. However, the lack of replacement services meant that many self-employed workers and their spouses/life partners returned to work before the end of the maternity period.

9. Article 9 – Defence of rights

1. The Member States shall ensure that judicial or administrative proceedings, including, where Member States consider it appropriate, conciliation procedures, 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. The 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 this Directive is complied with may engage, either 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.

9.1. Implementation of Article 9

For those countries that responded to this question, Article 9 has been implemented either by new measures, or by reference to existing measures (e.g. **Bulgaria, the Netherlands, the United Kingdom**). In most Member States, claimants can have access to courts. These courts may be specialist labour courts (e.g. **the United Kingdom**), administrative courts (e.g. **Germany, Greece** and **Latvia** for certain types of claim, **Romania**), civil courts (e.g. **Greece** for certain types of claim, **Italy** for certain groups of the self-employed, **Malta, Poland**), or even the criminal courts (e.g. **France**).

In some countries claimants can go to a specialist equality body only (e.g. **Sweden**). In others they can go to the courts or the specialist equality body. For example, in **Bulgaria** claimants can take their case to the courts or to the equality body (the Commission for Protection from Discrimination); in **Estonia** self-employed people can make a complaint to the Gender Equality and Equal Treatment Commissioner or to the Chancellor of Justice. In **the former Yugoslav Republic of Macedonia** claimants can bring a complaint to the Anti-Discrimination Commission and a specific anti-discrimination lawsuit in front of the regular courts. The system is similar in **Greece**.

In **Hungary** any person whose right has been violated may bring the claim to the Equal Treatment Authority (ETA) or to the labour or civil courts. Which forum depends partly on the choice of the individual, and partly on the merits of the case. According to Article 15(5) of the Equality Act, the ETA can initiate the procedure *ex officio* if the discriminatory action is committed by the Hungarian State, local and national government (and their corresponding bodies), organisations exercising official authority, and by the Hungarian army and law enforcement bodies. However, there is no record of this ever happening. Furthermore, procedures can be initiated in the form of *actio popularis* either by the ETA before the courts, or by associations, trade unions, and foundations before either the ETA or the courts. However, the *actio popularis* approach is rarely used in Hungary.

In **Croatia** there is a range of avenues for challenge. The appropriate body to deal with complaints is the Industrial Disputes Tribunal, except for cases that fall under Article 146 of the Constitution (complaints against administrative organs) where the appropriate body to order just and reasonable compensation is the District Court. The Industrial Disputes Tribunal may order just and reasonable compensation, which may cover all real damages and may include moral damages to the complainant plus legal interest. The Commissioner for Administration (Ombudsman) has authority to examine complaints of discrimination on the ground of sex. The Gender Equality Committee in Employment and Vocational Training was established under the Equal Treatment of Men and Women in Employment and Occupational Training Law No. 205(I)/2002 as amended by Law No. 39(I)/2009 to investigate complaints by victims of discrimination.

Likewise, **Slovenia** offers a range of avenues for recourse. Claimants can pursue their claims by judicial process before the competent civil court according to the general rules of civil law. In addition to the civil courts, there are specialised labour tribunals and the Administrative Court. Labour tribunals have jurisdiction to decide in individual disputes (concerning the conclusion, existence, duration and cessation of employment relations; concerning rights, obligations and responsibilities arising from the employment relationship between employees and employers or their legal successors etc.) and social tribunals which have jurisdiction in social disputes. And the Administrative Court has jurisdiction to

decide in an administrative dispute in accordance with the methods and procedures set out in the legislation. It rules on the legality of final administrative acts that interfere with the legal position of the claimant and adjudicates on the legality of individual acts and actions that interfere with the human rights and fundamental freedoms of an individual, unless a different form of due process has been guaranteed.

The questionnaire did not ask specifically how many cases are actually brought but some experts offered their views. In **Lithuania**, for example, the expert indicated that the numbers are very small. In **the former Yugoslav Republic of Macedonia** the commentator noted that the procedures are rather discouraging for litigants. And in **Hungary** only around 50 cases a year are filed with the Equal Treatment Agency (ETA) on gender, pregnancy and motherhood, out of which approximately 5-7 cases are considered well-founded.⁴¹ There are no specific statistics with regard to cases filed with labour courts and courts of other jurisdictions but it is thought that the number of cases is equally low. No case has been published by the ETA nor by the law courts on breach of the principle of equal treatment with respect to self-employment.

9.2. Implementation of Article 9(2)

A large number of countries allow representative bodies to intervene on behalf of claimants. These bodies may be state equality agencies (e.g. **Belgium, Bulgaria, Ireland, Portugal**), the equality ombudsman (**Sweden**), trade unions (**Greece, Spain, Sweden, Turkey**), or non-profit organisations (**Cyprus, Czech Republic, Denmark, France, Greece, Iceland, Italy, Latvia, Liechtenstein, Luxembourg, Sweden, Spain**). In **the Netherlands** a range of support mechanisms are in place: Under Article 3:305a of the Civil Code, interest groups that have the form of an association or foundation with full legal powers can take legal action in court on behalf of people whose interests have been infringed. In addition, public law organisations, like the State or local councils, or public bodies, like the Bar Association, are entitled to act on behalf of victims of discrimination. Under this legislation, anti-discrimination organisations can also act on behalf of victims.

Even with this intervention it may not be enough. **Slovakia** is a case in point. Victims of discrimination may be supported and represented in court by the Slovak National Centre for Human Rights (Centre), which is an equality body, or by an organisation which has protection against discrimination as its aim. The Centre and NGOs cannot provide adequate and efficient representation of the victims, because they can represent them only in regular courts (at first and second instance), but not onto the Supreme Court or the Constitutional Court. In cases of discrimination which affect a larger or non-specified number of people or otherwise threaten the public interest, such an organisation, or the Centre, can bring the case in its own name.

That said, in some countries such bodies cannot intervene in individual cases (e.g. **Slovenia**). In the **United Kingdom** bodies such as trade unions and the Equality and Human Rights Commission can fund individual claims. Meanwhile, in **Romania** representation rights are being restricted: an amendment of the Gender Equality Law has limited the possibility of alleged victims being represented or assisted by trade unions or non-governmental organisations to administrative procedures only, and not court proceedings, which may be in breach of Article 9(2) of Directive 2010/41. Moreover, trade unions and NGOs may act only in support of a victim, but not in their own name as claimant. This situation is limited to cases of discrimination on the ground of sex that are regulated by a special law (Gender Equality Law); the Anti-Discrimination Law prescribes that all groups exposed to discrimination may benefit from NGO support in both administrative procedures and court proceedings and NGOs may

⁴¹ Data provided by the Equal Treatment Agency.

act in their own name in cases of discrimination affecting a group of persons or a community.

In other countries where such bodies do have representation rights, their rights may be more apparent than real. For example, in **the former Yugoslav Republic of Macedonia** proxy engagement does exist at a formal level. However, not all legal entities may intervene: only civil society organisations can intervene if they have a legitimate interest. Furthermore, how viable they are in practice is not clear: the court has to ‘decide on the participation of the [intervener] by applying the provisions of the Law on Litigation Procedure’, and yet, unlike any other intervener – ‘Regardless of the outcome of the lawsuit, the [intervener] referred to in paragraph (1) of this Article shall bear the costs for its participation in the lawsuit’.

9.3. Equality bodies

The reports indicate that the involvement of equality bodies cover the whole spectrum of activity: advice giving, amicus curiae role in courts, investigation, conciliation, mediation and (quasi-)judicial powers.

Some equality bodies only have the power to give advice (**Belgium, Denmark, Germany, and Poland**). In other systems the equality body has the power to engage in conciliation (**Italy, Luxembourg, the former Yugoslav Republic of Macedonia, Portugal**). In the **Czech Republic** the public defender of rights is the forum for conciliation ‘with great moral authority’, according to the national expert.

In other systems, such as **Greece and Slovakia**, the equality body has mediation powers. In some countries the equality body has investigative powers. This is the case in **Iceland and the United Kingdom**. In **France** claims can be lodged with the Defender of Rights by any person who considers him or herself a victim of discrimination. The Defender of Rights may also, at its own initiative, investigate cases of direct or indirect discrimination brought to its knowledge. It may ask any individual, legal entity or public body for explanations, information or documents. It may also conduct on-site inspections and take evidence from any person whose testimony it deems necessary or helpful. The Defender of Rights helps victims of discrimination compile their case file and informs them of the appropriate procedure for their case. The High Authority may itself ask to submit evidence to such courts; in such circumstances the right to submit evidence is automatic. It also has the power to propose conciliation and to adopt non-binding decisions.

At the request of the parties, or at their own initiative, civil, criminal and administrative courts may request the French Defender of Rights to present observations on the instances of discrimination submitted to them. This (quasi-)amicus function of equality bodies can also be found in **Estonia**. In other countries, such as **Spain**, equality bodies can intervene to support claimants in court.

At the other end of the spectrum are those bodies with quasi-judicial power. This power may lead to non-binding decisions (**the Netherlands, Slovenia, Sweden and Latvia**). In **Latvia** the implementation of the decision depends on the authority of a particular person occupying a post of Ombudsman. In **Sweden** the equality body also has monitoring powers.

The equality bodies may also have power to make binding decisions. This is the case in **Romania**. In **Bulgaria** the Commission has the competence to rule on the existence of discrimination, on prohibiting further acts of discrimination and on restoring the initial situation. It can apply pecuniary sanctions and administrative sanctions but it has no competence to rule on the compensation of the victim. This is a matter for the court.

In **Austria** the equality bodies cover the full gamut of activity. The equality ombudsman (*‘Gleichbehandlungsanwaltschaft’*) is competent to counsel those who consider themselves to be discriminated against, to intervene in the goal of

reaching a solution to a case and to file cases with the equality body (*'Gleichbehandlungskommission'*), which can try reconciliation and issue non-binding opinions on the question, whether discrimination has occurred or by what it would have been constituted. However, the Equality Ombudsman informed the expert that it has received very few requests from the self-employed; and no relevant cases have been presented to the equality body.

In **Lithuania**, too, the powers of the equality body are broad. The victim may file the complaint within the Office of Equal Opportunities Ombudsperson. The Office investigates complaints, hears cases of administrative offences and imposes administrative sanctions. Administrative fines from EUR 29 (LTL 100) to EUR 1 160 (LTL 4 000) for a breach of the relevant legislation may be imposed by the Equal Opportunities Ombudsperson, but in many cases the Ombudsman issues a simple warning. The violation of equal opportunities for women and men or the sexual harassment of colleagues, subordinates or customers may (but not necessarily shall – it is left to the employer to decide) invoke disciplinary sanctions on an employee – dismissal. The Office of Equal Opportunities' Ombudsperson may also be invited to give an impartial opinion in legal proceedings before a civil or administrative court.

10. Article 10 – Compensation or reparation

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

By far the most common form of remedy is compensation which is available in nearly all systems, often on a tortious basis (e.g. **Iceland, Poland, the United Kingdom**) and/or on a contractual basis (**the Netherlands**). Usually this covers both material and immaterial damage. However, it is in respect of the levels of compensation that the experts have expressed their grave concerns over the compatibility of national rules with EU law. This is considered below.

Some countries, such as **Greece, Italy, Portugal and Spain**, make provision not only for compensation but also for the general remedy of nullity for all discriminatory acts. In other countries there is a right to access to the profession in the event of a successful claim (e.g. **Latvia**). In **the former Yugoslav Republic of Macedonia** the court can prohibit the undertaking of activities which have violated the right to equal treatment.

Some systems lay down detailed rules on the remedies available. For example, in **Sweden** 'discrimination compensation' is to be paid 'for the offence resulting from the infringement' and 'particular attention shall be given to the purpose of discouraging such infringements of the Act' – aiming at amounts of damages rather above the general level of damages in Sweden.

In **Belgium** the Gender Act of 10 May 2007 offers a victim the possibility of applying for a court order to put an end to discrimination (Article 25), which could serve as reparation, as well as for compensation (Article 23). Under Article 18(1), a victim may claim integral compensation, including immaterial damage, but s/he carries the burden of demonstrating the reality and extent of the prejudice. Alternatively, s/he may apply for fixed damages, provided in detail by Article 18(2). Finally, under Article 20 any provisions in regulations or contracts which are contrary to the Gender Act must be declared null and void by the courts. There is no relevant case law which could provide any information on the effectiveness of these provisions.

Most countries do not report upper limits on compensation, with the exception of **Turkey**.

It seems that most countries have implemented Article 10 correctly. However, for all the rules on the rule book, they are of no effect if they are not applied by the courts. This is the case in **Bulgaria**. In other countries the compensation applied may be so low that it may not satisfy the test of adequacy. This is the case in the **Czech Republic, the Netherlands, Romania, Slovakia**. In **Lithuania** courts are reluctant to grant high awards for non-material damage.

In **Finland** the nature of the concerns are somewhat different: Finnish law on compensation for discrimination is problematic in the sense that the compensation does not merely reflect the loss or damage to the victim, but also circumstances of the violator, and the actual reparation depends on laws that present different burden of proof requirements.

Other countries report practical difficulties with access to justice. This is the case in **Estonia** where civil court procedure is time consuming, expensive and if the case succeeds, the claim for getting costs for legal assistance must be separately filed. The claimant pays first and can wait years for recovery of costs and compensation. In **Hungary** the law makes it difficult and time-consuming for women to seek effective, proportionate and dissuasive penalties under the Equality Act. In **Slovakia** court fees are the issue. The claimant is supposed to pay 3 % of any sum claimed as non-pecuniary compensation (at all stages of the proceedings). This means that the higher the amount that is claimed as non-pecuniary damages, the higher the judicial fee. In the **United Kingdom**, too, the difficulty for potential claimants lies in the threat of costs liability in the case of the courts and in the very significant fees for bringing claims to employment tribunals.

The position is more complex in **Norway**. The very few cases handled by the courts show that the level of compensation awarded in cases of, for instance, pregnancy discrimination is adequate, dissuasive and proportionate. However, as most cases are brought to the Ombud/Tribunal for gender equality issues and these are not, according to the law, entitled to award damages, there is weak protection against discrimination and poor access to the court structure. People file complaints with the Ombud as this is a no-cost system and many cases are resolved when employers choose to follow the advice of the Ombud. However, where Norwegian legislation does not fully respect the requirements of the Directive, for example that maternity leave of 14 weeks is not specifically stated in the Act, individuals need to bring a complaint to the European Surveillance Agency and that has not been done.

In **Cyprus** the judicial body, the Industrial Disputes Tribunal, does not have jurisdiction over the self-employed and so the remedies are not available to enforce this Directive. In **Liechtenstein** Article 10 has not been properly implemented.

11. Article 11 – Equality bodies

1. The Member States shall take the necessary measures to ensure that the body or bodies designated in accordance with Article 20 of Directive 2006/54/EC are also competent for the promotion, analysis, monitoring and support of equal treatment of all persons covered by this Directive without discrimination on grounds of sex. ...

Three national reports indicate satisfaction with the implementation and realisation of Article 11 (the **Czech Republic, Norway, and Portugal**). The remaining reports indicate considerable dissatisfaction. Three themes emerge: (1) the invisibility of the self-employed in the eyes of the agencies; (2) lack of

resources of the equality bodies; (3) lack of independence of the equality body. We shall examine these themes in turn.

First, where equality bodies do exist and have a broad remit, they do not extend this in practice or in law to the situation of the self-employed. This was raised as an issue in many countries: **Bulgaria, Denmark, Estonia, Finland, Germany, Hungary, Iceland, Italy, Latvia, Lithuania, the former Yugoslav Republic of Macedonia, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Turkey**. A corollary of this may be that, as in **Croatia, Greece, Ireland**, the self-employed are not bringing claims.

Second, there is a common theme about lack of resources to support the equality bodies. This often means that they have to prioritise their activities by, for example, focusing on the position of employees and not the self-employed. This is particularly the case in **Belgium, Luxembourg, and the United Kingdom**.

Third there is a concern that the equality bodies are not independent in practice. This is the case in **Finland, Italy, Slovenia, and Spain**. In **Romania** the National Council for Combating Discrimination is an independent body according to the law, but the process of naming the members of the Steering Committee of NCCD is heavily politicised and not all members have the required expertise required by law. The Department for Equal Opportunities between Women and Men is not independent – it is a department within the Ministry of Labour, Family, Social Protection and the Elderly.

Finally, in **Liechtenstein** Article 11 has not been implemented at all.

12. Article 12 – Gender mainstreaming

The Member States shall actively take into account the objective of equality between men and women when formulating and implementing laws, regulations, administrative provisions, policies and activities in the areas referred to in this Directive.

The reports provide few examples of the successful implementation of gender mainstreaming in relation to self-employment. In some countries (**Denmark, Belgium, Finland, Greece, Lithuania**), gender mainstreaming is embodied in national law. In **the United Kingdom and Finland**, the Government has a positive duty to promote equality. Other countries have adopted processes whereby regulations or legislative acts are checked for their impact on gender equality (**Belgium, Cyprus, France, Latvia** (though this is not done in practice); **Sweden**).

That said, while a number of reports note mainstreaming programmes relating to gender equality generally (such as work by the Equality Commissioner in **Estonia**, gender budgeting in **Iceland** and **the former Yugoslav Republic of Macedonia**, the National Women's Strategy and gender quotas in **Ireland**, and Gender Equality Plans in **Portugal**), these are not related to self-employment as such.⁴² Further, evaluation of gender mainstreaming programmes in **Finland** found that the projects were not well coordinated or planned.

No action has been taken in relation to gender mainstreaming in **Bulgaria, the Czech Republic, Hungary, Italy, Liechtenstein, Luxembourg, Malta, the Netherlands, Poland, Romania, Slovakia, Slovenia, Spain** and **Turkey**.

⁴² However, the self-employed may benefit from the Gender Equality Plans in **Portugal** if they are involved in public procurement.

13. Article 13 – Dissemination of information

The 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.

Few countries have undertaken dissemination activities as required by Article 13. Some countries have publicised the changes via standard legislative notification processes (e.g. publication of laws in force). This has occurred in the **Czech Republic, Latvia and Malta**. However, no specific steps have been taken beyond this.

Others have been more proactive:

- In **Belgium**, legislative changes were publicised through the sickness funds and the competent minister's staff.
- In **Cyprus**, the activities of the National Machinery of Women's Rights (NMWR), women's organisations, trade unions and equality bodies promoted the dissemination of information.
- In **Estonia**, the Gender Equality and Equal Treatment Commissioner is undertaking a project entitled 'Promoting Gender Equality through Empowerment and Mainstreaming', which promotes awareness of gender equality issues generally. Again, these activities are not generally aimed at issues of self-employment and gender (as noted in the report from France).
- In **Romania**, the Department for Equal Opportunities between Women and Men reported disseminating information about the amendments of the Gender Equality Law, and the dissemination of information targeted the general public via government websites, equal opportunities commissions at the local level and NGOs through direct communication, seminars and meetings.
- In **Germany**, information is available from public authorities and professional associations or funds, but not the Government.
- In **Sweden**, information has been disseminated by the Equality Ombudsman's website and the special Government project 'Promoting Women Entrepreneurs'.
- In **Hungary**, campaigns about equal treatment have targeted the general public via advertisements on TV, a traveling exhibition, publication of short booklets about different forms of discrimination and the availability of legal protection, an audiobook and short film contest. However, again, these campaigns did not target specifically the issue of equal treatment in self-employment.

Countries that have taken no action in this area include: **Bulgaria, Denmark, Finland, Greece, Iceland, Liechtenstein, Lithuania, Luxembourg, the former Yugoslav Republic of Macedonia, the Netherlands, Norway, Portugal, Slovenia and Turkey**. Some (minimal) action had been taken in: **Italy** (a short bulletin on the website of the National Equality Adviser), **Spain** (dissemination by public entities in programmes for promoting self-employment), and **the United Kingdom** (via government websites).

For some countries, no dissemination activities were thought to be required, as they had made no legislative changes in response to the Directive (e.g. **Finland, Iceland, Liechtenstein, the Netherlands**). However, Article 13 also requires that 'relevant provisions already in force' be brought to people's attention. Thus, it is unlikely that this approach is sufficient for compliance with Article 13. Further, some reports doubted that the self-employed were aware of their entitlements under the Directives (e.g. **the Netherlands, Romania**).

14. Article 14 – Level of protection

The Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment between men and women than those laid down in this Directive.

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.

According to the reports, most countries provide a level of protection that is no greater than that required by the Directive. Where the protection is higher, this normally relates to the availability, length or amount of maternity benefits available. In other countries, the level of protection is less than that required by the Directive.⁴³ The responses of the experts are summarised in Table 3.

Higher	Same / Not higher	Less
Belgium – <i>compulsory for spouses to join social protection scheme; adoption allowance</i>	Croatia	Cyprus – <i>self-employed not covered by Industrial Disputes Tribunal</i>
Bulgaria, Denmark, Iceland, Ireland, Norway, Poland, Romania, Sweden – <i>amount / length of maternity benefits</i>	Czech Republic	Germany
Finland – <i>stand-in service during family-related leave for agricultural entrepreneurs</i>	Lithuania	Greece
France	Luxembourg	Portugal – <i>coverage of spouses; length of maternity leave</i>
Italy – <i>coverage of maternity benefits</i>	The former Yugoslav Republic of Macedonia	Hungary – <i>gaps regarding spouses and life partners</i>
Latvia – <i>availability of parenting allowance</i>	Malta	
	the Netherlands	
	Slovakia	
	Slovenia	
	Spain	
	United Kingdom	

Table 3: Summary of expert responses regarding the level of protection offered

15. Case law

The majority of countries reported no case law on the interpretation of the Directive. Where there is case law, it often concerns the personal scope of the national implementing measure: is the national rule sufficiently broad to cover the self-employed person bringing the claim (e.g. **Ireland, Malta**)?

⁴³ As noted in the sections above, there are other gaps in the implementation of the Directive by certain States, though the expert reports did not always note these gaps in their answers to this question.

A handful of countries have had a range of cases covering, for example, the differential treatment between workers and the self-employed (**Italy, Poland**) or between male and female self-employed workers (**Spain**). Otherwise the reports mention the cases before the Court of Justice: *Joergensen*,⁴⁴ *Danosa*,⁴⁵ and *Soukoupová*.⁴⁶

16. Issues regarding the ‘duty holder’

The article in the European Gender Equality Law Review by Nicola Countouris and Mark Freedland on ‘Work, self-employment, and other personal work relations: who should be protected against sex discrimination in Europe’⁴⁷ notes that ‘the question of who ought to be seen as the duty holder vis-à-vis self-employed professionals in respect of the various distinct “equality duties”, national approaches appear to vary considerably and are often characterised by a high degree of uncertainty.’ The report by Annick Masselot, Eugenia Caracciolo Di Torella and Susanne Burri on *Fighting discrimination on grounds of pregnancy, maternity and parenthood* also notes that ‘there is no employer to enforce the obligations against because by definition the workers are self-employed’.⁴⁸

Despite these concerns, few reports noted that issues regarding the ‘duty holder’ had made implementation or application of the Directive difficult. Many reports merely noted that they had not experienced problems in this area (e.g. **Czech Republic, Denmark, France, Greece, Liechtenstein, Luxembourg, Sweden, Turkey**).

Other reports said that issues over who the duty holder should be *could* raise issues in the future (e.g. **Bulgaria, Italy, Lithuania, Slovenia**) or was a live issue at present (e.g. **Germany**), though few complaints had been received to date (e.g. **Cyprus**).

The only countries that had explicitly determined who the duty holder should be were:

- **Hungary**, where Article 5(d) of the Equality Act stipulated that in case of other relationships for work, the person who has the right to give orders to the self-employed person was supposed to follow the rules of equal treatment. This rule applied to all aspects of equal treatment with respect to the self-employed; and
- **Portugal**, where Law No. 3/2011 says that the duty holder is the counterpart in the service contract that involves self-employment or the beneficiary of such a service. This does not apply to the creation of a business or maternity rights, where the definition of the duty holder is more complex.⁴⁹

In other countries, the ‘duty holder’ could variously be the Government (via the implementation of social protection programmes: **Croatia, Estonia, Greece, Latvia, the former Yugoslav Republic of Macedonia, the Netherlands**; or due to a failure to implement the Directive: **Czech Republic, Norway**), professional and sectoral associations / statutory professional corporations

⁴⁴ Case C-226/98 *Birgitte Jørgensen v Foreningen af Speciallæger and Sygesikringens Forhandlingsudvalg* [2000] ECR I-02447.

⁴⁵ Case C-232/09 *Dita Danosa v LKB Lizings SIA* [2010] ECR I-11405.

⁴⁶ Case C-401/11 *Blanka Soukupová v Ministerstvo zemědělství* [2013] ECR n.y.r.

⁴⁷ N. Countouris & M. Freedland ‘“Work”, “Self-Employment”, and Other Personal Work Relations: Who Should be Protected against Sex Discrimination in Europe’, in particular at p. 18.

⁴⁸ A. Masselot & E. Caracciolo di Torella ‘Executive Summary’ in: European Network of Legal Experts in the Field of Gender Equality *Fighting discrimination on grounds of pregnancy, maternity and parenthood*, European Commission 2012, at p. 21. Available at: http://ec.europa.eu/justice/gender-equality/files/your_rights/discrimination_pregnancy_maternity_parenthood_final_en.pdf, accessed 12 March 2015.

⁴⁹ Compare **Denmark**, where Section 5 of the Equal Treatment in Employment and Occupation Act specifies that the duty holder can be any person, including employers, organisations, or the Government.

(**Austria, Cyprus, Greece, Italy, Poland, Slovenia**), local public authorities (**Estonia, Poland, Spain, Sweden**), statutory and private insurance funds and professional pension funds (**Germany**), those receiving services from the self-employed and/or contracting with them (**Austria, Estonia, Germany, Greece, Ireland, Italy, the Netherlands, Portugal, Spain**; contrast with **Sweden**), those offering training (**Estonia**) or suppliers of goods and services (**Estonia, Sweden**). In the **United Kingdom**, the expert felt the issue was not uncertainty regarding who the duty-holder was, but rather an absence of *any* duty holder, at least in relation to treatment which was unrelated to the payment of social security benefits. That said, few (if any) cases or claims had tested who the duty holder was in this context (e.g. **Italy, Malta**).

Concerns were also raised in the reports that it is difficult to monitor and police the circumstances of the self-employed, as their working conditions and protections are often self-determined (e.g. **Belgium**) and/or social protection is dependent on self-declared income (e.g. **Finland, Iceland**).

17. National statistics

While national statistics regarding self-employment cannot be directly compared (see below), self-employment was noted to be increasing in some countries (e.g. **Austria, Belgium, Cyprus, Denmark, Germany, Greece, Iceland, the Netherlands, Slovakia, the United Kingdom**), decreasing in others (e.g. **Italy, Lithuania, the former Yugoslav Republic of Macedonia, Poland**) and, in some contexts, remaining fairly stable (e.g. **Denmark, Estonia, Latvia, Romania, Slovenia**). However, it is important to distinguish a decline in the *proportion* of the self-employed from a decline in the *number* of self-employed (e.g. **Greece**, where overall numbers are decreasing, but the proportion of self-employed is increasing). The number of assisting spouses was also decreasing in some countries (e.g. **Belgium**).

The accuracy of national statistics on self-employment depends on how 'self-employment' is defined. The definition adopted for the purpose of gathering data was different to the legal definition in **Hungary, the former Yugoslav Republic of Macedonia** and **Romania**. Other reports noted that the definition was consistent with that at law (e.g. **Germany, France, Spain**) or in social security provisions (e.g. **Austria, Belgium, Cyprus, Lithuania**). In other countries, there was no explicit legal definition of the 'self-employed' (see the discussion of Article 2 above), making any useful comparison of the definitions difficult. In some countries, an explicit definition was adopted for determining statistics, though the State lacked a legal definition (e.g. **Bulgaria**); some statistics adopted the Eurostat definition (e.g. **Greece**); and others relied on self-classification (e.g. **the United Kingdom**). Some reports explicitly noted definitional issues in compiling statistics (e.g. **Estonia, the former Yugoslav Republic of Macedonia, Poland, Portugal**).

18. Any other issues?

Most commentators did not add any further information. There were, however, five exceptions. These covered an eclectic range of matters.

The **Danish** expert raised the issue that self-employed workers cannot contribute to the pregnancy fund.

The **Finnish** expert noted that if the emphasis of Directive 2010/41/EU is on improving the social welfare situation of self-employed persons, then the position of the Finnish Government in deciding that no transposition of the Directive was needed was understandable, as Finnish social welfare legislation already provided the level required by the Directive. The Directive's requirements on justiciable rights and compensation are more problematic, as the Finnish legislation is based

mainly on public law institutions (the Parliamentary Ombudsman, the Chancellor of Justice) to protect citizens against misconduct by authorities.

The **German** expert noted the issue with the decline in the ‘female job’ – very small in number but very important for many women. She mentions that ever more self-employed midwives give up work. The reason is that they are not appropriately paid by the health insurance schemes and at the same time, the contributions to their professional liability insurance have increased significantly. Another employment – sex working – mostly exercised by women, is affected by administrative arbitrariness. Although their profession has been legally recognised in Germany since 2002, self-employed sex workers face severe and often illegal obstacles when trying to establish their own undertaking (with better working conditions than in a brothel) or when offering sexual services in public urban spaces. The parties of the governing coalition are not able to agree on legislative measures to improve the situation of sex workers.

In **Ireland** the question of personal scope was raised again. The expert notes that the definition of the contract of employment in the Employment Equality Acts provides that a person who personally executes a service falls within the scope of the Act. This puts those individuals providing services through a limited liability company in a difficult position.

Finally, in **Lithuania** the Directive has had almost no effect on the development of the discrimination-free environment for the self-employed. However, the cases of genuine discrimination on the grounds of sex are also difficult to identify. The protection of spouses seems to be the major problem of implementation of the Directive in Lithuania.

19. Conclusions

The picture painted by the report is one of general disinterest in the content of the Directive, perhaps exacerbated by a lack of understanding of its purpose. If, as we suggested at the beginning, the main purpose of the Directive is actually to deliver improved maternity and social benefits to the self-employed, this seems to have been unsuccessful. The maternity provisions have been particularly badly implemented. In respect of the equal treatment provision, the confusion over the scope of application of the Directive has meant that most States consider that the Directive is mainly addressed to the State itself and its emanations as well as to professional bodies. This indicates that States see this Directive as one primarily dealing with ‘public’ (as broadly construed relations) and not private ones. The absence of promotion of the Directive combined with the weakness of the remedial provisions in a number of countries has also meant that the Directive is not being enforced as it should and nor are the equality bodies able to take much action.

Part II

National Law: Reports from the Experts of the Member States, EEA Countries, former Yugoslav Republic of Macedonia and Turkey

AUSTRIA – Martina Thomasberger

1. Context

From a legal perspective self-employment in Austria covers the conditions for gainful occupation of a wide and rather diverse part of the workforce:

- Entrepreneurs and tradespersons covered by the Trade and Commerce Act (*Gewerbeordnung, GewO*),¹ who operate in trades and businesses that require a business license and who are statutory members of the Chambers of Commerce (*Wirtschaftskammern*).²
- Self-employed members of one of the statutory professional corporations of Free Professions (*Kammern der freien Berufe*), that are tax consultants and fiduciary accountants, architects and consulting engineers, attorneys, notaries, physicians, dentists, pharmacists, and veterinaries. All of these professions are subject to special legislation covering corporative organisation and professional statutes, for instance occupational training, professional duties and disciplinary measures.
- Self-employed workers in occupations covered neither by the Trade and Commerce Act nor by any of the regulations for professional corporations, so-called 'New Self-Employed Persons' (*Neue Selbständige*), who typically work as freelancers in professions like journalism, graphic design, performing arts and music, adult education services and training, medical massages, midwifery, and others. Members of these professions are not incorporated under any of the existing professional statutes or corporations, they have no statutory corporative representations and little to no statutory professional regulations. However, many of these professions have established voluntary associations.
- Self-employed farmers and forestry workers, who are statutory members of the Chambers for Agriculture and Forestry (*Landwirtschaftskammern*).

Self-employment in a general sense implies gainful occupation in one of the areas mentioned above combined with, in the required cases, statutory membership in one of the professional corporations (*Kammern*). According to the federal constitutional principle of self-government in Article 120(a) of the Federal Constitution Act;³ all self-employed workers are included in one of the specialised systems of statutory social security. Professionals who want to commence self-employed work (with the exception of 'New Self-Employed Persons') have to gain access to the relevant professional corporation or to the Chamber of Commerce by proving completion of the education and/or training required in the professional statutes and have to apply for affiliation or for a business

¹ See: <https://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/10008422/GSVG%2c%20Fassung%20vom%2024.06.2014.pdf>, accessed 24 June 2014.

² See: <https://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/10007962/WKG%2c%20Fassung%20vom%2024.06.2014.pdf>, accessed 24 June 2014.

³ See: <https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40094632/NOR40094632.pdf>, accessed 12 September 2014.

licence.⁴ Self-employed professionals in one of the Free Professions and in occupations covered by the Commerce and Trades Act may continue their gainful occupation only as long as the relevant corporation recognises their continued membership.

The status of a self-employed professional demands acquiring formal qualifications by passing the requisite university degree and/or occupational training and in many cases consecutive statutory professional examinations. Issues of gender inequality in occupational training are addressed by Paragraph 1 Section 1 no. 2 of the Equal Treatment Act.⁵

Gaining formal membership in a professional corporation depends on the requisite certificate of competence and/or business licence being issued. The competent professional corporations are legally required to issue these as soon as all requirements are met and formally proved. Continued membership in corporations and Chambers of Commerce also depends on regular payment of the prescribed dues and on complying with the professional statutes.

Every person who starts in a self-employed occupation is legally required to submit a written announcement to the tax authority (*Finanzamt*) and to the competent social security authority.

Self-employed members of most of the statutory professional corporations and members of the Chambers of Commerce are insured under the mandatory social security system for self-employed persons as regulated by the Social Security Act for Commerce and Business (*Gewerbliches Sozialversicherungsgesetz, GSVG*), which is carried out by the Social Security Authority for Commerce and Business (*Sozialversicherungsanstalt der gewerblichen Wirtschaft*). For some professional corporations pensions are regulated in separate Acts (especially notaries and pharmacists) and administered by a separate authority. Most of the statutory corporations for Free Professions also have autonomous retirement plans that are financed by their members' dues.

The Social Security Authorities provide for the statutory health and pension insurances by calculating and claiming contributions and administering the ensuing social security benefits. In cases where a statutory professional corporation and the insurance authority have reached an agreement, members of the corporation can opt out of the mandatory health insurance and into private health insurance schemes, provided the private schemes cover the same insured events as the mandatory system.

Contributions to the Social Security Authority for Commerce and Business are calculated as a fixed percentage of the taxable annual income as declared in the income tax return. Mandatory insurance sets in as soon as an annual threshold of taxable income (2014: EUR 6 452.36) is being declared in advance or has been reached according to tax returns. Self-employed freelance professionals are mandatorily included in the Commerce and Business social security insurance without any exceptions or possibilities to opt out. Persons insured under the Social Security Act for Commerce and Business can opt into the Unemployment Insurance and draw benefits in cases of quitting or suspending the insured occupation.

Self-employed farmers and forestry workers typically own or lease a farm and/or woodland that they themselves cultivate. They are covered by the Farmers' Social Security Act (*Bauernsozialversicherungsgesetz, BSVG*), which is carried out by the Farmers' Social Security Authority (*Sozialversicherungsanstalt*

⁴ E.g. Paragraphs 1, 5 and 5a Attorneys' Law (*Rechtsanwaltsordnung, RAO*) at: <https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40114082/NOR40114082.pdf>, <https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40094709/NOR40094709.pdf>, and <https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40155907/NOR40155907.pdf>, all accessed 24 June 2014.

⁵ See <https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40151371/NOR40151371.pdf>, accessed 24 June 2014.

der Bauern).⁶ Contributions are calculated as a percentage of a legally defined monetary value of the agricultural property (*Einheitswert*).

The social security systems for self-employed workers have been modelled on the general social security system for employed workers as regulated in the General Social Security Act (*Allgemeines Sozialversicherungsgesetz*). All systems cover health benefits and pensions in cases of retirement or of disability, as well as pensions for widows/widowers and orphans' benefits. General Social Security and Farmers' Social Security also cover insurance for occupational accidents and illnesses. Entitlement requirements, calculation of benefits, especially of pensions for insured persons born from 1955 onwards, and coverage of spouses or registered partners and children run parallel in all systems except where specific features of a system demand different regulations.⁷

Self-employment in Austria is defined by the applicable social security regulations and additionally by the professional statutes, where they apply. If a person earns a taxable income above the social security threshold in a self-dependent gainful occupation he or she is considered as a self-employed person mostly due to the ensuing mandatory insurance.

2. Transposition of the Directive

The Directive has been transposed by an amendment of the Equal Treatment Act for the Private Sector (*Gleichbehandlungsgesetz*, GIBG) that came into force on 1 August 2013.⁸ No extension time for implementation was required.

3. Article 1 – Subject matter

There have been no reported difficulties with the overlap of this Directive with Directives 2006/54, 79/7, and 2004/113.

4. Article 2 – Scope

As described above there is no general legal definition of self-employment in Austrian legislation.

The scope of Part I of the Equal Treatment Act covers both employees and self-employed persons as well as other work-related areas (*Arbeitswelt*). Paragraph 1 Section 1 no. 4 has been amended to cover 'the establishment, appointment, or extension of an enterprise as well as the commencement or expansion of any kind of self-employed activity' ('...*die Gründung, Einrichtung oder Erweiterung eines Unternehmens sowie die Aufnahme oder Ausweitung jeglicher Art von selbständiger Tätigkeit*'). The same wording has been introduced into the legal definition of direct and indirect discrimination in Paragraph 4 no. 3.⁹ However, these amendments were not extended to Part IV of the Equal Treatment Act, (Paragraphs 41 to 58) which covers agriculture.¹⁰ The scope of this part still only applies to work contracts but not to self-employment.¹¹

⁶ See <https://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/10008431/BSVG%2c%20Fassung%20vom%2024.06.2014.pdf>, accessed 24 June 2014.

⁷ For instance maternity benefits and health insurance benefits in cash under the Social Security Act for Business and Commerce differ from those under the General Social Security Act.

⁸ BGBl I 107/2013, at https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2013_I_107/BGBLA_2013_I_107_sig, accessed 13 June 2014.

⁹ See https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2013_I_107/BGBLA_2013_I_107.pdf and legislative annotations http://www.parlament.gv.at/PAKT/VHG/XXIV/I/I_02300/fname_301334.pdf, both accessed 24 June 2014.

¹⁰ Self-employed farmers have a social security classification equivalent to other self-employed persons, and are entitled to the same social security benefits, even though the Equal Treatment Act does not expressly cover them.

¹¹ Amendment of 20 June 2013, BGBl I 107/2013, at https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2013_I_107/BGBLA_2013_I_107.pdf, accessed 24 June 2014.

As far as could be ascertained by research in the databases and by oral information obtained from several of the statutory professional corporations, it was not considered necessary to implement the Directive separately into the professional statutes.

As described above, self-employment is to a large extent defined by the mandated social security status. Mandatory social insurance sets in as soon as a taxable income above the social security threshold is earned. This means that 'small entrepreneurs' are generally excluded. However, they can enter into a self-insurance with the competent authority.¹² Despite their social security status they could formally still carry on their self-employed work; they could also theoretically remain members of a statutory professional corporation.¹³

5. Article 3 – Definitions

The legal definitions in the relevant paragraphs of the Equal Treatment Act comply with the standard of all the Equality Directives that have been implemented by this Act by simply adopting the wording of the relevant Directive articles. Paragraph 4 defines the scope,¹⁴ and Paragraph 5 contains the legal definitions for direct and for indirect discrimination.

The Equal Treatment Act makes the distinction between sexual harassment and gender-related harassment in Paragraphs 6 and 7 for the general area of work. There is labour case law pertaining to this distinction that could be used for other work-related areas, but no actual case law concerning self-employment exists.¹⁵

There may however be a gap in the scope of the Equal Treatment Act concerning sexual harassment and harassment. Self-employed persons can sue for compensation and damages only in cases where the harassment occurs 'in relation to the establishment, equipment or extension of a business or the launching or extension of any other form of self-employed activity' ('... *bei der Gründung, Einrichtung oder Erweiterung eines Unternehmens sowie bei der Aufnahme oder Ausweitung jeglicher anderer Art von selbständiger Tätigkeit*').¹⁶ This wording of the scope seems to give no protection against sexual harassment and gender-related harassment that occur in the context of the regular pursuit of gainful self-employed activities, for instance by a customer or a client.¹⁷

6. Article 4 – Principle of equal treatment

As with other Directives the implementation was effected by inserting the relevant wording of the Directive into the Equal Treatment Act without changes. The modifications correspond to the changes from Directive 86/613/EEC to Directive 2010/41/EU.

¹² Spouses, registered same-sex partners and life-partners and children are covered by the health insurance part of these voluntary self-insurance schemes.

¹³ Except in the Chambers of Agriculture, membership in the professional corporations typically requires the payment of – in some cases substantial – dues; it would be very difficult to sustain membership with a taxable income under the social security threshold.

¹⁴ See above in Section 4 on scope.

¹⁵ OGH 02.09.2018, 8 Ob A 59/08x, https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JJT_20080902_OGH0002_008OBA00059_08X0000_000, accessed 24 June 2014. The distinction is not very clear – in existing labour case law the Supreme Court has drawn the relevant distinction between gender-related harassment and sexual harassment along the lines of intensity and also intent – sexual harassment would require a definite impact on the subjective mental state of the claimant and also some misuse of power, whereas an insult with gender-related content would be enough to constitute harassment.

¹⁶ Paragraph 4 no. 3 Equal Treatment Act, at <https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40151373/NOR40151373.pdf>, accessed 24 June 2014.

¹⁷ See also Section 18 of this report on issues regarding the 'duty holder'.

7. Article 5 – Positive action

There are no public positive action measures for self-employment. Programmes targeted at starting in self-employment are either run by the competent professional corporations or financed by the Unemployment Agency (*Arbeitsmarktservice, AMS*), and these programmes generally address both sexes equally.¹⁸

8. Article 6 – Establishment of a company

There are no regulations prohibiting or restricting the establishment of a company by spouses, by registered partners or by life partners.

9. Article 7 – Social protection

Self-employment is to a large extent defined by the social security status of a person, therefore the principles of statutory social protection that form the legal frame of self-employment have been described above. Except in cases where a professional corporation has established corresponding private insurance for their members there is no legal possibility for opting out of social protection as long as self-employed persons earn a taxable annual income above the insurance threshold.

Social security coverage of children, spouses, registered same-sex partners and life partners has been part of all statutory social security systems for over 20 years, therefore no adaptations of social security legislation were necessary.

In all statutory social security systems the health coverage for benefits in kind extends to the insured person's own or adoptive children until the age of 18 or above in cases where further education is pursued. Social security health benefits in kind also extend to spouses and to registered same-sex partners (*Mitversicherung*). This is also applicable to life-partners who have been living in a joint household for at least 10 months. Extended health coverage is free of charge for all children and also for spouses/partners, if children live or have lived in the joint household.

Spouses, registered same-sex partners and children, but not life-partners of the deceased are entitled to widows' or widowers' pensions and orphans' benefits, which also include mandatory health insurance.

Full inclusion into social security, which leads to independent financial benefits, depends only on having a gainful occupation above the insurance threshold. Marriage or same-sex partnership to an insured person does not provide for an autonomous coverage, and therefore spouses and registered partners of self-employed persons can only claim survivors' pensions but they cannot accrue pension entitlements of their own out of an enterprise of their partner.

10. Article 8 – Maternity benefits

Maternity benefits for self-employed professionals and farmers have been included in social security legislation since 1996, so a separate implementation of Article 8 was not necessary.

The entitlement for maternity benefits depends on inclusion into the mandatory social security system for professionals or for farmers for at least six months prior to the beginning of the protection period.¹⁹ Insured women are

¹⁸ For example, see https://www.gruenderservice.at/Content.Node/gruenden/w/Gruenden_-_Startseite_Wien.html and <http://www.ams.at/service-arbeitsuchende/finanzielles/foerderungen/unternehmensgruendungsprogramm>, both accessed 18 June 2014.

¹⁹ Durations of all maternity benefits correspond to the duration of maternity leave in Paragraphs 3 and 5 of the Maternity Protection Act, starting at eight weeks before the calculated date of birth

primarily entitled to temporary personal help by a trained assistant (*Betriebshilfe*) as a benefit in kind. In cases where an assistance is not feasible or forbidden by the applicable professional statute they can claim a net financial benefit of (in 2015) EUR 52.08 per day (*Wochengeld*).²⁰ The two kinds of benefits are mutually exclusive. In both cases the women retain the entitlement to health benefits in kind. The duration of both kinds of benefits corresponds with maternity benefits in General Social Security.²¹ Benefits in cash are only granted if the primary benefit in kind, an assistant during the maternity protection period, is not possible. The assistant enables the mother to carry on (most of) her enterprise, and the benefit in cash amounts to at least EUR 1 500 net, which is well above the margin of existence of between EUR 870 and 980 net per month for a single person.

The Chamber of Commerce and the Chamber for Agriculture either provide assistants themselves or co-finance associations that do so in their place. As far as could be ascertained none of the statutory corporations for Free Professions provide replacement personnel, mostly because professional duties generally cannot be transferred to others for longer periods like maternity protection.

During maternity benefit periods and during suspension of self-employed work for childcare, statutory social security contributions for pensions and for health insurance are carried on until the fourth birthday of the child (*Kindernerziehungszeiten*), for which the dues are paid from internal revenues. Spouses/partners without regular incomes and therefore without mandatory social security cover are covered by extended health insurance (see Section 9 of this report, below). The pension contributions for childcare can be split between partners, if the father can prove that he has actually participated in the care of the child.

11. Article 9 – Defence of rights

Self-employed persons are free to submit any legally founded claims with the competent civil law courts.²²

As far as can be ascertained there are no special legal entities concerned with the protection of rights according to the Directive.

12. Article 10 – Compensation or reparation

Paragraph 12 Section 14 of the Equal Treatment Act has been slightly reformulated with the goal of unequivocally defining the legal basis for compensation both for financial losses suffered and for damages in cases of gender-related discrimination.²³ The claim is based on the general principles of compensation law, by which only the effective impairment of the claimant's financial assets can be asserted. Under Paragraph 12 an additional punitive damage can be claimed.²⁴ There is no formal upper limit to compensation, as

with the possibility of extension in urgent medical cases for eight weeks after delivery, in cases of premature births, or caesarean deliveries 12 weeks after delivery.

²⁰ Paragraph 102a GSVG at <https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40159284/NOR40159284.pdf> and Paragraph 98 BSVG at <https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40159211/NOR40159211.pdf>, both accessed 23 June 2014.

²¹ Durations of all maternity benefits correspond to the duration of maternity leave in Paragraphs 3 and 5 of the Maternity Protection Act, starting at eight weeks before the calculated date of birth with the possibility of extension in urgent medical cases for eight weeks after delivery, in cases of premature births, or caesarean deliveries 12 weeks after delivery.

²² Claimants in civil cases run the risk of having to bear their own legal fees as well as those of the defendant in the case of a negative verdict; this serves as an effective barrier for lawsuits that are not well-founded and would probably make it a difficult decision for a self-employed person to enter into a lawsuit that is not central to the running of their business.

²³ See https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2013_I_107/BGBLA_2013_I_107.pdf, and legislative annotations http://www.parlament.gv.at/PAKT/VHG/XXIV/I/I_02300/fname_301334.pdf, especially p. 8, both accessed 24 June 2014

²⁴ Austrian legislation and jurisdiction are averse to the concept of punitive damages. Where they have been granted in labour law cases, mostly sexual harassment cases, the amounts were

Austrian compensation law depends on the doctrine of compensation for objective damages. The enforcement lies with the competent court for civil cases. As far as could be ascertained from the official databases so far no relevant cases pertaining to questions of equal treatment in self-employment matters have been entered.

13. Article 11 – Equality bodies

Neither the Equality Ombud nor the equality body have any competence in civil compensation cases.

The Equality Ombud (*Gleichbehandlungsanwaltschaft*) is competent to counsel persons who consider themselves to have been discriminated against, to intervene with the goal of reaching a solution to a case, and to file cases with the equality body (*Gleichbehandlungskommission*). The equality body can try reconciliation and issue non-binding opinions on the question of whether discrimination has occurred. The Equality Ombud has informed the author of this report that it has received very few personal requests by self-employed persons. At the time of writing, no relevant cases had been presented to the equality body.²⁵

14. Article 12 – Gender mainstreaming

In accordance with the principle of self-government in Article 120(a) of the Federal Constitution Act, gender mainstreaming programmes for self-employment should only be carried out by the competent professional corporations.²⁶ The Chambers of Commerce for instance carry out a programme that specifically addresses female entrepreneurs (*Frau in der Wirtschaft*).²⁷

15. Article 13 – Dissemination of information

There were no information initiatives addressing the implementation of Directive 2010/41. The competent professional corporations and the specific social security institutions offer extensive information materials and personal information on entering into self-employment where required.

16. Article 14 – Level of protection

In the view of the author, the level of protection offered in Austria is adequate when compared to the level required by Directive 2010/41.

17. Case law

In order to obtain affiliation, attorneys are admitted into the competent professional corporation (*Rechtsanwaltskammer*) on a provisional basis. In order to obtain permanent membership they must prove at least five years of working in a legal profession, of which at least three years must be spent at a law firm (*Rechtsanwaltskonzipienz*) and pass a special exam. According to long-standing jurisdiction by the Constitutional Court this rather long on-the-job training requirement is justified by the public demand for a thorough and rigorous

calculated with great judicial restriction based on monthly earnings. Self-employed claimants would also have to demonstrate and prove a basis for the calculation of punitive damages that has a factual connection to their business.

²⁵ Oral communication by the competent Ombudsperson in August 2014.

²⁶ See: <https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40094632/NOR40094632.pdf>, accessed 12 September 2014

²⁷ E.g. Chamber of Commerce for Vienna, https://www.wko.at/Content.Node/FIW-Wien/Startseite_FIW_Wien.html?wt_ad=8727994302_37185344142&wt_kw=8727994302_frau%20in%20der%20wirtschaft, accessed 12 September 2014.

formation of attorneys. Periods of maternity protection do not interrupt the mandatory training period, if their duration does not counteract the aim of a thorough training.²⁸ However the requisite on-the-job training period is interrupted by parental leave periods; the professional corporation regularly suspends membership for the duration of the leave period. If another child is born during this suspension of membership, there are no grounds for including times corresponding to a maternity protection period into the requisite training period.²⁹

18. Issues regarding the ‘duty holder’

The concept of ‘duty holder’ is characterised by a high degree of legal uncertainty. With respect to a person commencing or continuing self-employment the relevant statutory professional corporations can be regarded as ‘duty holders’, because the accreditation and/or affiliation is constitutive for many cases of gainful self-employment.

There are no specific equal treatment regulations within the pieces of legislation for the statutory professional corporations. However, as has been discussed above, the scope of the Equal Treatment Act covers discrimination in connection with vocational and on-the-job training and with the establishment of a self-employed occupation or a business, which gives persons who consider that they been discriminated against a legal claim they can file with the civil courts or the equality body.

As ‘duty holder’ vis-à-vis any self-employed workers can also be considered whoever concludes contracts with them for the actual goods or services they market. Gender-related discrimination in general contract law is covered by the scope of Part III of the Equal Treatment Act.³⁰

19. National statistics

For statistical purposes self-employment is characterised by the related social insurance status. Statistics show that by the end of 2013, 476 900 persons were self-employed, and 78 100 persons were categorised as assisting family members, most of them in agriculture. Over the last 10 years a steady increase in self-employment by almost 16 percentage points has been registered.³¹

20. Any other issues?

The author would like to emphasise that self-employment in Austria is mainly defined as membership in a professional corporation or professional association, which results in the relevant social security classification and the ensuing entitlements. All professional corporations and associations are open to members of either sex. Social security institutions in Austria are legally obliged to include anybody who earns an income above the social security threshold. There are therefore no gender equality issues concerning access to social security or to entitlements.

²⁸ The Constitutional Court has argued in an *obiter dictum* that 10 months’ consideration of maternity protection periods within the mandatory 3-year on-the-job training period in a law firm could be considered excessive.

²⁹ Constitutional Court (Verfassungsgerichtshof) vom 08.03.2005, B1742/03, VfSlg. 17.491, see http://www.ris.bka.gv.at/Dokumente/Vfgh/JFT_09949692_03B01742_00/JFT_09949692_03B01742_00.pdf, accessed 24 June 2014.

³⁰ Paragraph 30, <https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40126091/NOR40126091.pdf>, accessed 24 June 2014.

³¹ *Statistik Austria*, Mikrozensus-Arbeitskräfteerhebung, http://www.statistik.at/web_de/statistiken/arbeitsmarkt/erwerbstaetige/selbstaendige_mithelfende/index.html, accessed 24 June 2014.

BELGIUM – Jean Jacqmain

1. Context

Women represent one third of self-employed workers (in 2012, 653 000 men and 335 000 women), although a breakdown by sector of activities reveals important differences: women are a majority (of 51 %) in services, 42 % in the liberal professions but only 20 % in agriculture and 14 % in industry.³²

Although (as reported below) the principle of equal treatment in gender, as stated in Directives 2006/54 and 2010/41/EU, seems to have been implemented correctly and there is no related case law, a report from the Institute for Equality of Women and Men highlights that women's access to and success in self-employment appear to be hindered by a variety of interacting factors of an economic, sociological and psychological nature: e.g. gender imbalance in performing family tasks; women's reluctance to borrow in order to invest; women's propensity to work alone or with a very small number of employees, in sectors which are fiercely competitive; commonplace macho scepticism towards businesses run by women; etc. Based on self-employed workers' tax returns, the pay gap is 42 % in favour of men.³³

2. Transposition of the Directive

Essentially, the substantial provisions that serve to transpose Directive 2010/41/EU (as they did for Directive 86/613/EEC) are to be found in Royal Decree no. 38 (equivalent to an Act of Parliament) of 27 July 1967 'organising the social protection scheme for self-employed persons' and in a number of ancillary Royal Decrees.³⁴

As to effectiveness and remedies, the necessary provisions are those of the Act of 10 May 2007 'aimed at fighting discrimination between women and men' (the 'Gender Act'), which was devised to implement all EU instruments on gender equality.

The time for implementation was not extended.

3. Article 1 – Subject matter

Given the horizontal nature of the Gender Act (see above at 2) there are no particular problems to be mentioned.

4. Article 2 – Scope

The social protection system organised by R.D. no. 38 is applicable to two categories of persons:

- 'self-employed workers': any person performing a gainful activity other than under an employment contract or regulations applicable to civil servants;
- 'assistants': any person who assists or substitutes for a self-employed worker in performing his/her activity without having been hired by the latter under an employment contract.

When the spouse of a self-employed worker does not perform any gainful activity which entitles her /him to social protection, or is not a recipient of social security benefits, that spouse is regarded as an assisting spouse and therefore an assistant.

³² Statistics (2012) of the Social Security Office for Self-Employed Workers, available on <http://www.rsvz-inasti.fgov.be>, accessed 3 July 2014.

³³ *Femmes et hommes en Belgique/Vrouwen en mannen in België*, Institute for Equality of Women and Men, 2012, available on <http://igvm-iefh.belgium.be>, accessed 3 July 2014.

³⁴ All legal texts quoted in this report are available (in French and Dutch) on <http://www.juridat.be>, accessed 3 July 2014.

The same provision applies in case of registered partnership (*cohabitation légale/wettelijke samenwoning*), which under Article 1475 ff. of the Civil Code simply requires a common statement of the partners at the registrar's office.

As to *de facto* (or 'common law') life partnerships, the assisting partner simply falls into the category of assistants, as will, for instance, a sibling of a self-employed worker.

Finally, it should be recalled that both marriage and registered partnership are available to heterosexual and to homosexual couples.

The provisions mentioned above are applicable regardless of the dimension of the business, including in the agricultural sector.

The only restriction worth reporting concerns the spouse or registered partner of a person who is a member of the board of directors or a chief executive officer in a company which does not employ him/her under an employment contract, as defined in Article 32 of the Income Tax Code (1992). That person is a self-employed worker, but his/her spouse or registered partner is not regarded as an assistant.

In conclusion, Article 2 of the Directive seems to have been transposed exhaustively.

5. Article 3 – Definitions

Article 5 (5° through 10°) of the Gender Act offers word-perfect copies of the four definitions mentioned in Article 3 of the Directive.

Although the very scanty case law concerning gender equality of self-employed workers has never had to handle the distinction between direct and indirect discrimination, this distinction has always been interpreted correctly in the case law concerning paid workers. As to the development in the definition of indirect discrimination, which was introduced by Directive 2002/73/EC, confirmed by Directive 2006/54/EC and duplicated by Directive 2010/41/EU, there has been no need for it to be applied in any recent judicial decisions, but given the legal provision (Article 5 of the Gender Act) there is no reason to fear that it might be disputed.³⁵

The distinction between harassment and sexual harassment is correctly interpreted as well, although there is no related case law whatsoever concerning self-employed workers. Indeed, for the expert it seems difficult that such behaviour could be observed within the material scope of the directive.

6. Article 4 – Principle of equal treatment

No steps had been taken to transpose Article 4 of Directive 86/613/EEC, most probably because at the time, there were no legal provisions which might have been used to hinder women in the establishment, equipment or extension of a business. There have never been any cases to reveal practices to such an effect.

Article 14(1)(a) of Directive 2006/54/EC has been transposed in Articles 5(1°) and 6(8) of the Gender Act by including a reference to self-employment into provisions apparently designed for situations of subordinate employment. Consequently, nothing more was done to implement Article 4(1) of Directive 2010/41/EU,³⁶ so that the example 'the establishment, equipment or extension, etc.' remains unmentioned.

In contrast, the Gender Act (Article 6(2)(1°)) went one step further than both Directives by mentioning (as a 'condition of access to employment') 'partnership

³⁵ The expert might be allowed here to refer to the CJEU's decision in Case C-7/12 *Riežniece* [2013] ECR n.y.r., in which the Court used the definition of indirect discrimination provided in Directive 97/80/EC, although the facts of the case took place after the implementation of Directive 2002/73/EC, which had been mentioned in the reference for a preliminary ruling.

³⁶ The expert must also confess that he fails to see any relevance to the wording 'in the public sector', given the fact that the Directive deals exclusively with self-employment.

in associations of self-employed persons', because it had been noted that in various law firms, women used to be accepted as trainees or members, but not as partners.

As mentioned above, Article 4(2) of Directive 2010/41/EU finds transposition in Article 5 of the Gender Act; so does Article 4(3) on the instruction to discriminate. Again, the total absence of relevant case law precludes any appreciation as to possible improvement of the protection.

7. Article 5 – Positive action

Over the years, some indirect positive actions have certainly been taken by way of modest subsidies granted to universities or private associations in order to stimulate research on and campaigning in favour of female entrepreneurship. However, any more resolute initiative is presently impossible because, while Article 16(2) of the Gender Act allows positive action, Article 16(3) requires that a Royal Decree define in what situations and on what conditions such actions may be taken. Now, seven years later, such a Royal Decree still does not exist, so that no positive action is possible.

8. Article 6 – Establishment of a company

No steps were taken to implement either Article 5 of Directive 86/613/EEC or Article 6 of Directive 2010/41/EU as there was no legal obstacle to the establishment of a company between spouses to be removed. The same applied to the registered partnership when it was instituted (as from 1 January 2000).

The expert could not find any statistics of such companies.

9. Article 7 – Social protection

The social protection scheme for self-employed workers is entirely statutory. Its legal foundation is Royal Decree no. 38 of 27 July 1967, which provides that the scheme is financed by compulsory pay-as-you-go contributions of self-employed workers and assistants (see above at 4) and by a state subsidy.

The following categories of benefits are available:

- healthcare: the social insurance scheme is now the same as for paid workers, organised by the Consolidated Act of 14 July 1994;
- sickness and maternity benefits: organised by the Royal Decree of 20 July 1971;
- family benefits: organised by the Act of 29 March 1976;³⁷
- retirement and survivors' pensions: organised by Royal Decree no. 72 of 10 November 1967; and
- premature end of activity benefit: organised by the Royal Decree of 18 November 1996, this is a stopgap relief measure, available during a maximum of one year to meet situations such as bankruptcy or permanent disablement.

In order to implement Article 6 of Directive 86/613/EEC, affiliation to the sickness and maternity benefits scheme was first made available to assisting spouses on a voluntary basis. It was then found that such a measure was insufficient and, after a two-year transition period, affiliation to the whole protection scheme was made compulsory for all assisting spouses and registered partners as from 1 January 2006. However, a spouse or registered partner may remain exempt of affiliation if she/he states in an affidavit that she/he does not provide any assistance to the

³⁷ As a consequence of the 6th Institutional Reform of the State, family benefits will be transferred to the respective jurisdictions of the various federate authorities as from 1 January 2015.

self-employed worker, in which case she/he will be considered as the latter's dependant.

As explained above (under 4), a *de facto* ('common law') life partner who assists a self-employed worker is simply regarded as an assistant, subject to compulsory affiliation to the whole scheme.

10. Article 8 – Maternity benefits

The scheme aimed at protecting maternity for self-employed workers, assistants and assisting spouses was built up gradually, first in order to implement Directive 86/613/EEC, then under its own steam and finally, but in a very marginal way (see below at 17), in order to implement Directive 2010/41/EU.

The expert must report that there is implicit consensus that protection of maternity is certainly necessary and that the utmost must be done to that effect, but also that being realistic must remain a motto. Such an approach was evident in Opinion no. 118,³⁸ of 13 February 2009, in which the Council for Equal Opportunities of Men and Women commented on the proposal which finally resulted in Directive 2010/41/EU. An advisory body with the federal Government, the Council had consulted various associations of female self-employed workers. In its opinion, the Council considered that the reference to Directive 92/85/EEC as to the length of maternity leave was wrong because self-employed women had no wish for such a long absence from their activities. Implicit was also the consideration that given the system through which the social protection scheme is financed (see above at 9), it would be impossible to provide allowances for such a long period.

Protection of maternity is optional, i.e. a woman must apply with her sickness insurance fund to be granted benefits. This scheme can be described in the following way:

- there is a maternity leave of eight weeks (or nine in case of multiple delivery), of which three weeks (one immediately before and two immediately after the delivery) are compulsory, i.e. using those three weeks is a condition of entitlement to any of the allowances. The remainder (i.e. five or six weeks) is optional and usable under the following possibilities: two extra weeks immediately after the compulsory postnatal leave; and/or in fractions, each of at least one week, during a maximum period of twenty-one weeks following the compulsory postnatal leave;
- for every week of leave, a gross maternity allowance of EUR 440.50 (as from 1 December 2012) is available; and
- in order to promote reconciliation of work and family life, there is an additional scheme of 'maternity support', under which the beneficiary receives 105 'service vouchers', each worth EUR 9.00. Private persons normally buy and use service vouchers to remunerate menial household tasks, performed by workers in precarious situations (unemployed, beneficiaries of public assistance, etc.) who in this way are given access to regular employment. The workers are employed by specially created 'service vouchers firms' which remunerate them (the minimum gross hourly salary is EUR 11.25 as from 1 February 2013). One voucher corresponds to one hour's work, and the difference is compensated by a state subsidy paid to the firm.

The amount of the maternity allowance seems to meet the requirements of Article 8(3) of Directive 2014/41/EU. The criteria which were used to fix this amount appear to fall under subsection (a), but it is definitely higher than the sickness benefit (a maximum of EUR 378.00 per week), most probably as an incentive to use maternity leave.

³⁸ Available at <http://www.conseildelegalitedeschances.be> (in French) or <http://www.raadvandegelijkekansen.be> (in Dutch), accessed 3 July 2014.

As to Article 8(4) of the Directive, the ‘maternity support’ scheme can hardly be regarded as an implementation measure, as it is aimed at relieving the self-employed worker of part of her domestic tasks and not at providing her with temporary replacement in her gainful activities.

11. Article 9 – Defence of rights

The implementation of Article 9 of the Directive is to be found in the horizontal provisions of the Gender Act of 10 May 2007, mainly: Article 23, under which a person who claims to be a victim of gender discrimination may sue for compensation; and Article 25, under which the victim may apply for a court order to put an end to the discrimination.

Under Article 34, the equality body (Institute for Equality of Women and Men) has *locus standi* in all cases which fall within the scope of the Act. So have, under Article 35, the trade organisations of self-employed workers and any registered charity whose terms of reference, stated in its charter, aim at defending human rights or fighting discrimination. Under Article 36, when a person or body corporate can be identified as a victim of discrimination, their approval is required before the *locus standi* mentioned above may be used. There is no power of representation under Belgian law but a trade organisation can assist one of its members who wishes to take legal action by paying counsel fees; the same applies to a charity. There is no known case law related with the scope of Directive 2010/41/EU in which either a charity, an organisation or the equality body has ever used its *locus standi*.³⁹

Under its foundation Act, of 16 December 2002, the equality body is competent to give advice to any person who claims to be a victim of discrimination and to question public authorities who may be involved in a situation of discrimination. However, it is not empowered to act as a mediator (unless informally) and even less to adjudicate.

12. Article 10 – Compensation or reparation

It can be stated that in matters of gender equality, Belgium never chose between compensation and reparation. As the previous pieces of legislation did (Acts of 4 August 1978 and 7 May 1999), the present Gender Act of 10 May 2007 offers a victim the possibility to apply for a court order to put an end to discrimination (Article 25), which could serve as reparation, as well as for compensation (Article 23).

Under Article 23(1), a victim may claim integral compensation, including of immaterial damages, but she/he carries the burden of demonstrating the reality and extent of the prejudice. Alternatively, she/he may apply for fixed damages, provided by Article 23(2) in a very intricate way.

Basically, fixed damages amount to EUR 650.00; they amount to EUR 1300.00 if the duty holder cannot prove that the unfavourable treatment would still have applied if there had been no discrimination,⁴⁰ or if other circumstances such as grievous immaterial damages must be taken into account.

However, if the discrimination occurred within the sphere of ‘working conditions’ (a phrase which may apply to self-employed workers, at least within an association of professionals: see above at 6), fixed damages amount to three or six months’ remuneration (according to whether the duty holder can or cannot

³⁹ Indeed, the Report of Activities 2012 of the Institute for Equality of Women and Men does not mention any complaints related to equal treatment of self-employed workers having been filed with its legal service. The report is available in French or Dutch on <http://iqvm-iefh.belgium.be>, accessed 3 July 2014.

⁴⁰ This tortuous distinction was inspired by the CJEU’s decision in Case C-180/95 *Draehmpaehl* [1997] ECR I-2195, concerning discrimination in the hiring of a secretary.

demonstrate that the unfavourable treatment would still have applied in the absence of discrimination).

Finally, under Article 20 any provisions in regulations or contracts which are contrary to the Gender Act must be declared null and void by the courts.

There is absolutely no relevant case law which could provide any information on the effectiveness of the provisions above.

13. Article 11 – Equality bodies

Under its foundation Act of 16 December 2002, already mentioned under 11, the Institute for Equality of Women and Men is empowered to perform all the tasks listed in Article 11(1) and (2) of the Directive. However, the Institute's brief encompasses all aspects of gender equality within the jurisdiction of the federal authorities, while its financial and human resources are extremely limited. Consequently, the Institute does not seem to have dedicated any important efforts to improving gender equality for self-employed workers; but it must also be noted that the competent members of the federal Government do not seem to have ever required the Institute's assistance in preparation of measures concerning those workers.

14. Article 12 – Gender mainstreaming

Belgium has a Gender Mainstreaming Act (of 12 January 2007), the implementation of which should be boosted by the 'impact analysis of regulations', introduced by the Multi-Purpose Act of 15 December 2013. This 'IAR', which integrated several tests including the gender test, must be annexed to any draft of legislation or regulation which a federal Minister submits to cabinet for approval. However, the expert is incapable of mentioning a single example of gender mainstreaming performed within the scope of the Directive.

Still, a promising step was taken when an Act of 27 December 2005 inserted in Royal Decree no. 38 a provision (Article 18(5)) which enabled the sovereign (i.e. the federal Government) to introduce social security benefits aimed at facilitating the reconciliation of work and family life for self-employed workers. Unfortunately, that provision was first used as the basis for the 'maternity support' scheme (see above at 10), which does not contribute in any way to the better sharing of family tasks between the members of a couple.

More recently, under a Royal Decree of 20 December 2006 an adoption allowance was made available for any adopting self-employed worker, assistant or assisting spouse. The amount of the allowance is the same as for maternity (EUR 440.50 per week) and may be received during a maximum of six weeks (for a child under three) or four weeks (for a child between three and eight), during which the beneficiary may not perform any gainful activities. Such an adoption leave, available to both parents, might be regarded as a step in the correct direction, but given the very small number of adoptions in Belgium (in 2012, 740, regardless of the occupation of the adopting parents), its practical usefulness must be very limited.

15. Article 13 – Dissemination of information

Every amendment to the social protection scheme for self-employed workers was publicised through various channels, e.g. the sickness insurance funds and the competent Minister's staff (the same Minister has been in charge of self-employed workers for eleven years within several successive federal cabinets, and she made improvement of the social protection scheme her main concern). However, implementation of EU law is rarely mentioned, except to claim that Belgian law is certainly in conformity.

16. Article 14 – Level of protection

Given Article 7(2) of the Directive, Belgium obviously preceded EU law when affiliation to the full social protection scheme was made compulsory for all assisting spouses as from 1 January 2006 (see above at 9). The availability of an adoption allowance (see above at 14) also goes a (modest) step farther than the requirements of the Directive.

17. Case law

The only case in which Directive 86/613/EEC was quoted (in a marginal way) concerned a woman who claimed that, as she had assisted her self-employed husband for several years, she should be entitled to a corresponding retirement pension. At the time, assisting spouses were excluded from the social protection scheme, but they were allowed to subscribe to the sickness and maternity insurance on a voluntary basis. When the Labour Court in Brussels referred this case to the Constitutional Court (then called Court of Arbitration) for a preliminary ruling, the latter Court found that when a married couple jointly performed a self-employed activity, they were free to choose between two formulas: either both could subscribe to the social protection scheme, or one of them could enjoy protection as dependant of her/his subscribing spouse.⁴¹ Consequently, such a system did not entail any discrimination under Articles 10 and 11 of the Constitution (the general principle of equality under the law). Conformity with Directive 86/613/EEC was mentioned by the Court as an extra argument strengthening its conclusion.

There is no case law related to Directive 2010/41/EU either, but the following case may be reported. Under the Royal Decree of 20 July 1991, entitlement to maternity allowance is conditional to having subscribed to the social protection scheme for self-employed workers for six months; however, this condition is waived if immediately before becoming a self-employed worker (or assistant or assisting spouse), a woman subscribed to the social protection scheme for paid workers during the same minimum period. As to the maternity support scheme, under the Royal Decree of 17 January 2006, the same condition of subscription applied, but previous affiliation to the scheme for paid workers was not taken into account. Thus, it so happened that a self-employed worker was granted maternity allowance but denied maternity support. When she challenged such a difference in treatment, the Labour Court of Appeal in Brussels found that indeed the difference was unjustified under Articles 10 and 11 of the Constitution, all the more so as the maternity support scheme was supposed to contribute to the implementation of Article 8 of Directive 2010/41/EU.⁴² The Court concluded that under Article 159 of the Constitution, the faulty provision of the Royal Decree of 17 January 2006 must be left aside so that the claimant was entitled to maternity assistance; however, the Court's decision did not apply beyond the case at hand. The Council for Equal Opportunities of Men and Women then submitted to the competent Minister that the Royal Decree of 17 January 2006 should be amended accordingly, which was done by the Royal Decree of 10 April 2014,⁴³ Article 1 of which refers to Directive 2010/41/EU.

⁴¹ Judgment no. 44/97 of 14 July 1997, *Moniteur belge/Belgisch Staatsblad*, 20 September 1997.

⁴² Judgment of 8 March 2013, *Journal des tribunaux du travail*, 2013, p. 233.

⁴³ *Moniteur belge/Belgisch Staatsblad*, 5 May 2014.

18. Issues regarding the ‘duty holder’

The main issue concerning ‘duty holders’ arises from the uncertain willingness of self-employed workers, assistants and assisting spouses to respect rules aimed at their own protection.

Although suspending any gainful activity is a condition for entitlement to maternity allowance and the maternity support scheme, it does not seem that any effective monitoring is performed by the various labour inspectorate services in this respect.⁴⁴

Thus, while it has been suggested that protection against dangerous substances, as provided both by Directive 92/85/EEC and by the national legislation for pregnant or breast-feeding paid workers,⁴⁵ should be extended to self-employed workers, nobody seems to know how such protection could be made effective.

19. National statistics

Self-employment represents 22 % of the total working population (slightly less than 1 in 4.5), a proportion which is slowly increasing in reaction to the deepening crisis of paid employment. However, the figure is misleading as more than one fifth of the total figure (which was 988 567 in 2012) consists of persons who are mainly paid workers and contribute to the scheme for the self-employed in an accessory capacity. With this restriction, the notion used for compiling statistics is the same as in the social security scheme (see above at 4).

Worth mentioning is the following observation:⁴⁶ the number of assisting spouses (approximately 33 000 persons, nine tenths of whom are women) is decreasing steadily. This suggests that in many cases, in a couple running a self-employed business the assisting spouse (i.e. the wife) prefers to state by affidavit that she gives no assistance to the self-employed worker (the husband) and is his dependant, instead of contributing to the protection scheme for herself. Again, the monitoring of such situations by the labour inspectorate services must be very lenient, if it exists at all. However, the slow but relentless extinction of self-employed agricultural businesses may also contribute to this development.

20. Any other issues?

There are no other issues to be mentioned.

BULGARIA – *Genoveva Tisheva*

1. Context

There is insufficient statistical and research data on the issue of equal treatment between self-employed men and women in Bulgaria and there has been no relevant political debate. The comparative data from Eurostat shows that the rate of self-employment in Bulgaria (as a percentage of total employment) is higher than in other Member States and much higher than the average of the EU-28. The average is 15.5 %, with 18.9 % for men and 11.6 % for women. These

⁴⁴ The latest (2012) report of activities of the Social Security Office for Self-Employed Workers (available on <http://www.rsvz-inasti.fgov.be>, accessed 3 July 2014) does not mention any occurrence of violation of that rule.

⁴⁵ By the Council for Equal Opportunities in its Opinion no. 52 of 13 September 2002 concerning ministerial proposals for protection of maternity of self-employed workers, available on <http://www.conseildelegalitedeschances.be> (in French) or <http://www.raadvandegelijkekansen.be> (in Dutch), accessed 3 July 2014.

⁴⁶ In the report of activities (2012) of the Social Security Office for Self-Employed Workers, see: <http://www.rsvz-inasti.fgov.be>, accessed 9 September 2014.

figures for Bulgaria are as follows: 27.3 % on average and 33.2 % for men, compared to 20.8 % for women.⁴⁷ This means that the phenomenon of self-employment and the problems of this important group in the labour market deserve more attention.

There is not one uniform definition of self-employed persons. For the purposes of the National Insurance Institute an unofficial definition was created, including the following groups of employed persons: those who conduct a productive activity on their own or in association with others; freelancers; those who take on lease/rent real assets; those who conduct other activities on their own, without hiring other people; and those who work under a civil contract according to the Law on Contracts and Obligations. As self-employed persons are also considered unpaid family workers in non-corporate enterprises and fully or partially involved in the productive activity, and homeworkers whose income is a function of the result of a productive activity for which they are responsible.

In recent years a new sub-category of self-employed person has emerged – the so-called economically dependent self-employed person, whose income depends fully or for at least 70 % on one or at most two principals.

The lack of a clear definition generates difficulties in several areas: differences in the levels of self-insurance or complete lack of such insurance; lack of mechanisms for protection in case of unemployment and respective compensation; and risk of precariousness.

The majority of self-employed persons in the villages are registered agricultural producers and producers of tobacco and their working conditions are very harsh, the economic and regulatory environment is unfavourable and the risk of losses is too high. This makes this group of self-employed persons one of the most vulnerable groups, not only among the self-employed but in employment as a whole.

In addition, the situation for the youngest self-employed, the group of under 25, has strongly worsened. This enhances the problem with youth unemployment in the country as a whole and the difficulties in finding work after completing secondary and university education.

Bearing in mind that in 2012 the self-employed numbered 896 000, their legal status should receive more attention from the Government and should be better regulated. This will contribute to ensuring the coverage by social insurance of the self-employed.⁴⁸

2. Transposition of the Directive

The transposition was realised through amendments to the Law on Protection from Discrimination (LPFD),⁴⁹ namely amendments of Articles 7 Paragraph 1 Point 19, and Article 37 Paragraphs 2 and 3, as well as Paragraph 1 Points 1 and 2 and 5 of the Additional Provisions to the Law. The amendments in Article 7 introduce an additional exception when differential treatment is not deemed discriminatory: in cases of differential treatment of persons when taking measures aimed at initiatives exclusively and mainly promoting entrepreneurship among women, in the instances of their under-representation or for overcoming and compensating for disadvantages in their professional career. The provision of Article 37

⁴⁷ Employment and Social Developments in Europe in 2013, available at: <http://ec.europa.eu/social/main.jsp?langId=en&catId=113&newsId=2023&furtherNews=yes>, accessed 4 July 2014.

⁴⁸ Data from the *Survey of the employment climate in 2010 and 2012*. Analytical report, Sofia, July 2013, in the framework of a project of the Confederation of the Independent Trade unions (KNSB) 'Security through legislation, flexibility through collective agreements', financed by the European Social Fund (ESF) under the Operational Programme 'Development of human resources', and from the KNSB report *Prekarious types of employment in Bulgaria – means for overcoming them and approaches of trade unions*. See: www.knsb-bg.org, accessed 4 July 2014.

⁴⁹ Law on Protection from Discrimination in force from 1 January 2004, last amended in State Gazette No. 68/ 2013, Bulgarian version available at <http://lex.bg/laws/ldoc/2135472223>, accessed 4 July 2014.

Paragraph 2 bans any discrimination based on any of the grounds of Article 4 Paragraph 1 of the LPFD in the public or real (economic) sector, direct or indirect, in relation to conducting an economic activity, including the establishment, equipment or expansion of an economic activity or in relation to starting or expanding any other form of such activity. The new Paragraph 3 of Article 37 prohibits any harassment or sexual harassment in the framework of the activities mentioned above.

It is worth mentioning the already existing Article 26 of the LPFD which provides for equal conditions for access to a profession or an activity, for opportunities to exercise the activity or profession and for development in this sphere. It covers the scope of the equal treatment principle enshrined in Article 4(1) of Directive 2010/41/EU⁵⁰: the establishment, equipment and extension of a business or the launching or expansion of any other form of self-employed activity, despite the different wording of the two provisions.

The other provisions which were amended in view of compliance with the Directive are those of Article 4 of the Code on Social Insurance (COSI),⁵¹ which enhance the insurance rights of the persons covered by the Directive. These provisions will be mentioned below in relation to the rights of the self-employed to social security.

To the knowledge of the expert, the Bulgarian Government has not extended the time for transposition and implementation of the Directive.

3. Article 1 – Subject matter

To the knowledge of the expert, there have not been any particular problems.

4. Article 2 – Scope

As mentioned above, Bulgarian law does not contain a legal definition of self-employed persons, only a definition of different groups of self-employed for the purposes of social security law. In fact, in addition to the list of self-employed persons mentioned above with reference to the reports of trade unions, the COSI and related regulatory Acts mention different categories of such persons. For example, Article 4 of the COSI mentions the following categories: registered for performing freelance activities and crafts; persons exercising commercial activities, single owners of companies, owners or associates in trading companies; registered agricultural and tobacco producers; and the spouses of the categories of persons mentioned above when they participate in their activities with their consent.

In the Regulation on the social insurance of self-employed persons, Bulgarian citizens working abroad and those involved in maritime activities,⁵² the group of the freelancers is further specified and can non-exhaustively comprise those performing the following types of activities: based on preliminary registration, legally required notaries public, attorneys-at-law, accountants, licensed evaluators, experts to the court and the prosecutor's office, medical experts, insurance agents; activities for which they are obliged to pay a patent tax, without being single company owners; when the professional activity is conducted at their own risk and on their own account; scientists; experts in the field of

⁵⁰ Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC OJ L 180 of 15 July 2010, pp. 1-6.

⁵¹ Code of Social Insurance in force since 1 January 2000, last amended in State Gazette No. 53/2014, Bulgarian version available at <http://lex.bg/laws/ldoc/1597824512>, accessed 4 July 2014.

⁵² Regulation on the social insurance of self-employed persons, Bulgarian citizens working abroad and those involved in maritime activities in force since 1 January 2000, last amended in State Gazette No. 17/ 2014, available in Bulgarian at www.lex.bg/laws/ldoc/-549442559, accessed 4 July 2014.

culture and education; architects; economists; journalists; and other persons performing a freelance activity, duly registered.

We would like to note that these provisions of the regulation existed prior to the adoption of the new Directive and this regulatory Act was not amended for the purpose of the harmonisation.

In terms of rights as self-employed persons, all categories are treated equally, including freelancers, agricultural producers, small business operators, and others.

The status of life partners is not explicitly regulated in this sphere and in any other sphere. In terms of social security, the COSI only mentions contributing spouses as subjects of insurance rights.

5. Article 3 – Definitions

The definitions had all been correctly transposed in Bulgarian legislation through the Law on Protection from Discrimination, most of them long before the adoption of the Directive, and the provisions have been applicable to other spheres where unequal treatment occurs, other than self-employment. The differences between direct and indirect discrimination in Bulgarian legislation (Article 4 of the LPFD) correspond to the definitions in the Directive.

As to harassment and sexual harassment, the definition in the LPFD has been fully synchronised with the provision of the Directive, by the amendments of the Law, as mentioned in Section 2 of this report, above. The definition encompasses all forms of unwanted, offensive and humiliating behaviour. The interpretation of differences between harassment and sexual harassment is evolving in the practice of the equality body (the Commission for Protection from Discrimination) and of the courts. In the practice of the equality body there have been issues with the distinction not in terms of formal interpretation of the notions, but in the substance of the decisions.

A new Paragraph 3 of Article 37 LPFD prohibits any harassment or sexual harassment in the framework of the activities mentioned above.

6. Article 4 – Principle of equal treatment

Article 4 has been correctly transposed in Bulgarian legislation firstly through the existing provision of Article 26 of the LPFD which provides for equal conditions for access to a profession or an activity, for opportunities to exercise the activity or profession and for development in this sphere. In addition, the equal treatment principle is ensured through the new provision of Article 37 Paragraph 2 LPFD which bans any discrimination based on one of the grounds of Article 4 Paragraph 1 of the LPFD in the public or real (economic) sector, direct or indirect, in relation to conducting an economic activity, including the establishment, equipment or expansion of an economic activity or to the undertaking or expansion of any other form of such activity.

We would like to note that the provision of Article 26 is broader and also covers the requirements of Article 14(1)(a) of Directive 2006/54/EC.⁵³

7. Article 5 – Positive action

As mentioned above, the amendment in Article 7 Paragraph 1 Point 19 LPFD introduces an additional hypothesis of positive action aimed at initiatives exclusively and mainly promoting entrepreneurship among women, in the instances of their under-representation or for overcoming and compensating for disadvantages in their professional career.

⁵³ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) OJ L 204 of 26 July 2006, pp. 23-36.

No specific real positive action in implementation of this provision has been taken.

8. Article 6 – Establishment of a company

No specific legislation has been enacted after the adoption of the Directive to explicitly recognise the coverage and protection of life partners. No amendments have been made in this direction.

There are no specific obstacles or problems regarding the establishment of family companies. To the expert's knowledge, statistical trends identified show that family firms are most often encountered in the sector of services and trade. They represent about 42 % of the companies in Bulgaria. According to expert opinions, this percentage is even higher in reality, about 50-60 %.

9. Article 7 – Social protection

According to Article 4 Paragraph 3 of the COSI, the coverage for disability due to general illness, for old age and death is mandatory for the following categories of persons: 1. persons registered as freelancers or craftsmen; 2. persons exercising trade activities, company owners, and associates in a trading company; 3. registered agricultural and tobacco producers. These persons can insure themselves voluntarily for the risks of general illness and maternity.

Article 4 Paragraph 9 of the COSI, amended in view of harmonisation with Directive 2010/41/EU, regulates the voluntary insurance of the spouses of the self-employed persons mentioned above. As a matter of principle, the spouses of the persons mentioned in Points 1 and 4 (the persons registered as freelancers or craftsmen; and registered agricultural and tobacco producers), when with their consent they participate in the activities of these persons, can be registered voluntarily for disability due to general illness, old age and death, as well as for general illness and maternity, if they are not already insured on other grounds.

The insurance contributions for the spouses of the persons mentioned in Point 1 of Article 4(3) of the COSI are based on the minimum insurance income for self-employed persons, defined by the Law on the Budget of State Social Security, and the contributions for the spouses of registered agricultural and tobacco producers are based on the minimum insurance income for agricultural producers, defined explicitly in the same Law.

The concrete procedure for insurance of self-employed persons is regulated by the Regulation on the social insurance of self-employed persons, Bulgarian citizens working abroad and those involved in maritime activities.

Voluntary social security pension schemes exist according to the COSI (Part III of the Code) and they are open to everyone in a position to pay the contribution. The insurance in the companies and funds for supplementary voluntary insurance is individual. This insurance gives the right to an individual pension for age or disability, survivor's pension, etc.

10. Article 8 – Maternity benefits

Protection of pregnancy and maternity regarding self-employed persons and assisting spouses/life partners is in compliance with the requirements of the Directive both in terms of opportunities and minimum coverage. In fact the self-employed women in these categories who are insured for general illness and maternity, according to the conditions mentioned above have the right to maternity benefits which amount to 90 % of their average gross remuneration. The condition for the self-employed is to have paid contributions for these risks for at least 24 months preceding the month when the temporary inability to work

occurs (Article 49 of COSI).⁵⁴ If these requirements have been fulfilled, self-employed women have the right to pregnancy and maternity benefits for the term recognised as maternity leave for workers and employers in the Labour Code: up to 410 days. This is equivalent to the income they would receive in the event of a break in their activities on grounds connected with their state of health.

Life partners are not specifically covered as they are not recognised as subjects of state social insurance.

No system of supply of temporary replacements or existing national social services is available to self-employed women.

11. Article 9 – Defence of rights

Bulgarian legislation is, as a whole, in compliance with the requirements of the Directive in this field. This compliance was achieved long before the new Directive, thanks to the adoption of the Law on Protection from Discrimination in 2004. Since then the rights and access to justice of those who consider themselves victims of discrimination are guaranteed. The alleged victims can refer their case to the courts or to the equality body (the Commission for Protection from Discrimination). The Commission is a quasi-judicial body with the power to adopt binding decisions. In these decisions the Commission has the competence to rule on the existence or non-existence of discrimination, to prohibit further acts of discrimination and to order restoration of the initial situation, to impose pecuniary sanctions provided in the LPFD and to take measures of administrative coercion (Article 47 LPFD). The Commission has no competence to rule on compensation for the victim. Only the court has this competence.

The equality body has competences to initiate complaints in court and to intervene as an interested party in court in cases of discrimination. It can also propose independent support to victims of discrimination. Despite these broad competences, they have not been used frequently enough by the Commission.

Trade unions and non-profit organisations that are registered as acting in the public interest have the right to intervene in judicial proceedings as interested parties when victims have filed complaints of discrimination. They can also lodge a claim on behalf of persons whose rights have been violated, upon request from these persons. In the event of violation of the rights of a number of persons, these associations are allowed to initiate an independent lawsuit (Article 71 LPFD).

12. Article 10 – Compensation or reparation

Formally speaking, the provisions about compensation and reparation in case of discrimination exist in Bulgarian legislation, covering both losses and damages incurred and also in principle including immaterial damages. The problem is that compensation for cases of discrimination is rarely awarded by the court, which means that the compensation is not effective, proportionate and dissuasive, despite the fact that there is no prior upper limit to the compensation amount claimed.

13. Article 11 – Equality bodies

The Commission for Protection from Discrimination established with the LPFD is an independent equality body with broad competences which include, as a matter of principle, all the functions and activities required by the Directive.

In the last few years there have not been many activities and cases related to gender equality, and specifically cases concerning the rights of self-employed.

⁵⁴ As per the recent changes of the COSI – S.G. 107/2014, in force since 1 January 2015.

14. Article 12 – Gender mainstreaming

There have not been any examples of implementation of this specific article.

15. Article 13 – Dissemination of information

There have been no specific activities for dissemination of information in this particular area.

16. Article 14 – Level of protection

An example of greater protection is the amount of the maternity benefits, as well as the length of the period during which the self-employed mothers who have contributed to the state social security system are covered for pregnancy and maternity.

17. Case law

To the knowledge of the expert, there has not been any relevant case law on the issue.

18. Issues regarding the ‘duty holder’

Issues regarding the ‘duty holder’ have not been raised openly but the arguments would be relevant for Bulgaria as well. We would like to note that in the analyses of trade unions reviewed for the purpose of this report an argument in this direction was presented: one of the problems with which the self-employed are confronted is the difficulty to cover this category in uniform or similar groups in view of the creation of a trade union and ensuring the respective rights for the self-employed. The reason for this is said to be the non-existing party of the employer.

19. National statistics

The current statistics and trends have been described in detail above. The issues of definition and the existing working definitions for the purposes of social security have also been discussed above.

The unofficial definition of self-employed persons used for the methodology of the National Statistical Institute is as follows: those persons who conduct a productive activity on their own or in association with others; freelancers; those who take on lease/rent real assets; and those who conduct other activities on their own, without hiring other people.

20. Any other issues?

There are no other issues to be mentioned.

CROATIA – *Nada Bodiroga-Vukobrat*

1. Context

According to the Strategy for Women Entrepreneurship 2014-2020, women are significantly underrepresented in total employment, including self-employment. The highest unemployment rate is of women aged 25-40. The percentage of female owners of companies in 2012 was 26.5 %, and for crafts it was 32 % of the total number of company owners. The National Employment Incentives Plan

contains measures to support female self-employment, but the percentage of female beneficiaries of entrepreneurship incentives in 2013 was 16.5 %. Between 2010 and 2013, the overall rate of beneficiaries was 19.4 %.

The available statistics cited in the Strategy demonstrate a proportion of only 1 female entrepreneur to 2.24 male entrepreneurs in 2013. Women in the Republic of Croatia are paid 10 % less than equally qualified men and are significantly underrepresented in managerial positions, ownership of private companies and in crafts. The obstacle to more in-depth analysis is a lack of gender-segregated statistical reports on self-employment. The Strategy emphasises the main impediments to female entrepreneurship in the Republic of Croatia, among which are gender-particular education choices which limit options for start-ups in technology, gender stereotypes, limited social support, the regulatory framework and its implementation, difficult access to financing and inadequate business network, absence of a mentorship system and lack of vocational trainings.⁵⁵

2. Transposition of the Directive

The following laws of the Republic of Croatia have explicitly transposed Directive 2010/41:

1. the Law on Maternity and Parental Benefits (Official Gazette No 85/08, 110/08, 34/11, 54/13); and
2. the Law on Voluntary Pension Funds (O.G. 19/14).

The following laws have implicitly transposed the Directive's provisions related to certain rights of self-employed persons:

3. the Law on Obligatory Health Insurance (O.G 80/13, 137/13);
4. the Law on Pension Insurance (O.G. 157/13);
5. the Law on Gender Equality (O.G. 82/08);
6. the Law on Prevention of Discrimination (O. G. 85/08, 112/12);
7. the Law on Job Search Services and Rights during Unemployment (O.G. 80/08, 94/09, 121/10, 25/12, 118/12, 12/13, 153/13);
8. the Law on Social Welfare (O. G. 157/13);
9. the Law on Children Allowances (94/01, 138/06, 107/07, 37/08, 61/11, 112/12); and
10. the Law on Income Tax (O.G. 177/04, 73/08, 80/10, 114/11, 22/12, 144/12, 43/13, 120/13, 125/13, 148/13).

The time for implementation was not extended.

3. Article 1 – Subject matter

Directive 2006/54 will be explicitly transposed into Croatian legislation by provisions in the Final Proposal for Amendments of Labour Law, submitted on 27 June 2014 to Parliament and currently pending in the adoption procedure.⁵⁶ The same Directive was implicitly transposed into Croatian legislation through provisions of the Law on Gender Equality providing the legal basis for implementation of constitutionally protected gender equality.⁵⁷

⁵⁵ According to the Strategy for Women Entrepreneurship Development in the Republic of Croatia 2014-2020, pp. 5-14, Government of Republic of Croatia, Ministry for Entrepreneurship and Crafts, available at <http://www.minpo.hr/UserDocsImages/Strategy%20of%20Women%20Entrepreneurship%20Development%20in%20the%20Republic%20of%20Croatia%202014%20-%202020.pdf>, accessed 16 January 2015.

⁵⁶ Labour Law, 7 August 2014, Official Gazette No. 93/14.

⁵⁷ See N. Bodiroga-Vukobrat 'Croatia' in: European Network of Legal Experts in the Field of Gender Equality *The Personal Scope of the EU Sex Equality Directives* at p. 37, European Commission

The provisions of Directives 2006/54 and 2004/113 were explicitly transposed into the Law on Prevention of Discrimination by amendments in October 2012.

The principle of equal treatment for men and women in matters of social security as regulated in Directive 79/7 has long been part of Croatian social security law, particularly in relation to health and pension insurance. Since self-employed persons enjoy the same rights as other workers, currently there is no overlap of the coverage between Directives 2006/54,⁵⁸ 79/7,⁵⁹ 2004/113⁶⁰ and 2010/41.

4. Article 2 – Scope

The Law on Income Tax provides the most detailed description of qualification conditions for self-employment. It specifies that self-employment income tax duty holders are: artisans, four categories of freelancers (or independent contractors): 1. health workers, veterinarians, lawyers, notaries, auditors, architects, insolvency managers, court interpreters, translators, tourist guides, and similar; 2. scientists, writers, innovators, and similar; 3. teachers, pedagogues, and similar; 4. journalists, artists and sportsmen; and persons employed in agriculture and forestry (Article 18).

The Law on Maternity and Parental Benefits in Article 6(2) defines self-employment as the ‘work of a natural person by which he/she independently performs gainful economic or professional activity as his/her only or main occupation, and is subject to obligation to pay income or profit tax, in accordance with tax laws and regulations.’

The Law on Voluntary Pension Funds in Article 3(9) defines self-employed persons as those who ‘perform independent work, such as for example artisanship or similar activity, freelancers, people employed in agriculture and other, or self-employed persons in accordance with the regulations of another Member State.’

Croatian Labour Law does not explicitly define self-employed worker. Article 4 of the Labour Law includes a definition of ‘worker’ that presumes that workers necessarily have to perform work for others (employers). In this vein, the Law stipulates that a ‘worker is a natural person who performs certain work activities for the employer in an employment relation.’ Nevertheless, we consider that rights provided by the provisions of the Labour Law should be applicable to all categories of workers, including self-employed workers.

Croatian legislation recognises the same legal effects of a three-year cohabitation or partnership as a legal marriage, under the Family Law. Therefore, life partners enjoy the same scope of social protection as spouses. The Law on Pension Insurance provides a condition of three years’ cohabitation for life partners to obtain a right to family pension (Article 22(3) of the Law on Pension Insurance). However, in its Annual Report, the Gender Equality Ombudswoman has criticised certain provisions of the Income Tax Law related to personal deductible income which exclude life partners.⁶¹

2012, available at http://ec.europa.eu/justice/gender-equality/files/your_rights_personal_scope_eu_sex_equality_directive_final_en.pdf, accessed 25 November 2014.

⁵⁸ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) OJ L 204 of 26 July 2006, pp. 23-36.

⁵⁹ Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security OJ L 6 of 10 January 1979, pp. 24-25.

⁶⁰ Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services OJ L 373 of 21 December 2004, pp. 37-43.

⁶¹ Annual Report for 2013 Republic of Croatia, Ombudsperson for Gender Equality, March 2014, pp. 242-243, 245, available at <http://www.prs.hr/attachments/article/997/Izvjescje%20o%20radu%20za%202013%20Pravobraniteljice%20za%20ravnopravnost%20spolova.pdf>, accessed 16 January 2015.

In conclusion, Croatian law mainly defines self-employment in terms of tax obligations and less so in terms of labour-rights beneficiaries. Because there are several categories of self-employment in the Republic of Croatia, there is still certain confusion regarding the precise definition of a self-employed worker. A positive development is that social protection legislation uses the term 'self-employed worker', which is broader and can encompass all sub-categories of self-employed workers, thus minimising the risk of exclusion from coverage. The agricultural and forestry sectors are included in the definition of self-employment. Life partners enjoy the same social rights as spouses and the legal effects of long-term cohabitation (longer than three years) are the same as the legal effects of marriage. Social legislation explicitly includes partners into the personal scope.

5. Article 3 – Definitions

All four definitions of discrimination and harassment have been transposed into Croatian legislation by provisions of the Law on Prohibition of Discrimination. The Law recognises the distinction between direct and indirect discrimination. In the transposition of the definition of harassment, the Law omitted to include any relation of certain conduct to the sex of a person. In addition, Croatian legislators have chosen to use the term 'gender harassment' for 'sexual harassment' due to the linguistic similarities of both terms in local language.⁶² This presents an obstacle in the interpretation of legal provisions by relevant courts, as a person can be subjected to both gender harassment unrelated to sexual behaviour and to sexual harassment unrelated to the gender of a person (in a case of LGBT sexual harassment).

Labour Law prohibits direct and indirect discrimination in employment and working conditions (Article 7). It regulates the protection of dignity of workers related to all forms of harassment in Articles 134(9) and 7(5) by stipulating that harassment or gender/sexual harassment (this is the same as above) are violations of the labour relationship. The same Article specifies procedural guarantees for the protection of dignity of workers that are of less importance in the context of self-employed workers as they are not applicable to that specific category of workers.

6. Article 4 – Principle of equal treatment

Croatian law does not differentiate between the sexes in terms of establishment of business or launching of self-employed activity. In this regard, Paragraph 1 of Article 4 has been fully transposed into national legislation. The Law on Prohibition of Discrimination explicitly includes a prohibition of discrimination in the area of access to self-employment, working conditions, professional advancement, vocational training and access to social security schemes (social welfare, pension and health insurance and unemployment benefits) as well as in the area of access to goods and services, education, social housing, etc. (Article 8).

Article 4 of the Directive has been transposed into the Labour Law through the stipulation that a worker's refusal to submit to both forms of harassment must not be used as a basis for discrimination (Article 134(10)).

The adoption of the Law on Prohibition of Discrimination has certainly increased the level of legal protection for self-employed workers against all forms of discrimination and harassment. This Law is applicable to all public bodies and companies, legal entities and natural persons. The general personal scope

⁶² The Law on the Prevention of Discrimination (Article 3(1)) stipulates that harassment is any unwanted behaviour *caused by any* of the protected grounds enumerated in Article 1(1) of this Law with the purpose or effect of violating the dignity of a person *causing* intimidation, hostile, degrading, humiliating or offensive environment.' (Author's own emphasis).

provides protection against external contractors or service providers engaged by self-employed workers.

7. Article 5 – Positive action

Instead of positive action, the Law on Gender Equality regulates 'specific measures' of a temporary nature, applied with the aim of achieving real equality in the public sector. In Article 9(1), the Law defines specific measures as specific advantages allowing equal participation in public life for members of the underrepresented sex, removing existing inequalities or ensuring rights that were previously denied. Under Article 10 of the Law on Gender Equality, specific measures have been stipulated by special laws and other legislative acts for each area of public life. Relevant state bodies and legal state entities are obliged to implement specific measures for gender equality and to adopt action plans on the implementation of specific measures. They have a duty to provide an analysis of the position of men and women in their sector of work with sound justification, goals, and monitoring mechanisms for specific measures. This has to be done in a four-year cycle. An integral part of action plans is the implementation plan for measures planned by the National Policy for Promotion of Gender Equality (under Article 11 of the Law on Gender Equality). Article 12 of the Law on Gender Equality specifies the goal of specific measures to be the promotion of equal participation of women and men in the work of legislative, executive and judicial bodies, including public services, and a gradual increase of the underrepresented gender (less than 40 %), so that its participation is equal to the overall percentage of the specific gender in the total population.

Between 2001 and 2003 the Labour Law allowed positive action for the underrepresented sex in employment, but due to the vagueness of the provision and issues related to the interpretation, this provision was revoked in 2003.

8. Article 6 – Establishment of a company

Conditions for the establishment of a company between spouses or life partners in the Republic of Croatia are equal to the conditions for the establishment of a company between other persons. There are no problems in practice for spouses or life partners in establishing a company. Statistics on the number of such companies are not available (see Section 19 of this report, below).

The Public Employment Service implements the National Employment Incentives Plan that contains a special package of measures supporting self-employment of women. It consists of 22 different training and financial subsidy programmes. The Public Employment Office reported 4 800 female beneficiaries of incentives for self-employment at the beginning of 2014, and 5 693 up to the time of writing.

In 2013, the Gender Equality Ombudswoman conducted research on the implementation of the Plan and assessed the activities targeting unemployed women as insufficient. Local self-government bodies as well as central state bodies should develop additional incentives at the local level.⁶³

9. Article 7 – Social protection

The social protection system in the Republic of Croatia is available to all workers, including self-employed workers. It covers mandatory pension, social and health insurance. Self-employed workers are entitled to the following benefits: disability, survivor, sickness, work injury, occupational disease, unemployment, maternity and parental leave, new-born child assistance, income-based child allowance and

⁶³ Reply to the implementation of Directive 2010/41 submitted by the Gender Equality Ombudswoman on 14 July 2014 upon request for this research.

social welfare.⁶⁴ Currently, there is only a public social protection system, but self-employed workers can benefit from voluntary pension insurance through payment of contributions. Spouses and life partners are eligible to benefit from social protection in accordance with relevant national law.⁶⁵ This is a mandatory requirement, since for example health or pension insurance of the main beneficiary covers a spouse, minor children and life partners. There are no mandatory schemes for the self-employed worker, but there are voluntary schemes for his/her spouse or life partner, or vice versa.

Article 7 of Directive 2010/41 relating to the social protection rights of spouses and life-partners is already part of Croatian social legislation.

10. Article 8 – Maternity benefits

Rights to maternity benefits for self-employed women have the same scope as the rights of other employed women. By amendments to the Law on Maternity and Parental Benefits in 2013, Article 8 of Directive 2010/41 was transposed into Croatian legislation. Currently, self-employed mothers enjoy the same scope of maternity benefits as other female workers.

The maternity allowance meets the requirement of sufficiency because it covers the total amount of previous remuneration as stipulated in Article 8(3). The criterion used in Croatian legislation is the one regulated by subparagraph (b), i.e. the average loss of income in relation to a comparable preceding period. The maternity allowance is granted on a mandatory basis but based on the request of the applicant. There is no available choice of systems, except that Article 26 of the Law on Pregnancy and Parental Support stipulates that collective agreements, employment contracts or internal regulations can provide more favourable rights, but in the context of self-employment this provision bears no particular importance as the employer would have to pay for the additional benefits. The Croatian Health Insurance Company pays the contributions. In relation to Article 8(4), there are no existing services supplying temporary replacements or access to services as an alternative to or as part of the allowance.

11. Article 9 – Defence of rights

The Law on Prevention of Discrimination (Articles 16 to 24) and Gender Equality Act (Article 30) provide possibilities for judicial protection of rights guaranteed under the anti-discrimination and gender equality legal provisions. Both laws also stipulate possibilities of conciliation procedures to reach a binding out-of-court settlement. Article 21 of the Law regulates the possibility of intervention of a competent state body (Ombudswoman or Ombudswoman for Gender Equality) during the proceedings before the court, with the consent of the claimant. Article 30 of Gender Equality Law does not explicitly provide the possibility for the Gender Equality Ombudswoman to intervene in court proceedings to assist the victim of gender discrimination. In conclusion, both public bodies can only provide support to victims, with a limited option to intervene in case of violation of

⁶⁴ Please see the following legislative provisions: the Law on Child Allowance (O.G. 94/01, 138/06, 107/07, 37/08, 61/11, 112/12); the Law on Compulsory Health Insurance (O. G. 80/139; the Law on Job Search Services (O. G. 12/13); the Law on Pregnancy and Parental Support (O. G. 85/08, 110/08); the Law on Pension Insurance (O.G. 157/13); and the Law on Social Welfare (O.G. 157/13, 152/14).

⁶⁵ See further: Law on Child Allowance (all articles are applicable since as the child allowance is income based, the Law does not make any distinction on the labour status of the parent); Law on Compulsory Health Insurance (Article 1(1) and Article 3, and Articles 50, 56, and 128); Law on Job Search Services (Articles 6, 37, 38, 40, 41, 44, 45, 46, 48, and 49); Law on Pregnancy and Parental Support (Articles 6, 7, and 27); Law on Pension Insurance (Articles 10, 86(7)-(8), 87(7)-(8), 90 (7)-(8), and 100(2) and (5)); Law on Social Welfare (all articles because the entitlement to social welfare is based on the inability to engage in remunerated employment, and all persons who cannot satisfy their basic social needs have the right to social welfare).

provisions of Law on Prevention of Discrimination. Both equality bodies can act as conciliators.

12. Article 10 – Compensation or reparation

Article 11 of the Law on Prevention of Discrimination and Article 30 of the Gender Equality Law regulate entitlements to compensation, according to the provisions of the Law of Obligations.⁶⁶ There is no regulatory prior upper limit and the claimant is entitled to immaterial damages. The Courts have the freedom to decide on the amount of immaterial damages because the law only stipulates 'fair compensation' of immaterial damage.

13. Article 11 – Equality bodies

The Law on Prevention of Discrimination stipulates that the Ombudswoman is the main equality body. The Ombudswoman has the authority to receive complaints, to provide the necessary information with regard to the relevant rights and obligations and to the possibilities of court procedures, to examine individual complaints and to take action aimed at the elimination of discrimination and the protection of rights of discriminated persons prior to court proceedings. It also conducts conciliation aimed at reaching binding out-of-court settlements, submits criminal charges related to discrimination cases to the competent state attorney's office and conducts activities aimed at the promotion, analysis and monitoring of human rights.

The mandate of the Gender Equality Ombudsperson under the Gender Equality Act is almost identical to the mandate of the Ombudswoman under the Law on Prevention of Discrimination.

Both equality bodies carry out tasks specified in Article 11, paragraph (2)(a)-(d), but so far no separate reports focusing on equality in the self-employment sector have been published in the Republic of Croatia. Both equality bodies carry out the tasks in Article 11(2)(a)-(d) independently and submit an annual report on their activities to the Croatian Parliament.

In addition, the Republic of Croatia has established an elaborate network of central, regional and local equality bodies. Central bodies are the Committee for Gender Equality of the Croatian Parliament, the Office of the Government for Gender Equality and the Equality Coordinators in State bodies. In addition, there are 21 regional, 30 municipal and 53 city Equality Committees.

14. Article 12 – Gender mainstreaming

The National Policy for Gender Equality 2011-2015 outlines several gender mainstreaming measures such as: measures aimed at improving the awareness of anti-discrimination legislation, equality and human rights of women, measures aimed at advancing particular categories of women (disabled, rural, minorities), measures aimed at decreasing unemployment rates for women, measures aimed at the removal of discriminatory practices against women on the labour market, measures aimed at strengthening female entrepreneurship, etc.⁶⁷

In spite of a regulatory and institutional framework that promotes gender equality in the Republic of Croatia, Annual Reports of the Gender Equality Ombudswoman have emphasised deeply-rooted gender inequality in the labour market, primarily visible in limited access to employment for women, a high rate of gender discrimination in recruitment, the gender pay gap, an increase in gender-segregated employment and a lack of gender-sensitive employment-

⁶⁶ Law on Obligations, Official Gazette Nos 35/05, 41/08, 125/11.

⁶⁷ National Policy for Gender Equality for the Period 2011/2015, Republic of Croatia, Official Gazette Number 88/11, available at http://narodne-novine.nn.hr/clanci/sluzbeni/2011_07_88_1868.html, accessed 16 January 2015.

related statistics.⁶⁸ Therefore, we can conclude that the implementation of measures aimed at gender mainstreaming in the Republic of Croatia is still unsuccessful.

15. Article 13 – Dissemination of information

As to the efficient modes of dissemination of the information regarding the Directive's provisions, self-employment generally receives limited public promotion and attention. Labour and social rights of self-employed persons are currently regulated by a wide range of laws and regulations. There is widespread confusion on the definition of self-employed worker as it includes several different categories. In order to facilitate awareness regarding the individual rights and application of equal treatment in the area of self-employment, rights of the persons concerned should be codified.

16. Article 14 – Level of protection

The level of legal protection provided in Croatia is approximately the same as required by the Directive.

17. Case law

Due to the relatively recent transposition of the provisions of Directive 2010/41, recent national case law does not exist. The same is true for Directive 86/613/EEC.⁶⁹

18. Issues regarding the 'duty holder'

The national approach to the issue of the duty holder of 'equality duties' is still not clearly defined. The positive aspect of the Law on Prohibition of Discrimination is its wide personal scope, which includes all public bodies and companies, legal entities and natural persons. In social protection legislation, the duty holder is the State because all social protection matters are public and self-employed workers therefore submit their social claims with the public social bodies.

19. National statistics

The National Strategy for Development of Female Entrepreneurship highlights the very important problem of the lack of gendered statistics on self-employment, managerial matters and ownership structure of private companies. Since 2006 the Croatian Bureau of Statistics has issued the publication *Women and Men in the Republic of Croatia* which provides statistics on education, social welfare, employment, salaries, etc. but not on self-employment. Statistical data from various state registries on self-employment, ownership, and partnership relationships in private companies has never been incorporated or made available for further analytical purposes.

⁶⁸ See: *The Annual Report for 2013 Republic of Croatia*, Ombudsperson for Gender Equality, March 2014, pp. 31-32, available at <http://www.prs.hr/attachments/article/997/lzvjesce%20o%20radu%20za%202013%20Pravobraniteljice%20za%20ravnopravnost%20spolova.pdf>, accessed 16 January 2015.

⁶⁹ 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 of 19 December 1986, pp. 56-58.

20. Any other issues?

The Republic of Croatia has numerous strategies and policies outlining support for entrepreneurship, particularly in regard to female entrepreneurs:

1. The Strategic Plan for Entrepreneurship for the Period 2014-2017 of the Ministry for Entrepreneurship and Craft emphasises the need to support the development of female entrepreneurship in the Republic of Croatia, including increased visibility and networking opportunities. Strengthening of female entrepreneurship initiatives should result in an increase of the number of female entrepreneurs (pp. 1.3. and 1.3.3).
2. The Strategy for Development of Female Entrepreneurship in the Republic of Croatia for the Period 2014-2020 and its Action Plan outline four strategic goals: improvement of the coordination and alignment of public policies with particular emphasis on the development of statistics and implementation mechanisms; improvement of systematic support to female entrepreneurship through education, vocational training, access to financing and EU funds; incorporation of female entrepreneurship into the institutional infrastructure through increased professional support; and mentorship and promotion of female entrepreneurship.
3. The National Policy for Gender Equality for the Period 2011-2015 includes support and measures to strengthen female entrepreneurship in the Republic of Croatia.

CYPRUS – *Lia Efstratiou-Georgiades*

1. Context

Directive 2010/41/EU on the application of the principle of equal treatment of men and women engaged in an activity in a self-employed capacity mainly relates to the legal safeguarding of maternity allowance to women who are self-employed, to spouses of self-employed persons and to life partners of self-employed persons to the degree that the latter are recognised under national law (Articles 2, 7 and 8 of Social Insurance Law No. 59(I)/2010).

Directive 2010/41 does not include measures for the improvement of health and safety at work of women belonging to the above categories who are pregnant, who have given birth or are breastfeeding, as provided for in Directive 92/85/EEC of the Council.⁷⁰

The latest labour force research of the Statistics Department of Cyprus shows a decline in the number of self-employed persons in the second quarter of 2014 compared to the first quarter.⁷¹ The relevant figures are the following: 66 696 self-employed persons in the second quarter (men: 44 513, women: 22 182); compared to 69 641 in the first quarter (men: 46 193, women: 23 448).

2. Transposition of the Directive

Directive 2010/41/EU had been implemented in Cyprus through Social Insurance Law No. 59(I)/2010, Equal Treatment of Men and Women in Occupational Social Insurance Schemes (Amendment) Law No. 40(I)/2009, and Equal Treatment of

⁷⁰ Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC) OJ L 348 of 28 November 1992, pp. 1-8.

⁷¹ Statistics available at: www.mof.gov.cy/cystat, accessed 23 October 2014.

Men and Women in Employment and Occupational Training (Amendment) Law No. 39(I)/2009 (the last two of which are based on Directive 2006/54/EC⁷²).

Cyprus did not have to extend the time of implementation because, as mentioned above, implementation had already been achieved through the above-mentioned Laws.

3. Article 1 – Subject matter

There have not been any problems with overlap of the coverage of this Directive with Directives 2006/54, 79/7 and 2004/113.

4. Article 2 – Scope

There is no specific definition of ‘self-employed workers’ or ‘self-employment’ in Law No. 59(I)/2010, but the Law refers to the Second Schedule, Part I, under the title ‘Self-employed’, where it is stated that the term ‘self-employed’ covers any employment in Cyprus of a person who is pursuing a gainful activity, provided such activity is not insurable under the First Schedule, Part I, under the title ‘Employees, Insurable and Non-Insurable Employments’. The First Schedule refers to employment in Cyprus of a person on the basis of a contract of work or training or under such circumstances from which an employer-employee relationship can be derived.

On the basis of the above it is considered that Article 2(a) has been transposed in the national legislation of Cyprus.

Generally in Cyprus national law, a ‘self-employed’ person is considered a person in a situation where there is no employer-employee relationship and the person pursues a gainful activity.

Law No. 59(I)/2010 uses both the words ‘self-employed’ (Article 2) and ‘self-employment’ (Second Schedule, Part I). All self-employed workers are considered to be part of the same category and are all covered under the General Social Insurance Scheme (GSIS). The agricultural sector is not treated differently.

Life partners are not yet recognised under Cyprus national law. Cyprus national law covers only spouses (on an individual basis) of self-employed persons.

5. Article 3 – Definitions

All four definitions in Article 3 of the Directive (direct discrimination, indirect discrimination, harassment, and sexual harassment) have been correctly transposed into Cyprus national law, in Article 2 of Law No. 39(I)/2009 (based on Article 2 of Directive 2006/54/EC).

The national law in Cyprus distinguishes between direct and indirect discrimination. According to the definitions given in Article 2 of Law No. 39(I)/2009 ‘direct discrimination’ exists where one person is treated less favourably on grounds of sex than another is, has been or would be, treated in a comparable situation; ‘indirect discrimination’ exists where an apparently neutral provision, criterion or practice would put 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.

There is a distinction between harassment and sexual harassment in Law No. 39(I) 2009. No difficulties have arisen up to now.

6. Article 4 – Principle of equal treatment

⁷² Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) OJ L 204 of 26 July 2006, pp. 23-36.

In Cyprus the principle of equal treatment is safeguarded in Article 28.2 of the Constitution, which states: 'Every person shall enjoy all the rights and liberties provided for in this Constitution without any direct or indirect discrimination against any person on the ground of his/her...sex...unless there is express provision to the contrary in this Constitution'.

Article 25 of the Constitution states: 'Every person has the right to exercise any profession or carry out any business or gainful activity, subject to conditions relating to qualifications, or which are necessary only for public safety or public order or public health'.

Article 10(1) of Law No. 39(1)/2009 (implementing Directive 2006/54/EC) provides that men and women enjoy equal treatment and there shall be no discrimination on grounds of sex as regards access to a free profession, the terms and conditions for its exercise and termination of its exercise and as regards access to education or vocational training, including practical work experience that is needed in order to have access to and exercise such profession. Furthermore it provides that the provisions of Article 10 apply to every individual or legal person or organisation of public or private law responsible for the matters mentioned in this Article. The contents of Article 4(1) of Directive 2010/41 and of 14(1)(a) of Directive 2006/54 were included in Article 10 of Law No. 39(1)/2009.

The national law of Cyprus has not transposed exactly the contents of Article 4(1) of the Directive which give additional protection to self-employed persons, but it is considered that Article 10(1) of Law No. 39(1)/2009 provides sufficient implementation.

7. Article 5 – Positive action

The Cyprus Government has not taken any positive action up to now. Law No. 39(1)/2009 provides for positive actions, including the taking of such actions in favour of self-employed persons (Articles 2 and 6).

8. Article 6 – Establishment of a company

According to Cyprus national law any person, man or woman, can establish a company, including spouses and life partners, provided they comply with the provisions and follow the procedures set out in the Companies Law, Cap 113 as amended. There is no restriction or differentiation if shareholders are spouses or life partners.

There are no statistics on this matter.

9. Article 7 – Social protection

The General Social Insurance Scheme (GSIS) (Law No. 59(I)/2010 as amended) falls under Directive 79/7/EEC⁷³ and covers all persons gainfully occupied in Cyprus either as employed or as self-employed person.

The GSIS covers the following branches of social security: old-age pension, widow's pension, sickness allowance, unemployment allowance (which does not apply to the self-employed), employment injury allowance, maternity allowance, invalidity pension, orphan's benefit, marriage grant and maternity grant.

There is only one system of social protection and this is mandatory. There is payment of contributions. In the case of self-employed persons, the contribution is 15.6 % of the insurable income of the person concerned, 11.6 % is paid by the self-employed himself/herself and 4 % by the State. The insurable earnings of a

⁷³ Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security OJ L 6 of 10 January 1979, pp. 24-25.

self-employed person are fixed by regulation according to occupational categories.

A person who is employed in the service of his/her spouse (who is self-employed) is insured as a self-employed person.

Under the GSIS spouses can benefit from social protection but not life partners.

All persons, either workers or self-employed, are insured under the GSIS, which is mandatory and covers spouses. Life partners are not covered, but a life partner who is a self-employed person must be insured independently from his/her life partner. There is no voluntary system under the GSIS for persons working in Cyprus.

10. Article 8 – Maternity benefits

Social Insurance Law No. 59(I)/2010 provides for maternity allowance and social protection for women who are self-employed as well as for wives of self-employed persons as stipulated in Articles 2, 7 and 8 of Directive 2010/41/EU. It should be noted that in Cyprus maternity allowance started to be granted to beneficiaries by the Social Insurance Services in 1983.

According to Articles 24, 29 and 30 of the Social Insurance Law, self-employed women are entitled to maternity allowance for a period of 18 weeks and in case of adoption of a child for a period of 16 weeks.

Maternity allowance is payable to an insured employed woman, a self-employed woman or a voluntarily insured woman in the service of a Cypriot employer abroad. Maternity allowance is granted on a mandatory basis, provided the conditions stipulated in the Social Insurance Law concerning the amount of paid contributions are satisfied

The amount of maternity allowance is determined according to the weekly amount of paid and credited insurable earnings of the insured woman in the previous contribution year. Maternity allowance is composed of the basic and the supplementary benefit. The weekly rate of the basic benefit is equal to 72 % of the weekly average of the basic insurable earnings of the beneficiary, in the previous contribution year. The weekly amount of the supplementary benefit is equal to 72 % of the weekly average of insurable earnings of the beneficiary, beyond her basic insurable earnings. The basic and supplementary benefits cannot exceed 72 % of EUR 4 533 per month. Employers may supplement the benefit up to the beneficiary's full wages. Public sector employers do this. In the private sector it depends on the contract of service. Although the rate of 75 % was reduced to 72 % in 2014 because of the economic crisis, the maternity allowance is considered sufficient under Article 8(3) (a) of the Directive; the allowance is the same with the sickness allowance. Moreover, it is not subject to taxes.

There are no services supplying temporary replacements or national social services.

A person who is in the service of his/her spouse or is in the service of his/her life partner is insured as a self-employed person. Life partners are not yet recognised under Cyprus national law in terms of entitlement to the same benefits as spouses.

11. Article 9 – Defence of rights

Articles 10 and 11 of the Equal Treatment of Men and Women in Occupational Pension Schemes Law No. 40(I)/2009 as well as Articles 15 and 17(A) of the Equal Treatment of Men and Women in Employment and Occupational Training Law No. 39(I)/2009 expressly refer to judicial and extra-judicial protection (administrative proceedings). Under Law No. 40(I)/2009, the appropriate body to deal with complaints is the Industrial Disputes Tribunal, except regarding cases

that fall under Article 146 of the Constitution (complaints against administrative organs), where the appropriate body to order just and reasonable compensation is the District Court.

The Industrial Disputes Tribunal may order just and reasonable compensation, which may cover all real damages and may include moral damages to the claimant plus legal interest.

The Commissioner for Administration (Ombudsman) has authority to examine complaints of discrimination on the ground of sex.

The Gender Equality Committee in Employment and Vocational Training was established under Equal Treatment of Men and Women in Employment and Occupational Training Law No. 205(I)/2002 as amended by Law No. 39(I)/2009 to investigate complaints by victims of discrimination.

Article 11A of Law No. 40(I)/2009 and Article 18A of Law No. 39(I)/2009 provide that associations and other legal entities which have a legitimate interest in combatting discrimination and promoting equality of men and women may engage, either on behalf of or in support of a claimant, with his or her approval, in any judicial or administrative proceedings in order to support his/her rights safeguarded by the Laws.

As no complaint has been submitted up to now by a self-employed person, no comment can be made as regards the extent to which these powers have been used.

The above bodies may provide independent assistance to victims of discrimination in pursuing their complaints on discrimination.

Equality bodies act as quasi-judicial bodies and have power to adopt binding decisions.

12. Article 10 – Compensation or reparation

Laws No. 39(I)/2009 and 40(I)/2009 have introduced in Cypriot national law the measures provided for in Article 10 of the Directive relating to compensation or reparation. They provide for real and effective compensation for real damage suffered by the claimant as well as compensation for moral (immaterial) damage, plus legal interest from the date the damage was incurred up to the date of payment (Article 15 of Law No. 39(I)/2009 and Article 11 of Law No. 40(I)/2009). There is no prior upper limit.

According to the Annual Leave with Pay Law No. 8/1967 as amended by Law No. 5/1973 (Article 12(1), which established the Industrial Disputes Tribunal), the Tribunal has authority to deal with differences between employer-employee, but has no authority to deal with problems related to self-employed persons. Therefore there is a need to amend the Law in order to include complaints by self-employed persons.

There are no provisions in the Laws on how the compensation is calculated. Such calculation is made by the judicial body which examines a complaint, on the basis of the material facts of the case.

13. Article 11 – Equality bodies

Article 11 of the Directive has been implemented through the Laws which established the equality bodies. In particular, the Law relating to the Commissioner for Administration (Ombudsman) No. 3/1991 as amended and the Combating of Race and other Discriminations (Ombudsman) Law No. 42(1)/2004 as amended, give the Ombudsman authority to effectively promote, analyse, monitor and support equal treatment of all persons without discrimination on the ground of sex, by carrying out the activities listed in Paragraph 2(a)-(d).

Also, the Gender Equality Committee in Employment and Vocational Training which was established by Law No. 39(I)/2009 has the same duty to act as above.

Furthermore, Law No. 19(I)/2004, which amended Law No. 205(I)/2002, gave the Ombudsman authority to deal with any complaint arising from the violation of Law No. 205(I)/2002.

In the expert's view the equality bodies are independent in the carrying out of the tasks in Article 11(2) (a)-(d) of the Directive.

As mentioned above, no complaints have been submitted to equality bodies in Cyprus by self-employed persons.

14. Article 12 – Gender mainstreaming

Examples of the implementation of this Article in practice is the Government's policy that every Ministry appoints an officer who is in charge of monitoring and checking that all decisions and activities of the Ministry take into proper account gender mainstreaming. The Government's policy is that laws, regulations and administrative provisions, including the provisions of the Annual Budget Law, must take into account the objective of equality between men and women. This policy has been successful in the sense that each decision, before it is carried out, is checked to ensure that it does not violate the principle of equal treatment between men and women.

15. Article 13 – Dissemination of information

Dissemination of information is achieved through the activities of the National Machinery of Women's Rights (NMWR), women's organisations, trade unions and equality bodies.

Such activities include the publication of decisions of equality bodies, seminars, speeches, workshops and similar activities. The NMWR subsidises its member organisations to disseminate information. Some progress has been made, but more action is required to this effect.

16. Article 14 – Level of protection

The level of protection provided in Cyprus national law is the same as that provided for in the Directive, except as regards compensation and reparation by the Industrial Disputes Tribunal, which does not cover self-employed persons, as mentioned above.

17. Case law

There is no national case law on Directive 2010/41/EU or its predecessor, Directive 86/613/EEC⁷⁴ and/or its implementation.

18. Issues regarding the 'duty holder'

In the absence of case law in Cyprus on this issue, as well as in the absence of complaints to equality bodies, no comments can be made on how difficult the implementation and application of the Directive can be. As regards self-employed professionals the duty holder may be public authorities, professional councils and other professional bodies which have authority by law to regulate some professions.

⁷⁴ 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 of 19 December 1986, pp. 56-58.

19. National statistics

Self-employed persons in Cyprus are 16.6 % of the working population. There was a small increase in 2013 compared to 2012, but the latest statistics show a decrease in the number of self-employed persons, as mentioned in section 1 of this report.

The definition used to compile national statistics is the same as the definition used in social insurance legislation.

20. Any other issues?

There are no other issues to be mentioned.

CZECH REPUBLIC – *Kristina Koldinská*

1. Context

Self-employment in the Czech Republic is currently surrounded by a number of unresolved issues that concern the status of self-employed persons on the labour market and goods and services market, their income situation, social and health security and the burden placed on their incomes by social security contributions and tax, and the legal framework for their activities.

The first relevant survey on this topic, which is very general however and does not deal with gender perspectives, was carried out as late as in 2009 by the Research Institute of Labour and Social Affairs. According to this study, 'although the sector's productivity is roughly half the national average, it provides goods and services that are not particularly lucrative or are uneconomical for self-employed persons. The quantitative development of self-employment slowed down after the year 2000. Even financial assistance out of public budgets is insufficient to improve the low capital resources of the population enough to enable them to start an independent business. Additionally, worse working conditions compared to those in medium-sized and large firms deter people from starting their own business. While the sector did much to eliminate the social impacts of transformation in the 1990s, after 2000 it became a factor in the labour market's rigidity in view of the need for technical professions (manual and non-manual) in corporations with higher work productivity.'⁷⁵

In the Czech Republic, incomes from entrepreneurship currently account for more than two-thirds of the total income of the households of self-employed persons. For individual entrepreneurs the proportion ranges from 75 % to 90 %, depending on whether incomes from enterprise are the only source of income or are supplemented by other sources.

Almost 85 % of entrepreneurs whose enterprise is their primary income source state that they work over 40 hours a week and a third more than 60 hours; roughly three-fifths of self-employed persons devote most or all of their days off to their business. Independent farmers report the highest number of hours worked: over 60 % declare a working week of over 60 hours and 75 % of them work on days off. Freelance entrepreneurs work shorter hours: approx. 85 % state that they work up to 60 hours a week and just 40 % work on days off.⁷⁶

According to the Czech Statistical Office, entrepreneurs (employers and self-employed persons) include 12.9 % of employed women and 21.9 % of employed men. Women dominate human health and social work activities in case of employees as well as of entrepreneurs. Men dominate (more among

⁷⁵ L. Průša, et al. *The Socio-Economic Status of Self-employed Persons in Czech Society*, RILSA, Prague 2009, at pp. 113-114, available at http://praha.vupsv.cz/Fulltext/vz_293.pdf, accessed 6 July 2014.

⁷⁶ L. Průša et al. *The Socio-Economic Status of Self-employed Persons in Czech Society* at p. 108.

entrepreneurs than among employees) construction, transportation and storage and manufacturing.⁷⁷

2. Transposition of the Directive

The Directive has been transposed by a number of Acts, of which the most relevant are: Act No. 198/2009 Coll., Anti-Discrimination Act; Act No. 89/2012 Coll., Civil Code; Act No. 455/1991 Coll., Trade Licencing Act; Act No. 435/2004 Coll., Employment Act; Act No. 155/1995 Coll., on pension insurance; Act No. 187/2006 Coll., on sickness insurance; Act No. 48/1997 Coll., on health insurance; Act No. 349/1999 Coll., on the public defender of rights; and Act No. 586/1992 Coll., on income tax.

The Czech Republic did not extend the time for implementation of the Directive.

3. Article 1 – Subject matter

In the Czech Republic, there have not been any specific problems with overlap of the coverage of the Self-Employment Directive with Directives 2006/54,⁷⁸ 79/7,⁷⁹ and 2004/113.⁸⁰

4. Article 2 – Scope

Article 2(a) of the Directive has been transposed by several Acts, which define several types of self-employment. The definitions differ slightly and are included especially in the Pension Insurance Act, the Civil Code and the Trade Licencing Act.

The definition of self-employment can be found in the Pension Insurance Act, which defines this activity as an insured one. Section 9 defines self-employment as independent activity in agriculture, trade based on the Trade Licencing Act, activity of an associate in a public trade company, activity as a free artist, some special activities provided with special authorisation and all other activities performed in the person's own name and on their own responsibility for the purpose of making a profit.

The Civil Code defines 'entrepreneur' in its Section 420 as follows: 'Whoever performs independently on their own account and responsibility of trade or employment in a similar manner with the intent to do so consistently for profit, is considered with regard to this business for entrepreneurs.'

Last, but not least, the Trade Licencing Act defines trade as 'any systematic activity conducted independently, under the conditions stipulated in this act, by a natural person or legal person in its own name and on its own responsibility for the purpose of making profit'.

All self-employed workers are considered to be part of the same category and there is no particular risk that e.g. 'small entrepreneurs' or 'business persons' will not be covered. The agricultural sector is not treated differently.

Life partners are recognised if they live together with the self-employed person and have a common household. Helping persons are insured in social

⁷⁷ Data available at http://notes.czso.cz/csu/cizinci.nsf/engkapitola/gender_pracemzdy, accessed 6 July 2014.

⁷⁸ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) OJ L 204 of 26 July 2006, pp. 23-36.

⁷⁹ Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security OJ L 6 of 10 January 1979, pp. 24-25.

⁸⁰ Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services OJ L 373 of 21 December 2004, pp. 37-43.

security as self-employed persons and it is possible to divide the income from self-employed activity among them and the self-employed person for purposes of taxes and social security.⁸¹ There is no other law that specifically addresses the term ‘helping persons’.

5. Article 3 – Definitions

All four definitions in this Article have been transposed into national law through the general Antidiscrimination Act (Act No. 198/2009 Coll.). This Act draws a distinction between direct and indirect discrimination in the same way, as all antidiscrimination directives do. The same can be said for the distinction between ‘harassment’ and ‘sexual harassment’. This has not caused any difficulties in general and no difficulties can be mentioned in connection with self-employment.

6. Article 4 – Principle of equal treatment

Article 4(1) has been transposed in a general way through the Anti-Discrimination Act. There is no specific provision that would explicitly mention the principle of equal treatment in connection with self-employed persons. No modification of the implementation compared to the repealed self-employment directive has occurred and so no additional protection to self-employed persons is provided by Czech legislation.

7. Article 5 – Positive action

The Czech Republic generally allows positive action as allowed by the anti-discrimination directives, which is facilitated through Section 7(2) of the Anti-Discrimination Act. No specific action has been taken by the State in favour of self-employed women. Only a few initiatives have been taken, e.g. by self-employed women themselves aimed at providing consultancy and information support to women who want to start working as a self-employed person.⁸²

8. Article 6 – Establishment of a company

There has been no specific implementation of this Article. To establish a company in the Czech Republic is quite easy, establishing a company between spouses or life partners does not encounter any special barriers. Czech law requires certain conditions to be met when establishing a company, but such conditions are administrative and do not include any barriers to spouses or life partners. No problems in practice can be reported in this regard. Article 1(1) of the Anti-Discrimination Act explicitly states that the right to equal treatment also covers the right to equal access to employment, entrepreneurship, and self-employment. As there is no barrier for spouses to establish a company, in the view of national expert Article 4(1) of the Directive has been correctly transposed.

9. Article 7 – Social protection

Self-employed workers are covered in practically the same way as employees under the Czech social protection system. They are obligatorily insured by pension insurance and health insurance (covers healthcare expenditure), the system of sickness insurance (covers sickness benefits in cash) is open to any self-employed person who wishes to be insured, and the participation in sickness insurance is voluntary.

⁸¹ Section 9 of Act No. 155/1995 Coll. and Section 13 of Act No. 586/1992 Coll., on income taxes.

⁸² Information available at <http://www.svazpodnikatelek.cz/projektove-poradenstvi>, and <http://www.odyssey-network.cz/cz/nase-sluzby/pro-women-odyssey>, both accessed 6 July 2014.

As regards public social protection systems, there is only one system of social protection, divided into areas of protection (pension insurance, sickness insurance, health insurance, state social support – family benefits and three systems of social assistance).

In the field of pensions, there are currently three systems: the public pension insurance, which is mandatory, and two private voluntary systems, being pension savings (Act No. 426/2011 Coll.) and supplementary pension savings (Act No. 427/2011 Coll.). Private health insurance schemes also exist, although these are not used very often, unless they cover travel insurance.

Self-employed persons participate in these systems in the same way as employees and these systems are gender neutral. The same is true for helping persons – spouses or life partners living together in one household.

There is no scheme that would be mandatory for the self-employed worker but voluntary for his/her spouse or life partner, or vice versa.

10. Article 8 – Maternity benefits

According to the Sickness Insurance Act, the insured person (including the self-employed) is entitled to financial aid in maternity, if conditions are met. Among these conditions there is also a requirement for a previous insurance period: 270 days in the last two years. In some cases, this waiting period can cause problems for self-employed women. As the participation in the system is voluntary for self-employed persons, many of them prefer not to participate and not to pay contributions, especially when they are starting their business. If a self-employed woman falls pregnant shortly after she started paying contributions, she may be facing a difficult situation, as she will not be entitled to the benefit, which is quite generous.

The maternity benefit is provided for 28 or 37 weeks, from which 6 weeks can be claimed before the planned date of birth. The maternity allowance is granted on a mandatory basis, if the self-employed person is insured (the participation of self-employed persons is voluntary, as explained in the previous section). The maternity benefit meets the requirement of sufficiency, as the amount is 70 % of the previous income. None of the criteria for sufficiency of Article 8(3) have been explicitly used.

Temporary replacements and services are not available.

11. Article 9 – Defence of rights

Section 10 of the Anti-Discrimination Act established the right to claim before the courts for the discrimination to be refrained from, that consequences of the discriminatory act be remedied, and that the victim be provided with appropriate compensation. The same section provides for a possibility to claim a monetary compensation for non-material damage. Monetary compensation in the field of anti-discrimination claims is not normally very high; victims do not ask for much and even if they did, the courts are usually quite hesitant to approve a high amount for compensation. Compensation usually amounts to between approximately EUR 1 000 and EUR 4 000. In the area of equal treatment of self-employed persons, there has been no case published yet.

In Czech law, there is a possibility for legal entities established in order to protect rights of victims of discrimination to support the victim and provide relevant information (Article 11 of the Anti-Discrimination Act) and they can also act on behalf of a victim, if s/he desires it.⁸³ Some NGOs represent victims of discrimination before courts, often either without a charge or with a lower charge. For instance, the League of Human Rights is very active in this regard.

⁸³ Section 26 of Act No. 99/1963 Coll., Code of Civil Procedure; and Section 35 of Act No. 150/2002 Coll., Code of Administrative Justice.

The Public Defender of Rights as the equality body in the Czech Republic is currently involved rather as a forum for conciliation, although with great moral authority. According to Section 21 of the Public Defender of Rights Act 'The Defender shall contribute to promotion of the right to equal treatment of all persons irrespective of their race or ethnic origin, nationality, sex, age, disability, religion, belief or opinions. To this end, the Defender provides methodological assistance to victims, undertakes research, publishes reports, and issues recommendations.

Currently, the Minister for Human Rights has proposed to extend the powers of the Public Defender of Rights in order to be able to represent victims before the courts.

12. Article 10 – Compensation or reparation

Article 10 of Directive 2010/41 was implemented through the Anti-Discrimination Act, the Civil Procedure Code, and the Civil Code, as discussed in the previous section of this report.

For compensation there is no specific system or prior upper limit. The new Civil Code also provides for a remedy, but this is a general rule. Section 2957 of the Civil Code states: 'the method and amount of adequate compensation must be determined so that the atonement and the circumstances are worthy of special consideration'. Such circumstances also include an 'intentional infliction of harm causing discrimination with regard to the victim's sex, health status, ethnic origin, faith or other similarly compelling reasons'..'

There is no specific system of calculation of compensation for victims of discrimination. In general, the remedy claimed by a victim is usually quite modest, whereas the courts often tend to further decrease the claimed amount.

13. Article 11 – Equality bodies

The equality body is the Public Defender of Rights. Its competences follow the requirements of the Directive. The Public Defender's office promotes, analyses, monitors and supports equal treatment in general; including the focus on self-employed persons. However, there has been no case concerning sex discrimination in relation to self-employed persons before this body.

The Public Defender of Rights carries out its tasks independently. Act No. 349/1999 Coll., on Public Defender of Rights states in Section 5 that the Public Defender is to function independently and impartially.

14. Article 12 – Gender mainstreaming

Unfortunately, no example of the implementation of this Article in practice can be mentioned.

15. Article 13 – Dissemination of information

The Czech Republic disseminates the information on all laws and acts approved by publishing them in the Collection of Laws (Coll.). Furthermore, information is available on official websites, for instance the websites of ministries. However, there have been no specific campaigns that focus on the issue of self-employed persons and gender equality. It is therefore difficult to gauge effectiveness. The dissemination of information through the above mentioned sources of information is as effective as the dissemination of information on any other law or act.

16. Article 14 – Level of protection

The level of protection provided in the Czech Republic is not greater than that required by the Directive. However, the length of general maternity leave, which

also applies also to self-employed persons, is longer. As explained in Section 11 of this report, the maternity benefit is provided for 28 weeks. This period is longer than the period required by Article 8 of Directive 2010/41.

17. Case law

As regards national case law, the case of *Soukupová* can be mentioned, which was also decided by the CJEU. The claimant argued that her right to equal treatment had been violated, as she could not claim certain financial support as self-employed person working in the field of agriculture, because she had already reached the pensionable age. If she were a man, this would not have applied, because the pensionable age cannot be lowered for men when raising two or more children.⁸⁴

There is also another quite famous national case, that of Mr. and Mrs. Whelan, who in 2008 asked for common taxation, which for them was more convenient. The financial office refused this, and they claimed that the husband was discriminated against, because he was working as a self-employed person while staying at home with two children and so his income was not high enough to apply for the convenient common taxation. This case was also rejected by the Constitutional Court.⁸⁵

18. Issues regarding the 'duty holder'

In the view of the expert, in the Czech Republic issues over who the duty holder should be have not made implementation and application of the Directive difficult or resulted in gaps in domestic legislation. There currently is no serious debate on who the duty holder should be. In the context of implementing the Directive, the duty holder is the State. However, no specific party has been indicated as the duty holder in the context of enforcing the Directive.

19. National statistics

According to a study on the self-employed in the Czech Republic 'there was e.g. no reliable data available on the number of self-employed persons.⁸⁶ While self-employed persons account for approximately one-fifth of total employment in the Czech Republic, the sector including its employees represents approximately one quarter. Among economically active women 13.5 % are self-employed, and self-employed men represent 21.2 % of economically active men.⁸⁷

Recently, some more current data have been published on numbers of self-employed women in the Czech Republic, which show that in the last 20 years the number of self-employed women has doubled. According to G. Halířová,⁸⁸ there are almost 290 000 women working as self-employed persons – this represents some 33% of all self-employed persons (data from 2013), of which 41 % are in the 45-59 age group. This means that many women start working as self-employed persons after they have raised their children. Young women often do not see real possibilities to combine self-employment and family life, and are therefore not very strongly represented among young entrepreneurs. Most self-employed women have completed secondary school education (42.1 %), and almost one third of self-employed women have a university degree. For national

⁸⁴ Case C-401/11 *Blanka Soukupová v Ministerstvo zemědělství* [2013] ECR n.y.r.

⁸⁵ Case No. I. ÚS 2476/2013 of 13 September 2013.

⁸⁶ L. Průša, et al. *The Socio-Economic Status of Self-employed Persons in Czech Society* at p. 11.

⁸⁷ Data available at: http://www.czso.cz/csu/2014edicniplan.nsf/kapitola/300002-14-r_2014-14, accessed 20 February 2015.

⁸⁸ G. Halířová 'Počet podnikatelek se za 20 let zdvojnásobil' ('Number of women entrepreneurs doubled in last 20 years') in: *Statistika a my (Statistics and us)* No. 6/2014, available at <http://www.statistikaamy.cz/2014/06/pocet-podnikatelek-se-za-20-let-zdvojnásobil>, accessed 6 July 2014.

statistics, usually a wide definition of entrepreneur is used (from a self-employed hairdresser to a lawyer or medical doctor).

20. Any other issues?

There are no other issues to be mentioned.

DENMARK – Ruth Nielsen

1. Context

In Denmark, gender equality in employment and occupation, including self-employment, is governed by three⁸⁹ basic pieces of legislation:

- (i) the Equal Pay Act (*Ligelønsloven*);⁹⁰
- (ii) the Equal Treatment in Employment and Occupation Act (*Ligebehandlingsloven*);⁹¹ and
- (iii) the Gender Equality Act (*Ligestillingsloven*).⁹²

These three Acts complement each other. There is no specific Act on self-employment in Denmark. Most provisions on 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, are found in the Equal Treatment in Employment and Occupation Act.

Directive 2002/73⁹³ was implemented by Act no. 1385 of 21 December 2005 amending the Equal Treatment in Employment and Occupation Act. The Equal Treatment in Employment and Occupation Act deals with gender equality with regard to access to employment including self-employment, working conditions (including pay), promotion and dismissal. The Equal Treatment in Employment Act and Occupation was not amended again in connection with transposition of the Recast Directive⁹⁴ and the Self-Employment Directive⁹⁵ since those Directives were not interpreted as requiring any substantial changes compared to what was already current Danish law.

2. Transposition of the Directive

Section 5 of the Equal Treatment in Employment and Occupation Act provides that the obligation to observe the principle of equal treatment shall also apply to any person who lays down provisions and makes decisions concerning the access to and exercise of activities on the basis of self-employment. This shall also apply to the establishment, organisation or extension of an enterprise and the taking-up

⁸⁹ In regard to private pensions (which are not relevant in this context) the Equal Treatment in Insurance and Pension Act may be seen as a fourth basic piece of legislation.

⁹⁰ Consolidation Act no. 899 of 5.9.2008 with later amendments, available in Danish at www.retsinfo.dk, accessed 3 February 2015.

⁹¹ Consolidation Act no. 645 of 8.6.2011 with later amendments, available in Danish at www.retsinfo.dk, accessed 3 February 2015.

⁹² Consolidation Act no. 1678 of 19.12.2013, available in Danish at www.retsinfo.dk, accessed 3 February 2015.

⁹³ Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council 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.

⁹⁴ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) OJ L 204 of 26 July 2006, pp. 23-36.

⁹⁵ Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC OJ L 180 of 15 July 2010, pp. 1-6.

or extension of any other form of self-employment, including the financing thereof. Denmark did not extend the time for implementation, as provided for in Article 16(2) of Directive 2010/41.

3. Article 1 – Subject matter

There have been no problems in Denmark with overlap of the coverage of Directive 2010/41 with Directives 2006/54, 79/7,⁹⁶ and 2004/113.⁹⁷

4. Article 2 – Scope

Article 2(a) of Directive 2010/41 does not define what is meant by ‘self-employed workers’ but provides that they are persons who pursue a gainful activity for their own account, under the conditions laid down by national law. In Danish legislation there is no explicit definition of what is meant by self-employment. The agricultural sector is treated in the same way as any other sector of employment or occupation. In Denmark marriage can be entered into by persons of the same sex. The spouse of a self-employed worker can therefore be of the same sex as the self-employed person. Sex discrimination is prohibited, see below.

There is no general definition of when spouses can be regarded as collaborating. For tax purposes there are more specific rules. There is no Danish case law which clarifies whether or not life partners who are not married are covered by the provisions on self-employment.

5. Article 3 – Definitions

Directive 2002/73 – as mentioned above – was implemented by Act no. 1385 of 21 December 2005 amending the Equal Treatment in Employment and Occupation Act. On that occasion the four definitions of discrimination were (correctly) transposed into Danish law. Danish law draws a distinction between direct and indirect discrimination in accordance with the underlying EU rules. The same applies to the distinction between ‘harassment’ and ‘sexual harassment’. These definitions have not caused any difficulties in Denmark.

6. Article 4 – Principle of equal treatment

Article 4(1) of Directive 2010/41 has been correctly transposed into Danish law. The implementation has not been modified as compared to Article 4 of the repealed Directive 86/613/EEC,⁹⁸ and in the view of the author has not added to the protection for self-employed persons in the access to self-employment, as set out in Article 14(1)(a) of Directive 2006/54.

7. Article 5 – Positive action

There is a positive action provision in Section 13 of the Equal Treatment and Occupation Act but so far no positive action measures have been taken to help self-employed persons.

⁹⁶ Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security OJ L 6 of 10 January 1979, pp. 24-25.

⁹⁷ Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services OJ L 373 of 21 December 2004, pp. 37-43.

⁹⁸ 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 of 19 December 1986, pp. 56-58.

8. Article 6 – Establishment of a company

As set out above, Section 5 of the Equal Treatment in Employment and Occupation Act provides that the obligation to observe the principle of equal treatment shall apply to any person who lays down provisions and makes decisions concerning the access to and exercise of activities on the basis of self-employment and that this shall also apply to the establishment, organisation or extension of an enterprise and the taking-up or extension of any other form of self-employment, including the financing thereof.

There are no barriers to the establishment of companies by spouses. No statistics exist on such companies.

9. Article 7 – Social protection

Self-employed men and women and collaborating spouses are covered by Danish social security schemes, e.g. in case of sickness, pregnancy, or unemployment. The Danish unemployment benefit schemes are voluntary both for workers/employees and self-employed/collaborating spouses. Membership in an unemployment benefit scheme and payment of membership fees is required. Occupational injuries insurance is mandatory for workers/employees but voluntary for self-employed and collaborating spouses. Other social security schemes such as sickness benefit and pregnancy and maternity/paternity benefit are mandatory both for workers/employees and for self-employed/collaborating spouses. Section 45 of the Sickness Benefit Act entitles self-employed and collaborating spouses to benefits after two weeks of illness. For workers/employees the employer carries the risk of the two first weeks. The municipality (i.e. the taxpayers) only bears the risk after two weeks of illness. On a voluntary basis and by paying contributions, self-employed/collaborating spouses can insure themselves from the first or third day of illness.

There is no special system for social protection for self-employed workers or collaborating spouses in Denmark. They are covered by the general social protection system including social pensions and healthcare etc. on the same conditions as others. There are no schemes in Denmark which are mandatory for the self-employed worker but voluntary for his/her spouse or life partner, or vice versa.

10. Article 8 – Maternity benefits

Under the Act on leave and benefit in connection with pregnancy and childbirth, self-employed persons and collaborating spouses have the same rights to maternity leave, paternity leave and parental leave and maternity, paternity or parental leave benefit during such leave vis-à-vis the municipality as workers/employees if they meet the occupation requirement provided for in Section 28 of the Act. Since they have no employer they have no rights against employers. Under Section 28 of the Act it is a condition for the right to maternity, paternity or parental leave benefits for self-employed persons that within the last 12 months they have been self-employed for at least half the normal contractual working week for at least 6 months, including the last month prior to the absence.

The maternity benefit meets the requirement of sufficiency in Article 8(3) of Directive 2010/41. The criterion used is subparagraph (a). The allowance is granted on a mandatory basis. There is no choice of systems. There is no provision for services supplying temporary replacements.

11. Article 9 – Defence of rights

In Denmark there is access to judicial proceedings for all persons who consider that 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. Associations, organisations, and other legal entities which have a legitimate interest in ensuring that the ban on discrimination is complied with may engage – in the same way as in regard to employees – either on behalf or in support of the complainant, with his or her approval, in any judicial or administrative proceedings. These rights have also been granted to the equality bodies, see below. In practice they are not used in regard to self-employed persons. The Danish equality body (the Institute of Human Rights) is not a (quasi-) judicial body with the power to adopt (binding or non-binding) decisions. There is a Complaints Board for Equality in Denmark.

12. Article 10 – Compensation or reparation

Section 14 of the Equal Treatment in Employment and Occupation Act provides that persons whose rights are violated by breach of Sections 2-5 may be awarded compensation. Self-employed persons who are discriminated against in violation of Section 5 of the Equal Treatment in Employment and Occupation Act therefore have a right to compensation. Compensation is also available for immaterial damages. The compensation is calculated by discretion of the Court or Complaints Board for Equality. There is no prior upper limit.

13. Article 11 – Equality bodies

Article 11 of Directive 2010/41 on equality bodies is a parallel to the similar provision in Article 20 of the Recast Directive (2006/54/EC) and the similar requirements for gender equality bodies in the Equal Treatment Directive and the Supply of Goods and Services Directive have been transposed fully into Danish law. In practice the Danish Equality Body has not dealt with self-employment.

14. Article 12 – Gender mainstreaming

Section 1(a) of the Danish Equal Treatment in Employment and Occupation Act provides that public authorities in their field of competence shall work for equality and incorporate gender equality in all planning and management in the areas this Act concerns. There are no examples in practice of gender mainstreaming specifically with regard to self-employment.

15. Article 13 – Dissemination of information

There has been no specific dissemination of information on gender equality in regard to self-employment.

16. Article 14 – Level of protection

Self-employed persons and collaborating spouses in Denmark are entitled to more maternity, paternity and parental leave benefits than the minimum required by Directive 2010/41.

17. Case law

Directive 2010/41 on self-employed persons and helping spouses and its predecessor – as set out above – were implemented in Denmark in Article 5 of the Equal Treatment in Employment and Occupation Act which extends the

prohibition against sex discrimination to anyone who makes decisions on access to or conditions of work as a self-employed person or helping spouse. That provision, for example, was used in a Danish case on privately practising doctors which was brought before the CJEU⁹⁹ for the interpretation of the underlying Directives. The Eastern High Court took the view that resolution of the dispute required an interpretation of Article 3(1) of Directive 76/207 and of Article 4 of Directive 86/613. It decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

1. The Court of Justice is asked to clarify how an assessment as to whether there is indirect discrimination on grounds of sex should be undertaken in a case concerning equal treatment under Council Directive 76/207 of 9 February 1976 and Council Directive 86/613 of 11 December 1986.

Since it is supposed that under the settled case-law of the Court of Justice on equal pay a point-for-point comparison should be made, the Court is asked to clarify whether the comparison of occupational conditions to be undertaken in an equal treatment case should be made by way of an overall assessment of all the surrounding factors or by way of a point-for-point comparison as in equal pay cases.

It can be assumed in answering the question that the negotiated reorganisation scheme, assessed as a whole, is gender-neutral in both its effect and purpose.

It can further be assumed that the negotiated reorganisation scheme contains provisions which, viewed in isolation, result in a sex bias, inasmuch as it appears that some provisions predominantly affect female specialised medical practitioners whilst other provisions predominantly affect male specialised medical practitioners.'

The CJEU answered:

1. In order to determine whether indirect discrimination on grounds of sex exists in a case concerning equal treatment such as the present case, Council Directive 76/207/EEC of 9 February 1976 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 and 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 must be interpreted as requiring a separate assessment to be made of each of the key conditions governing the exercise of a professional activity laid down in the contested provisions, in so far as those key elements constitute in themselves specific measures based on their own criteria of application and affecting a significant number of persons belonging to a determined category.
2. Budgetary considerations cannot in themselves justify discrimination on grounds of sex. However, measures intended to ensure sound management of public expenditure on specialised medical care and to guarantee people's access to such care may be justified if they meet a legitimate objective of social policy, are appropriate to attain that objective and are necessary to that end.

⁹⁹ Case C-226/98 *Birgitte Jørgensen v Foreningen af Speciallæger and Sygesikringens Forhandlingsudvalg* [2000] ECR I-2447.

3. The price which a doctor may receive for goodwill when the doctor ceases activity on reaching retirement age cannot be treated as equivalent to the retirement pension of an employed worker.'

18. Issues regarding the 'duty holder'

According to Section 5 of the Equal Treatment in Employment and Occupation Act, the duty holder can be any person.¹⁰⁰ In the view of the author issues over who the duty holder should be do not make implementation or application of Directive 2010/41 difficult in Denmark and have not created gaps in Danish legislation.

19. National statistics

In 2012, the total figure of self-employed persons in Denmark was 17.9 %. This is only a slight increase since 2010, with the figure in both 2010 and 2011 being 17.0 %. Of the total population, 21.6 % of men were self-employed in 2012, compared to 13.1 % of women. In 2010, the figure for men was the same (21.6 %), whereas for women it was lower, at 12.0 %.¹⁰¹

20. Any other issues?

Workers/employees are covered by the Act on reimbursement of pregnancy payments in the private sector (*Barselsudligningsloven*). Under this Act all employers in the private sector who are not under a similar duty by collective agreement must pay contributions to a pregnancy fund. When employers actually pay out pregnancy-related payments to their staff they are reimbursed twice: first by the municipality for an amount equivalent to the benefit the worker/employee would have received from the municipality if she had not been entitled to pay from the employer and second from the pregnancy fund for an amount between the amount of the benefit and the maximum under the Act on reimbursement of pregnancy payments. During the preparation of the Act on reimbursement of pregnancy payments a minority wished it to be extended to also cover self-employed persons but that proposal was not adopted. The Danish Federation of Small and Medium-Sized Enterprises has criticised the fact that self-employed men and women and collaborating spouses do not receive more than the benefit paid by the municipality during their absence on grounds of childbirth and pregnancy and in most cases cannot – not even voluntarily – join a pregnancy fund.

ESTONIA – Anu Laas

1. Context

Market-driven entrepreneurship is about 25 years old in Estonia. The number of enterprises is small and the economy is dominated by micro and small enterprises.¹⁰² National enterprise policies and promotion of entrepreneurship started with a vertical approach to SME support in the 1990s, but has moved to a

¹⁰⁰ Including employers, organisations, and even the Government.

¹⁰¹ See the European Commission report *Employment and Social Developments in Europe 2013*, where Eurostat statistics are mentioned in relation to Denmark on p. 433. Available to download via: <http://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=7684>, accessed 19 November 2014.

¹⁰² Out of 60 000 active enterprises only 150 have more than 250 employees. Source: Economic analysis, available at <https://www.mkm.ee/en/objectives-activities/economic-development-and-entrepreneurship/economic-analysis>, accessed 12 July 2014.

horizontal model, where many ministries had to play an important role.¹⁰³ Estonian enterprise policy has aimed to increase competitiveness, economic growth, employment, and export.¹⁰⁴ The main support agency for economic growth is Enterprise Estonia (EAS), established in 2000. Development of agriculture, forestry and fishery is managed through the Agricultural Registers and Information Board (PRIA). Efforts devoted to encouraging start-ups and entrepreneurship among specific target groups like women have remained modest and project-based at the national level.

There are two main options for one-person companies in Estonia. An entrepreneur can work alone as a self-employed natural person or as the owner of a private limited company (legal person). In Estonian national legislation the term 'self-employed worker' is not used. The terms 'sole proprietor' or 'sole trader' and the acronym 'FIE' are used in Estonia.

2. Transposition of the Directive

In April 2012, the Government initiated a Bill (222 SE) to transpose the requirements of Directive 2010/41 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity. On 14 June 2012, Parliament adopted the Act on Amendments to the Social Tax Act and Other Acts, which entered into force on 1 August 2012. This Act ensures equal treatment of female and male self-employed workers (FIEs) and offers an opportunity for equal social protection of spouses participating in the activities of FIEs' businesses. Equal social protection is granted without any obligation to enter into a formal contract of employment and a self-employed worker is given the right to reduce his or her business income by the amount of social tax paid for the spouse participating in the activities of the enterprise.

The time for implementation of the Directive was not extended.

3. Article 1 – Subject matter

Transposition of the requirements demanded a change in many legal texts and a new legal term 'assisting spouse of the self-employed natural person (FIE)' was introduced.¹⁰⁵ Amendments were made to the Social Tax Act (STA), the Taxation Act (TA), the Health Insurance Act (HIA), the State Pension Insurance Act (SPIA), and the Labour Market Services and Benefits Act (LMSBA). There was no need for substantial amendments to the Gender Equality Act (GEA) and the Equal Treatment Act (ETA), other than stating compliance with the provisions of the new Self-Employment Directive's requirements.

There have been no overlap issues with Directives 2006/54,¹⁰⁶ 79/7,¹⁰⁷ or 2004/113.¹⁰⁸

¹⁰³ A. Kuura *Entrepreneurship Policy in Estonia*, 2006, available at <http://mpra.ub.uni-muenchen.de/676/>, accessed 20 July 2014.

¹⁰⁴ M. Möttus & O. Lukason 'The System of Firm Support Grants in Estonia: Whom Does It Favor?', *Discussions on Estonian economic policy: Theory and practice of economic policy in the European Union*, 2013, No. 1. Available at <http://ssrn.com/abstract=2336011> or <http://dx.doi.org/10.2139/ssrn.2336011>, both accessed 21 July 2014.

¹⁰⁵ In Estonian: 'füüsilisest isikust ettevõtja ettevõtte tegevuses osalev abikaasa'.

¹⁰⁶ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) OJ L 204 of 26 July 2006, pp. 23-36.

¹⁰⁷ Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security OJ L 6 of 10 January 1979, pp. 24-25.

¹⁰⁸ Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services OJ L 373 of 21 December 2004, pp. 37-43.

4. Article 2 – Scope

The Commercial Code (CC) defines ‘an entrepreneur’ as a natural person and/or a company. According to the CC the natural person who offers goods or services in his or her own name and for whom the sale of goods or provision of services is a permanent activity should enter the Central Commercial Register.¹⁰⁹ A sole proprietor (FIE)¹¹⁰ may notify the registrar of the Commercial Register of the suspension of the enterprise’s activities in advance specifying the period of time when the enterprise does not operate.¹¹¹

From 1 August 2012 the FIE can register her/his husband/wife as assisting spouse with the Tax and Customs Board office and the FIE should pay monthly minimum in social taxes for the spouse. Life partners of the FIE cannot be considered as assisting partners in Estonian law. However, the Cohabitation Bill was debated in the Estonian Parliament between April and October 2014.¹¹² It has been pointed out that cohabitants ought to find suitable legal instruments from other fields of law instead of family law.¹¹³

The business name of a sole proprietorship shall contain the given name and surname of the sole proprietor, and shall not contain an appendage or abbreviation referring to a company. An exception is made for creative persons. A self-employed creative person engaged in a liberal profession may use the attribute ‘creative person engaged in a liberal profession’ (freelancer, ‘*vabakutseline loovisik*’ in Estonian) in the business name upon entering into the relevant Commercial Register.¹¹⁴ However, a freelancer could be a sole proprietor (FIE), but there is no obligation to identify her/himself as an entrepreneur. A creative person may be a member of one or several artistic associations. Membership of an artistic association gives social guarantees in the event of irregular income. For the freelancer a monthly minimum social tax is paid by the Association, which is part of a state support scheme for people engaged in art and culture.

A farmer is an entrepreneur or engages in at least one activity which can be classified as production of agricultural products and who uses a farm for such purpose in the capacity of an owner, usufructuary or commercial lessee.

5. Article 3 – Definitions

The definitions of ‘indirect discrimination’, ‘harassment’ and ‘sexual harassment’ have been transposed into Estonian legislation (GEA) directly from EU law. The definition of direct discrimination has an extension in the GEA, which adds: ‘Direct discrimination based on sex also means less favourable treatment of a person in connection with pregnancy and childbirth, parenting, performance of family

¹⁰⁹ In Estonia the professional activity of a notary, bailiff and sworn translator and the creative activity of a creative person is expected to register under the relevant person’s own name.

¹¹⁰ In Estonian a natural person who is involved in a gainful activity for her/his own account is ‘*füüsilisest isikust ettevõtja*’. The acronym FIE is widely used in legal texts in Estonian. It is translated as ‘a sole proprietor’ into English, although the direct translation is ‘a natural person who is an entrepreneur’. FIE is an entrepreneur, but not seen as a legal person in the Commercial Code.

¹¹¹ This is important in connection with tax payment procedures.

¹¹² According to the Cohabitation Bill (650 SE) the couples, regardless of gender, would be able to formalise their relationships without marrying and have their property rights recognised. As it means redefining a marriage and recognition of LGBT rights, heated discussions around the Bill occurred in the Estonian Parliament and in the media. The Bill was renamed the ‘Registered Partnership Act’ after being adopted on 9 October 2014. It will enter into force on 1 January 2016.

¹¹³ A. Olm ‘Non-married Cohabiting Couples and Their Constitutional Right to Family Life’, *Juridica International*, No. 1 (2013), pp. 104-111.

¹¹⁴ According to the Creative Persons and Artistic Associations Act (CPAAA) ‘a creative person is an author or a performer within the meaning of the Copyright Act who acts in the field of architecture, audiovisual arts, design, performing and stage arts, music and sound engineering, literature, visual arts or scenography’. A more convenient term to use is ‘a freelancer’, who is a person who works as a writer, designer, performer etc.

obligations or other circumstances related to gender, as well as gender-based harassment and sexual harassment and less favourable treatment of a person due to rejection of or submission to harassment'.¹¹⁵

A nuance exists in Estonian law between the definitions of sexual harassment and gender-based harassment. 'Sexual harassment' refers to any form of unwanted verbal, non-verbal, or physical conduct or activity of a sexual nature; and 'gender-based harassment' refers to any unwanted conduct or activity related to the sex of a person.

6. Article 4 – Principle of equal treatment

The principle of equal treatment was already a legal requirement before transposition of Directive 2010/41. Article 3(2) of the GEA stipulates that 'equal treatment of men and women' means that there is no discrimination whatsoever based on sex, either directly or indirectly. Article 5(1) of the GEA prohibits direct and indirect discrimination including giving orders. This Article entered into force in October 2009. This extends to self-employment when a self-employed person has employees.

7. Article 5 – Positive action

Ensuring full equality in practice between men and women in working life has never been a popular topic in Estonian national policies and practice. On the contrary, it has been seen as a non-issue. Female entrepreneurship is poorly understood, elaborated and supported on a national and European level due to the idea that an entrepreneur's gender does not affect their entrepreneurial spirit. Analysis of company support grants in 2007-2013 in Estonia show missing activities and funding for female entrepreneurship development.¹¹⁶ Fathers' chances for reconciliation of work and family have been targeted in some projects.

Possibilities for spouses to participate in self-employed wives'/husbands' enterprises have been more frequently discussed in the 1990s and due to unsolved legal problems and insecurity, this way of life has become part of the past. The first two years after the legislative amendment (1 August 2012) have not initiated any changes in entrepreneurial culture.

8. Article 6 – Establishment of a company

Transposition of Article 6 of the Directive did not require any changes in Estonian legislation, because the conditions for the formation of a company between spouses were not more restrictive than the conditions for the formation of a company between unmarried persons. However, spouses were expected to act as separate self-employed persons under their own name or the one self-employed person had to conclude an employment contract with the other (spouse).

Establishment of a company by women or men is easy and could be a quick procedure in Estonia. To start as a sole proprietor (FIE) is easy for everyone: registration can take place from home when using e-services. A self-employed person is not seen as a legal person in Estonia. Therefore, either the self-employed person's spouse should enter the Commercial Register as a natural person under her/his own name, or only one spouse will register herself/himself in the Commercial Register as an FIE and then register her husband or his wife as their spouse and social tax for both persons will then be paid. Registration of an

¹¹⁵ Article 3(1)(3), Gender Equality Act (GEA), entered into force on 23 October 2009.

¹¹⁶ M. Möttus & O. Lukason (2013), 'The System of Firm Support Grants in Estonia: Whom Does It Favor?', *Discussions on Estonian economic policy: Theory and practice of economic policy in the European Union*, 2013, No.1, available at SSRN: <http://ssrn.com/abstract=2336011> or <http://dx.doi.org/10.2139/ssrn.2336011>, accessed 21 July 2014.

assisting spouse of a self-employed person is voluntary, but for registered assisting spouses, social taxes should be paid. The FIE has no management board.

Establishment of a company between spouses or between life partners is possible, but then a legal person should be created and a company form should be chosen.¹¹⁷ From 1 January 2011, a private limited company can be created without making a monetary contribution: 'founders are not required to pay for the share upon the foundation of the private limited company'.¹¹⁸ However, the share capital shall be at least EUR 2500 as a guarantee for obligations.

The modest share of self-employed persons among the working population could be connected with the high risk (responsible with all private assets) of self-employed workers and with changes of the rules on company establishment in 2011.

There is limited freedom to choose a business form for notaries, bailiffs and sworn translators: they are expected to be self-employed and to carry full liability.

9. Article 7 – Social protection

Self-employed persons have the same rights as employees selling their work if they have applied for social security and have paid social taxes. Payment of social taxes is a precondition for obtaining revenues required for pension insurance and state health insurance. The insured person is a permanent resident of the Republic of Estonia or a person living in Estonia by virtue of a temporary residence permit or by the right of permanent residence, who pays social taxes for himself/herself.

The amended STA ensures equal treatment of female and male self-employed workers and grants equal social protection of spouses participating in the activities of their business (Article 6¹).¹¹⁹ Equal social protection is granted without an obligation to enter into a formal contract of employment and a self-employed worker is given the right to reduce his or her business income by the amount of social taxes paid for the spouse participating in the activities of the enterprise. The Explanatory Memorandum has stressed that social protection for the spouse is voluntary.¹²⁰

Estonian health insurance relies on the principle of solidarity. If a self-employed person has paid social taxes (advanced payment), her or his sick leave compensation is dependent on the amount paid. If payment was at the minimum level, the compensation for sick leave is also very low. When a self-employed person needs a doctor and treatment, there is no need for additional payment, in spite of the fact that only a symbolic amount of money was paid to the social fund. Significant differences will appear in the future, when tax policies and public pensions will be contrasted.

To apply for social protection is voluntary for adults in Estonia. Self-employed persons should make mandatory contributions to a funded pension scheme depending on her/his social tax payments. This is mandatory for employers, and self-employed persons are obliged to pay a mandatory minimum amount. These payments could be rather small. Social security contribution rules are tighter for companies; self-employed people have more space for low payments, which is like a voluntary choice for poverty. Self-employed persons could often be a working poor. It is hard to say whether offering such often insecure

¹¹⁷ In Estonia, company forms are listed in Article 2 of the CC as a general partnership, limited partnership, private limited company, public limited company or commercial association. Other companies may also be prescribed by law.

¹¹⁸ Article 140.1 of the Commercial Code (CC), RT I 2010, 77, 589.

¹¹⁹ Social Tax Act (STA), RT I, 10.01.2014, 13.

¹²⁰ *Seletuskiri sotsiaalmaksuseaduse ja sellega seonduvalt teiste seaduste muutmise seaduse eelnõu juurde (Explanatory Memorandum to the Bill on Amendments to the Social Tax Act and Other Acts)*, 2012, www.riigikogu.ee, accessed 12 July 2014.

circumstances to spouses of the working poor would constitute a win-win situation.

10. Article 8 – Maternity benefits

The Directive aims at improving social protection for self-employed women, and for assisting spouses and life partners of the self-employed, particularly in the event of maternity. The Directive requires that women should be granted a maternity allowance and a leave of at least 14 weeks. In Estonia, a woman has the right to 140 calendar days (20 weeks) of pregnancy and maternity leave. However, self-employed female workers and assisting spouses of FIEs can receive maternity benefits, even without pregnancy and maternity leave. The precondition for these benefits is payment of social security contributions in the past year(s). A minimum payment is mandatory. The FIE and registered assisting spouse have health insurance and free-of-charge medical aid (universal right for insured persons), but sick leave benefits are dependent on previous social tax payments.

There are no minimum or maximum rates for pregnancy and maternity benefits, which in practice could cause huge differences in income. Therefore there is no reference to the criteria used for determining sufficiency of benefits, as stipulated in Article 8(3) of the 2010/41 Directive. For self-employed workers and assisting spouses it is also possible that pregnancy and maternity benefits and other health insurance benefits are not available, because they depend on previous earnings. An exception is made for persons who have no working relationship, and for this reason some self-employed persons temporarily stop their activities to be protected by the State during pregnancy. Self-employed persons also receive at least a state minimum of the parental benefit after maternity leave. The Directive 2010/41 requirement (right to maternity benefits) therefore has not been fully implemented. This means that Article 8 of the Preamble may allow too much space for Member States to organise their social protection systems.

Under the Health Insurance Act (HIA), the FIE has the right to receive benefits. Also, the sole proprietor (FIE) has a right to maternity leave, but there is no obligation to use it. The FIE is not expected to work during pregnancy and maternity leave and FIE should notify the Tax Office and during pregnancy, maternity and parental leave the State will pay social taxes and respective benefits.

Parental benefits are universal benefits and not related to employment status. If social taxed have not been paid before childbirth, national minimum parental benefits will be paid.

There is a serious problem with non-existing services supplying temporary replacements for FIEs who are on pregnancy or maternity leave. Some business associations (farmers' association) have created some social services on a project basis. In the case of micro-enterprises such as those of FIEs, there are also many subjective obstacles for creating national social services supplying temporary replacements.

11. Article 9 – Defence of rights

Self-employed persons whose rights have been violated can submit a complaint to the Gender Equality and Equal Treatment Commissioner or to the Chancellor of Justice. They have the right to bring a claim before a court.

The Gender Equality and Equal Treatment Commissioner has promised to take active part in some court cases to set some positive examples for the judiciary.

This intention is planned in the framework of the current project on gender mainstreaming.¹²¹

Article 17 of the ETA is about the Commissioner's opinion. An applicant files an application with the Commissioner, and circumstances about discrimination will be identified. The opinion of the Gender Equality and Equal Treatment Commissioner is considered by the Labour Inspectorate and the court, but is not legally binding. The Commissioner has experience with labour disputes in the Labour Inspectorate and if the Office's capacity will increase, this could constitute important support for the victim. Article 16 of the ETA stipulates the mandate of the Commissioner, listing advice (including advising and assisting persons upon the filing of complaints regarding discrimination), analysis, giving information, making proposals, cooperation, and publication. However, the mandate of the Commissioner does not include the filing of a court case in the Commissioner's own name as a claimant, or acting on behalf of non-specified victims.

The Chancellor of Justice is an independent official who reviews the legislation of general application of the legislative and executive powers and of local governments for conformity with the Constitution of the Republic of Estonia. The Chancellor can start a court case to solve a conflict between a certain law and the Constitution.

12. Article 10 – Compensation or reparation

Article 13 of the GEA and Article 24 of the ETA prescribes victims' rights for compensation and the related procedure. If the rights of a person have been violated due to discrimination, he or she may demand from the person who has violated these rights that the harmful activity should be terminated and that the damage should be compensated on the basis of and pursuant to the procedure provided by law. There is no upper limit to the amount of compensation granted, and according to Articles 13(3) of the GEA and 24(3) of the ETA, a court or labour dispute committee shall consider inter alia the scope, duration, and nature of discrimination. Compensation for immaterial damages are rare and modest. However, Articles 13(2) of the GEA and 24(2) of the ETA allow claims for non-pecuniary damages in a reasonable amount of money.

Civil court procedures are time consuming and expensive. The claimant has to pay first, and may have to wait for the coverage of expenses and payment of the awarded compensation for years.

13. Article 11 – Equality bodies

The Gender Equality and Equal Treatment Commissioner is an independent and impartial expert who acts independently, monitors compliance with the requirements of the GEA and the ETA and performs other functions imposed by law. The Gender Equality and Equal Treatment Commissioner reports on gender gaps, one of which is related to entrepreneurship. There is low representation of women among entrepreneurs and women are poorly involved in political and economic decision making.¹²² The Commissioner has initiated several awareness-raising activities about gender equality promotion among civil servants and employers. Promotion of gender equality is a legal requirement in the GEA.

¹²¹ See <http://www.svv.ee/failid/Promoting%20Gender%20Equality%20through%20Empowerment%20and%20Mainstreaming.pdf>, accessed 21 July 2014.

¹²² *Soolise võrdõiguslikkuse ja võrdse kohtlemise voliniku 2013. aasta tegevuse aruanne (Annual Report 2013 of the Gender Equality and Equal Treatment Commissioner)*, Soolise võrdõiguslikkuse ja võrdse kohtlemise voliniku kantselei (Office of the Gender Equality and Equal Treatment Commissioner), Tallinn, 2014, p. 11 and p. 9, available at <http://www.svv.ee/failid/Voliniku%202013.%20aasta%20tegevuse%20%C3%BClevaade.pdf>, accessed 2 July 2014.

In 2013, the Commissioner received 61 complaints and notification which referred to discrimination on grounds of sex. There were no complaints by sole proprietors (FIEs).

In 2011, the Chancellor of Justice received a complaint in connection with unequal treatment in the taxation of sole proprietors (FIEs) and the taxation of employees (working under an employment contract or some kind of service contract). The Chancellor of Justice issued an opinion regarding self-employed persons, stating that self-employed persons and employees cannot be compared.¹²³ The Chancellor did not find any contradiction between the social tax payments for employees working on a contractual basis (employers should pay social taxes within ten days after payment to employee) and advance payments of social taxes by the self-employed (paid by the self-employed person herself or himself). The Chancellor of Justice pointed out that weighing up helps assess whether less favourable treatment has taken place and persons, entities or situations should be comparable. Equal treatment should be granted only in cases of comparable situations and the equality principle is applicable only for equals.

14. Article 12 – Gender mainstreaming

Female entrepreneurship is lower than male entrepreneurship. However, women's average education is higher in society, e.g. among entrepreneurs. Despite these facts, no attention has been paid to the promotion of women-owned businesses and female entrepreneurship at the national level. The Gender Equality and Equal Treatment Commissioner has started a project on gender mainstreaming, where awareness raising is one of the activities, but the promotion of entrepreneurship and of a supporting legal framework is not targeted.

Survey findings vary and depend on the relevant methodological approach. The Estonian Entrepreneurship survey states that gender has marginal importance in entrepreneurship: '...when different attitudes, human and social capital are taken into account, the gender effect becomes marginal. Men tend to be slightly more entrepreneurial, but this circumstance is not more influential than place of residence, size of family, experience of living abroad, fear of failure smaller than that of women and a higher evaluation of one's own skills. Gender has less effect in the case of new entrepreneurs than with established entrepreneurs.'¹²⁴

There are surveys of entrepreneurship that show a need for promotion of women in business.¹²⁵ The problem of contradictory aims of national enterprise policy (growth, creation of workplaces, export) and women's personal strategies to reconcile work and family (income-generating activities without remarkable business growth and employee recruitment) should be discussed at the national level and at EU level. Gender should be mainstreamed into economic policies and every person as entrepreneur or entrepreneur's assisting spouse should be more highly valued.

¹²³ Chancellor of Justice Position of 2 September 2011, No. 6-1/111225/1104379, '*Seisukoht vastuolu mittetuvastamise kohta*' ('Position about detection of non-contradiction'), available at http://oiguskantsler.ee/sites/default/files/field_document2/6iguskantsleri_seisukoht_vastuolu_puu_dumine_fuusilisest_isikust_ettevotja_sotsiaalmaks.pdf, accessed 1 July 2014.

¹²⁴ Estonian Development Fund (2013), *Global Entrepreneurship Monitor 2012: The Estonian report*, p. 40, available at http://www.arengufond.ee/wp-content/uploads/2013/01/GEM_ENG.pdf, accessed 12 July 2014.

¹²⁵ A. Laas *Naiste ettevõtlusuuringu aruanne, ETNA Mikrokrediit (Women's Entrepreneurship. Survey report)*, 2012, available at <http://www.fem.ee/files/66e9b3c2bbfddc8abcb1c8cf8f944671.pdf>, accessed 12 July 2014; H. Jonson Ahl 'The Construction of Female Entrepreneur as the Other', in: B. Czarniawska & H. Höpfl (eds) *The Production and Maintenance of Inequalities in Work Organizations*, 2002, London: Routledge; S. Gustafsson 'Feminist Neo-classical Economics: Some Examples', in: G. Dijkstra & J. Plantenga (eds), *Gender and Economics: A European Perspective*, 1997, London: Routledge.

15. Article 13 – Dissemination of information

The Gender Equality and Equal Treatment Commissioner has started a project to improve the implementation of the GEA. The project 'Promoting Gender Equality through Empowerment and Mainstreaming' is carried out in 2013-2015 and is funded by the Norway Grants. The aim of the project is to raise awareness among different actors regarding issues of gender equality and prohibition of discrimination as well as structural gender inequalities in society. However, after ten years of equality legislation, promoting gender equality and increasing awareness about gender mainstreaming should be a routine, high-quality civil service funded from the national budget.

16. Article 14 – Level of protection

Transposing the requirements of Directive 2010/41 did not reduce the level of protection against discrimination already offered in Estonian equality legislation. In 2009 the ETA entered into force and the GEA was amended. However, Estonia has not introduced provisions which are more favourable to the protection of the principle of equal treatment between self-employed men and women. There have been disputes on the differences in social tax payment procedures for sole proprietors and companies, but this is not based on entrepreneurs' gender.¹²⁶

17. Case law

There have been no court cases in connection with unfair treatment of self-employed and their assisting spouses.

18. Issues regarding the 'duty holder'

Article 7 of the GEA regulates the employer's duty to give explanations. Within fifteen working days upon receipt of a written application describing the facts related to a possible case of discrimination, a supplier of goods or services is required to provide a written explanation concerning the activities of the supplier to the person who believes that he or she has been discriminated against in relation to the access to or supply of goods or services on the grounds of sex.

Discrimination issues among self-employed workers are not discussed, and may not occur in Estonia. However, according to the data from Statistics Estonia every second self-employed male entrepreneur has employees.

In some areas of business like construction and hairdressers' services, self-employed people could have a main contractor and subcontractor relationship. Of the total number of self-employed workers, there are twice as many men as there are women. At the same time it seems that discrimination in labour relationships is not connected with the employer's sex.

Self-employed persons are often engaged in different areas of activity with the same assets (could be seen as an advantage), but they are also liable with all their assets, while companies' liability is limited to their shares.

The duty holder is also the goods and services provider. Article 7.1 of the GEA stipulates: 'Within fifteen working days upon receipt of a written application describing the facts relating to a possible case of discrimination, a supplier of goods or services is required to provide a written explanation concerning the activities of the supplier to a person who believes that he or she has been discriminated against in relation to the access to or supply of goods or services on the grounds of sex.'¹²⁷

¹²⁶ See: <http://oiguskantsler.ee/et/seisukohad/seisukoht/vastuolu-puudumine-sotsiaalmaksu-avansiline-makse-fie-ks-registreerimise-kuu>, accessed 5 November 2014.

¹²⁷ Gender Equality Act (GEA), entered into force on 23 October 2009.

Educational institutions, state and local government authorities and indirectly legal persons (including associations) who offer e.g. training directed at persons of only one sex, may also constitute duty holders.

19. National statistics

A number of self-employed workers (FIEs) is complicated to identify due to data being different in the Central Commercial Register, in the Estonian Tax and Customs Board, and from Statistics Estonia. The main factors here are inactive entrepreneurs in the Commercial Register, and the FIE as a fluid and flexible form of entrepreneurship. Jürgenson states that the best estimation of entrepreneurship could be made using Labour Force Survey data, where people identify themselves as entrepreneurs.¹²⁸

According to Statistics Estonia, in 2013 there were about 1 million people in the 15-74 age group, of whom 680 000 were economically active.¹²⁹ 621 000 persons were employed and of them 57 000 were entrepreneurs (e.g. self-employed). Of those aged 15-74, 9 % were self-employed (12 % men and 6 % women).¹³⁰ Every second self-employed man had employees and every fourth self-employed woman had employees. This could mean that among 'assisting' spouses of the self-employed workers, there could be more women than men. It is difficult to state the share of women among assisting spouses of self-employed persons, because at the time of writing (July 2014) life partners were not entitled to this status. The share of self-employed workers has been quite stable in the past fifteen years (between 7 and 9 %).

20. Any other issues?

For the self-employed, the high tax wedge is a problem: they have to pay 21 % income tax plus 33 % social taxes, regardless of how much they earn. In addition to the social taxes for each employee, an unemployment insurance payment must be made. Social taxes paid (incl. the advance payment of social taxes) and mandatory contributions to a funded pension scheme (2 %) cannot be deducted from the business income.¹³¹ Social taxes for the FIEs assisting spouse are paid on a voluntary basis and this is seen as eligible business costs. Payments to funded pension schemes for the spouse are not required. A new positive legal development that has been occurring is the attempt to take into account the specificity of freelancers' work, where income may be rare and irregular: the idea is that associations pay these people's monthly minimum social contributions and the State compensates this through the Ministry of Culture as the record-keeping institution.¹³²

¹²⁸ A. Jürgenson *Eestlaste ettevõtlusaktiivsusest (Entrepreneurship in Estonia)*, 2013, available at: <http://mottehommik.praxis.ee/eettevotlusaktiivsusest/>, accessed 4 July 2014.

¹²⁹ Statistics Estonia, *Population aged 15–74 by labour status, 2012–2013 (thousands)* at www.stat.ee, accessed 10 July 2014.

¹³⁰ In 2013, there were 39 000 self-employed men and 18 000 self-employed women. Database of Statistics Estonia, *ML217: Employed Persons by Indicator, Sex, Status in employment and Year*, available at <http://pub.stat.ee/px-web.2001/Dialog/varval.asp?ma=ML217&lang=1>, accessed 10 July 2014.

¹³¹ Estonian Tax and Customs Board, www.emta.ee, accessed 10 July 2014.

¹³² Creative Persons and Artistic Associations Act (CRAAA) was widely amended in 2013, RT I, 10.01.2014, 2.

FINLAND – Kevät Nousiainen

1. Context

The term 'self-employed' has no clear legal meaning in Finnish, and the Directive's definition ('persons pursuing a gainful activity for their own account') is ambiguous in the Finnish legal context. In Finnish, the term self-employed may refer to professional entrepreneurs (*itsenäinen ammatinharjoittaja*), e.g. in legislation on the permits for health professionals who act as private entrepreneurs. It can also be translated literally (*itsensä työllistäjä*), which refers to a person who employs him- or herself but does not employ others. The latter term seems to have no legal significance. The main legal distinction is that between an employee and an entrepreneur. 'Employee' is defined differently in different legal contexts, however. For example, the Employment Contracts Act uses a stricter definition than the Act on Equality.

Approximately one third of Finnish entrepreneurs are women, and policies for encouraging women in entrepreneurship have been in place since the 1990s. The strong gender segregation of the labour market into women's and men's jobs is visible also in entrepreneurship, so that certain types of work (e.g. care work, social and educational work) are done by women regardless of whether it is done under an employment contract or as an entrepreneur. A working group set up by the Ministry of Commerce and Industry was established in 2004 to study the conditions of female entrepreneurs and propose policies to improve them. The working group report published in 2005 stated that the income of female entrepreneurs was lower than that of male entrepreneurs, and also lower than persons employed by small enterprises.¹³³ The report confirms the assumption that many female entrepreneurs have modest enterprises, and many may be considered as self-employed workers. Young women seldom start as entrepreneurs, mainly due to family-related problems. The working group proposed that a replacement service during maternity leave should be established for all entrepreneurs, and that a tax reduction to cover lost income during the sickness of the entrepreneur's children be introduced. Although entrepreneurs are covered by the sickness insurance, the first four days of sickness are not covered, which the working group saw as an encumbrance especially for female entrepreneurs. Pregnancy-related absences from the enterprise should be considered as one absence, as otherwise there will be several non-paid periods during the pregnancy. These proposals have not led to legislative amendments.

Another working group on female entrepreneurship was established by the Ministry of Employment and the Economy in 2008, and it published a final report in 2010. This report also even proposed an amendment of the family-related social welfare measures, but stressed the need of counselling and education.¹³⁴ Women Entrepreneurs state on their website that '(T)he laws affecting businesses are the same for women and men, but the practice is different', and especially refer to problems related to maternity-related disadvantages.¹³⁵

¹³³ *Naisyrittäjyys. Nykytilanne ja toimenpide-ehdotuksia*, available at:

[http://ktm.elinar.fi/ktm_jur/ktmjur.nsf/all/FC484F6F81456453C2256FFC0028F85C/\\$file/jul11elo_2005.pdf](http://ktm.elinar.fi/ktm_jur/ktmjur.nsf/all/FC484F6F81456453C2256FFC0028F85C/$file/jul11elo_2005.pdf), accessed 12 August 2014.

¹³⁴ *MoniNainen ja Uudistuva Naisyrittäjyys – Naisyrittäjyyden edistämistyöryhmän loppuraportti (Final report of the working group for women entrepreneurship, Ministry of Employment and the Economy) 2010*, available at: http://www.tem.fi/files/25810/TEM_4_2010.pdf, accessed 12 August 2014.

¹³⁵ Female entrepreneurs have been organised since 1947 in the organisation The Women Entrepreneurs of Finland, see the homepage of The Women Entrepreneurs of Finland at: <http://www.yrittajanaiset.fi/index.php?k=3979>, accessed 12 August 2014.

2. Transposition of the Directive

The Act on Equality between Women and Men (609/1986) is the main legislative tool that prohibits discrimination. The Act was not amended in order to transpose Directive 2010/41/EU, and it was assumed that Finnish legislation would not need to be amended in other respects either.

3. Article 1 – Subject matter

The provisions on protection against discrimination in employment also cover groups whose working conditions are comparable to those of an employee. When Directive 2002/73/EC was transposed,¹³⁶ the definition of ‘employee’ under Section 3, Subsection 1 of the Act was amended from one based on labour-law criteria to a broader one. The Act’s provisions on employees apply ‘as appropriate, to persons working in other legal relationships that are comparable to an employment relationship’. The preparatory works explain that the definition refers to forms of work that take place under circumstances similar to those under employment contracts, such as independent workers or entrepreneurs, freelancers, persons with their own professional practice, or persons who do care work in families under an assignment agreement, being paid by public funds under social welfare legislation. Independent workers and entrepreneurs are only covered if they sell their own skills, even though they may act as entrepreneurs in the sense meant by unemployment or pension legislation. A person similar to ‘employee’ cannot be one who engages in activities which involve a proper enterprise risk, or employs others. In that sense, some independent workers, as meant by the Directive, may not be similar to employees in the sense of the Finnish Act. On the other hand a person similar to an ‘employee’ does not need to act under the direction and supervision of the employer, or work on the premises of the person who pays for the service, or use equipment provided by that person. The decisive factor is the actual nature of the activity, not its legal form.¹³⁷ The extended definition seems to bring self-employed persons under the scope of protection against discrimination in work-like situations, with remedies and sanctions available. The extended definition does not give protection against discrimination when establishing a business and other business-related situations, however.

4. Article 2 – Scope

The scope of the Directive covers self-employed workers and their assisting spouses who are not business partners or work under an employment contract. The Directive leaves it to national law to define what is meant by the terms. It is not self-evident what the term ‘self-employed’ refers to under Finnish legislation, and especially what the term ‘self-employed’ or ‘assisting spouse’ refers to. A person may establish an enterprise, but the obligation to register only exists if the enterprise has a business location or employs persons other than the spouse or under-age child of the entrepreneur. No documents are needed to establish an enterprise, unless the entrepreneur wishes to run it in a company form, but naturally the entrepreneur is obligated to submit a tax declaration and follow any special regulations of his or her line of activity. Provisions on how the income to be divided between spouses for tax and social welfare purposes is to be calculated

¹³⁶ Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council 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 (Text with EEA relevance) OJ L 269, 5 October 2002 pp. 15-20.

¹³⁷ *Hallituksen esitys Eduskunnalle laiksi naisten ja miesten välisestä tasa-arvosta annetun lain muuttamisesta* (Government Bill on amendment of the Act on Equality between Women and Men), HE 195/2004 vp.

are explained under Sections 9 and 10 of this report, as well as special provisions on agricultural entrepreneurs.

The novelty of the Directive was to include a definition of an assisting spouse or partner who is not under an employment contract or a business partner but still participates in the activities of the self-employed person. The definition implies provisions which distinguish this group of persons and define their rights and duties. Such provisions do not exist in Finnish law, and were not introduced in the context of transposition of the Directive.

The Act on Dividing Life Partner Property at Separation (26/2011) defines life partners as persons who have lived in a shared household for five years or who have a child together, and are not married to someone else (Section 3). The provisions of the Act are not mandatory, and life partners may therefore make agreements which differ from them. The main rule under the Act is that each partner keeps his or her property at separation, but the partner who has worked for the common property or spent money for common purpose or for the other partner's property may request compensation at the division of property. This means that a person who has assisted a self-employed life partner may be entitled to compensation when the couple separates. The stipulations regarding life partner property differ from rules on 'deferred community property' under the Marriage Act, which normally requires an equal sharing of assets between spouses at the dissolution of the marriage. The idea is similar, however, in that each spouse owns his or her property individually while the relationship lasts. Unlike under the Marriage Act, there is no regulation of maintenance responsibilities under the Act on Dividing Life Partner Property. During marriage and life partnership, spouses or life partners are considered as independent economic actors. A measure designed to protect a spouse against loss of income-related social protection is the rule that spouses who run a farm may not freely divide the income between them when contributing to the pension scheme, see Section 9 below.

5. Article 3 – Definitions

Different forms of gender discrimination are defined under Section 7 of the Act on Equality, which follows the wording of the EU gender equality directives, in distinguishing direct and indirect discrimination, harassment on the basis of sex and sexual harassment. Indirect discrimination does not require particular disadvantage, however. It is enough that a person can prove disadvantage on the grounds of gender, in order to establish an assumption of discrimination. Also, the Act on Equality defines differential treatment on the grounds of parenthood or family obligations as indirect gender discrimination. Most harassment cases in Finland proceed legally as harassment as it is defined under the Occupational Safety Act, which also contains a provision on harassment on unspecified grounds, which requires however that the victim of harassment has suffered a health risk.

6. Article 4 – Principle of equal treatment

Section 7 of the Act on Equality applies to all circumstances under the Act, which has a general scope of application, the only exceptions being family and private life, and religious activities. The Act therefore applies to both public and private activities related to entrepreneurship. While the material scope of the prohibition of discrimination is broad, remedies are not always available for the victim of discrimination. By extending the definition of 'employee' to cover similar working circumstances, as explained in Section 3 above, the provisions on compensation for discrimination in working life were extended to independent workers and similarly situated groups of persons. Entry to self-employment may at least partly be protected by the extended definition, but the employment-related protection

does not cover certain aspects of access to self-employment, such as official permits. If authorities conduct discriminatory trade or other official policies, the Act on Equality does not provide a remedy for the victim. Section 6 (2) of the Finnish Constitution (731/1999) prohibits discrimination by an open list of protected grounds, and explicitly mentions gender, which binds authorities. Remedies against discriminatory public authority practices are also available under many public law provisions.

7. Article 5 – Positive action

Under Section 4 of the Act on Equality, authorities have a positive duty to promote gender equality and to create administrative and functional routines that promote gender equality in the preparation of decisions and decision making. Section 6(4) of the Constitution (731/1999) also includes the obligation to promote gender equality, especially in working life. Authorities are therefore obligated to contribute to gender mainstreaming. In practice, gender mainstreaming activities concerning women's entrepreneurship have often been connected to EU funding. An evaluation of Finnish ministries' gender mainstreaming policies was made some years ago. Among the authorities evaluated was the Ministry of Finance, which presented projects run on EU funding as representative for the Ministry's gender mainstreaming activities. In the view of the expert, the projects were not very well coordinated or planned.

Since the 1990s Finnvera, the Finnish state financing company, which provides financing and other assistance for small and medium-sized enterprises, gave loans to female entrepreneurs with a slightly lower (0.5 %) interest than for male entrepreneurs. The practice was discontinued in 2013, however. The slight benefit to women was no longer considered necessary, and there was little opposition to the return to formal equality even from the side of female entrepreneurs. Financing by Finnvera has lost importance during the economic crisis, when rates for loans have generally been low.

8. Article 6 – Establishment of a company

There are no restrictions on spouses to establish an enterprise together, either in a company form or by simply starting one.

9. Article 7 – Social protection

The social protection of entrepreneurs is ordered through mandatory participation in an entrepreneur's or agricultural entrepreneur's pension scheme. The Act on Entrepreneur's Pension (1272/2006) covers entitlement to old-age pension, part-time pension, rehabilitation pension, disability pension and family pension for an entrepreneur's widow or widower. Section 3 of the Act defines as an entrepreneur a person who, without being in private or public employment, is in a gainful occupation. A partner in an open company and other business partners who are personally responsible for the company's obligations are considered as entrepreneurs, and a partner in a leading position in a company with limited liability (*osakeyhtiö*) is considered as an entrepreneur if he or she owns more than 30 % of the shares or votes in the company, or together with family members owns more than 50 % of the shares or votes. Life partners are considered as family members. The pension accrues in a manner similar to employment-based pension schemes on the basis of occupational income, and it also accrues during maternity, paternity and parental leave periods and sickness periods. There is no regulation as to how spouses or life partners who run an enterprise together are to divide the income from the enterprise between themselves for purposes of the entrepreneurs' pension scheme.

The Act on Agricultural Entrepreneur's Pension (1280/2006) provides pensions similar to those in the Entrepreneur's Pension Act, and the Act also applies to persons who rely on stipends.¹³⁸ An agricultural entrepreneur is defined under Section 3 as a person who alone or together with others runs an agricultural business on a minimum of five hectares of agricultural land, is a professional fisherman/fisherwoman without being in employment, runs reindeer husbandry, performs these activities as a family member of the entrepreneur, or is in life partnership with the entrepreneur. The provisions on agricultural enterprises in company form are similar to those for other enterprises. Persons whose income from agriculture is less than EUR 2 752 per year are not obligated to contribute to the pension scheme, but otherwise the pension scheme is mandatory for persons who fall under the definition of agricultural entrepreneur. The annual income from agriculture is calculated per hectare of land or forest (or the number of reindeer for reindeer herders). Unlike in other entrepreneurs' pension schemes, the income cannot be divided freely between the spouses or life partners. Under Section 18 of the Act, the agricultural income is to be shared so that one third is calculated for each spouse, and only one third may be divided between them as they agree upon. For special reasons the income may be divided differently. Between family members other than spouses or life partners, the income is divided according to work input.

Spouses and life partners may, of course, work as employees in an enterprise of the other spouse, in which case they are insured under the mandatory employment-related insurance schemes. If an 'assisting spouse or life partner' has not been insured appropriately under the entrepreneur's pension laws, the residence-based basic universal insurance under the Act on National Pension (568/2007) steps in. The right to the basic insurance is individual, and not dependent on the right of the entrepreneur spouse or life partner.

10. Article 8 – Maternity benefits

Maternity, paternity and parental benefits are paid for all entrepreneurs and their spouses under Chapter 9 of the Sickness Insurance Act (1224/2004). The benefits are calculated on the basis of occupational income during a preceding period, and persons without income are entitled to minimum benefits on the grounds of residence. The income-related daily benefits are calculated on the basis of taxed income so that the daily benefits are 70 % of income up to EUR 32 892, 40 % of income up to EUR 50 606 and 25 % of the annual income above that sum, divided by 300 (Chapter 11, Section 1). The entrepreneur's annual income calculated for the entrepreneur's pension or agricultural entrepreneur's pension is the occupational income under the Act (Chapter 11, Section 2(1)). The benefits are at the same level as sickness-related benefits. There is a replacement service for agricultural entrepreneurs for family-related leave periods, but not for other entrepreneurs. The Act on Agricultural Entrepreneurs' Replacement Services (1231/1996) guarantees replacement services to an agricultural entrepreneur who has been responsible to a considerable extent for regular tasks at the farm. Such replacement services include replacement during vacation each year, during disability and rehabilitation, during maternity, paternity and parental leave, and during a child's illness. After maternity, paternity and parental leave, an agricultural entrepreneur is entitled to 100 days of replacement services for the care of a child under 3.

¹³⁸ Persons who rely upon stipends, or grants, for their income are in a sense self-employed because they are not under an employment contract. Their social security has been arranged so that they are annexed to the agricultural entrepreneurs' pension scheme.

11. Article 9 – Defence of rights

No transposition has been considered necessary. The material scope of the Finnish Act on Equality is broad, as only religious practices and matters concerning family and private life are excluded. The prohibition of discrimination under Section 7 of the Act on Equality therefore covers most circumstances, including those meant in the Directive. The victims of discrimination have justiciable rights under the Act on Equality only when there is a right to compensation, which is available for discrimination in working life (Section 8), in educational institutions (Section 8b), in interest organisations (Section 8c), and in the provision of goods and services (Section 8 e), while the Equality Ombudsman supervises all provisions, may assist victims in court (but not take compensation cases to court in her own name), as well as take cases to the Equality Board, which may prohibit a discriminatory measure. The victim of discrimination has no individual access to the Board. The Social Partners are the only organisations which may take cases to the Board, and associations expressly interested in gender equality have no official role to play. The Finnish court procedure does not recognise *amicus curiae* briefs. In practice, very few cases have been brought to the Equality Board, and the Equality Ombudsman has so far not assisted any victim in a court case.

The Constitution's prohibition of discrimination under Section 6(2) also obligates authorities, and there is a double-track ombudsman system (the Parliamentary Ombudsman and the Chancellor of Justice) to handle complaints by citizens on illegal practices by authorities. The problematic issue is that a victim of alleged discrimination may bring a compensation claim to court only under Sections 8 and 8(a)-(e) of the Act on Equality, which mostly deal with situations that are covered by EU gender equality law, but not all situations under Directive 2010/41/EU. The discrimination referred to in the Directive is therefore not explicitly covered.

There is a possible remedy for circumstances which can be construed as similar to employment relationships (see the explanation in Section 1 above). Discriminatory measures by authorities who deal with different trade issues cannot be brought under the definition, however. An employment-like relationship is also defined in a manner that seems to exclude such entrepreneurship which involves true entrepreneurial risks. Depending on the case, there may be remedies in administrative law to overturn discriminatory decisions and allow compensation, but to point out in which cases exactly this may be so is not possible in this context. The Finnish Penal Code (39/1889), Chapter 11, Section 11 also contains a provision on discrimination by an authority or a service provider which could be used. The Criminal Code requires that the deed is intentional, and there is no division of the burden of proof of the type prescribed by EU law, however.

12. Article 10 – Compensation or reparation

As discussed above, a compensation claim may be brought in cases which fall under the 'similar to employment' requirement. In these cases, under the Act on Equality, Section 11, compensation is possible. The minimum compensation is EUR 3 240, and there is no upper limit except for candidates for a position who would not have been nominated even if there had been no discrimination. The compensation sum may be cut or waived, however, depending on the economic position of the violator, the violator's aim to remove the impact of the violation and other circumstances. The compensation under the Act on Equality is meant mainly as a compensation for the immaterial damage caused by discrimination as a violation of a person's rights. Compensation may also be paid on the basis of other legislation, such as the Employment Contracts Act or Tort Liability Act. Finnish law on compensation for discrimination is problematic in the sense that

the compensation does not merely reflect the victim's loss or damage, but also circumstances of the violator, and the actual reparation depends on laws that present burden of proof requirements that differ from those in the Act on Equality.

13. Article 11 – Equality bodies

The Act on Equality Ombudsman and Equality Board (610/1986) defines the mandate of the equality bodies. The Ombudsman supervises the Act and promotes its aim by initiatives, advice and instructions, provides information about how the Act has been applied, and observes how gender equality is established in various areas of social life, see Section 2 of the Act. Under Section 3, the Equality Ombudsman may assist the victim of alleged discrimination, if s/he considers that the case has considerable importance for the application of the Act on Equality. In principle, the Ombudsman therefore has the mandate to act for self-employed persons as well. In practice, the Ombudsman has never assisted a victim in court, but has taken initiatives and given opinions on matters related to the self-employed. The position of the Ombudsman is not as independent as required by the Directive, as the Ombudsman is part of the Ministry of Social Affairs and Health.

The Equality Board, the equality body discussed above in Section 11 of this report, may prohibit a discriminatory practice, but only in matters brought to the Board by the labour market organisations or by the Equality Ombudsman, and access to the Equality Board is limited to the same situations as the access to compensation claims, see Sections 20 and 21 of the Act on Equality. This means that the Equality Board seems to have no mandate in matters related to Directive 2010/41/EU.

The two equality bodies, the Equality Ombudsman and the Equality Board, have no formal rights to reconcile parties, although the Equality Ombudsman may try to negotiate in cases brought to his or her attention. The Equality Ombudsman may advise an alleged discriminator, but has no power to decide cases. There is a Government Bill¹³⁹ before Parliament at the moment which would unify the Equality Board with a similar equality body under the Non-Discrimination Act, and would allow reconciliation procedures also in gender discrimination cases. It is too early to predict what form the amendment may take, however, and as there is no related Government Bill to amend the Act on Equality, the limited access to the Board would remain.

14. Article 12 – Gender mainstreaming

The authorities' duty to mainstream gender has been discussed under positive action. Mainstreaming projects have been financed especially under the umbrella of the 'Valtava' project¹⁴⁰ related to the EU structural funds. Some of the projects under Valtava have been oriented to women's entrepreneurship.¹⁴¹ In spite of the project's umbrella orientation to mainstreaming, the projects under it seem to be involved with positive measures rather than gender mainstreaming. One of the projects developed is a replacement service for entrepreneurs in one economic area. In 2012 The Women Entrepreneurs in Finland established a national replacement service as a private company.¹⁴²

¹³⁹ HE 19/2014 vp *Hallituksen esitys eduskunnalle yhdenvertaisuuslaiksi ja eräiksi siihen liittyviksi laeiksi (Government Bill for the Non-Discrimination Act and certain related Acts).*

¹⁴⁰ The programme Valtava, run by the Ministry of Employment and the Economy, is a national development programme in the context of the EU Social Fund, for the years 2007-2014. One of the aims of the programme is to develop gender mainstreaming.

¹⁴¹ Four of the projects under Valtava concentrated on female entrepreneurs.

¹⁴² The Women Entrepreneurs in Finland, at: <http://www.yrittajanaiset.fi/uutiset.php?aid=8740>, accessed 23 October 2014.

15. Article 13 – Dissemination of information

There have been no specific efforts to inform the general public, as no measures were considered necessary for the transposition of the Directive.

16. Article 14 – Level of protection

In certain respects, the measures for promoting gender equality for independent workers exceed what is required by the Directive. For example, there is a replacement service during family-related leaves for agricultural entrepreneurs, not required by EU law.

17. Case law

The expert has found no case law.

19. Issues regarding the ‘duty holder’

The difficulties caused by the ‘in-between’ position of self-employed persons have been discussed above. The protection of employees has been extended to the self-employed in certain contexts, but as to the authorities’ duty of non-discrimination and the positive duty to promote equality, no remedies are available to the victim of discrimination under the Act on Equality (while there may be remedies under administrative law). If the main emphasis of the Directive is on social welfare measures, the ‘duty holder’ is also ambiguous. The Finnish social insurance system does provide for a mandatory insurance scheme for all entrepreneurs, but if the insured entrepreneur systematically underestimates his or her annual income, or an ‘assisting spouse’ is not insured properly, the benefits of the relevant person may remain very low – in practice at the level of the universal ‘national pension’. Because female entrepreneurs’ income is lower than that of male entrepreneurs or employed women, their benefits also remain at a lower level. In that sense, self-employed women carry an entrepreneurial risk which seems to bring low winnings.

20. National statistics

It is difficult to find exact figures on how many female entrepreneurs could be counted as self-employed workers.¹⁴³ Most Finnish statistics do not distinguish between the ‘self-employed’ and other entrepreneurs. Enterprises run by women are often small and seldom established as companies. A study on women’s enterprises established in 1996-1999 showed that in 64 % of cases, the female entrepreneur had no employees. Of women’s enterprises started in that period, 63 % produced services, especially social and health, business and various personal services, such as hair dressing.¹⁴⁴ According to information by the Women Entrepreneurs of Finland,¹⁴⁵ 40 % of female entrepreneurs have no employees, but another study shows that female entrepreneurs mostly work

¹⁴³ Self-employed workers for most purposes are considered as entrepreneurs, and many statistics do not distinguish between entrepreneurs who employ others and those who do not, but the majority of all entrepreneurs work alone, according to the Federation of Finnish Entrepreneurs, <http://www.yrittajat.fi/fi-FI/suomenyrittajat/tavoiteohjelmat/yksinyrittajaohjelma-2011-2015/>, accessed 22 October 2014. An entrepreneur may be established as a company, but this is not necessary under Finnish law. Under the Act on Equality between Women and Men, the protection of employees has been extended to entrepreneurs and self-employed persons who work under circumstances comparable to employees, see Section 3 above.

¹⁴⁴ P. Lith *Ovatko naisyrittäjät eri maata (Are women entrepreneurs different?)* Statistics Finland 2005, available at: http://www.stat.fi/tup/tietoaika/tilaajat/ta_02_05_naisyrittajat.html, accessed 12 August 2014.

¹⁴⁵ *The Women Entrepreneurs of Finland*, available at: <http://www.yrittajanaiset.fi/index.php?k=3979>, accessed 12 August 2014.

alone, as only one fourth of female entrepreneurs had employees (in contrast, 40 % of male entrepreneurs had employees). Being an entrepreneur continues to be twice as common among men as among women.¹⁴⁶ The number of female entrepreneurs in agriculture has decreased, and now 2 % of all female entrepreneurs work in agriculture, in contrast to 45 % in 1995. Traditionally, Finnish farms are run by families, but the number of farms has been decreasing fast. Medical doctors and lawyers may also work as independent entrepreneurs. The gender segregation of the Finnish labour market is evident also in the segregation of entrepreneurship. Education is gender-segregated, and women study health and social sciences, pedagogy, and human sciences, and start enterprises that reflect their education.¹⁴⁷ Female entrepreneurs show more social mobility than male entrepreneurs do, and this applies to both agricultural entrepreneurs, who generally show less mobility than other entrepreneurs, and other types of enterprises. Only one fourth of female entrepreneurs continued as entrepreneurs 25 years later. Mostly they moved to blue-collar or lower white-collar jobs.¹⁴⁸

21. Any other issues?

If the emphasis of Directive 2010/41/EU is on improving the social welfare situation of self-employed persons, then the position of the Finnish Government in deciding that no transposition of the Directive was needed is understandable, as Finnish social welfare legislation already provided the level required by the Directive. The Directive's requirements on justiciable rights and compensation are more problematic, as Finnish legislation is based mainly on public law institutions (the Parliamentary Ombudsman, the Chancellor of Justice) to protect citizens against misconduct by authorities.

FRANCE – Sylvaine Laulom

1. Context

According to Eurostat,¹⁴⁹ in 2012 self-employed persons in France represented 9.6 % of the working population, and women were under-represented in this category (6.4 % women against 12.5 % men). For example, only 3 out of 10 enterprises were established by women, and this rate had been stable for more than 10 years without improvement. Women have more difficulties in accessing credit or to reconcile work and family life.¹⁵⁰ The gender pay gap is even more significant among self-employed persons (more than 27 %).¹⁵¹

¹⁴⁶ *Yrittäjyyskatsaus 2012 (Entrepreneurship review 2012)*. Ministry of Employment and the Economy, Publication 46/2012, pp. 129-134.

¹⁴⁷ A. Kovalainen 'Yrittäjyyden sukupuolen mukaiset jaot 2000-luvulla' ('The gendered differentiation of entrepreneurship in the 2000s') *Tilastollinen aikakauslehti* 4 (2004), 25.

¹⁴⁸ P. Myrskylä *Naisten ja miesten sosiaalinen liikkuvuus (Social mobility of women and men)*, Statistics Finland, Hyvinvointikatsaus 3/2009, available at: http://www.tilastokeskus.fi/artikkelit/2009/art_2009-09-30_004.html?s=5, accessed 12 August 2014.

¹⁴⁹ Data of Eurostat on (female and male) self-employment as a percentage of total employment can be found in the statistical annex of: *Employment and Social Developments in Europe in 2013*, available at: <http://ec.europa.eu/social/main.jsp?langId=en&catId=113&newsId=2023&furtherNews=yes>, accessed 18 August 2014.

¹⁵⁰ Ministère du droit des femmes *Vers l'égalité réelle entre les femmes et les hommes, chiffres clés*, 2014, <http://femmes.gouv.fr/publications/egalite-entre-les-femmes-et-les-hommes/vers-legalite-reelle-entre-les-femmes-et-les-hommes-chiffres-cles-edition-2014/>, accessed 18 August 2014.

¹⁵¹ 'Les revenus d'activité des indépendants du commerce, de l'industrie, du BTP et des services en 2008' *Insee Première*, no. 1362, July 2011. *Regards sur la parité*, Insee Références, 2012, <http://www.insee.fr/fr/publications-et-services/sommaire.asp?codesage=FHPARIT12>, accessed 18 August 2014.

2. Transposition of the Directive

France has requested an additional period as mentioned in Article 16(2) of the Directive to comply with Article 7. The transposition was made by Decree No. 2014-20 of 9 January 2014. It is not clear why France needed this additional period. Except from this Decree, France has not provided any explicit instruments formally implementing the Directive as it seems that France considered its national law already compliant with the Directive.

3. Article 1 – Subject matter

The 2008 Act transposes both Directive 2006/54/EC and Directive 2004/113.¹⁵² It states in its Article 5 that the law applies to every public and private person including those carrying out an independent activity. It seems that this provision could also be analysed as implementing Directive 2010/41. This could explain the absence of any formal transposition of this Directive. Therefore, it is difficult to conclude whether there is a problem of overlap between the Directives.

4. Article 2 – Scope

There has been no explicit transposition of Article 2(a) in France. There is no legal definition of self-employed person or self-employment in France. As many labour laws, the French Labour Law is built around the 'binary divide' between employment and self-employment, between subordinated labour and independent or autonomous work and a self-employed person can be defined as a person who is not a worker. The French Labour Code does not contain any definition of what is an employee or a definition of subordinate employment. However, criteria have been set by the *Cour de Cassation*, the French Supreme Court. An employment contract exists when a person undertakes to work in the name and under the supervision of another in return for remuneration. Three elements, required to prove the existence of an employment contract, emerge from this definition: the performance of an activity, in return for remuneration and the existence of a hierarchical relationship between the parties (a link of legal subordination). This last criterion is the most important one. According to case law, the legal superior-subordinate relationship means that a job is performed under the authority of an employer, who has the power to give orders and instructions, supervise the performance of said job and apply sanctions in case of failure or breaches by their subordinate. A self-employed person can therefore be defined as a person who provides services to another party in an independent and non-subordinate manner.

As regards the application of the principle of non-discrimination, the absence of definition of self-employed does not seem to be a problem and it seems that there is no risk that people like 'small entrepreneurs' or 'business persons' will not be covered. Indeed, the Directive 2004/113/EC was implemented in France by the 2008 Act. This Act provides a general prohibition of direct or indirect discrimination based on sex in the access to and supply of goods and services. Article 5 of the Act simply states that the Act applies to every private and public entity, including those carrying out an independent activity. This Article therefore makes no distinction between self-employed persons and workers.

For social protection issues, life partners are recognised (see below).

¹⁵² *Loi no. 2008-496 du 27 mai 2008 portant diverses dispositions d'adaptation au droit communautaire dans le domaine de la lutte contre les discriminations.*

5. Article 3 – Definitions

The four definitions of Article 3 of the Directive can be found in Articles 1 and 2 of the 2008 Act. These two Articles define direct and indirect discrimination, harassment and sexual harassment in relation to sex but also in relation to the other types of discrimination prohibited by Directive 2000/78 and Directive 2000/43. The French definitions appear to be very similar to the ones given in Directive 2010/41. The distinction between harassment and sexual harassment has not generated any case law, which does not mean that the distinction could not cause any difficulties in the future.

6. Article 4 – Principle of equal treatment

France has not adopted a specific provision to implement Article 4 of the Directive, since Article 5 of the 2008 Act already implemented it. This Article states that the main provisions of the Act apply to self-employed workers.¹⁵³

In addition, the Penal Code prohibits discrimination in very general terms. Article 225-1 states the following:

‘Discrimination comprises any distinction applied between natural persons by reason of their origin, sex, family situation, pregnancy, physical appearance or patronymic, state of health, handicap, genetic characteristics, sexual morals or orientation, age, political opinions, union activities, or their membership or non-membership, true or supposed, of a given ethnic group, nation, race or religion.’

‘Discrimination also comprises any distinction applied between legal persons by reason of the origin, sex, family situation, physical appearance or patronymic, state of health, handicap, genetic characteristics, sexual morals or orientation, age, political opinions, union activities, membership or non-membership, true or supposed, of a given ethnic group, nation, race or religion of one or more members of these legal persons.’

Article 225-2 adds:

‘Discrimination defined by Article 225-1, committed against a natural or legal person, is punished by three years’ imprisonment and a fine of EUR 45 000 where it consists:

1. of the refusal to supply goods or services;
2. of obstructing the normal exercise of any given economic activity;
3. of the refusal to hire, to sanction or to dismiss a person;
4. of subjecting the supply of goods or services to a condition based on one of the factors referred to under Article 225-1;
5. of subjecting an offer of employment, an application for a course or a training period to a condition based on one of the factors referred to under article 225-1;
6. of refusing to accept a person onto one of the courses referred to under 2. of Article L412-8 of the Social Security Code.’

Here also, the protection against discrimination is largely defined and can include self-employment. As there has been no formal transposition of Article 4 of Directive 2010/41, because the implementing French provisions of Article 4 were in force even before the adoption of the Directive, it is not possible to say that the

¹⁵³ *Loi no. 2008-496 du 27 mai 2008 portant diverses dispositions d’adaptation au droit communautaire dans le domaine de la lutte contre les discriminations.*

implementation of the Directive has added to the protection for self-employed persons who were already protected against discrimination based on sex.

7. Article 5 – Positive action

Even if they are not specifically related to Directive 2010/41, some policies regarding equal treatment for self-employed persons exist in France. For example, a fund for women's initiatives was created in 1989 to support the setting up of businesses by women. Today, this fund can guarantee women loans for the creation or the development of their business.

8. Article 6 – Establishment of a company

It is perfectly possible for spouses and for life partners to form a company. The conditions under which such a company is formed are the same for both married and unmarried couples.

According to a report published in 2008 by the Agency for Enterprise Creation (*Agence pour la creation d'entreprise*), 7.5 % of new businesses had been created by a couple and one of the conclusions of the report was that regarding the creation of businesses, 5 % are a 'couple's affair'.¹⁵⁴

9. Article 7 – Social protection

France has social protection for the self-employed. This social protection is subject to separate regulations (even if they are very similar). Farmers come under the agricultural system. Craftsmen, retailers and manufacturers fall within the scope of the Social protection Scheme for the Self-employed (RSI), while practitioners of the liberal professions are covered by separate schemes. However, liberal professionals also come under the RSI insofar as sickness insurance is concerned. The schemes are funded by social contributions and they cover benefits and pensions related to sickness, maternity, invalidity, survivors, accidents at work and occupational diseases. The schemes are mandatory and most of them are complemented by compulsory supplementary systems governed by the same funds.

Spouses and now also life partners (registered by a *Pacte Civil de Solidarité*: PACS, the contract of civil union) can choose between three different statuses: dependent worker, partner or collaborating spouse. Since 2005, there is an obligation to choose one of these three options. Spouses or life partners who have chosen the status of collaborating spouse will obligatorily benefit from social protection: old age, maternity and invalidity. Since 1 January 2014, the right to cash sickness benefits has been improved in order to implement Directive 2010/41. Collaborating spouses and life partners will now contribute and have the right to cash sickness benefits in case of sickness, which was not the case before. However, this provision does not seem to apply to spouses and life partners in liberal professions.

Partners who are not married or registered by a PACS, if they participate in the activity of the business, can voluntarily benefit from social protection.

10. Article 8 – Maternity benefits

There are some small differences between the schemes and as a consequence the whole system is complex.

For farmers, benefits for replacement may be paid to compensate the fees paid to ensure the replacement of the woman farmer in farm work (Articles L732-

¹⁵⁴ APCE *Entreprendre en couples* 2008, <http://www.apce.com/cid78456/entreprendre-en-couple-septembre-2008.html?cid=78456>, accessed 18 August 2014.

10 et seq. of the Rural Code). The duration of payment of the benefits for replacement is the same as the period of maternity leave for employees (16 weeks).

For craft, commerce and manufacturing and liberal professions, self-employed women have a right to a lump-sum payment for resting, which aims at compensating the decrease of their activity.¹⁵⁵ The first half of this allowance is paid at the end of the 7th month of the pregnancy and the second half after the birth. Its amount for 2014 is EUR 3 129. Furthermore, self-employed women have a right to daily maternity benefits for a period of 44 days, a period which can be extended up to two times, for 15 days each. The maximum period for these benefits is therefore 74 days, which is less than the 14 weeks provided by Directive 2010/41/EU. The amount of these benefits for 2014 is EUR 2 262.92 for 44 days, EUR 3034.37 for 59 days and EUR 3 805.82 for 74 days.

Spouses and life partners also have a right to a lump-sum payment for resting which aims at compensating the decrease of their activity and the duration of payment of these benefits is 16 weeks.

Some specific rules can also apply to various categories of self-employed workers. Solicitors and barristers have concluded an agreement in order to extend the right to maternity leave to 16 weeks (against 12 before). This extension of this period is a result of Directive 2010/41.

Even if the French maternity allowances meet the requirement of sufficiency of the Directive (as it is at least equivalent to the allowance which the person concerned would receive in the event of a break in her activities or grounds connected with her state of health), in practice, the main problem for self-employed women is the fact that the benefits are not very high and only paid during a short period. Therefore, many self-employed women do not interrupt their activities for pregnancy or maternity-related reasons (the interruption is not mandatory) or do so only for a very short period, even if temporary replacements are available. For example if women are craftsmen, retailers or manufacturers, 90 % of the cost of hiring a person to replace the pregnant woman will be covered.

11. Article 9 - Defence of rights

According to Article 2-6 of the Code of Criminal Procedure (the Criminal Code), any association lawfully registered for at least five years on the date of offence proposing in its constitution to combat discrimination based on gender or sexual morals or sexual orientation may exercise the rights granted to the civil party in respect of discrimination under Articles 225-2 and 432-7 of the Criminal Code, where such offences are committed because of gender, family situation or sexual morals of the victim.

In respect of violations of the provisions of sexual harassment, the association's action will only be admissible if it proves that it has obtained the written consent of the person concerned, or, if the latter is a minor, that it has heard his opinion, that of the holder of parental authority or of the legal representative.

Regarding civil actions, Article 1263-1 of the Code of Civil Procedure provides that any association lawfully registered for at least five years proposing in its constitution to combat discrimination has a right of action for victims of discrimination in violation of the 2008 Act.¹⁵⁶ The association must have obtained the written consent of the person concerned and must have informed the victim on the content of the judicial action.

Various rights have been granted to the Defender of Rights to fight against discrimination. Claims may be lodged with the Defender by any person who considers him or herself a victim of discrimination. All claims lodged by letter will

¹⁵⁵ Articles L. 611-1 et seq.; L. 615-19 et seq.; and D. 615-4 et seq. of the Social Security Code.

¹⁵⁶ *Loi n°2008-496 du 27 mai 2008 portant diverses dispositions d'adaptation au droit communautaire dans le domaine de la lutte contre les discriminations.*

receive a written response. The Defender may also, at its own initiative, investigate cases of direct or indirect discrimination brought to its knowledge, provided that the victim, where identified, has been informed to this effect and has no objection. The Defender investigates the claims it receives using the investigation powers at its disposal. It may ask any individual, legal entity or public body for explanation, information or documents. It may also conduct on-site inspections and take evidence from any person whose testimony it deems necessary or helpful. The Defender helps victims of discrimination compile their case file and informs them of the appropriate procedure for their case. At the request of the parties, or at their own initiative, civil, criminal and administrative courts may request the Defender to present observations on the instances of discrimination submitted to them. The Defender of Rights may itself ask to submit evidence to such courts; in such circumstances the right to submit evidence is automatic. It also has the power to propose a conciliation procedure and to adopt non-binding decisions.

12. Article 10 - Compensation or reparation

In application of the general principles of civil law, the sanction is compensation that should entirely compensate the entire damage, including immaterial damages. There is no upper limit. Penal sanctions are also possible.

13. Article 11 – Equality bodies

The competences of the Defender of Rights are largely defined and it effectively has the competence to promote, analyse, monitor and support equal treatment in all fields, including self-employed persons. The Defender of Rights also carries out communication and information campaigns designed to promote equality. It encourages the implementation of training programmes. It provides independent assistance to victims of discrimination, and conducts independent surveys and reports as required by Directive 2010/41.¹⁵⁷ This means that there was no need to extend the competence of the Defender of Rights to implement Directive 2010/41.

14. Article 12 – Gender mainstreaming

Since 2012 and the election of a new President in France, the Government has applied a new policy on gender equality. One of the measures adopted is a systematic gender assessment of all legislative proposals.¹⁵⁸ It is difficult to evaluate the impact of this policy but it shows the willingness of the Government to promote gender equality.

15. Article 13 – Dissemination of information

Article 13 on dissemination of information has not been implemented as such. However, information on discrimination can be found for example on the website of the Defender of Rights. However, there is no specific information specifically regarding self-employed persons and spouses or life partners of self-employed persons. The expert therefore does not believe that this Article has been correctly transposed.

¹⁵⁷ See the website of the Defender of Rights: <http://www.defenseurdesdroits.fr>, accessed 28 October 2014.

¹⁵⁸ *Circulaire du 23 août 2012 relative à la prise en compte dans la préparation des textes législatifs et réglementaires de leur impact en termes d'égalité entre les femmes et les hommes, JORF n° 0196 du 24 août 2012, p. 13760.*

16. Article 14 – Level of protection

Regarding for example the social protection of assisting spouses or life partners, the expert believes that the level of protection is generally higher than the one provided by the Directive. However, the social protection system in general is complex, because different provisions apply to different categories of independent workers. The lack of explicit implementation of the Directive (even if the French system seems to conform to the Directive) could have some consequences regarding the awareness of self-employed persons of their rights.

17. Case law

The expert is not aware of any case law based on this Directive or on Directive 86/613.

18. Issues regarding the ‘duty holder’

The question regarding the application of the Directive seems to be a problem of information rather than a problem of identifying the duty holder.

19. National statistics

Some statistics are available (see Section 1 above). The definition generally used is that self-employed persons work without any contract of employment, and without any form of subordination.¹⁵⁹

20. Any other issues

There are no other issues to be mentioned.

GERMANY – Ulrike Lembke

1. Context

Germany shows a relatively low percentage (11 %) of self-employed persons in comparison to other European countries. However, the total number of self-employed persons has been increasing over the last twenty years, especially from 2001 to 2005. This rise is almost exclusively the result of an increase of self-employment without employees (solo entrepreneurs) and was strongly influenced by public procurement of business start-ups on the part of the unemployed as well as amendments to the previously very restrictive trade and craft law.¹⁶⁰ Another important factor in the increase of the number of self-employed persons is the existence of female start-ups.¹⁶¹ Today, women account for 32 % of the self-employed workforce: 24 % of the self-employed with employees and 37 % of the solo entrepreneurs are female.¹⁶²

However, only 8 % of all working women are self-employed. Women face several problems when deciding for self-employment, especially family and care duties, lack of financial capital, gender stereotypes, low profits, and lack of

¹⁵⁹ *Regards sur la parité* Insee Références, 2012, <http://www.insee.fr/fr/publications-et-services/sommaire.asp?codesage=FHPARIT12>, accessed 18 August 2014.

¹⁶⁰ K. Brenke ‘Allein tätige Selbständige: starkes Beschäftigungswachstum, oft nur geringe Einkommen’ *DIW Wochenbericht Nr. 7/2013*.

¹⁶¹ C.-M. Mai & K. Marder-Puch ‘Selbständigkeit in Deutschland’ *Wirtschaft und Statistik*, Federal Statistics Agency, Wiesbaden 2013.

¹⁶² C.-M. Mai & K. Marder-Puch ‘Selbständigkeit in Deutschland’ *Wirtschaft und Statistik* p. 492, Federal Statistics Agency, Wiesbaden 2013.

mental support by family members.¹⁶³ Many female start-ups only provide for subsidiary or additional income.¹⁶⁴ Due to family and care duties, half of all female solo entrepreneurs work part-time.¹⁶⁵ Many female start-ups are established as means of return to work after periods of childcare.¹⁶⁶ The better reconciliation of working and family life by part-time work and mainly self-determined flexible working times is a strong incentive for women to work self-employed.¹⁶⁷ However, part-time solo self-employment harbours considerable risks: The average earnings of solo entrepreneurs are less than those of employed people, and 35 % of all solo entrepreneurs work in the low-pay sector with incomes of less than EUR 1 100 per month.¹⁶⁸ 3 % of all self-employed persons receive social assistance although working; and women are particularly strongly affected.¹⁶⁹

Working part time is not the only reason for (mostly highly educated¹⁷⁰) self-employed women having low incomes. Women also establish themselves as self-employed person in branches with lower incomes, especially in the field of health, care, education and other personal services.¹⁷¹ These choices are based on a generally gender-segregated labour market in Germany, gender stereotypes, personal qualifications, flexible working times, and, not least, on the fact that start-ups in these fields do not need significant seed capital. Many women have no private savings and no access to bank loans because banks are not interested in microcredit activities, especially without adequate security.¹⁷²

Migrant women face special obstacles and intersectional discrimination.¹⁷³ All in all, the question remains open whether self-employment grants more independence to women and allows better reconciliation of work and family life or whether it turns out to be just another poverty trap. Most recently, the Federal Government has started an initiative for empowerment and support of female business start-ups and entrepreneurs.¹⁷⁴

2. Transposition of the Directive

There is no specific legislation transposing Directive 2010/41/EU in Germany. The European Anti-Discrimination Directives were transposed by the 2006 General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz, AGG*) and was not intended to implement the provisions of Directive 86/613/EEC.¹⁷⁵ The Act was not

¹⁶³ C. Boll et al. *Female Entrepreneurship—Evidence from Germany and the Baltic Sea Region* p. 90 et seq., Baltic Sea Academy, Hamburg 2014.

¹⁶⁴ Agentur für Gleichstellung im ESF *Gender-Aspekte in der Existenzgründung* p. 7 et seq., Berlin 2010.

¹⁶⁵ C.-M. Mai & K. Marder-Puch 'Selbständigkeit in Deutschland' *Wirtschaft und Statistik* p. 494, Federal Statistics Agency, Wiesbaden 2013.

¹⁶⁶ Agentur für Gleichstellung im ESF *Gender-Aspekte in der Existenzgründung* pp. 12-13, Berlin 2010.

¹⁶⁷ Federal Ministry of Economics *GründerZeiten 03.Existenzgründungen durch Frauen* p. 2, Berlin 2013.

¹⁶⁸ K. Brenke 'Allein tätige Selbständige: starkes Beschäftigungswachstum, oft nur geringe Einkommen' *DIW Wochenbericht Nr. 7/2013*.

¹⁶⁹ E. May-Strobl et al. *Selbständige in der Grundsicherung* Institut für Mittelstandsforschung, Bonn 2011.

¹⁷⁰ C.-M. Mai & K. Marder-Puch 'Selbständigkeit in Deutschland' *Wirtschaft und Statistik* p. 493, Federal Statistics Agency, Wiesbaden 2013.

¹⁷¹ Federal Ministry of Economics *Gründer Zeiten 03.Existenzgründungen durch Frauen* p. 2, Berlin 2013.

¹⁷² Agentur für Gleichstellung im ESF *Gender-Aspekte in der Existenzgründung* pp. 18-19, Berlin 2010.

¹⁷³ Agentur für Gleichstellung im ESF *Gender-Aspekte in der Existenzgründung* p. 22, Berlin 2010.

¹⁷⁴ See <http://www.bmwi.de/BMWi/Redaktion/PDF/F/frauen-gruenden-gruenderinnen-und-unternehmerinnen-in-deutschland-staerken,property=pdf,bereich=bmwi2012,sprache=de,rwb=true.pdf>, accessed 16 August 2014.

¹⁷⁵ 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

amended with the intention to transpose Directive 2010/41. On the contrary, the Federal Government and the Federal Council were averse to the contents of the Directive and questioned its need as well as the competence of the European Union concerning social security law.¹⁷⁶ In 2012, the German Government stated that German legislation was already in accordance with the requirements of the Directive and therefore rejected any further request for transposition.¹⁷⁷

3. Article 1 – Subject matter

Self-employed persons are covered by Section 6(3) of the General Equal Treatment Act which transposes Article 3(1)(a) of Directives 2000/78¹⁷⁸ and 2002/73.¹⁷⁹ Consequently, the prohibition of gender-based discrimination of self-employed persons is restricted to access to self-employed activities and promotion. There has been some debate on whether this restriction is in compliance with European law, especially the decisions of the CJEU such as *Joergensen*, *Allonby* or *Danosa*.¹⁸⁰ Until now, however, German courts have not applied further regulations of the General Equal Treatment Act to questions of self-employment.¹⁸¹

Some authors have suggested that self-employed persons may invoke Section 19 of the General Equal Treatment Act against discrimination concerning working conditions or the discriminatory termination of self-employment contracts.¹⁸² This Section transposes the requirements of Directive 2004/113/EC and covers the protection against discrimination in the area of civil law. However, this protection is restricted to so-called 'mass contracts' irrespective of the identity of the other contracting party which is not the rule for the contracts of self-employed persons.¹⁸³ Other authors generally contradict the applicability of Section 19 by pointing out that its scope covers persons receiving goods and services, not providing them.¹⁸⁴

An overlap of coverage is most plausible in the field of social protection. There is no specific legislation transposing Directive 79/7¹⁸⁵ or its successors in

motherhood OJ L 359 of 19 December 1986, pp. 56-58.

¹⁷⁶ See Parliamentary Documents 16/13830 of 20 July 2009, p. 149, <http://dipbt.bundestag.de/dip21/btd/16/138/1613830.pdf>.

¹⁷⁷ Answer of Parliamentary State Secretary H. Kues to a request by the Social Democratic Party on 11 May 2012, Parliamentary Documents 17/9615, p. 53, <http://dipbt.bundestag.de/dip21/btd/17/096/1709615.pdf>.

¹⁷⁸ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2 December 2000 pp. 16-22.

¹⁷⁹ Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council 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 OJ L 269 of 5 October 2002, pp. 15-20.

¹⁸⁰ Cases C-226/98 *Brigitte Joergensen v Foreningena Speciallaeger and Sygesikringens Forhandlingsudvalg* [2000] ECR I-2447, C-256/01 *Debra Allonby v Accrington & Rossendale College, Education Lecturing Services, trading as Protocol Professional and Secretary of State for Education and Employment* [2004] ECR I-00873, and C-232/09 *Dita Danosa v LKB Lizings SIA* [2010] ECR I-11405. See: U. Rust & S. Eggert-Weyand in: U. Rust & J. Falke (ed.) *Allgemeines Gleichbehandlungsgesetz mit weiterführenden Vorschriften. Kommentar* Section 2 Paragraph 34, Berlin 2007; U. Rust *Allgemeines Gleichbehandlungsgesetz mit weiterführenden Vorschriften. Kommentar*, Section 6 Paragraph 7; J. Falke *Allgemeines Gleichbehandlungsgesetz mit weiterführenden Vorschriften. Kommentar*, Section 6 Paragraph 23, is waiting for clarifying court decisions.

¹⁸¹ See Federal Labour Court, judgment of 23 August 2012, 8 AZR 285/11, Paragraph 17: promotion and access including the application for employment as a freelancer.

¹⁸² See G. Thüsing *Arbeitsrechtlicher Diskriminierungsschutz*, Paragraph 94, München 2007.

¹⁸³ See J.-H. Bauer et al. *Allgemeines Gleichbehandlungsgesetz. Kommentar* Section 2 Paragraph 16, München 3rd ed. 2011.

¹⁸⁴ M. Schmidt in: D. Schiek (ed.) *Allgemeines Gleichbehandlungsgesetz. Kommentarauseuropäischer Perspektive* Section 6 Paragraph 13, München 2007.

¹⁸⁵ Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security OJ L 6 of 10 January 1979, pp. 24-25.

Germany, however. Although Section 2 of the General Equal Treatment Act mentions social security and protection, the provisions of the Social Code (*Sozialgesetzbuch, SGB*) are exhaustive. However, the Social Code only covers the general statutory social security systems, which are of minor importance for self-employed persons (see below). The important Act on Occupational Pension Schemes (*Betriebsrentengesetz, BetrAVG*) was only amended to implement the CJEU's decision in *Barber*.¹⁸⁶

4. Article 2 – Scope

Under German law, self-employed persons are persons who pursue a gainful activity without instructions by others and for their own account. The identification as self-employed or dependent worker presupposes the applicable law. However, the differentiation between dependent and 'quasi-subordinate' employees protected under Section 6(1) and self-employed persons or freelancers protected under Section 6(3) of the AGG can be difficult in individual cases and has been the subject of rather heterogeneous case law.¹⁸⁷ The main criteria are: decisive influence on working conditions, authority to give instructions, competence to delegate the performance of duties, contractual obligations to one or more employers or clients and the comparable need for social protection.

In 2012, the Federal Court of Justice decided that a managing director with a fixed-term contract who re-applies for this post is protected against discrimination in his/her access to a self-employed activity under the General Equal Treatment Act.¹⁸⁸ This decision was partly misunderstood as an extension of the special employees' protection against dismissal to self-employed persons. The majority of legal commentaries continues its adherence to the applicability of the AGG to self-employed persons only within the limited scope of access and promotion not covering working conditions, equal pay or the termination of contracts.¹⁸⁹

Legal commentaries disagree on the question which groups of self-employed persons are covered by the General Equal Treatment Act. There are hundreds of professions in the field of self-employment and many of them are organised in associations which have the right of self-regulation and their own social security systems. Generally, the opinion seems to be that organised self-employed persons would not need the protection of the AGG although there is no indication that self-regulations were amended to implement the provisions of Directive 2010/41. Some commentaries restrict the scope of the AGG to managing directors,¹⁹⁰ members of company boards and freelancers,¹⁹¹ some commentaries suggest a broad scope including counsellors, franchisees, commercial agents, shareholders and others.¹⁹²

The professional activities of most self-employed persons in Germany are covered by regulations set by their professional associations. Their social security

¹⁸⁶ Case C-262/88 *Barber v Guardian Royal Exchange Assurance Group* [1990] ECR I-1889. For the history of the law's development see Federal Labour Court of 15 April 2014, AZR 114/12, Paragraphs 21-23, <http://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=en&nr=17428>, accessed 30 July 2014.

¹⁸⁷ Examples given by H.J. Willemsen & M. Müntefering 'Begriff und Rechtsstellung arbeitnehmerähnlicher Personen' *Neue Zeitschrift für Arbeitsrecht* 2008 pp. 193-201.

¹⁸⁸ Federal Court of Justice, judgment of 23 April 2012, II ZR 163/10.

¹⁸⁹ See J.-H. Bauer et al. *Allgemeines Gleichbehandlungsgesetz. Kommentar* Section 6 Paragraphs 35 et seq, München 3rd ed. 2011. J. Schubert & P. Schrader in: W. Däubler & M. Bertzbach (ed.) *Allgemeines Gleichbehandlungsgesetz. Handkommentar* Section 6 Paragraphs 31c et seq, Baden-Baden 3rd ed. 2013.

¹⁹⁰ With reference to the *Danosa* decision of the CJEU, managing directors are equated with dependent workers and enjoy the full protection of the AGG, see M. Kort 'Sind GmbH-Geschäftsführer und Vorstandsmitglieder diskriminierungsschutzrechtlich Arbeitnehmer?' *Neue Zeitschrift für Gesellschaftsrecht* 16/2013, pp. 601-607.

¹⁹¹ J.-H. Bauer et al. *Allgemeines Gleichbehandlungsgesetz. Kommentar* Section 2 Paragraph 16, München 3rd ed. 2011.

¹⁹² M. Schmidt in: D. Schiek (ed.) *Allgemeines Gleichbehandlungsgesetz. Kommentaraus europäischer Perspektive* Section 6 Paragraphs 12-15, München 2007.

is guaranteed by various professional pension funds (*berufsständische Versorgungswerke*) shaped by state law, by special federal regulations on social security e.g. for the agricultural sector, or by explicit extension of the statutory social security systems. The 2001 Act on Registered Same-Sex Partnerships (*Lebenspartnerschaftsgesetz, LPartG*) was a federal law and could only recognize life partners in the federal laws on statutory social security systems and special federal laws such as the Second Law on Health Insurance for Farmers (*Zweites Gesetz über die Krankenversicherung der Landwirte, KVLG*). The professional pension funds did not recognize life partners and only some of the German states amended their respective laws on a number of professional pension funds. After a decision of the Federal Constitutional Court on the topic of survivor's pensions for registered life partners within the occupational pension schemes of the civil service in 2009,¹⁹³ more states adapted their legislation and all professional pension funds amended their regulations or changed their practice of granting survivor's pensions to registered life partners as well as spouses.¹⁹⁴

5. Article 3 – Definitions

The General Equal Treatment Act defines the four concepts of discrimination – direct and indirect discrimination, harassment and sexual harassment – with the same wording as the European anti-discrimination directives. However, it has to be noted that the scope of protection against sexual harassment is limited under Section 3(4) and Section 2 of the AGG: the protection does not cover social security, education and the access to and supply of goods and services. In combination with the very limited personal scope of the AGG concerning self-employed persons, the protection against discrimination fails to meet expectations.

6. Article 4 – Principle of equal treatment

There is no specific legislation transposing Directive 2010/41/EU in Germany. Concerning access and promotion, managing directors, members of company boards and freelancers can invoke the regulations of the AGG. Other self-employed persons can refer to the constitutional principle of equality, which has limited influence in civil-law cases. The institute for the law on self-regulation of the liberal professions does not even mention the European directives on self-employment.¹⁹⁵

7. Article 5 – Positive action

In 1994, the state of North Rhine-Westphalia established master foundation awards for young entrepreneurs in the craft and trade sector with an application deadline of two years after the master examination in general and five years for female entrepreneurs. In 2002, the Federal Administrative Court accepted the extended deadline as a means of positive action to increase the number of female entrepreneurs in crafts.¹⁹⁶ This was a positive signal to authorities in Germany to use temporary special measures to encourage female entrepreneurship.

In August 2014, the Federal Ministry of Economics and the Federal Ministry for Family, Seniors, Women and Youth presented an initiative for empowerment

¹⁹³ Federal Constitutional Court, judgment of 7 July 2009, 1 BvR 1164/07. The judgment was based on the constitutional principle of equality.

¹⁹⁴ Some pension funds needed encouragement by the courts, see for example the State Administrative Court of North Rhine-Westphalia, judgment of 23 September 2010, 17 A 674/08.

¹⁹⁵ See <http://www.kammerrecht.de/eu-dokumente.html>, accessed 10 August 2014.

¹⁹⁶ Federal Administrative Court, judgment of 18 July 2002, 3 C 54/01. See O. Hinrichs & R. Zimmer in: W. Däubler & M. Bertzbach (ed.) *Allgemeines Gleichbehandlungsgesetz. Handkommentar* Section 5 Paragraph 38, Baden-Baden 3rd ed. 2013, on positive action through awarding subsidies.

and support of female business start-ups and entrepreneurs including support and presentation of female role models, public relations, further research, counselling, coaching, return to work, migration, financing by micro loans, reconciliation of work and family life, childcare facilities and family support services.¹⁹⁷

Although it is controversial whether the advancement of women might be a condition for awarding public contracts,¹⁹⁸ some states have set respective regulations for contracts of a certain volume and larger contractors.¹⁹⁹

8. Article 6 – Establishment of a company

The statutory requirements for the establishment of a company do not differ when it comes to spouses, life partners or other persons. There is no data available on the number of companies established by spouses or life partners. However, it seems that regulations on social security, taxes, liability and post-marital maintenance influence the decision of spouses against joint entrepreneurship.

9. Article 7 – Social protection

The social protection for self-employed persons shows highly differentiated structures. There are special provisions for some groups of self-employed persons, e.g. in crafts and commerce. There are independent social security systems for farmers and their assisting family members as well as for self-employed artists and publicists. All members of professions which have the right to form associations for self-regulation, especially the liberal professions, are covered by one of the many professional pension funds (*berufsständische Versorgungswerke*) in Germany. Every one of these professions has its own pension fund in every German state which is authorised on the legal basis of its own state law. Only very few of these many special laws deal with questions of gender equality.

Self-employed persons and freelancers who are not covered by special provisions, independent systems or professional pension funds can voluntarily become members of the statutory social security scheme (which is expensive) or may be covered by Section 17(1) of the BetrAVG under rare and special circumstances or decide to take out private insurance. Since the implementation of the *Test-Achats* ruling by amendments to the SEPA-accompanying Act (*SEPA-Begleitgesetz*), the private insurance industry has terminated its practices of sex discrimination by increasing insurance rates for the previously privileged sex in every field. However, the special disadvantage of higher insurance rates for female self-employed persons under private insurances is now history.

Nowadays, self-employed persons in crafts and commerce are subject to compulsory sickness and long-term care insurance but can decide whether they prefer statutory or private insurance systems. Most of them are subject to compulsory statutory pension insurance systems. Some occupational accident insurance funds (*Berufsgenossenschaften*) provide for compulsory accident insurance for entrepreneurs in their bylaws, others offer accident insurance on a

¹⁹⁷ See <http://www.bmwi.de/BMWi/Redaktion/PDF/F/frauen-gruenden-gruenderinnen-und-unternehmerinnen-in-deutschland-staerken.property=pdf,bereich=bmwi2012,sprache=de,rwb=true.pdf>, accessed 16 August 2014. For an overview of existing support for female start-ups see Federal Ministry of Economics *Gründer Zeiten 03. Existenzgründungen durch Frauen* Berlin 2013, http://www.existenzgruender.de/imperia/md/content/pdf/publikationen/gruenderzeiten/gz_03.pdf, accessed 10 August 2014.

¹⁹⁸ D. Schiek 'Gleichbehandlungsrichtlinien der EU – Umsetzung im deutschen Arbeitsrecht' *Neue Zeitschrift für Arbeitsrecht* 2004, pp. 873-884, 877, doubts that affirmative action in public procurement can be aimed at other groups than persons with disabilities.

¹⁹⁹ E.g. Section 19 of the 2012 Statute on Conditions for Public Procurement in North Rhine-Westphalia, https://recht.nrw.de/lmi/owa/br_vbl_detail_text?anw_nr=6&vld_id=13150.

voluntary basis. Self-employed persons in crafts and commerce have the option of voluntary unemployment insurance within the statutory system but the contributions have been multiplied since 2006. Helping spouses and life partners very often defined themselves as employees of the self-employed entrepreneur and paid contributions to the statutory insurance schemes like any other dependent worker. However, when applying for the respective benefits, they were defined as helping family members or co-entrepreneurs by the social security funds and denied the respective benefits as well as full repayment of their contributions.²⁰⁰ Since 2005, the social security status of helping spouses and life partners is automatically defined with binding effect for the social security funds when starting employment and existing employment relations can be reviewed on request under Section 7a of Social Code No. 4. When helping spouses or life partners are not defined as dependent employees, they have to insure themselves in statutory or private insurance systems.

Self-employed artists and publicists are covered by statutory pension and long-term care insurance as well as a freely chosen sickness insurance under the artists' social insurance fund (*Künstlersozialkasse*). This is a privileged position because only half of the fund is financed by contributions, the rest is financed by federal subsidies (20 %) and special social security charges for artists (*Künstlersozialabgabe*) which have to be paid by every entrepreneur commercialising art and journalism (30 %). Self-employed artists and publicists have the option of voluntary unemployment insurance within the statutory system but the related contributions have been multiplied since 2006. There is a special feature for freelancers for public broadcasting services: they are entitled to sick pay due to the applicable collective agreements.

Self-employed persons in agriculture and forestry are members of the agricultural social security system. The system is financed by contributions and by federal subsidies. It includes health and long-term care, accidents at work and pension insurance. These insurances cover farmers and helping spouses or life partners of the farmer or of a helping family member. In 1998, the Federal Social Court decided that the co-insurance of spouses in the agricultural sector is in compliance with European directives 79/7 and 86/613.²⁰¹ A specialty of the agricultural social security system is that sickness benefits can be substituted by social assistance to run the farm or forestry business. Since 2014, the contributions have been uniformly defined nationwide. To receive invalidity, old-age or survivor's benefits, the agricultural or forestry business has to be given up. Due to low contributions, the pension insurance only offers partial coverage. Female members of the agricultural social security system receive significantly lower pensions than male members.²⁰² Even the survivor's benefits which are the most common form of pension payments for female members are lower than the male members' old-age and invalidity benefits.

Professional pension funds, especially for the liberal professions (doctors, dentists, psychological therapists, pharmacists, veterinaries, lawyers, notaries, tax agents, accountants, architects, civil engineers), cover invalidity, old age and survivor's benefits. They are completely financed by contributions. In many professional pension funds, sex previously was an important factor in calculating the pension amounts to the detriment of women and it was not before 2007 that

²⁰⁰ See B. Zoch *Rolle und Bedeutung von mitarbeitenden Familienangehörigen im deutschen Handwerk* at p. 45 et seq., Ludwig Fröhler Institut 2010; and e.g. State Social Court of Bavaria, judgment of 16 May 2006, L 5 KR 34/06, decided that the life partner of a restaurant entrepreneur was not his employee and therefore not a member of the (in this case financially advantageous) statutory health insurance.

²⁰¹ Federal Social Court, judgment of 12 February 1998, B 10/4 LW 9/96 R.

²⁰² See Report of the Federal Government on Old-Age Protection in the Agricultural Sector, Parliamentary Publication 18/83 of 20 November 2013, p. 6, <http://dip21.bundestag.de/dip21/btd/18/000/1800083.pdf>, accessed 10 August 2014.

the last fund terminated this practice.²⁰³ A major problem for members of the liberal professions was that child-raising periods were not taken into account by every professional pension fund. In 2005, the Federal Constitutional Court decided that professional pension funds for lawyers have to offer non-contributory membership during child-raising periods without income for up to three years to meet the requirements of the gender equality principle under the German Constitution.²⁰⁴ Nowadays, some of the professional pension funds offer non-contributory membership for up to three years but no solutions for part-time work after childbirth, which is the norm in the liberal professions. Members of the liberal professions can apply for benefits from the statutory pension funds for children born after 1991 when their professional pension fund does not pay for child-raising periods. However, lower courts excluded the raising of adopted children from beneficiary regulations of professional pension funds.²⁰⁵ And some German courts still doubt that national and European anti-discrimination law can be applied to professional pension funds at all.²⁰⁶

10. Article 8 – Maternity benefits

Maternity protection and maternity allowances are covered by the Maternity Protection Act (*Mutterschutzgesetz, MuSchG*) which grants pregnant employees a right to maternity leave six weeks before, and eight weeks after childbirth. (More precisely, the MuSchG prohibits any employer from requiring a pregnant woman to work for these fourteen weeks.) During maternity leave, employees are entitled to maternity allowances in the amount of their last net income.

Generally, self-employed women are not covered by the MuSchG and therefore not entitled to maternity protection and maternity allowances. In the opinion of the Ministry for Family, Seniors, Women and Youth, there is no necessity to implement Article 8 of Directive 2010/41/EU in national law,²⁰⁷ because self-employed women who are voluntarily insured under the statutory health insurance including sickness benefits – which many are not because of the costs involved – are entitled to maternity allowances in the amount of these sickness benefits (usually 70 % of their previous income). Some private health insurances provide for a one-time allowance in the amount of EUR 210, many offer no maternity allowances. The Federal Constitutional Court decided that the unequal treatment between employees and self-employed women related to maternity allowances is compatible with the general principle of equality under the German Constitution.²⁰⁸ But the compatibility with European law is more than doubtful.

²⁰³ After intervention of the respective state Ministry, see Administrative Court of Hannover, judgment of 3 December 2008, 5 A 873/08, which directly applied Directive 79/7/EEC due to its lack of timely implementation. The invalidity of the respective bylaw by direct application of Article 4 of Directive 97/7 was confirmed by the State Administrative Court of Lower Saxony, judgment of 23 October 2009, 8 LC 12/09, and judgment of 12 June 2014, 8 LC 130/12.

²⁰⁴ Federal Constitutional Court, judgment of 5 April 2005, 1 BvR 774/02. It can be assumed that this decision overruled State Administrative Court of Hessen, judgment of 30 September 2003, 11 UE 1716/00, which held that no violation of the constitutional equality principle or Directive 79/7 is at hand when child-raising periods of fathers are not taken into account by a lawyers' professional pension fund.

²⁰⁵ Administrative Court of Frankfurt, judgment of 23 October 2008, 12 K 1948/08F, although applying the German Constitution, the ECHR and Directive 79/7/EEC. In the author's opinion, the Court was mistaken in assuming that this was a question of family protection only and not of gender equality as well.

²⁰⁶ The Federal Administrative Court, judgment of 25 July 2007, 6 C 27/06, as well as the Higher Administrative Court of Rhineland Palatinate, judgment of 26 May 2010, 6 A 10320/10, seriously questioned the applicability of the AGG, Article 141 of the EC Treaty and the Anti-Discrimination Directives to the regulation of professional pension funds.

²⁰⁷ See Parliamentary Publication (*Bundestags-Drucksache*) 17/9615, p. 53 et seq.

²⁰⁸ Federal Constitutional Court, judgment of 3 April 1987, 1 BvR 1240/86.

When pregnant women try to enter into contracts with private health insurances they might face discriminatory practices.²⁰⁹ Some insurance companies deny new contracts after the third month of pregnancy, some impose waiting periods of up to one year, some demand additional contributions (not only during the pregnancy but permanently) and some will only contract on the condition that benefits for the pregnancy and childbirth are excluded.²¹⁰

According to the prevailing opinion of legal commentaries, quasi-subordinate workers are not entitled to maternity leave and maternity allowances under the MuSchG.²¹¹ With regard to the criteria of comparable need for social protection, these mothers(-to-be) should be covered as well. Quasi-subordinate workers for public service broadcasting are entitled to maternity leave and maternity allowances under the applicable collective agreements.

Self-employed artists and publicists are entitled to full maternity allowances. However, they have to report their return to self-employment after maternity protection to remain members of the artists' social insurance fund.

In the agricultural sector, helping family members who are subject to social security contributions are entitled to maternity allowances under Section 14 of the Second Law on Health Insurance for Farmers (KVLG). Maternity benefits can be substituted by social assistance to run the farm during pregnancy and up to eight weeks after giving birth under Section 9(3)(a) of the KVLG. Bylaws may extend the entitlement to this substitution to spouses or life partners of the insured farmer or insured helping family members. Moreover, household care may be provided for the same group of persons by bylaws under Section 10(1) of the KVLG.

Self-employed parents are not entitled to parental leave because there is no employer to whom such a claim can be addressed. They are entitled, however, to parental allowances on the same conditions as employees under the Federal Law on Parental Allowance and Parental Leave (*Bundeseltern- und Elternzeitgesetz, BEEG*). If the self-employed mother does not receive maternity allowances, the parental allowances are paid from the day of the birth (but not for a longer period of time). The differences between employed and self-employed parents were significantly reduced, but the denial of additional maternity allowances and the calculation of the amount of parental allowances for self-employed parents still place them at a disadvantage.

11. Article 9 – Defence of rights

Article 9 has not been implemented in German law. There are different jurisdictions: dependent employees file their complaints to the labour courts and self-employed persons normally apply to the civil courts. An important exception to the latter are claims concerning professional pension funds, which have to be brought before administrative courts. Neither the respective civil law nor the professional pension law cover extended representation rights. The professional associations and the pension funds are legal entities under public law and therefore generally able to bring proceedings to court — but only on their own behalf. However, in many court cases initiated by self-employed persons, the associations or funds are the defendants, so extended representation rights would not work out too well. Equality bodies have no representation rights under

²⁰⁹ See http://wirtschaft.t-online.de/pkv-keine-vertraege-fuer-schwangere/id_45689000/index, accessed 10 August 2014.

²¹⁰ Confirmed by the District Court of Hannover, judgment of 26 August 2008, 534 C 5012/08.

²¹¹ H. Buchner & U. Becker *Mutterschutzgesetz und Bundeseltern- und Elternzeitgesetz* Section 1 MuSchG Paragraph 90, München 8th ed. 2008; P. Meisel & H.-H. Sowka *Mutterschutz und Erziehungsurlaub* Section 1 MuSchG Paragraph 21, München 5th ed. 1999; G. Pepping in: F. Rancke (ed.) *Mutterschutz, Elterngeld, Elternzeit. Handkommentar* Section 1 MuSchG Paragraph 30, Baden-Baden 2007; B. Willikonsky *Kommentar zum Mutterschutzgesetz* Section 1 MuSchG Paragraph 17, Neuwied 2nd ed. 2007. For further information see: M. Müller *Die Arbeitnehmerähnliche Person im Arbeitsschutzrecht*, Frankfurt 2009.

German law, since they are not a mandatory forum for conciliation and are not (quasi-)judicial bodies.

12. Article 10 – Compensation or reparation

There are no special provisions on compensation or reparation for the loss or damage sustained by a self-employed person as a result of discrimination on the grounds of sex. Self-employed persons can refer to the provisions of the General Equal Treatment Act within its described limited scope or invoke general principles, e.g. when claiming the invalidity of a professional pension fund's regulations. If the General Equal Treatment Act is held to be applicable, the disadvantaged person may demand that the discriminatory conduct be stopped, may sue for an injunction or may demand appropriate compensation in money for the damage, although not for economic loss under Section 21.

13. Article 11 – Equality bodies

Since 2006, there is a general anti-discrimination authority on the federal level (*Antidiskriminierungsstelle des Bundes, ADS*) whose independence is guaranteed by the law. There is no indication that the ADS explicitly deals with the topic of sex discrimination of self-employed persons.

14. Article 12 – Gender mainstreaming

The Federal and State Ministries are aware of the importance of female entrepreneurship.²¹² Today, female entrepreneurs are an important target group of foundation programmes and the Federal Ministry of economics coordinates consulting, networking, financing and various other offers for female start-ups and entrepreneurs.²¹³

15. Article 13 – Dissemination of information

Supposedly due to the sheer number and diversity of regulations on self-employment and social security of self-employed persons, there is no centralised information about the respective provisions. Many public authorities and professional associations or funds offer information for certain groups of self-employed persons or on specific questions of social security.

Until now, the German Government has not published any information on the implementation of Directives 86/613, 2010/41 and 79/7 as required.

16. Article 14 – Level of protection

There is no general level of protection for self-employed persons but some indication that for many of them the protection remains below the requirements of the Directive.

²¹² See Agentur für Gleichstellung im EFS *Gender-Aspekte in der Existenzgründung* pp. 5-6, Berlin 2010.

²¹³ See http://www.existenzgruenderinnen.de/DE/Home/home_node.html, accessed 10 August 2014.

17. Case law

There is very little case law on the prohibition of sex discrimination of self-employed persons, none of these cases deal with Directive 2010/41 and only very few claimants have invoked Directive 86/613 — without success. Eight out of ten published cases mentioning Directive 86/613 deal with conditions for the approval as a contract psychotherapist.²¹⁴ The courts decided that the requirement of an average working time of less than 19 hours per week does not constitute an indirect discrimination on the grounds of sex of self-employed mothers with children under the age of three and is no violation of European directives.²¹⁵

18. Issues regarding the ‘duty holder’

The lack of a clearly defined ‘duty holder’ is one of the main obstacles for the effective protection of self-employed persons against discrimination on the grounds of sex. The success of claims for reparation or compensation or amendments of insurance or other contracts depends on a liable defendant. Even the limited coverage by the General Equal Treatment Act does not work because the chapter referred to by Section 6(3) gives a right of action against private employers who discriminate, and hence does not apply to the situation of self-employed. Due to this faulty concept, the German legal debate focuses on the protection of the tiny group of managing directors and the connected company law questions.

For an effective protection of self-employed persons under German law, federal and state legislation as well as courts should identify statutory and private insurance funds and professional pension funds as ‘duty holders’ concerning sex discrimination in social security. There is no reason why these funds should not be obliged to act in accordance with national and European antidiscrimination law. Moreover, the identification of the contracting party as ‘duty holder’ could entitle self-employed persons to equal pay and protect them against any form of sex discrimination during work and against discriminatory termination of their contracts. However, this would require an extended scope of applicable law to also cover so-called mass contracts. Without legally identified ‘duty holders’, the efforts to end sex discrimination against self-employed persons are destined to fail.

19. National statistics

11 % of the workforce in Germany are self-employed persons.²¹⁶ Since 2002, this figure has only slightly increased by 1 %, but the total number of self-employed persons has increased by 0.6 million. The Federal Statistics Agency uses the term ‘self-employed’ as described above and as used for legal purposes: persons who pursue a gainful activity without instructions by others and for their own account.

20. Any other issues?

A ‘female job’, very small in numbers but very important for many women, is threatened with extinction: More and more self-employed midwives give up work. The reason is that they are not appropriately paid by the health insurance schemes, and at the same time the contributions to their professional liability

²¹⁴ Two other available court decisions deal with questions of social security and have been mentioned above.

²¹⁵ See Federal Social Court, judgment of 19 July 2006, B 6 KA 18/05 B.

²¹⁶ C.-M. Mai & K. Marder-Puch ‘Selbständigkeit in Deutschland’ *Wirtschaft und Statistik*, Federal Statistics Agency, Wiesbaden 2013.

insurance have hugely increased.²¹⁷ The Federal Government is seeking solutions because the number of self-employed midwives is significantly decreasing.

Another profession, mostly exercised by women, is affected by administrative arbitrariness. Although their profession has been legally recognised in Germany since 2002, self-employed sex workers face serious and often illegal obstacles when trying to establish their own business (with better working conditions than in a brothel) or when offering sexual services in public urban spaces. The parties of the governing coalition have not been able to agree on legislative measures to improve the situation of sex workers. The framework for a draft law on the commercial law requirements for prostitution presented by the Federal Ministry for Family, Senior Citizens, Women and Youth in August 2014 includes some good elements. However, it lacks differentiation in a very heterogeneous working field and shows no intention to tackle authorities' arbitrariness and their widespread unlawful practices.²¹⁸

GREECE – *Sophia Koukoulis-Spiliotopoulos*

1. Context

1.1. A growing number of the self-employed in Greece are in a critical situation in the context of the socio-economic crisis, which is affecting them and their potential clients. As a result, their number is decreasing (see 19.1. in this report, below). Indeed, in order to cope with a high sovereign debt, since May 2010 Greece has been under an EU / International Monetary Fund (IMF) assistance programme, which includes pooled bilateral loans by the Euro area Member States in conjunction with IMF funding. The disbursements are dependent on austerity measures required by Memoranda of Understanding (MoU) signed by the European Commission, acting on behalf of the Euro area Member States, and the Hellenic Republic. The implementation of the programme is overseen by the 'Troika' (Commission, European Central Bank (ECB) and IMF representatives). The avalanche of implementing measures are included in long and tortuous pieces of legislation, often dealing with subjects unrelated to one another ('omnibus laws') and difficult to combine amongst themselves and with other relevant legislation, which often have retroactive effect and are often and unpredictably modified. This has resulted in great legal uncertainty, even among lawyers and judges, and in widespread insecurity, in particular regarding *employment*, *social security*, and *taxation* matters. The courts are overwhelmed and no time is left for case law to catch up with new legislation.

1.2. UN independent expert C. Lumina has summed up the situation as follows: '[...] the stringent policy measures that entail deep public spending cuts, public sector job cuts, tax increases, the privatisation of public enterprises and structural reforms (including labour market reforms) [...] have pushed the economy into recession and generally undermined the enjoyment of human rights, particularly economic, social and cultural rights. [...] public spending cuts and labour market reforms have resulted in increased unemployment (in particular among young people [and women]), homelessness, poverty and social exclusion [...] and severely reduced access to public services, such as health care and education', while the emigration of highly educated young professionals

²¹⁷ See: M. Albrecht et al. *Versorgungs- und Vergütungssituation in der außerklinischen Hebammenhilfe* Berlin 2012. In the last ten years, the contributions to midwives' liability insurance schemes have been increased from EUR 1 352 to EUR 5 091 per annum. In June 2014, the Federal Parliament decided that the health insurance funds have to pay for these additional costs until July 2015.

²¹⁸ See: <https://researchprojectgermany.files.wordpress.com/2014/08/eckpunkte-prostituiertenschutzgesetz.pdf>, accessed 3 October 2014.

means a brain drain ‘which poses a threat to the country’s potential’.²¹⁹ Moreover, rising barriers to medical care and medicines, while the population’s physical and mental health is deteriorating, lead to a ‘health and even humanitarian crisis’,²²⁰ or a ‘Greek public health tragedy’.²²¹

1.3. According to the Hellenic Statistical Authority (ELSTAT), between the first quarter of 2009 and the first quarter of 2014 the unemployment rate rose from 9.5 % to 27.8 %, the highest in the EU (male rate from 6.9 % to 25 %; female rate from 13.1 % to 31.4 %). Long-term unemployment (over 12 months) rose from 39.1 % to 71.4 %, ²²² the female rate being higher. ²²³ In 2012, 34.6 % and in 2013, 35.7 % of the population were at risk of poverty and social exclusion. ²²⁴ Due to strict entitlement conditions, a mere 9 % of the unemployed registered with the Manpower Employment Organisation (OAED) ²²⁵ receive, for 12 months in principle, an allowance of EUR 360 per month plus EUR 36 for each dependent family member, ²²⁶ which is well below the poverty threshold (EUR 580). ²²⁷ Therefore, increasingly fewer people can afford the goods and services provided by the self-employed. There is a swelling wave of solidarity however, in the form of free ‘social’ clinics, pharmacies, groceries, food handouts, run by groups of volunteers, NGOs, the Church, local authorities, doctors’ unions, and so on. ²²⁸

1.4. The self-employed are also directly affected by the crisis and austerity measures, in particular by heavy and unpredictable taxes and other charges often with retroactive effect. A monthly unemployment allowance of EUR 360, which is well below the poverty threshold, is paid to them for three to nine months, subject to a strict means test and to an indirectly discriminatory condition on grounds of nationality: permanent residence in Greece. ²²⁹ Moreover, the opening-up of liberal professions ²³⁰ in practice favours big firms to the detriment of young professionals. There are also restrictions to the exercise of professions, such as

²¹⁹ *Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Cephias Lumina, Mission to Greece (22–27 April 2013), Summary, and paragraphs 44–46, UN Human Rights Council 25th Session, 11 March 2014 (A/HRC/25/50/Add.1): <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session25/Pages/ListReports.aspx>; C. Lumina *End of mission statement*: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13272&LangID=E>, both accessed 30 July 2014. For the situation until September 2012, see also S. Koukoulis-Spilliotopoulos ‘Greece’ in *European Gender Equality Law Review* 2/2012 (the situation has been deteriorating since): http://ec.europa.eu/justice/gender-equality/document/index_en.htm#h2-9, accessed 30 July 2014.*

²²⁰ Council of Europe Parliamentary Assembly (PACE) Doc. 13225/7.6.2013, Report of the Committee on Social Affairs, Health and Sustainable Development, *Equal access to healthcare*: <http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID>; PACE Resolution 1946 (2013) adopted on 26 June 2013 (24th Sitting): <http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=19991&Language=en>, accessed 20 July 2014.

²²¹ A. Kentikelenis et al. ‘Greece’s health crisis: from austerity to denialism’ *The Lancet* 383 (2014) pp. 748–753.

²²² ELSTAT Population 15 years and over by employment status, age and gender: 2001–2014 by quarter, Table 2A; unemployed 15+ (length of unemployment) first quarter 1998 to first quarter 2014, Table 6: http://www.statistics.gr/portal/page/portal/ESYE/PAGE-themes?p_param=A0101&r_param=SJO01&y_param=TS&mytabs=0, accessed 25 July 2014.

²²³ ELSTAT *Living conditions in Greece* July 2014, and November 2014, Labour market, Table 8: <http://www.statistics.gr/portal/page/portal/ESYE/PAGE-livingcond>, accessed 30 December 2014.

²²⁴ ELSTAT *Living conditions in Greece* July 2014, and November 2014, Poverty-inequality, Table 6: <http://www.statistics.gr/portal/page/portal/ESYE/PAGE-livingcond>, accessed 30 December 2014.

²²⁵ The number of the unemployed registered with the Manpower Employment Organisation (OAED) is lower than the number of those reported by ELSTAT (993.118 v.1.274.843). See *Concise Report on those Registered with OAED*, available at <http://www.oaed.gr/images/statistika/aprilios2014/ekthesiaprillioy2014.pdf>, accessed 30 May 2014.

²²⁶ Manpower Employment Organisation (OAED) <http://www.oaed.gr>, accessed 30 July 2014.

²²⁷ European Committee of Social Rights *GENOP-DEI and ADEDY v. Greece* Complaint No. 66/2011, decision of 23 May 2012, invoking Eurostat data: http://www.coe.int/t/dghl/monitoring/socialcharter/complaints/complaints_EN.asp?, accessed 9 July 2014.

²²⁸ *Report of Independent Expert C. Lumina*, op. cit., paragraphs 67–69; see e.g. <http://www.solidarity4all.gr>.

²²⁹ Manpower Employment Organisation (OAED): <http://www.oaed.gr>, accessed 30 July 2014.

²³⁰ See e.g. Act 3939/2011 (OJ A 32 of 2 March 2011) regarding lawyers, notaries public and engineers.

limits to prescriptions imposed on doctors which also entail risks to public health.²³¹

Undertakings, in particular small and medium-sized enterprises (SMEs) are increasingly closing down. In central Athens, in September 2013, 32.4 % of shops had closed down.²³² According to a 2013 survey of small enterprises (up to 49 employees) which constitute 99.6 % of Greek enterprises '76.5 % of entrepreneurs and self-employed believe that the crisis is deepening and have lost all hope for recovery; 110 000 enterprises are "in the red", with 40 000 estimated to close down over the next 12 months [...]; 63.3 % of enterprises estimate that they will be unable to pay their taxes; 57.2 % say the same about their social security contributions, while 22.6 % already owe contributions (a 30 % increase in six months)'.²³³ Until July 2014, 60 % of professionals covered by the Organisation for the Insurance of Independent Professionals (OAEE) (see section 9 of this report, below) were unable to pay their contributions.²³⁴ This is also the case of other professionals, such as lawyers.²³⁵ The sharp decline, due to falling demand, of sectors such as construction which involves many professionals (architects, engineers, building contractors, estate agents, notaries public etc.) a great number of whom are women, and of many other sectors, has led to growing unemployment or underemployment of self-employed persons (see 19.1. in this report, below). Retirement is no solution, as pensionable ages are on a constant rise, pension conditions are constantly tightened and pension amounts are increasingly cut. In sum, the situation is such that treaty bodies are warning of 'massive pauperisation' of the population.²³⁶

2. Transposition of the Directive

Directive 2010/41 was transposed by Act 4097/2012 (OJ A 235/03.12. 2012) (the transposing Act). Under the title of each article of this Act, the articles of the Directive that the article of the Act is intended to transpose are indicated. The time for implementation was not extended.

3. Article 1 – Subject matter

3.1. The transposing Act concerns aspects not covered by Act 3896/2010, OJ A 207/8.12. 2010, transposing Directive 2006/54, Decree 1362/1981, OJ A 339/1981, transposing Directive 79/7 or Act 3769/2009, OJ A 105/01.7.2009,

²³¹ According to the Council of State (Supreme Administrative Court – CS), which by decisions Nos. 59 and 274/2014 suspended the application of provisions of ministerial decisions introducing these limits.

²³² National Confederation of Hellenic Commerce, Institute for Commerce and Services (INEMY/ESEE) Press release 2 June 2014: <http://www.inemy.gr>; see also ESEE press release: social grocery for non-insured traders: <http://www.esee.gr>, both accessed 25 July 2014.

²³³ ILO Committee of Experts on the Application of Conventions and Recommendations *Report to International Labour Conference (ILC) 103rd Session (2014)*, ILO Convention 102 (social security) Greece, quoting Small Enterprises Institute of the Hellenic Confederation of Professionals, Craftspersons and Traders (IME/ GSEVEE) 2014: <http://www.ilo.org/dyn/normlex/en/f?p=1000:11003:0::NO>, accessed 9 July 2014.

²³⁴ Chair, Hellenic Confederation of Professionals, Craftsmen and Merchants (GSEVEE) Press Conference 16 July 2014: <http://www.gsevee.gr/deltiatupou/426-2014-07-16-13-16-42>, accessed 25 July 2014.

²³⁵ Plenary meeting of the Greek Bar: Press release 23 September 2014. www.dsa.gr, accessed 23 September 2014.

²³⁶ European Committee of Social Rights *Federation of Employed Pensioners of Greece (IKA-ETAM) v. Greece* Complaint No. 76/2012, decision of 7 December 2012: http://www.coe.int/t/dghl/monitoring/socialcharter/complaints/complaints_EN.asp?; *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Greece, ILO Convention 102 ILC 103rd Session (2014): <http://www.ilo.org/dyn/normlex/en/f?p=1000:11003:0::NO>, both accessed 9 July 2014.

transposing Directive 2004/113²³⁷ as amended after the CJEU *Test-Achats* judgment²³⁸ by Act 4099/2012, OJ A 25/20.12.2012.

3.2. Act 3896/2010 transposing Directive 2006/54 includes the self-employed in its personal scope (Article 5(1)). In areas covered by both Directive 2010/41²³⁹ and Directive 2006/54,²⁴⁰ such as harassment and sexual harassment, instruction to discriminate or positive action, this means there is an overlap, but there is no case law regarding self-employed persons, so we cannot describe any specific problems.

3.3. Article 6 of the transposing Act, entitled ‘Maternity benefits’, is meant to transpose Articles 7 and 8 of Directive 2010/41, as indicated under its title. However, it only transposes Article 8, and transposes it only partly. Paragraph 1 of Article 6 of the transposing Act only provides for the possibility to grant maternity benefits to self-employed women. Paragraph 2 of Article 6 of the transposing Act enables the Minister of Economics and the Minister of Labour, Social Security and Welfare to specify by joint decision the amount, the method, and the procedure for the payment of these benefits to self-employed women. Article 6 of the transposing Act is silent with regard to self-employed workers’ female spouses or life-partners (see also Section 10 of this report, below). Therefore the implementation is inadequate.

Moreover, there can be no overlap with Act 3896/ 2010 transposing Directive 2006/54 which also concerns occupational social security for the self-employed. There is a general problem with occupational social security in Greece however. Act 3896/2010 merely copies the relevant provisions of Directive 2006/54, without specifying which schemes are occupational or laying down any criteria for identifying such schemes. This means there is no awareness of the existence of occupational schemes and there is great confusion regarding the scope of relevant provisions and the transition periods for equalizing pensionable ages of men and women; this is the more so as Act 3896/2010 does not refer to legislation adopted some months earlier, which gradually equalized pensionable ages in all schemes without distinguishing between occupational and statutory ones.

3.4. Decree 1362/1981 transposing Directive 79/7/EEC²⁴¹ only concerns sickness benefits. As it modifies Article 33(1) of Act 1846/51 (OJ A 179/1951) governing the main social security scheme for salaried workers (IKA), in principle it does not cover the self-employed.

3.5. Act 3769/2009 transposing Directive 2004/113 does not provide for the self-employed.

4. Article 2 – Scope

4.1. Article 2(a) of the transposing Act copies the definition of the ‘self-employed’ from the Directive. Directive 86/613/EEC was not transposed. There is no more specific definition. For the purposes of employment and social security, several

²³⁷ Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services OJ L 373 of 21 December 2004, pp. 37-43.

²³⁸ Case C-236/09 *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres* [2011] ECR I-00773.

²³⁹ Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC OJ L 180 of 15 July 2010, pp. 1-6.

²⁴⁰ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) OJ L 204 of 26 July 2006, pp. 23-36.

²⁴¹ Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security OJ L 6 of 10 January 1979, pp. 24-25.

forms of employment are considered as self-employment in contradiction with subordinate employment.²⁴²

4.2. The self-employed may work on a *contract for (remunerated) services* or *independent employment* or a *remunerated mandate*. The meaning of these terms results from case law:

4.3. A *contract for services* is not concerned with work as such, but with its final result, i.e. the performance of a specific task (e.g. building, repair or maintenance of a building, drafting or execution of a project), irrespective of time and work needed. The decisive factor is that the person supplying his/her services (contractor) is not subject to the employer's instructions and control. The contract or relationship ends upon delivery of the final result.²⁴³

4.4. A *contract of independent employment* is also concerned with the performance of remunerated work for a fixed or indefinite period, without subordination²⁴⁴ or with some kind of (loose) subordination; the decisive criterion is the extent of the subordination.²⁴⁵

4.5. Persons exercising *liberal professions* (e.g. doctors, practising lawyers, engineers etc.) may be employed in any of the above forms of employment. Practising lawyers may only be employed on a *contract of remunerated mandate*, under which they offer legal advice and/or represent clients in court for monthly or yearly wages without subordination.²⁴⁶

4.6. By law²⁴⁷ those persons are considered as self-employed who perform an activity covered by the scheme for liberal professions (OAEE) or the scheme for independent workers (ETAA) (see 1.4. above and 9 below). The same applies to those required to issue data on transactions by the Code of Description of Transactions for Tax Purposes (KFAS).²⁴⁸ The latter are Greek nationals performing an activity in Greece with the aim to gain income from a commercial, industrial, handicraft or agricultural undertaking or a liberal profession or other undertaking, and any foreigners who have a genuine professional establishment in Greece or perform a professional activity in the same areas with the same aim.

4.7. The formulation of both Article 2 of the transposing Act and the above provision are so wide that it is difficult to justify exclusions. Therefore, it cannot be considered that small entrepreneurs', 'business persons', or the agricultural sector are excluded.

4.8. Article 2(b) of the transposing Act (scope) provides that this Act applies to 'the spouses of the self-employed workers and their life partners, in accordance with the provisions of Act 3719/2008 (OJ A 241/26.11.2008) and the provisions of Act 20²⁴⁹ of Act 3801/2009 (OJ A 163/2009), who are not employees or business partners, where they habitually participate in the activities of the self-employed worker and perform the same or ancillary tasks'.

4.8.1. The first of the above Acts (Act 3719/2008) recognises 'the agreement drawn up by two adults of different sex in person by virtue of a notarised act, by which they organise their life in common (life partnership agreement)'. In order to produce legal effects, this act must be registered with the registry office, as provided by the second of the above Acts (Act 3801/2009). The dissolution of the partnership must also be agreed by notarised act and registered. The partnership produces some binding legal effects under civil law, if these are agreed by the

²⁴² On the meaning of 'subordinate employment' see Supreme Civil and Penal Court (SCPC), Civil Section, Nos. 1674/2010, 433/2011.

²⁴³ SCPC Civil Section Nos. 1674/2010, 223/2011, 77/2011, 433/2011, 433/2011.

²⁴⁴ SCPC Civil Section Nos. 229/2011, 433/2011.

²⁴⁵ SCPC Civil Section Nos. 1898/1988, 800/1987.

²⁴⁶ SCPC Civil Section Nos. 302/2011, 229/2011.

²⁴⁷ Article 10(1) of Act 3865/2010, as replaced by Article 4(5)(b) of Act 4151/2013, OJ A 103/29.4.2013.

²⁴⁸ Article 1, Paragraph E, Subparagraph E1, KFAS, of Act 4093/2012, OJ A 222/12.11.2012, as amended.

²⁴⁹ There is a typing error in this provision: it is Article 29, not Article 20, which concerns life partnership.

partners (e.g. reciprocal rights and obligations in matters of property during and after the dissolution of the partnership; reciprocal rights and obligations regarding maintenance in case of dissolution of the partnership). Inheritance rights are granted to each partner, which are however restricted in comparison with those of spouses. The partnership does not create any rights in matters of employment and social security; this omission, as well as the restricted inheritance rights were strongly deplored by the Greek National Commission for Human Rights (GNCHR) in its comments on the relevant bill.²⁵⁰

4.8.2. The transposing Act provides that it applies to self-employed workers and their spouses or life partners. However, social protection is inadequate, as explained below.

5. Article 3 - Definitions

5.1. All definitions were copied in the transposing Act, as was done in the Acts transposing Directives 2002/73/EC²⁵¹ and 2006/54. However, there is no awareness of the notion of indirect discrimination, which has not been applied by case law, although there are many instances of such discrimination. An example: Family workers (employer's spouse, children and other close relatives) are covered by the IKA scheme (3.4. of this report, above). Their coverage starts and ends on the day of notification of the commencement or termination of employment; otherwise they are not covered, even if contributions are paid.²⁵² This is an exception to the general rule that coverage starts *ipso jure* upon commencement of work, which affects mostly women - the majority of family workers (see section 19 of this report, below). The Council of the State (Supreme Administrative Court – CS) considered the provision compatible with Articles 4(1) and 22(5) of the Constitution which require equality before the law and social security coverage of workers; gender equality was not invoked.²⁵³

5.2. The definitions of 'harassment' and 'sexual harassment' have been copied from previous directives and Directive 2010/41, but there is no awareness of the distinction. The few sexual harassment cases rely on Greek law; they do not concern self-employed persons.

6. Article 4 – Principle of equal treatment

6.1. The text of Article 4(1) of Directive 2010/41 (which specifies the meaning of the principle of equal treatment) has been copied in Article 4(1) of the transposing Act. Directive 86/613/EEC²⁵⁴ was not transposed and was never directly applied by the courts or the equality body. Therefore, we cannot say whether the protection has improved.

Spouses file a common tax return, but their incomes are taxed separately. However, Article 5(2) of the previous Income Tax Code²⁵⁵ required that the income of a spouse derived from an undertaking owned by the other spouse be added to the latter's income. This made income tax higher than for single persons and affected mostly women who are usually the ones working for their spouses.

²⁵⁰ GNCHR Comments on the bill 'Reforms regarding the family, the child and society' (which became Act 3729/2008), adopted on 10 July 2008: www.nchr.gr, accessed 20 July 2014.

²⁵¹ Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council 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, OJ L 269, 5 October 2002, pp. 15-20.

²⁵² Article 2 of Act 1846/1951 (3.4. above), Ministerial Decision F.21/3288/20.12.1988 OJ B 4/9.1.1989.

²⁵³ CS No. 4703/2012.

²⁵⁴ 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 358, 19 December 1986, pp. 56-58.

²⁵⁵ Act 2238/1994, OJ A 151/16.9.1994.

The new Income Tax Code²⁵⁶ repealed the previous Code with effect since the coming into force of the new Code (23 July 2013)²⁵⁷ and did not repeat this provision; this provision is, however, included in the Ministry of Finance's 'Instructions for filling out the income tax return of individuals for 2014', which concerns the tax return for 2013;²⁵⁸ therefore, taxpayers will unduly pay the higher tax for about half of 2013.

7. Article 5 – Positive action

Article 116 (2) of the Constitution requires positive action, in particular in favour of women, in all fields, even beyond those covered by EU law. This provision is so widely worded that it also covers the self-employed, but there do not seem to be any positive measures for the self-employed and/or their spouses or partners. Article 5 of the Directive was not transposed.

8. Article 6 – Establishment of a company

Article 6 of Directive 2010/41 was transposed regarding both spouses and life partners, but there are no relevant cases nor statistics on how many companies have been established.

9. Article 7 – Social protection

Social security in Greece, regarding old age, disability, provident and health benefits, is mandatory for all workers and for their spouses and minor children, as indirectly insured persons. This is unless they are covered by a scheme other than the scheme covering their spouse. The extent of the coverage is specified by the legislation concerning each scheme. Life partners as such are not covered by social security (see 4.4.1 above). Mandatory schemes may only be run by legal persons governed by public law. Originally there were specific mandatory (old age and disability) pension schemes, health schemes and provident schemes (which pay a lump sum upon retirement), as well as certain voluntary supplementary pension schemes, for each profession or similar professions. These were gradually merged into larger schemes, as autonomous sections thereof; i.e. they have retained full autonomy regarding their accounts and finances, as well as their own regulations regarding affiliation and benefits. This happened with the pension schemes for engineers and public works contractors (TSMEDe), which covers architects, engineers and public works contractors; for health workers (TSAY); for lawyers, notaries public, bailiffs and land registrars (TAN); together with several health and provident schemes and supplementary pension schemes for these professionals, they were merged into the Unified Scheme for Independent Workers (ETAA).²⁵⁹

The schemes for professionals and craftspersons (TEBE), traders (TAE), motorists and car owners (TSA), maritime agents (TANPY) were abolished and those affiliated to them became automatically affiliated to the Organisation for the Insurance of Independent Professionals (OAEE), which provides pension and health coverage. The scheme for hoteliers was merged into the OAEE as an

²⁵⁶ Act 4172/2013, OJ A 167/23.7.2013, as amended.

²⁵⁷ Article of 72 (22) Act 4172/2013, as added by Article 26(11) Act 4223/2013 OJ A 287/31.12.2013.

²⁵⁸ <http://www.publicrevenue.gr/kpi/public/blog/attach/files/rss/osfd2014.pdf>, p. 11, accessed 30 August 2014.

²⁵⁹ See Act 3655/2008, OJ 58/3.4.2008, Articles 25-38 establishing the ETAA, as amended and complemented by ministerial decisions, the ETAA website: <http://www.etaa.gr> and the websites of the schemes merged therein: <http://www.tsmede.gr>, <http://www.tsay.gr> and <http://www.tnomik.gr>, accessed 30 August 2014.

autonomous section thereof.²⁶⁰ The pension, health and provident schemes for persons working with mass media, either as self-employed or as salaried workers, were merged into the Unified Scheme for the Personnel of Mass Media (ETAP-MME).²⁶¹ The pension and health scheme for agricultural social security (OGA) covers both self-employed farmers and the salaried workers employed by them.²⁶²

The resources of all social security schemes come from the contributions of affiliated persons, the income from the property of the legal persons that run them and state support.

For the unemployment coverage of the self-employed, see 1.4. of this report, above.

Article 7 of the Directive has not been transposed. Since this Article refers to Article 2(b) of the Directive, it does not concern spouses or life partners who are employees or business partners of self-employed workers. It only concerns spouses and life partners ‘where they habitually, under the conditions stipulated by national law, participate in the activities of the self-employed worker and perform the same tasks or ancillary tasks’ (Article 2(b)). As explained above, life partners of the self-employed are in no cases covered by the latter’s social security scheme. However, spouses of the self-employed who fall in the category covered by Article 7, in conjunction with Article 29(b) of the Directive, are a group of persons not dealt with by Greek social security law. The spouses of the self-employed, like other members of the family of their spouse, may be covered if they so wish and if they are not covered by another scheme. In this case they may be covered by the main social security scheme for subordinate workers under a private law labour relationship (IKA), if they are full-time employees of their spouse.²⁶³ However, these employees are outside the scope of Article 7 of the Directive.

Under Greek law, the spouses of self-employed persons addressed by Article 7 of the Directive are covered by the self-employed person’s social security scheme (see above) only regarding sickness benefits in kind.²⁶⁴ Therefore, Article 7 of the Directive should have been transposed and the category covered by this Article, in conjunction with Article 2(b) of the Directive, should have been specified.

10. Article 8 – Maternity benefits

Article 8 of the Directive has been transposed by Article 6 of the transposing statute, which only transposed Paragraph 1 of this Article, as noted under Section 3.3. of this report, above. Moreover, this article only provides that self-employed women (not spouses or life partners) may be granted a maternity allowance allowing a temporary interruption of their activity due to pregnancy or maternity for at least fourteen weeks. Paragraph 3 of Article 8 was not transposed. It is only provided by Article 6(2) of the transposing statute that the source, the amount and the procedure for paying this allowance shall be determined by common decision of the competent Ministers. Ministerial Decision No. F.10060/15858/606 (OJ B 2665 of 8 October 2014), which was issued on the basis of Article 6(2) of the transposing statute, granted a monthly allowance of EUR 200 for four months to self-employed women insured with ETAA. Subsequently, Ministerial Decision

²⁶⁰ See Acts 2676/1999, OJ A 1/5.1.1999, and 3655/2008, OJ 58/3.4.2008, Articles 7-24, as amended and complemented by ministerial decisions, and <http://www.oaee.gr>, accessed 30 August 2014.

²⁶¹ See Act 3655/2008 OJ 58/3.4.2008, as amended, Articles 39-51.

²⁶² See Act 4169/1961, OJ 81/18.5.1961, as amended and complemented by ministerial decisions, and <http://www.oga.gr>, accessed 30 August 2014.

²⁶³ Article 1(1) Act 1759/1988 Social security coverage of non-insured groups with IKA (OJ 50/1988); Ministerial Decision F.21/3288/20.12.1988 (OJ B 4/1989, Regulation for the coverage by IKA of persons employed in undertakings of members of their family.

²⁶⁴ Act 3655/2008, OJ 58/3.4.2008, Article 26(d) regarding ETAA, Article 11 regarding OAEE.

No. F.40035/41931/1653 (OJ B 192 of 23 January 2015), which was also issued on the basis of Article 6(2) of the transposing statute, granted a monthly allowance of EUR 150 for four months to self-employed women insured with OAEE. This monthly allowance is lower by EUR 50 than the allowance granted to women insured with ETAA; this constitutes direct discrimination on grounds of pregnancy and maternity against self-employed women insured with OAEE. Moreover, those insured with other schemes (ETAP-MME and OGA, see Section 9 of this report, above) have not yet been granted any allowance. This constitutes direct discrimination on grounds of pregnancy and maternity against self-employed women insured with these other schemes.

The period covered by the above allowances is about sixteen weeks, i.e. two weeks more than the minimum required by the Directive. However, the monthly amount granted by both Ministerial Decisions is far below the poverty threshold, which is EUR 580 for Greece (see No. 1.3. above), and even significantly lower than the unemployment allowance, which is EUR 360 (see 1.4. above); therefore, these allowances cannot be considered 'sufficient', as required by Article 8(1) of the Directive.

Let us also recall that Article 6(2) of the transposing statute only partly transposed Article 8(1) of the Directive, since it only concerns self-employed women, not spouses or partners of self-employed men. Moreover, it does not transpose Paragraphs 3 and 4 of Article 8 of the Directive (see No. 10 above). Anyway, the three criteria mentioned in Paragraph 3 of Article 8 would make no sense in Greek law, as self-employed persons receive no allowance when interrupting their activities on grounds connected with their health (a), nor any other family allowance (c), nor is it possible to estimate the average loss of their income (b). Furthermore, the first Ministerial Decision is in conflict with the Directive, as on the occasion of the Directive's transposition it lowered the maternity allowance granted by prior legislation to certain self-employed women falling within its scope. For example, Decree 162/1998 (OJ A 122 of 5 June 1998) granted self-employed women lawyers a lump sum of EUR 470 before childbirth and EUR 470 after childbirth, i.e. EUR 940 in total. This was higher by EUR 140 than the total amount of the allowance granted by the first Decision (EUR 200 for four months).

Paragraph 4 of Article 8 was not transposed. There are no services supplying temporary replacements or national social services.

11. Article 9 - Defence of rights

Article 9 has been implemented by Article 7 of the transposing statute, which extends representation rights to associations, organisations and other legal entities for taking cases to court or submitting them to the competent administrative authorities in the name of the victim, or intervening in the victim's favour in proceedings initiated by him/her. The same Article also contains the EU burden of proof rule (these provisions are identical in all statutes transposing gender equality directives). However, regarding the standing of legal entities, while the directive requires the *approval* of the victim, the transposing provision requires his/her *consent*. Under Greek law (Articles 236-238 Civil Code) the *consent* must be obtained before lodging the request for a judicial remedy, while the *approval* can be obtained later.²⁶⁵ Therefore, until the consent is given, the remedy may well be time-barred. It is not clear whether this provision also empowers the legal entities to act in their own name. Moreover, as both the *locus standi* and the burden of proof rules have been left out of the procedural codes, they remain generally unknown and have not been applied in any gender equality or discrimination cases.

²⁶⁵ Author's own italics.

The equality body for this Directive, as for all other gender equality directives, is the Ombudsman, who has only mediation – not litigation – competences and issues opinions and recommendations, not binding decisions. Recourse to the Ombudsman is voluntary.²⁶⁶

12. Article 10 - Compensation or reparation

Article 10 has been properly implemented by Article 7(5) of the transposing statute, which 'inter alia' provides for 'full compensation', without upper limit. Under Greek law, full compensation includes actual damage and loss of earnings (Article 298 Civil Code) plus legal interest. The expression 'inter alia' was included in this provision so that restoration to the original position *restitutio in integrum*, as traditionally granted by Greek courts in cases of discrimination (e.g. annulment of a dismissal with retroactive effect), is not affected.

Moral damages may also be awarded, mainly in cases of offence to personality, on a case-by-case basis, by application of the principle of proportionality.²⁶⁷

13. Article 11 – Equality bodies

The Ombudsman (see section 11 of this report, above), whose independence is constitutionally guaranteed, fulfils the relevant criteria and is entrusted with the tasks of an equality body. However, no complaints regarding discrimination against self-employed persons seem to have been lodged.

14. Article 12 – Gender mainstreaming

Article 12 has not been transposed, in contrast with the corresponding Article 29 of the Recast Directive. However, mainstreaming is required by the constitutional gender equality norm (Article 4(2)) which applies in all fields, even beyond those covered by EU law.

15. Article 13 – Dissemination of information

No information has been disseminated to increase the impact or awareness of any of the two Directives.

16. Article 14 – Level of protection

Due to omissions in the transposing statute (see 3.3., 5.1., 6.1., 7, 9, 10 above), the level of protection in Greece is lower than that required by the Directive.

17. Case law

There is no case law relying on this Directive or the transposing statute, or on Directive 86/613.

18. Issues regarding the 'duty holder'

No issues regarding the duty holder seem to have arisen, as Directives 86/613 and 2010/41 have not been applied. However, it can be considered that the duty holder may be inter alia a professional body with which the self-employed person must register in order to be able to practise his/her profession (e.g. a lawyers' bar, a chamber of industry or commerce) or a body which grants professional

²⁶⁶ See the Ombudsman's website: <http://www.synigoros.gr>, accessed 12 November 2014.

²⁶⁷ SCPCt, Civil Section, No. 2069/2013.

licences. Such bodies may also be duty holders in cases of discrimination in promotion or work conditions (e.g. where a lawyer practising in lower courts seeks to be admitted to practise in higher courts). An employer/client may also be a 'duty holder' regarding terms and conditions for concluding or terminating a contract/ relationship of self-employment or one of the contracts mentioned under 4.2.-4.5. of this report, above. A social security scheme may also be a duty holder regarding the access to it or the benefits it pays.

19. National statistics

19.1. According to EUROSTAT, in 2012, the self-employment rate in Greece was 34.6 % of total employment; the male rate was 38.1 % of male employment, and the female rate was 29.6 % of female employment.²⁶⁸ According to ELSTAT, in the first quarter of 2014, the 'own-account workers' (in Greek 'self-employed without personnel') were 25.6 % of total employment and the 'employers' (in Greek 'self-employed with personnel') were 6.4 %, i.e. 32 % in total.²⁶⁹ 'Unpaid family workers' (in English and Greek), whom EUROSTAT counts as 'self employed' (see 19.2 below), are listed separately (4.6 % of total employment). Therefore, according to ELSTAT, in the first quarter of 2014, the self-employed were in total 36.6 %. The male 'own-account workers' were 30 %, the male 'employers' 8 % and the male 'unpaid family workers' 2.78 %, i.e. as a whole 40.78 % of male employment. The female 'own-account workers' were 19.6 %, the female 'employers' 4.19 % and the female 'unpaid family workers' 7.25 %, i.e. as a whole 31 % of female employment.²⁷⁰

In comparison with the first quarter of 2009, there has been a slight increase in the total self-employment rate (from 36.1 % to 36.6 % of total employment); in particular, the rate of 'own-account workers' has increased (from 21.6 % to 25.6%), while the rate of 'employers' has decreased (from 8.7 % to 6.4 %) and so has the rate of 'unpaid family workers' (from 5.8 % to 4.6 %). However, the number of employed persons has sharply fallen from the first quarter of 2009 to the first quarter of 2014 (from 4 545 600 to 3 483 700),²⁷¹ and all categories of self-employed persons have also greatly decreased in number.²⁷² Among the sectors in serious decline where the number of self-employed persons has greatly fallen between 2009 and 2014 are construction, manufacturing, education, health, social work and other services.²⁷³

19.2. ELSTAT uses the EUROSTAT definition of the self-employed: 'the sole or joint owner of the unincorporated enterprise (one that has not been incorporated,

²⁶⁸ EUROSTAT Employment and Social Developments in Europe 2013, Statistical annex: <http://ec.europa.eu/social/main.jsp?langId=en&catId=113&newsId=2023&furtherNews=yes>, accessed 9 July 2014.

²⁶⁹ ELSTAT *Labour Force Survey* Press release 1st quarter 2014: http://www.statistics.gr/portal/page/portal/ESYE/PAGE-themes?p_param=A0101&r_param=SJO01&y_param=2014_01&mytabs=0, accessed 30 July 2014.

²⁷⁰ ELSTAT *Labour Force* Table 12: 'persons employed 15 years and over by occupational status, age group and sex. 1st quarter 2014': http://www.statistics.gr/portal/page/portal/ESYE/PAGE-themes?p_param=A0101&r_param=SJO01&y_param=2014_01&mytabs=0, accessed 30 July 2014.

²⁷¹ ELSTAT *Labour Force Survey* Press release first quarter 2014: http://www.statistics.gr/portal/page/portal/ESYE/PAGE-themes?p_param=A0101&r_param=SJO01&y_param=2014_01&mytabs=0, as compared to the press release for the first quarter 2009: http://www.statistics.gr/portal/page/portal/ESYE/PAGE-themes?p_param=A0101&r_param=SJO01&y_param=2009_01&mytabs=0, both accessed 30 July 2014.

²⁷² ELSTAT 'Persons employed of 15 years and over by occupational status, age groups and sex. First quarter 2009 Table 12: http://www.statistics.gr/portal/page/portal/ESYE/PAGE-themes?p_param=A0101&r_param=SJO01&y_param=2009_01&mytabs=0, as compared to 'Persons employed of 15 years and over by occupational status, age groups and sex. First quarter 2014 Table 12: http://www.statistics.gr/portal/page/portal/ESYE/PAGE-themes?p_param=A0101&r_param=SJO01&y_param=2014_01&mytabs=0, both accessed 30 July 2014

²⁷³ ELSTAT *Labour Force* Table 3A: 'Persons employed 15 and over by sector and occupational status (first Quarter 2001 to first Quarter 2014: http://www.statistics.gr/portal/page/portal/ESYE/PAGE-themes?p_param=A0101&r_param=SJO01&y_param=2014_01&mytabs=0, accessed 30 July 2014.

i.e. formed into a legal corporation) in which he/she works, unless they are also in paid employment which is their main activity (in that case, they are considered to be employees)'. However, 'unpaid family workers; outworkers (working outside the usual workplace, such as at home); workers engaged in production done entirely for their own final use or own capital formation, either individually or collectively' are included in the EUROSTAT definition.²⁷⁴

HUNGARY – Beáta Nacsa

1. Context

Hungarian legislation does not include a well-developed, thorough definition of self-employment. In both the legal and the statistical system, the definition of 'self-employed person' relies on formal criteria (being an owner of a business, being registered as private entrepreneur in the taxation system, etc.) and disregards the fundamental difference between 'the owner of the business' and 'the self-employed person', who needs specific legal protection because of being economically vulnerable. In such a formal approach, the owner of a highly capitalised business employing a few hundred employees and the owner of the corner shop in which the owner and his/her family work both fall equally into the category of self-employed person, if they operate their businesses in the form of private entrepreneurship.²⁷⁵

There is little data available on the self-employed and knowledge of the situations of both the self-employed and their spouses/life partners is therefore limited. According to the information provided by the Department of Business Statistics, the Central Statistical Office, breakdown of the data on private entrepreneurs by gender is not available.

Research has indicated that self-employment frequently takes place in family-owned enterprises, where the family itself limits the business' potential to growth (e.g. the business is adjusted to the skills set and needs of the family and not to the potential of the market). Self-employed businesses rarely grow into a business with employees. There is no correlation between the number of workplaces offered and that of self-employed persons: a decrease in employment did not increase the rate of self-employment among men, and slightly increased that among women.²⁷⁶

2. Transposition of the Directive

No specific Act has been passed in order to transpose Directive 2010/41/EU. Several Acts, as is outlined in Section 4 of this report, below, contain a definition of self-employed person. Two Acts contain references to the transposition of Directive 2010/41/EU. The repeatedly modified Act LXXXIII of 1997 on the services provided by the compulsory health insurance and the Act CCXII of 2012 on the modification of different acts regulating health issues contain a reference to the Directive.

²⁷⁴ http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Glossary:Self-employed accessed 30 July 2014.

²⁷⁵ Central Statistical Office, *Statistikai Tükör (Statistical Mirror) Demography of entrepreneurs*, 12 June 2013, available at <http://www.ksh.hu/docs/hun/xftp/idoszaki/valldemog/valldemog11.pdf>, accessed 16 September 2014.

²⁷⁶ S. László 'A vállalkozás és a vállalkozási aktivitás mérése' ('Measuring entrepreneurship and entrepreneurial activity') *Statistikai Szemle* 6-7(2004) at p/ 546. Available at http://www.ksh.hu/statszemle_archive/2004/2004_06-07/2004_06-07_545.pdf, accessed 20 September 2014.

3. Article 1 – Subject matter

The overlap of the subject matters has not resulted in any problems in the course of the transposition.

4. Article 2 – Scope

The concept of 'self-employed person' is elaborated in Hungarian law in a rather formal and ambiguous way. Article 17 of Act IV of 1991 on the Promotion of Employment and Benefits for the Unemployed (hereafter 'Flt') defines a self-employed person as someone 'who provides employment for him/herself outside of a dependent employment relationship, including starting up a new business, or joining an existing business.'

According to Act CXVII of 2007 on occupational pension, the notion of self-employed covers both private and corporate entrepreneurs. These subcategories are defined by further pieces of legislation. Article 2(1) of Act CXV of 2009 on private entrepreneurs and private entrepreneurship defines the private entrepreneur (*egyéni vállalkozó*) as a natural person who carries out economic activity regularly, for the purpose of acquiring assets and making a profit, and by taking economic risks. Corporate entrepreneurs are the owners of businesses with legal personality.

The Equality Act (Act CXXV of 2003) defines self-employment through the legal relationship that self-employed usually enter into: 'other relationship for work' (*munkavégzésre irányuló egyéb jogviszony*). This is discussed in Section 6 of this report, below. Agricultural businesses are also covered by the notion of self-employment.

The life partner relationship is legally recognised by civil law. A life partner relationship is established by the fact that two persons live in the same household, in an emotional and economic community.²⁷⁷ The life partners may register their relationship in an administrative procedure. Following registration, the life partners' rights and obligations are equal to those of spouses.²⁷⁸ The Equality Act also includes into the lists of relatives the life partner and the registered life partner.

In order to be able to provide the appropriate benefits, the social security system is entitled to handle data on life partner relationships, and on economically dependent living situations in families.²⁷⁹

5. Article 3 – Definitions

The Equality Act defines the basic concepts of equality law (direct and indirect discrimination, harassment, unlawful segregation, victimisation and instruction to commit any of the above forms of unlawful treatment), which are to be applied in the entire legal system. The Hungarian concepts go beyond the relevant EU regulations to the extent that the definitions of direct and indirect discrimination and unlawful segregation also protect groups (and not only individuals) against unequal treatment. This difference has had some impact on jurisdiction in a case regarding unlawful segregation of Roma children in schools, but not in gender equality case law.

All central concepts are rather similar to those in Directive 2010/41/EU, although the Hungarian definitions are usually more limited. The definition of direct discrimination is narrower because it allows the possibility of exemption due to the enforcement of another person's fundamental right, if it is suitable for the designated purpose and proportional, or otherwise has a reasonable and

²⁷⁷ Article 6:514 (1) of Act V of 2013 of the Civil Code.

²⁷⁸ Act XXIX of 2009 on registered life partner relationships.

²⁷⁹ Article 42(e) of Act LXXX of 1997 on the benefits provided by social security.

objective explanation directly related to the relationship.²⁸⁰ Similar exemptions are allowed in the Directive only in relation to indirect discrimination. The concept of indirect discrimination is also narrower because of stipulating ‘considerably larger disadvantage’ compared to ‘disadvantage’ as mentioned in the Directive. The definition of harassment is identical to that in the Directive, although sexual harassment as such is missing from the Equality Act. This omission was intended to be eliminated by the modification of the Equality Act in 2006, which inserted into the definition of harassment that the violation of dignity of the person occurs as a result of a conduct ‘of a sexual or other nature’. Consequently, the content of sexual harassment must be developed through the jurisdiction of the Equal Treatment Agency (ETA) and the courts. Up to now the case law of the ETA has properly transposed the content of sexual harassment included in the Directive: the ETA imposed a fine for habitually making remarks about the attractive appearance of a female co-worker, using a very intimate tone (calling her ‘puppy’ or ‘piglet’), repeatedly and publicly offering himself as her sexual partner.²⁸¹ Instruction to discriminate has been properly transposed into the Equality Act.

6. Article 4 – Principle of equal treatment

Article 4(1) has been formally but ambiguously transposed into the legal system. According to the Equality Act, equal treatment regulations apply to all those relationships where the person is obliged to work under an ‘other relationship for work’ (*munkavégzésre irányuló egyéb jogviszony*).²⁸² The Hungarian term for ‘other relationship for work’ usually covers relationships where the work is performed between independent parties. Such independent work is performed through an agency contract (*megbízási szerződés*), a contract for professional services (*vállalkozási szerződés*), or membership in private companies (*gazdasági társaság*).

The self-employed have a right to equal treatment with respect to access to work, especially in public job advertisements, in hiring procedures, and regarding the conditions of employment; in establishing and terminating the employment relationship or other relationship for work; in relation to any training before or during the work; and in determining and providing working conditions.²⁸³

There are no rules in the legal system which would directly or indirectly discriminate in regard to self-employment between men and women, including the issues of establishment, equipment or extension of a business or the launching or extension of any other form of self-employed activity.

7. Article 5 – Positive action

Positive action is mentioned in the fourth modification of the Fundamental Law (March 25 2013), stating that ‘equal opportunities and social convergence shall be promoted by introducing special measures’. The rules of such measures are regulated by Article 11 of the Equality Act, stating that positive action measures might be issued by Act, by government decree based on the Act, or by collective agreement; and that it must not violate fundamental rights, it must not grant unconditional preference and it must not exclude the consideration of individual aspects. In regard to gender inequalities, no positive action has been ordered by law in Hungary yet, beyond the (questionable) specific pension entitlements of women after 40 years of service.

²⁸⁰ Article 7(2) of the Equality Act.

²⁸¹ ETA case no. 365/2011 EBH.

²⁸² Article 5.d, 3.b and 21.f of the Equality Act.

²⁸³ Article 21 of the Equality Act.

8. Article 6 – Establishment of a company

Hungarian law has never contained rules for the establishment of a company by spouses and life partners that are more restrictive than the conditions for the establishment of a company between other persons. There is no data available on the establishment of companies.

9. Article 7 – Social protection

The Hungarian social security system covers those who perform work, receive income and/or pay contribution (the concept of 'insured', possibly covering spouses and life partners) on a mandatory basis. The scope of the legislation covers sickness, invalidity, old age, industrial accidents and occupational diseases, and unemployment and it ensures equal treatment with regard to access to, contribution to and benefits from insurance covering these risks. Voluntary systems are also available for both healthcare services and pensions.

Article 24 of the Equality Act prescribes that the requirement of equal treatment applies with respect to social security, particularly in the course of claiming and ensuring benefits financed from the social security schemes, and social benefits, financial and in-kind child protection or personal care. According to the personal scope of this Article, this rule covers the self-employed but not their spouses and life partners. However, the spouse and/or life partner is free to conclude a social security contract and pay contributions in his or her personal capacity. In this case the spouse's or life partner's equal treatment is safeguarded by Article 4 of the Equality Act, which obliges authorities to follow the rules of equal treatment in all their legal relationships, and also by Article 24 (as explained above).

10. Article 8 – Maternity benefits

Mothers (both natural and adoptive) are entitled to twenty-four weeks of maternity leave. During this period, an infant care fee is paid to insured mothers, the amount of which is equal to 70 % of the average daily pay (with no ceiling on payments).²⁸⁴ For non-insured mothers, provided they have attended prenatal care at least four times during the pregnancy, maternity allowance is paid and is equal to 225 % of the minimum amount of old-age pension.²⁸⁵ A mother (parent) is considered insured if she has had 365 days of insurance relationship over a period of two years.²⁸⁶ The infant care fee and maternity allowance meet the criteria of sufficiency as stipulated in Article 8(3) (a) and (c) of Directive 2010/41 respectively, although national legislation makes no explicit reference to this. Following the end of maternity leave, both parents are entitled to unpaid leave until the child reaches the age of three (or the age of ten, in case of permanently and seriously ill children). For the period of this leave, two types of parental benefits are provided from the central budget: childcare benefit and childcare fee. Both are family entitlements, except for the childcare fee until the child reaches the age of one, which is provided only for (insured) mothers. The benefit is a flat-rate amount, equal to the amount of the minimum old-age pension, and is paid until the child reaches the age of three. The childcare fee is paid to insured parents only (including insured female spouses and life partners), from the end of the maternity leave until the child reaches the age of two. The amount of it is equal to 70 % of average daily earnings, with a ceiling of twice 70 % of the minimum wage.²⁸⁷

²⁸⁴ Article 40 of Act LXXXIII of 1997.

²⁸⁵ Article 29 of Act LXXXIV of 1998.

²⁸⁶ Article 40 and 42/A of Act LXXXIII of 1997.

²⁸⁷ Article 42/D of Act LXXXIII of 1997.

Since the beginning of 2014, in order to counterbalance the detrimental effect of the increase of service time precondition of childcare fee, college and university years can also be taken into account as service time in order to make students and fresh graduates entitled to childcare fee for one year.

While equal treatment is formally guaranteed, no attention is paid to the disproportionately disadvantaged position of self-employed women in reality. For example, in case of pregnancy and childbirth, although an individual entrepreneur is formally entitled to the same benefits as other women in employment relationships, in reality she can rarely enjoy them because of being unable to stay away from her business for such a long period, and usually no supportive childcare services are available either. No temporary replacement services are provided by national legislation.

11. Article 9 – Defence of rights

The right to bring a claim covers a wide range of legal subjects. Any person whose right is violated may bring a claim to the Equal Treatment Authority (ETA) or to the labour or civil courts, depending upon his/her choice and the merits of the case. According to Article 15(5) of the Equality Act, the ETA could initiate the procedure *ex officio* if the discriminatory action has been committed by the Hungarian State, local and national government (and their corresponding bodies), organisations exercising official authority, or by the Hungarian army and law enforcement bodies. However, there is no record of this ever happening. Furthermore, procedures could be initiated in the form of *actio popularis* either by the ETA before the courts, or by associations, trade unions, and foundations before either the ETA or the courts (Article 14(b) of the Equality Act). The *actio popularis* approach is rarely practised in Hungary.

Per year, only around 50 cases are filed with the Equal Treatment Agency regarding gender, pregnancy and motherhood, out of which approximately 5-7 cases are considered well-grounded.²⁸⁸ The ETA is used as a (quasi)judicial body by petitioners. In well-grounded cases, and provided that the parties agree on the remedies, the ETA can also proceed as a forum for conciliation. There are no specific statistics with regard to cases filed with labour courts and courts of other jurisdictions. Still, we may assume that the number of cases is equally low. No cases have been published by ETA and the courts of law on violation of equal treatment in regard to self-employment.

Equal treatment of self-employed persons and that of their spouses and life partners seems to be a rather neglected field in all areas of legal proceedings, academic research, and statistical data collection.

12. Article 10 – Compensation or reparation

Both compensation and reparation could be applied by the courts of law in equal treatment cases, depending upon the petition of the claimant and the merits of the case. No prior limit is designated by law. Immaterial damages are calculated on a case-by-case basis. The amount of the immaterial damages is intended to provide equal monetary compensation to the immaterial damage suffered.

13. Article 11 – Equality bodies

The Equal Treatment Agency (ETA) is an administrative body, the role of which is to safeguard the enforcement of equal treatment laws. The ETA has little to offer to petitioners: the Agency can only establish the infringement of law, issue fines and order the publication of its decision on its own website and that of the

²⁸⁸ Data provided to the expert by the Equal Treatment Agency by e-mail.

violator,²⁸⁹ but the ETA is not authorised to impose sanctions which could repair the harm suffered by the petitioner (e.g. payment of compensation). For the application of such sanctions, the applicant has to submit the case to a court of law (instead of or following the procedure at the ETA). Hungarian anti-discrimination legislation makes it rather difficult and time-consuming for women to seek effective, proportionate and dissuasive penalties under the Equality Act, as has been pointed out by experts on several occasions.

Although in the past years the ETA has conducted several research studies, the issues listed in Article 11(2)-(3) of Directive 2010/41/EU were not addressed.²⁹⁰ The ETA does not seem to effectively promote, analyse, monitor, or support the equal treatment of self-employed persons.

Article 35 of the Equality Act formally safeguards the independence of the ETA. Although the ETA has never been considered a strong authority, in the last few years it has become reluctant to even use the weak sanctions it could use. One of the most deterrent sanctions of the ETA is its competence to impose a fine, the amount of which ranges from EUR 165 (HUF 50 000) to EUR 20 000 (HUF 6 million). The number of cases in which a fine was imposed decreased from 20 to 2 in the years 2010-2012, although the total number of cases and the number of cases in which unequal treatment was established did not decrease correspondingly. In the 2013 report the number of cases in which a fine was imposed was no longer published. Only the total amount of fines was published (EUR 10 000; HUF 3 million), which did not even reach the maximum threshold that can be imposed in one single case.²⁹¹

14. Article 12 – Gender mainstreaming

There is nothing to be reported on this topic.

15. Article 13 – Dissemination of information

In the past five years, the ETA has conducted several campaigns targeting both the general public (advertisements on TV, traveling exhibition, publication of short booklets about different forms of discrimination and the availability of legal protection against them) and the younger generations (audiobook contest, short film contest) in order to disseminate information about principles of equal treatment.²⁹² These campaigns did not specifically target the issue of equal treatment in self-employment, but still the self-employed, their spouses and life partners could also benefit from these campaigns.

16. Article 14 – Level of protection

With some gaps, especially in regard to the legal protection of spouses and life partners, Hungarian law has properly transposed the 2010/41/EU Directive. No regulations are in force which would be more favourable than those stipulated in the Directive.

²⁸⁹ Article 17/A of the Equality Act.

²⁹⁰ See http://www.egyenlobanasmod.hu/app/webroot/files/img/articles/c3d85264cfaec3a18542379bd526adbf/TAMOP_zarokiadvany.pdf, accessed 26 January 2015.

²⁹¹ See <http://www.egyenlobanasmod.hu/article/view/tajekoztato-az-egyenlo-banasmod-hatosag-2013-evi-tevekenysegerol>, accessed 26 January 2015.

²⁹² Virtual library of ETA, available at http://www.egyenlobanasmod.hu/cikkek/virtual_library#videok; publications of ETA, available at http://www.egyenlobanasmod.hu/cikkek/virtual_library#dokumentumok; short film contest of ETA for youngsters, available at <http://www.egyenlobanasmod.hu/tamop/palyazatok#rovidfilmalyazat>; and audiobook contest of the ETA for youngsters, available at <http://www.egyenlobanasmod.hu/tamop/hangoskonyvek>. All webpages accessed 13 October 2014.

17. Case law

No cases have been published in regard to equal treatment of the self-employed.

18. Issues regarding the ‘duty holder’

As far as the ‘duty holder’ is concerned, Article 5(d) of the Equality Act stipulates that in case of other relationships for work, the person who has the right to give orders to the self-employed person is supposed to follow the rules of equal treatment. This rule applies to all aspects of equal treatment with respect to the self-employed.

19. National statistics

In the Labour Force Survey the term of ‘individual entrepreneur’ (*önálló vállalkozó*) is used, covering those natural persons who work in their own entrepreneurship, agricultural business, or professional practice.²⁹³ This definition (mistakenly) uses individual entrepreneur and self-employed person as synonyms.

In business statistics, the number of *registered* private entrepreneurs (every individual who has a tax number that she or he uses while doing business) was 421 122 in 2011.²⁹⁴ The number of *operating* private entrepreneurs (who had income and/or employees in the business year) was 298 000 (43 % of all entrepreneurs) in 2011. The recent economic and financial crisis has resulted in higher cessation among the private entrepreneurs than among business partnerships, most probably due to their lower level of average capitalisation.²⁹⁵ The proportion of private entrepreneurs whose main source of income is their entrepreneurship is 55 %, while 33 % of private entrepreneurs do their business in addition to their paid employment elsewhere. The proportion of pensioners is just below 2 % among private entrepreneurs.²⁹⁶

20. Any other issues?

There are no other issues to be reported.

ICELAND – *Herdís Thorgeirsdóttir*

1. Context

Self-employment constitutes an important part of the labour market in Iceland.²⁹⁷ Self-employment is more common among men than women. It appears to be an increasing trend to initiate an area of work in one’s own name (see statistics in Section 19 below). Recent research done by the SA Federation of Employers indicates that there is a growing interest among women to start their own business.

²⁹³ On the definitions in employment statistics, see http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Employment_statistics/hu, accessed 16 September 2014.

²⁹⁴ I. R. Kazimir ‘Az egyéni vállalkozók hozzáadott értékének számítása’ (‘Calculating the value addition of individual entrepreneurs’) *Statisztikai Szemle 7 (Statistical Review)* (2013) at p. 697.

²⁹⁵ Statistical methodology, available at <http://www.ksh.hu/docs/hun/modsz/modsz32.html>, accessed 10 September, 2014.

²⁹⁶ Central Statistical Office, *Statisztikai Tükör (Statistical Mirror) Demography of entrepreneurship*, 12 June 2013, available at <http://www.ksh.hu/docs/hun/xftp/idoszaki/valldemog/valldemog11.pdf>, accessed 16 September 2014.

²⁹⁷ <http://www.eu-employment-observatory.net/resources/reviews/Iceland-SERvw2010.pdf>, accessed 10 August 2014.

All self-employed persons are obliged to ensure their own pension rights through membership in a pension fund from the age of 16 until the age of 70.²⁹⁸

The problem with being self-employed is for example to withhold enough money for paying into the mandatory pension fund²⁹⁹ and paying the social security contribution based on their income. The self-employed individual has no one else to enforce her/his rights and is responsible her/himself for setting aside the payments required for the accorded social rights.

2. Transposition of the Directive

Directive 2010/41 has been fully implemented in the following Acts:³⁰⁰

- Act on Equal Status and Equal Rights of Women and Men No. 10/2008; as amended by Act No. 62/2014.
- Social Security Act No. 100/2007; and
- Act on Maternity, Paternity and Parental Leave No. 95/2000 with subsequent amendments, which mostly concern changes and reductions in amounts of payments.³⁰¹

There were no particular difficulties rendering it necessary to extend the period for implementation until 5 August 2014 in order to comply with Article 7 and in order to comply with Article 8 as regards female spouses and life partners referred to in Article 2(b).

3. Article 1 – Subject matter

National measures in Iceland concerning the implementation of Directive 2006/54 (implementation of equal treatment of men and women (recast)) are in the following legislation:

- the Act on Equal Status and Equal Right of Women and Men (Gender Equality Act), No. 10/2008; as amended by Act No. 62/2014;³⁰²
- the Social Security Act, No. 100/2007;
- the Act on Maternity/Paternity Leave and Parental Leave, No. 95/2000 with subsequent amendments;
- the Act on Unemployment Insurance, No. 54/2006; and
- the Act on amendments to the Act on Gender Equality, No. 10/2008 (employment, occupation etc.).

Directive 2004/113 on equal treatment of men and women in goods and services has not yet been implemented.³⁰³

²⁹⁸ Act on Mandatory Pension Insurance and on the Activities of Pension Funds, No. 129/1997, Article 1.

²⁹⁹ Act on Mandatory Pension Insurance and on the Activities of Pension Funds, No. 129/1997.

³⁰⁰ See a new provision added to Article 33 of the Gender Equality Act No. 10/2008 with Act No. 62/2014 stipulating on the implementation of the directive, i.e. EU Directive 2006/54; EU Directive 2010/41 of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC (OJ L 180, 15.7.2010, p. 1 in Annex XVIII to the EEA agreement as corrected by the decision of the EEA Joint Committee No. 84/2011).

³⁰¹ Changes to Act No. 95/2000 have concerned the amount of payments, which has been reduced since the beginning of the financial crisis. These payments reached a peak before the financial collapse in 2008.

³⁰² See also Judgment of the Court of 15 November 2013 in Case E-10/13 (Failure by an EEA/EFTA State to fulfil its obligations – Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle for equal opportunities and equal treatment of men and women in matters of employment and occupation).

³⁰³ Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services OJ L 373 of 21 December 2004, pp. 37-43.

4. Article 2 – Scope

Unemployment Insurance Act no. 54/2006 defines a self-employed individual in Article 3(b) as follows:

*Any person who works at his/her own business or independent activity to the extent that he himself/she herself is obliged to pay tax deductions at source in respect of calculated wages and social insurance tax in respect of his/her work, either every month or in another regular manner according to rules set by the Director of Internal Revenue on calculated remuneration.*³⁰⁴

Not all self-employed workers are considered to be part of the same category with regard to unemployment. There is a special unemployment fund for benefit payments to farmers, small fishing-vessel owners and lorry drivers.³⁰⁵ Other self-employed individuals, like wage earners, are entitled to apply to the Directorate of Labour for unemployment benefit when becoming unemployed.

Under Unemployment Insurance Act no. 54/2006 cohabiting partners if registered are covered like spouses. Under the Social Security Act, no. 100/2007 (see Article 49) two unmarried individuals have the same rights to benefits as couples if registered in Registers Iceland, providing that they have a child together or are expecting a child together or have been cohabitating together consecutively for more than one year. The same applies to benefit entitlements of the partner that survives his/her spouse. This provision was amended following amendments to the Law in Respect of Marriage, no. 31/1993 with law no. 65/2010 where the term 'two individuals' replaced 'man and a woman'.

With regard to tax rules, cohabiting same-sex partners may request to be taxed together, in the same way as married couples and cohabiting couples of the opposite sex, who have registered their cohabitation, have lived together for at least one year, or have or are expecting a child together (Act 90/2003 on income tax). Furthermore, a rule providing for a tax-free personal allowance that is transferable between spouses has been extended so that it is also transferable between cohabiting partners (Act 45/1987 on settlement of taxes).

5. Article 3 – Definitions

The definitions set forth in Article 3 of Directive 2010/41 had already been incorporated in Gender Equality Act no. 10/2008 (GEA). The GEA defines 'direct discrimination' in the same manner as Directive 2010/41, i.e. when one individual receives less favourable treatment than another of the opposite sex in comparable circumstances. The same goes for 'indirect discrimination', when an impartial requirement standard of reference or measure affects either sex more heavily than the other, unless this is appropriate, necessary or justifiable in terms of impartial considerations independent of gender. Subsequently the GEA sets forth a definition of 'gender based harassment' and 'sexual harassment', the former being 'unfair and/or insulting behaviour which is connected with the gender of the person affected by it, is unwelcome and impairs the self-respect of the person affected by it and which is continued in spite of a clear indication is given that it is unwelcome. The harassment may be physical, verbal or symbolic'. A single instance may be considered as gender-based harassment if it is 'serious'. 'Sexual harassment' is defined by wording similar to the above.

The distinctions between harassment and sexual harassment have not been the source of any legal controversies.

³⁰⁴ http://eng.velferdarraduneyti.is/media/acrobat-enskar_sidur/Unemployment-Insurance-Act-No-54-2006-as-amended.pdf, accessed 8 October 2014.

³⁰⁵ Article 7 of the Unemployment Insurance Act, no. 54/2006.

6. Article 4 – Principle of equal treatment

The principle of non-discrimination is firmly established in Article 65 of the Icelandic Constitution no. 33/1944, as amended in 1995. The principles of equal treatment had been set forth in GEA no. 10/2008; among them there is a definition of 'affirmative action' and several noble aims listed as means to promote gender equality in all spheres of society.

It is difficult to see how the implementation of the principle of equal treatment has added to the protection for self-employed persons. Regarding transposition of Article 14(1) of Directive 2006/54 (recast)³⁰⁶ the GEA imposes obligations on public and private bodies. Authorities are obliged (Article 15, GEA) to observe the principle of equal participation in government and municipal committees, councils and boards. Any discrimination preventing access to self-employment is strictly prohibited by public bodies. Indirect discrimination by private bodies as regards self-employed individuals is hard to assess, let alone prevent.

7. Article 5 – Positive action

There are no clear examples of authorities taking 'advantage of the power to take positive action'. As regards measures aimed at promoting entrepreneurship initiatives among women, there is an Innovation Centre under the Ministry of Industries, which is to be an option for start-up companies looking for support service and assistance in their financing. The Centre organises annual start-up conferences and at the last one there was only one female speaker (out of seven speakers in total).³⁰⁷

The SA Federation of Employers in Iceland is at present emphasizing the need to increase private enterprise within the educational and health sector in order to enhance gender equality on the labour market.³⁰⁸ The SA points out that women are far more numerous in the aforementioned sectors and hence there are good opportunities for the many women, not least those with special education to start their own enterprises.

8. Article 6 – Establishment of a company

Self-employed individuals operate on the basis of three different types of private enterprises.³⁰⁹ A self-employed individual may have an individual company, operated through the founder's own name and identification number. The registration of an individual's firm with a Business Register costs EUR 436 (ISK 67 500). The individual's liability is unlimited. General income tax levied on individuals (including individual's firms) amounts to 22.86 % for monthly income up to EUR 1 874 (ISK 290 000) in 2014, 25.30 % for monthly income from EUR 1 874 to EUR 5 000 (ISK 290 000 to ISK 784 619) and 31.80 % for monthly income above EUR 5 000 (ISK 784 619). There will be added municipal tax of 14.44 % (prepayment rate).

A self-employed individual may also establish a legal entity, usually a private limited company, in order to separate their business from personal finances. A single party may establish a private limited company and be a shareholder. In such instances a single principal may constitute the board of directors and then there is no need for holding board or shareholder meetings as is the case elsewhere. It is not obligatory to appoint a manager in private limited companies.

³⁰⁶ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) OJ L 204 of 26 July 2006, pp. 23-36.

³⁰⁷ <http://www.nmi.is/english>, accessed 14 August 2014.

³⁰⁸ <http://www.vb.is/frettir/105839/>, accessed 14 August 2014.

³⁰⁹ <http://eng.atvinnuvegaraduneyti.is/laws-and-regulations/nr/nr/7348>, accessed 14 August 2014.

The share capital, EUR 3.256 (ISK 500 000), must be paid into the company prior to its recording in the Register of Limited Companies. Liability is limited and confined to the share capital. The income tax is 20 %.

Special limiting rules apply to the payment of dividend out of private limited companies and in addition there is a general prohibition against granting loans and the like to shareholders of private limited companies.

Self-employed individuals may also form partnerships of two or more parties established with the Business Register. The registration costs EUR 575 (ISK 89 000). The liability of members of partnerships is in general unlimited, i.e. they guarantee the company's liabilities by means of their entire assets. The income tax levied on partnerships amounts to 36 % if upon request it has been registered as an independent taxpayer, but alternatively individual members are taxed according to shares owned in the partnership. In partnerships couples or life partners are taxed as individuals.

None of the above company forms are more restrictive for couples or life partners than for other individuals.

The number of private limited companies at the end of 2013 was 31 086.³¹⁰

9. Article 7 – Social protection

The Icelandic Pension System is based on three pillars. A tax-financed public pension scheme, which is means tested, mandatorily-funded occupational pension schemes (the pension funds) and a third pillar of voluntary private pension savings.³¹¹

All self-employed persons are obliged to ensure their pension rights through membership in a pension fund from the age of 16 until the age of 70 according to the Act on Mandatory Pension Insurance and on the Activities on Pension Funds No. 129/1997. Contributions towards pension rights are determined by special legislation, collective wage bargaining agreements, by employment contracts or other comparable means. Minimum pension contributions shall amount to at least 12 % of the contribution base. The contribution decided shall go to increasing pension rights.³¹²

Should no collective bargaining agreement apply to the collective field concerned, or if the specific terms of employment are not based on a collective bargaining agreement, the individual in question shall select a pension fund in accordance with the rules of individual funds.³¹³

In the event that a beneficiary dies before the deposit is fully paid out, it shall become the property of his/her heirs and be divided amongst them in accordance with the rules of the Inheritance Act.³¹⁴ Through contributions to earn pension entitlements in mutual pension funds a pension fund member earns for him/herself, and his/her spouse and children, as applicable, the right to old age pension, disability pension and spouses' and children's pensions, which may not be less extensive than provided for in the Pension Act.³¹⁵

A pension fund member may, on the basis of an agreement between the fund member and his/her spouse, decide on an arrangement that up to one-half of old-age pension payments accruing to a pension fund member shall accrue to his spouse or former spouse. The fund shall, in such an event, divide the payments pursuant to the decision of the fund member, but the payments shall lapse upon the demise of the member.

A pension fund member shall be entitled to disability pension in the event that he/she suffers a loss of ability assessed at 50 % or more, has contributed to a

³¹⁰ Statistics Iceland, <http://www.statice.is/>, accessed 14 August 2014.

³¹¹ Act on Mandatory Occupational Pension Funds, No. 121/1997, Article 2.

³¹² Act No. 121/1997.

³¹³ Act No. 121/1997, Article 2.

³¹⁴ Act No. 121/1997, Article 11.

³¹⁵ Act No. 121/1997, Article 13.

pension fund for at least two years and has suffered loss of income due to the loss of ability.³¹⁶

A pension fund shall pay a pension to the spouse of a deceased fund member if the fund member contributed to the pension fund for at least 24 of the previous 36 months prior to his/her demise or was receiving old-age or disability pension at the time of demise.³¹⁷

A spouse, according to the Pension Act, is understood to be a man or woman who was married to, or lived in registered partnership or co-habitation with, the deceased fund member upon his/her demise, provided their common estate had not been dissolved prior to the demise of the fund member. Co-habitation means a union between a man and woman who live together at a common domicile, who have a child together or where the woman is pregnant, or co-habitation has been continuous for at least two years. The same applies to the union of individuals of the same gender (same applies in Act 155/1998 on complementary pension schemes which include inter alia self-employed persons).

10. Article 8 – Maternity benefits

The Act on Maternity/Paternity Leave and Parental Leave No. 95/2000 with subsequent amendments applies to self-employed parents as well as those employed by others. The Act defines 'self-employed' individual as referring to anybody who works for him/herself, irrespective of the type of company, to the effect that it is mandatory for him/her to pay an insurance levy every month, or in another manner decided by the tax authorities.³¹⁸ The Maternity/Paternity Leave Fund is financed through the collection of an insurance levy in addition to interest on the Fund's deposits.³¹⁹

The Maternity/Paternity Leave Fund (Fund) makes payments to parents who hold entitlements to payments during maternity/paternity leave. A parent acquires the right to payments from the Fund after she/he has been active on the domestic labour market for six consecutive months prior to the birth of a child or the date on which a child enters the home in the case of adoption or permanent foster care. The work contribution of a self-employed parent shall be based on the payment of the insurance levy on calculated remuneration for the same period.

Parents each have an independent entitlement to maternity/paternity leave for up to three months due to a birth, primary adoption or reception of a child in permanent foster. This entitlement is not transferable. In addition, the parents shall have a joint entitlement to an additional three months, which either parent may draw in its entirety or the parents may divide between them. A self-employed mother must take maternity leave for at least the first two weeks after the birth of her child. However, in the case of a parent who begins taking maternity/paternity leave before the birth of a child, the date on which the parent begins taking maternity/paternity leave shall be taken as the base regarding that parent's entitlement.

A parent's right to maternity/paternity leave is conditioned on the fact that the parent herself/himself has custody of the child, or has joint custody with the other parent at the beginning of the maternity/paternity leave. A non-custodial parent is entitled to maternity/paternity leave if the consent of the parent exercising custody is obtained, authorising the non-custodial parent to have access to the child during the period of the maternity/paternity leave.

Article 33 of the Act on Maternity/Paternity Leave and Parental Leave No. 95/2000 stipulates³²⁰ that a parent receiving payments from the Unemployment

³¹⁶ Act. No. 121/1997, Article 15.

³¹⁷ Act. No. 121/1997, Article 16.

³¹⁸ See Act No. 45/1987 on the Withholding of Public Levies at Source.

³¹⁹ Compare the Insurance Levy Act No. 113/1990.

³²⁰ Note that Article 33 of Act No. 95/2000 has not been translated into English. See <http://eng.velferdarraduneyti.is/acts-of-Parliament/nr/33933>, accessed 24 January 2015.

Insurance Fund is not entitled to receive maternity/paternity grants or payments from the payments from the Maternity/Paternity Leave Fund. This is also the case if the parent is receiving per diem payments for accident injury on the basis of the Social Security Act, No. 100/2007, per diem payments because of illness according to the Act on Patient Insurance, No. 111/2000 or rehabilitation pensions, according to the Social Assistance Act, No 99/2007. This also goes for parents receiving payments on the basis of the Act on Payments to the Parents of Chronically Ill or Severely Disabled Children, No. 22/2006.

The maximum amount of payments in 2014 is EUR 2 410 (ISK 370 000). The monthly payment during maternity/paternity leave to a parent in a 25-49 % part-time job shall never be less than EUR 637 (ISK 97 786) and the monthly payment to a parent holding a 50-100 % job never less than EUR 882 (ISK 135 525). The monthly grant to a parent outside the labour market or in less than a 25 % job is ISK 59 137. The monthly payment to a parent doing full-time studies is EUR 882 (ISK 135 525). Regulation No. 1213/2014 amends regulation No.1218/2008 on payments from the Maternity/Paternity Leave Fund.

There is no reference in the Act on the Maternity/Paternity Leave to the criteria of sufficiency as stipulated in Article 8(3) of Directive 2010/41,³²¹ however the maximum amounts paid from the Unemployment Insurance Fund³²² are lower than the maximum amounts paid from the Maternity/Paternity Leave Fund.

The proportional amount of work of a self-employed person in his/her own company or that of a partner or close relative is assessed by the Directorate of Internal Revenue on basis of the presumptive employment income. A self-employed individual must declare as employment income an amount comparable to the remuneration he would receive if similarly employed by an unrelated person.

The spouse or life partner of a farmer who is not formally listed as employer or works outside the farm is considered to account for 50 % of the work of the farmer.

The Directorate of Labour operates a replacement service where a number of qualified individuals from various walks of life are listed. The staff of these services aid employers in finding replacements.³²³

11. Article 9 – Defence of rights

The Act on Maternity/Paternity and Parental Leave no. 95/2000 includes a procedure for complaints to a Complaints Board where proceedings are conducted under the provisions of Administrative Procedures Act no. 37/1994, with Article 11 prohibiting discrimination on the same grounds as included in Article 65 of the Constitution.

The Gender Equality Act provides for a gender equality complaints committee for those who consider that they are victims of violations of the Act. The Centre for Gender Equality may request that the Gender Equality Complaints Committee examine a case. The Committee's rulings may not be referred to a higher authority. The rulings of the Complaints Committee are binding for the parties to each case. The parties may refer the Committee's rulings to the courts.

The Centre for Gender Equality also has a duty under the GEA to investigate suspected violations of the law by an institution, enterprise or NGO and request the Gender Equality Complaints Committee to examine the matter. The relevant institution is subsequently obliged to provide the Centre with information and material that it considers necessary to reveal the facts of the case. Individuals,

³²¹ Regulation No. 1213/2014 concerns payments from the Maternity/Paternity Leave Fund and payments of maternity/paternity grant as originally set forth in Regulation no. 1218/2008.

³²² At present the maximum amount is ISK 184.188 (100 % entitlement). See: <http://www.vinnumalastofnun.is/atvinnuleysisbaetur/fjarhaedir-atvinnuleysisbota>, accessed 24 January 2015.

³²³ See: <http://www.vinnumalastofnun.is/atvinnurekandi/>, accessed 19 January 2015.

enterprises, institutions and non-governmental organisations, either in their own name or on behalf of their members who consider that they are victims of violations of the GEA, may submit their case to the Gender Equality Complaints Committee.³²⁴

12. Article 10 – Compensation or reparation

Compensation for loss or damage sustained by a person as a result of discrimination would in the case of self-employed persons most likely stem from a public body or organization and in that case if a breach is found by the Gender Equality Complaints Committee. In the case where a party against whom a ruling of the above Committee is directed fails to comply with it the Centre of Gender Equality may instruct the party to take satisfactory remedial measures in accordance with the ruling in reasonable time.

If a self-employed individual goes to court claiming discrimination on the basis of gender she/he can claim non-pecuniary damages on the basis of the Tort Liability Act no. 50/1993 (Article 26): for an unlawful injury against the freedom, peace, honour or person, another party may be ordered to pay non-pecuniary damages to the injured party.

There is established national judicial practice in defining the amounts of non-pecuniary damages. Otherwise there must be a causal link between the violation found and the pecuniary damage alleged.

13. Article 11 – Equality bodies

The Centre for Gender Equality was established in the same year as the law on gender equality no. 96/2000 was adopted and is operated on the basis of the present Gender Equality Act no. 10/2008 (GEA). The Centre is under the control of the Minister of Welfare who appoints its Director for a period of five years (Article 4 of the GEA No. 10/2008). The tasks of the Centre are defined in the GEA. It must monitor gender equality developments in society. The focus (homepage)³²⁵ is predominantly on gender-based violence and equal pay. No analysis has been found on the situation of self-employed women.

14. Article 12 – Gender mainstreaming

In 2009 the previous Government (coalition of Left Green Movement and Social Democrats) adopted a policy of gender budgeting by setting up a taskforce in 2009. The aim was to adopt a gender-focused fiscal policy where 'justice and fairness go hand in hand with economic wellbeing'. A three-year plan was approved by the Government in 2011 and a handbook was published. The new Government came into power in the spring of 2013.³²⁶

15. Article 13 – Dissemination of information

As there is an overlap with the Recast Directive 2006/54, the basic requirements of Directive 41/2010 had already been transposed in GEA no. 10/2008 and Act on Maternity/Paternity Leave and Parental Leave no. 95/2000 with subsequent amendments. There are no real novelties with regard to Directive 41/2010 that have been actively disseminated and brought to the attention of 'persons concerned'.

³²⁴ Article 6 of GEA No. 10/2008. See http://eng.velferdarraduneyti.is/media/acrobat-enskar_sidur/Act-on-equal-status-and-equal-rights-of-women-and-men_no-10-2008.pdf, accessed 20 October 2014.

³²⁵ See: <http://jafnretti.is/jafnretti/default.aspx>, accessed 20 October 2014.

³²⁶ http://www.ministryoffinance.is/media/utgafa/GB_in_Iceland_Fact_Sheet2012.pdf, accessed 8 October 2014.

16. Article 14 – Level of protection

The Act on Maternity/Paternity Leave and Parental Leave no. 95/2000 with subsequent amendments entails provisions that are even more favourable to the protection of the principle of equal treatment than those laid down in Directive 2010/41.

17. Case law

Most cases regarding self-employed individuals concern entitlement to unemployment benefits and are decided by the Appeals Committee for Unemployment Benefits and Labour Market Measures of the Directorate of Labour. The self-employed individuals who are found not to be in compliance with the conditions in the Unemployment Insurance Act (Article 18) are not insured for unemployment benefits.

There is no national case law on Directive 41/2010 or its predecessor, Directive 86/613.

18. Issues regarding the 'duty holder'

With regard to pregnancy and maternity leave the responsibility lies with the self-employed individual her/himself. Self-employed individuals acquire the right to payments from the Maternity/Paternity Leave fund if they pay the insurance levy based on their presumptive income prior to the birth of the child (or adoption/foster care).

19. National statistics

In the first half of 2014, women on the labour market in the age group 16-74 represented 79.4 %.³²⁷

The number of self-employed persons operating a firm in their own name and identification number is 18 000, out of which 5 800 women in 2013. The number of self-employed seems to be increasing but no accurate data are available.

The number of women directors of private limited companies was 1 167 in the year 2000 (16.1 % of the total number of directors of such companies). In 2013 the number of women directors was 2481 (21.4 % of the total number of directors).

Women chairmen of the board of directors of private limited companies were 23.7 % total in 2013.

The number of newly established private limited companies increased by 5 % from July 2013 until June 2014.

20. Any other issues?

There are no other issues to be mentioned.

IRELAND – Frances Meenan

1. Context

In Ireland, 16.5 % of the working population are self-employed and of those 24.3 % of the total male workforce and 7.5 % of the female workforce are self-

³²⁷ Iceland statistics, available at: <http://hagstofa.is/Pages/95?NewsID=10961>, accessed 18 August 2014.

employed.³²⁸ The real issue facing the self-employed is that they do not generally have the protection of employment legislation except for employment equality legislation. The self-employed pay a mandatory class S Pay Related Social Insurance ('PRSI') contribution provided that they earn over EUR 5 000 per annum. Such persons are more usually doctors, dentists, lawyers, farmers. They have a general entitlement to widow's and widower's or surviving civil partner contributory pension, contributory guardian's pension, state contributory pension, maternity and adoptive benefits, and a bereavement grant. However, the self-employed do not have entitlements for jobseeker's benefit, illness, dental or optical benefits. The lack of jobseeker's (or more commonly called unemployment) benefit has been a major issue because so many self-employed people lost their work during the current deep recession.

2. Transposition of the Directive

The Employment Equality Act 1998 was amended by the Equality Act 2004 so that self-employed persons came within the scope of the legislation as required by Directives 2000/43/EC³²⁹ and 2000/78/EC.³³⁰ The social protection aspects of the application of Directive 2010/41 are contained in the Social Welfare and Pensions Act 2014 which was signed into law on 17 July 2014.³³¹ The Department of Social Protection provides a very useful outline of entitlements to spouses or civil partners of the self-employed who are doing similar or ancillary tasks. Such persons must earn over EUR 5 000 per annum and then they must pay the relevant rate of PRSI. Then they will be entitled to maternity/adoptive benefits and state pensions when they have the necessary contributions. Payment commences in 2014.³³²

Spouses or civil partners who are partners in a family business, or who work together in a legally incorporated company can be insurable for all benefits.³³³ A 'prescribed relative' as defined in the Social Welfare (Consolidation) Act 2005 is a spouse, son or daughter, parent, brother or sister 'who help a self-employed person with their business but who are not partners in the business' and does not pay class PRSI at class S.³³⁴ If they have previously been self-employed or employed they may pay voluntary contributions. In summary, the assisting spouse (or civil partner) had no rights. For example a doctor's spouse cannot be their business partner or practice partner unless he or she is a doctor; it would also be the same for a lawyer.³³⁵ There can be other difficulties: for example, a farmer may not wish to have the 'family' farm transferred into a company arrangement or have a formal partnership with his or her spouse as it could create succession difficulties on the death of the farmer. However, Section 19 of the Social Welfare Act 2014 transposes Directive 2010/41/EU so that there is a liability for the payment of Pay Related Social Insurance (PRSI) on the income of the assisting spouse provided they earn over EUR 5 000. The liability dates were

³²⁸ Data of Eurostat on (female and male) self-employment as a percentage of total employment for Ireland in the statistical annex of Employment and Social Developments in Europe in 2013.

<http://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=7684>, accessed 17 July 2014.

³²⁹ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, *OJ L 180*, 19 July 2000 pp. 22-26.

³³⁰ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, *OJ L 303*, 2 December 2000 pp. 16-22.

³³¹ <http://www.oireachtas.ie/viewdoc.asp?fn=/documents/bills28/bills/2014/4714/document1.htm>, accessed 4 September 2014.

³³² <http://www.welfare.ie/en/Pages/Change-to-Self-Employed-Social-Insurance.aspx>, accessed 4 September 2014.

³³³ Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010. <http://www.irishstatutebook.ie/2010/en/act/pub/0024/>, accessed 21 July 2014.

³³⁴ Part 3 of Schedule 1 of the Act of 2005. <http://www.irishstatutebook.ie/2005/2005.html>, accessed 21 July 2014.

³³⁵ For example a barrister who is a member of the Bar of Ireland cannot work in partnership (even though they can share overheads).

1 January 2014 or 1 August 2014 depending on when their income tax falls due. The payment is mandatory as assisting spouses or civil partners are no longer exempted from paying self-employment social welfare contributions.³³⁶

Ireland sought and obtained permission for the extension of time for the implementation of the social welfare provisions as set out in Article 16(2)(a).³³⁷

3. Article 1 – Subject matter

The Employment Equality Acts 1998-2011³³⁸ encompass persons providing a personal service. If the self-employed person is not permitted to provide a service to an 'employer' then the self-employed person may have grounds to pursue a claim for discrimination.³³⁹ The Equal Status Acts 2000-2012³⁴⁰ provide that there cannot be discrimination in the access to and supply of goods and services. Article 4(1) *inter alia* provides that there can be no discrimination in the establishment, equipment or extension of a business (or the extension thereof). Therefore, if a service provider discriminates against a self-employed person on the grounds of gender in the provision of access to funding or the provision of some service required, then the self-employed person may have a claim under the equal status legislation.

4. Article 2 – Scope

The definition of 'contract of employment' includes 'an individual [who] agrees with another person *personally to execute any work or service for that person...*'.³⁴¹ There is no definition of 'self-employed worker'.³⁴² The definition of 'employee' means a person who has entered into or works under or worked under

³³⁶ Social Welfare (Consolidated Contributions and Insurability) (Amendment) (no. 3) (Excepted Self-Employed Contributors) Regulations 2014. S.I. No. 347 of 2014.

³³⁷ See Regulatory Impact Analysis.

<http://www.welfare.ie/en/Pages/search/results.aspx?k=directive%202010%2F41&cs=This%20Site&u=http%3A%2F%2Fwww.welfare.ie%2Fen>, accessed 21 July 2014.

³³⁸ <http://www.irishstatutebook.ie/> and see <http://www.lawreform.ie>, accessed 27 October 2014.

Employment Equality Act 1998, Equal Status Act 2000, Equality Act 2004, Civil Law (Miscellaneous Provisions) Act 2008, Civil Partners and Certain Rights and Obligations of Cohabitants Act 2010, Civil Law (Miscellaneous Provisions) Act 2011, Irish Human Rights and Equality Commission Act 2014, Pensions Acts 1990 to 2014, Social Welfare Acts 2005 to 2014.

³³⁹ For example if a self-employed person was discriminated against on grounds of gender in a procurement process.

³⁴⁰ <http://www.irishstatutebook.ie/>, and see <http://www.lawreform.ie>, accessed 27 October 2014.

Equal Status Act 2000, Intoxicating Liquor Act 2003, Equality Act 2004, Civil Law (Miscellaneous Provisions) Act 2008, Civil Partners and Certain Rights and Obligations of Cohabitants Act 2010, Civil Law (Miscellaneous Provisions) Act 2011, Equal Status (Amendment) Act 2012, Equality Act 2004, Irish Human Rights and Equality Commission Act 2014.

³⁴¹ Author's emphasis. The definition of 'contract of employment' in Section 2 of the Employment Equality Act 1998 as amended by section 3 of the Equality Act 2004 is as follows:

"'contract of employment' means, subject to subsection (3)—

(a) a contract of service or apprenticeship, or

(b) any other contract whereby—

(i) an individual agrees with another person personally to execute any work or service for that person, or

(ii) an individual agrees with a person carrying on the business of an employment agency within the meaning of the Employment Agency Act 1971 to do or perform personally any work or service for another person (whether or not the other person is a party to the contract), whether the contract is express or implied and, if express, whether oral or written'. It should be noted, however, that as regards access to employment, a person employed in another person's home for the provision of personal services for persons residing in that home where the services affect the private or family life of those persons.

³⁴² For consideration of the difference between 'an employee' and 'a self-employed worker' see generally F. Meenan 'The Employment Relationship' in: F. Meenan *Employment Law* pp. 25-59 Dublin, Round Hall Dublin 2014; and F. Meenan 'Ireland' in: European Network of Legal Experts in the Field of Gender Equality *The Personal Scope of the EU Gender Equality Directives* at pp. 111-116, European Commission 2012, available at: http://ec.europa.eu/justice/gender-equality/files/your_rights/personal_scope_eu_sex_equality_directive_final_en.pdf, accessed 21 July 2014.

a contract of employment. Likewise, ‘employer’ means in relation to an ‘employee’ the person with whom the employee has entered into or for whom the employee works or worked under a contract of employment.³⁴³ The legislation also applies to a partner in a partnership ‘as it applies to an employee’.³⁴⁴ Therefore a partner within a partnership is to be treated as an employee for the purposes of the legislation. Of course, if an employee considers that they have been discriminated against in respect of access to a partnership, they may bring their claim as an employee who has been discriminated against. More recently, the Irish Employment Appeals Tribunal has considered that a salaried partner was an employee³⁴⁵ in an unfair dismissals³⁴⁶ claim. The term ‘self-employment’ means that a person does not work under the control of another. The employment equality legislation applies to all areas of activity.³⁴⁷

The spouses or life partners of self-employed workers are entitled to certain social protection benefits under the Social Welfare and Pensions Act 2014, provided that the appropriate contributions have been made. Such payments are to be made effective from 1 January 2014 or 1 August 2014 in accordance with such person’s income tax and social welfare contributions liability.

5. Article 3 – Definitions

The Employment Equality Acts have nine discriminatory grounds: gender, civil status, family status, sexual orientation, religion, age, disability, race and Traveller community grounds. ‘Direct discrimination’ is defined as where ‘a person is treated less favourably than another person, is, has been or would be treated in a comparable situation’ on any of the discriminatory grounds which exist, existed but no longer exists, may exist in the future or is imputed to the person concerned. If a person who is associated with another person is treated by virtue of that association less favourably than a person who is not so associated is, has been or would be treated in a comparable situation and similar treatment of that other person on any of the discriminatory grounds, this would constitute discrimination.³⁴⁸ In addition, discrimination on the gender ground will be taken to occur where on a ground related to pregnancy or maternity leave, a female employee is treated contrary to any statutory requirement less favourably than another employee is, has been or would be treated.

‘Indirect discrimination’ on the gender ground ‘occurs where an apparently neutral provision puts persons of a particular gender...at a particular disadvantage in respect of any matter other than remuneration compared with other employees of their employer.’³⁴⁹ The employer shall be deemed to be discriminating against a person ‘unless the provision is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.’ Statistics are admissible in determining as to whether a person is at a particular disadvantage.

Both gender harassment and sexual harassment are prohibited.³⁵⁰ Harassment is any form of unwanted conduct related to gender and references to

³⁴³ References in the 1998 Act (as amended) to an employee shall be construed as references to a person who agreed personally to execute any work or service and then the references to the employer is the person for whom the services are being executed.

³⁴⁴ Section 13A of the Employment Equality Act 1998 as amended by Section 7 of the Equality Act 2004.

³⁴⁵ *Casey v L K Shields* [2012] E.L.R. 144.

³⁴⁶ Section 2 (c) of the Unfair Dismissals Acts 1977 excludes a person who is employed by a close relative (as defined) and works in the same household or on a farm (on which both of them reside) from bringing a claim under the Act.

³⁴⁷ The only exclusion would be in relation to access to employment in relation to the provision of personal services in a person’s home where the services affect the private or family life of that person. However, it must be noted that this is applicable to ‘access’ to employment only.

³⁴⁸ Section 6 of the Employment Equality Act 1998 as amended by Section 4 of the Equality Act 2004.

³⁴⁹ Section 22 of the Employment Equality Act 1998 as amended by Section 13 of the Equality Act 2004.

³⁵⁰ Section 14A of the Employment Equality Act 1998 (as amended).

sexual harassment are to any form of unwanted verbal, non-verbal or physical conduct of a sexual nature, being conduct which in either case has the purpose or effect of violating a person's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the person. Unwanted conduct may consist of acts, requests, spoken words, gestures or the production, display or circulation of written words, pictures or other material. An employee must not be victimised for rejecting such harassment. The application of the provisions in respect of harassment and sexual harassment has not caused any difficulties.

6. Article 4 – Principle of equal treatment

The Employment Equality Acts 1998 to 2012 apply. An employer shall not discriminate against an employee or a prospective employee in relation to access to employment, entry requirements, conditions of employment, training or experience for or in relation to employment, promotion or degrading, or classification of posts, instructions or practices.³⁵¹ As set out under Section 4 of this report, the definition of 'employee' includes a person personally executing a work or service for the 'employer'. There shall be no discriminatory advertising and the Irish Human Rights and Equality Commission may apply to the courts to obtain an injunction preventing the appointment of any person to which the advertisement relates. There cannot be discrimination in respect of vocational training. It is not unlawful to confine a post to a man or a woman where gender is a *bona fide* occupational qualification.

7. Article 5 – Positive action

Ireland has not taken any specific advantage in respect of positive action in respect of this Directive.

8. Article 6 – Establishment of a company

There are no restrictions on the establishment of a company between spouses or life partners that are more restrictive than any other arrangement between persons. There is no hindrance on spouses or life partners being directors and shareholders in a company or indeed in a partnership.

9. Article 7 – Social protection

The Social Welfare and Pensions Act 2014³⁵² ends the exclusion from social insurance of spouses or civil partners of a self-employed worker who participate in the activities of their self-employed spouse or civil partner performing the same or ancillary tasks. Up to now only one of the couple could be insured as a self-employed worker. The legislation extends social insurance cover to spouses or civil partners of a self-employed contributor in cases where that spouse or civil partner is participating in that person's business and earning more than EUR 5 000 per year.³⁵³ The spouse or civil partner will now pay 'Pay Related Social Insurance' ('PRSI') contributions. Prior to the enactment of the Social Welfare and Pensions Act 2014, only one of the couple could be insured as a self-employed worker for social insurance benefits. This means that the spouse or civil partner will be able to establish over time rights to maternity benefit, widow's,

³⁵¹ Section 8 of the Employment Equality Act 1998 (as amended).

³⁵² Section 19 of the Social Welfare and Pensions Act 2014 and Social Welfare (Consolidated Contributions and Insurability) (Amendment) (No. 3) (Excepted Self-Employed Contributors) Regulations 2014. S.I. No. 347 of 2014.

³⁵³ In the event that a person's income falls below EUR 5 000 gross per annum, voluntary contributions can be made.

widower's or surviving civil partner's (as the case may) contributory pension and state contributory pension in their own right. It is understood that about 6 000 people will benefit from this reform. It should be noted, however, that the Department of Social Protection state that entitlement to the state pension provision will be subject to the spouse or civil partner paying pay-related social insurance for at least ten years.³⁵⁴

10. Article 8 – Maternity benefits

Self-employed women are entitled to state maternity benefit for 26 weeks provided they have paid the necessary pay-related social insurance contributions.³⁵⁵ Self-employed women are also entitled to adoptive benefit in the same manner as women in employment.³⁵⁶ Therefore, the current provision for the self-employed is on a mandatory basis, as self-employed persons are obliged to pay certain social insurance contributions. The current amount of state benefit is EUR 230 gross per week which applies to employees and the self-employed. In the future it will apply to assisting spouses and civil partners. However, there is no provision to have access to a temporary replacement. Such an arrangement could be problematic because in many situations it may be a term of the contractual relationship that the provisions of services may not be delegated to a third party.

The Social Welfare and Pensions Act 2014 provides that the female spouse or life partner of a self-employed person is entitled to state maternity benefit. Entitlement to maternity benefit will be subject to the spouse or civil partner paying pay-related social insurance contributions for at least one year.³⁵⁷ As stated above, maternity benefit (and adoptive benefit) is at a standardised rate of EUR 230 gross per week. The said sum is applicable to all applicants for maternity benefit and the said benefit is actually higher than a person in receipt of disability benefit. If a person is on disability benefit and has qualifying dependants, they would be in receipt of higher monies than if they were in receipt of maternity benefit so in those circumstances their maternity benefit and allowances are increased to match the illness benefit and allowances.³⁵⁸ Maternity benefit is subject to income tax and the universal social charge.³⁵⁹

11. Article 9 – Defence of rights

A self-employed person who considers that they have been discriminated against on the gender ground may elect to bring a claim under the Employment Equality Acts to the Equality Tribunal or to the Circuit Court. A decision of the Equality Tribunal may be appealed to the Labour Court whose decision may be appealed to the High Court on a point of law only. A court order of the Circuit Court may be appealed to the High Court only on a point of law.

³⁵⁴ Department of Social Protection *Regulatory Impact Analysis*, available at: <http://www.welfare.ie/en/Pages/search/results.aspx?k=directive%202010%2F41&cs=This%20Site&u=http%3A%2F%2Fwww.welfare.ie%2Fen>, accessed 21 July 2014.

³⁵⁵ 52 weeks PRSI contributions in the relevant tax year. The entitlement is the same as for female employees. See: <http://www.welfare.ie/en/Pages/SW11.aspx>, accessed 21 July 2014.

³⁵⁶ http://www.welfare.ie/en/Pages/147_Adoptive-Benefit.aspx, accessed 21 July 2014.

³⁵⁷ Section 19 of the Social Welfare and Pensions Act 2014 and Social Welfare (Consolidated Contributions and Insurability) (Amendment) (No. 3) (Excepted Self-Employed Contributors) Regulations 2014. S.I. No. 347 of 2014. As assisting spouses and civil partners are no longer excepted contributors, they are now contributors and therefore have entitlements *inter alia* to maternity and adoptive benefits.

³⁵⁸ <http://www.welfare.ie/en/Pages/SW11.aspx>, accessed 28 October 2014.

³⁵⁹ Presently (July 2014) maternity benefits amount to EUR 5 980 over 26 weeks or EUR 230 per week; subject to income tax and the universal social charge.

The parties may agree to a statutory mediation process prior to any hearing before the Equality Tribunal. The Irish Human Rights and Equality Commission³⁶⁰ may provide legal assistance and act on behalf of a person in legal proceedings but the claimant must bring the claim in his or her own name. There is however provision that the Irish Human Rights and Equality Commission may refer a claim in its own name where it would not be reasonable for the claimant to make such a reference. Such references are rare.

12. Article 10 – Compensation or reparation

The Equality Tribunal may order in respect of equal pay arrears of remuneration not earlier than three years prior to the date of reference of the claim with an order for on-going equal pay, and an order for compensation for the effects of acts of discrimination or victimisation.³⁶¹ In equal treatment cases there may be an order for compensation of up to a maximum of two years' remuneration or EUR 40 000 whichever is the greater,³⁶² and/or an order for a specified course of action. In dismissal cases reinstatement, re-engagement or compensation up to a maximum of two years' remuneration may be ordered. If the claim is referred to the Circuit Court there is unlimited compensation (for the effect of the discrimination for six years prior to the reference of the claim). Where the claimant is not an employee the maximum award is EUR 13 000. This award is the upper limit in relation to a successful claim in respect of access to employment, for example. However, in a case where a self-employed person is denied access to self-employment for example, the same upper limit of EUR 13 000 would apply. However, if the self-employed person is discriminated against during the course of their employment then the maximum award of two years' gross remuneration (or EUR 40 000 whichever is the greater) would apply. In addition, a self-employed person could bring their discrimination claim to the Circuit Court where they would be entitled to unlimited compensation (for the effect of the discrimination going back six years prior to the reference of the claim). It must be stressed, however, that there is little experience of self-employed person bringing proceedings under the Employment Equality Acts. Interest may be awarded and the Circuit Court may award costs. There are provisions for enforcement and criminal sanctions. If a claimant is successful in respect of their claim and also in respect of a claim of victimisation he or she may obtain the full award under both claims. In addition, to any award of compensation the Equality Tribunal may also make an order as it sees fit, e.g. changes in policy to prevent discrimination in the future. In the event of a dispute under the Social Welfare and Pensions Acts, the matter would be heard under those Acts.

13. Article 11 – Equality bodies

In the view of the expert, there is a perception that only persons who are employees (to include former employees) or those seeking employment fall within the scope of the Employment Equality Acts. The Irish Human Rights and Equality

³⁶⁰ Irish Human Rights and Equality Commission Act 2014; Irish Human Rights and Equality Commission Act 2014 (Establishment Day) Order 2014 S.I. No. 450 of 2014. The first day of November 2014 is the establishment day for the new Commission and the dissolution of the Equality Authority and the Irish Human Rights Commission.

³⁶¹ Section 82 of the Employment Equality Act 1998 as amended by Sections 36 and 46 of the Equality Act 2004 and Section 25(1) of the Civil Law (Miscellaneous Provisions) Act 2011.

³⁶² This is the maximum amount of compensation that can be awarded by the Equality Tribunal even though a claimant may have been successful on more than one discriminatory ground. Claimants have the option of a reference to the Circuit Court where there may be an award of compensation for the last six years of discrimination with no upper financial limit.

Commission,³⁶³ however, do point out that the legislation applies to the self-employed. There have been remarkably few claims by persons who are self-employed or by persons in a partnership. The Equality Authority (since dissolved and now the Irish Human Rights and Equality Commission) does not appear to have advanced the cause of the self-employed. The Irish Human Rights and Equality Commission Act 2014 was signed by the President as of July 2014 and the Irish Human Rights and Equality Commission is to be established effective 1 November 2014.³⁶⁴ This is an independent body.

14. Article 12 – Gender mainstreaming

Ireland has a broad level of gender mainstreaming, for example, the Electoral (Amendment) (Electoral Funding) Act 2012 which in summary provides that political parties must have at least thirty per cent of female candidates in the next general election.³⁶⁵ There is also the National Women’s Strategy 2007-2016,³⁶⁶ which generally refers to women as entrepreneurs and in business generally; such persons may use the self-employment business model.

15. Article 13 – Dissemination of information

Presently, there appears to be little information to disseminate in relation to this Directive. However, the most likely reason for this is that there is a presumption that as the Employment Equality Acts already have a broad scope there is little requirement. The Department of Social Protection provides a considerable volume of information on its website in relation to the relevant social protection changes.³⁶⁷

16. Article 14 – Level of protection

The length of state benefit for maternity leave is longer than as provided for in Directive 2010/41.

17. Case law

There is no case law concerning Directive 2010/41. However, there is case law confirming that persons who are independent contractors or self-employed persons fall within the scope of the Employment Equality Acts.³⁶⁸

³⁶³ Irish Human Rights and Equality Commission Act 2014; Irish Human Rights and Equality Commission Act 2014 (Establishment Day) Order 2014 S.I. No. 450 of 2014. The first day of November 2014 is the establishment day for the new Commission and the dissolution of the Equality Authority and the Irish Human Rights Commission.

³⁶⁴ Irish Human Rights and Equality Commission Act 2014; Irish Human Rights and Equality Commission Act 2014 (Establishment Day) Order 2014 S.I. No. 450 of 2014. The first day of November 2014 is the establishment day for the new Commission and the dissolution of the Equality Authority and the Irish Human Rights Commission. See: <http://www.oireachtas.ie/viewdoc.asp?fn=/documents/bills28/bills/2014/2014/document1.htm>, accessed 21 July 2014.

³⁶⁵ See: <http://www.irishstatutebook.ie/2012/en/act/pub/0036/index.html>, accessed 21 July 2014.

³⁶⁶ See: <http://www.justice.ie/en/JELR/Pages/NWS>, accessed 21 July 2014.

³⁶⁷ See: <http://www.welfare.ie/en/Pages/home.aspx>, accessed 21 July 2014.

³⁶⁸ For instance: *Dr. A v The Health Service Executive* DEC-E2011-133, available at: <http://www.labourcourt.ie/en/Cases/2011/June/DEC-E2011-133-Full-Case-Report.html>, accessed 21 July 2014; *Nyamhosva v Boss Worldwide Promotions* DEC-E2007-072, available at: <http://www.labourcourt.ie/en/Cases/2007/December/DEC-E2007-072-Full-Case-Report.html>, accessed 21 July 2014. By contrast then a claim which was prior to the commencement of the Equality Act 2004 held that the claimant was a franchisee and therefore was not an employee who fell within the scope of the earlier legislation. *A Named Complainant v A Named Company* DEC-E2003-015, see: http://www.labourcourt.ie/en/Cases/2003/April/DEC-E2003-015_Full_Case_Report.html, accessed 21 July 2014.

18. Issues regarding the ‘duty holder’

Logically the ‘duty holder’ is ‘the employer’ (i.e. the person to whom the services are provided) of the self-employed person. It is a term that is not known in employment law.

19. National statistics

In Ireland, 16.5 % of the working population are self-employed and of those 24.3 % of the total male workforce and 7.5 % of the total female workforce are self-employed.³⁶⁹ The Regulatory Impact Analysis (‘RIA’) for the transposition of Directive 2010/41 in respect of the social protection provisions states that around 11 % of self-employed workers in Europe rely on the help of spouses and civil partners who work on an informal basis in the family business and states that the number of hours can be significant with a third of assisting spouses working up to 25 hours per week.³⁷⁰ The RIA further states that Irish census figures indicate that there are 5 872 ‘assisting relatives’ of which 3 515 are female and 2 557 are male. Some of these ‘assisting relatives’ could be family members other than spouses or civil partners. This data suggests that the current exclusion from social insurance affects fewer than 6 000 assisting spouses/civil partners who assist in family businesses. The Department of Social Protection states that administrative measures will be required to verify the *bona fide* nature of the contribution of the spouse or civil partner.

There is no fixed definition of ‘self-employment’ in national statistics; it is a matter of contract³⁷¹ or tax law.

20. Any other issues?

The definition of the contract of employment in the Employment Equality Acts provides that a person who personally executes a service falls within the scope of the Act. However, what is the position if an individual provides services through a limited liability company, for example? Frequently self-employed persons providing services operate through a limited liability company so that they are protected from liability in the event that the business fails and there may also be tax advantages for operating in this manner. However, if the service is being provided through the medium of a company, the expert is of the view that arguably they are not working ‘on their own account’ and therefore do not fall within the scope of the Directive.³⁷² The effect of this view is that the application of the Directive may be more limited and perhaps confines its application to the liberal professions (e.g. medicine and law), where persons work individually or in partnership as opposed to practising under the shelter of a limited liability company.

³⁶⁹ Data of Eurostat on (female and male) self-employment as a percentage of total employment for Ireland in the statistical annex of Employment and Social Developments in Europe in 2013. Available at: <http://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=7684>, accessed 17 July 2014.

³⁷⁰ See: <http://www.welfare.ie/en/Pages/search/results.aspx?k=directive%202010%2F41&cs=This%20Site&u=http%3A%2F%2Fwww.welfare.ie%2Fen>, accessed 21 July 2014.

³⁷¹ For consideration of the difference between ‘an employee’ and ‘a self-employed worker’ see generally F. Meenan ‘The Employment Relationship’ in: F. Meenan *Employment Law* pp. 25-59 Dublin, Round Hall Dublin 2014; and F. Meenan ‘Ireland’ in: European Network of Legal Experts in the Field of Gender Equality *The Personal Scope of the EU Gender Equality Directives* at pp. 111-116, European Commission 2012, available at: http://ec.europa.eu/justice/gender-equality/files/your_rights/personal_scope_eu_sex_equality_directive_final_en.pdf, accessed 21 July 2014.

³⁷² In a recent unfair dismissals case in Ireland, the Employment Appeals Tribunal decided that a claimant who was providing services through a limited company was not an employee for the purposes of the Unfair Dismissals Acts 1977-2012. A claimant has to be an employee to fall within the scope of those Acts. See: *McCotter v Quinn Insurance Ltd.* [2013] ELR 45.

ITALY – *Simonetta Renga***1. Context**

The Italian labour market has always been characterised by a high level of self-employment. At present it is about 22 % of the total workforce and accounts for a large part of the gross domestic product (about 18 % only including professionals).

This sector includes many different occupations such as farmers, professionals, shopkeepers, quasi-subordinated workers, and small entrepreneurs. Their productive organisation and regulations can be very different. As a consequence each category has its own peculiarities. In general terms we can say that their representative associations usually underline the same chronic problems, i.e. lack of infrastructure, bureaucracy and fiscal pressure. All categories have been hit by the financial crisis and about 8 out of 10 self-employed persons suffered an income reduction or an increase of production costs, or experienced difficulties arising from a more complex market. According to the results of a recent study performed in 2012 by Isfol (Institute for professional training), GnrResearch, Censis Foundation and *Associazione nuovi lavori* (New Jobs association),³⁷³ another common and remarkable problem affecting the field of self-employment is the lack of professional training. In fact resources are mainly allocated to sustain workers in the employment sector and the self-employed have to carry the full cost of their own professional training, which is compulsory only for some categories. The study also described the average self-employed person, irrespective of the category, as fully dedicated to his profession, performing the activity on his own, following a typically and deeply-rooted male model of work, characterised by long hours which tend to stretch and mix with private life. This is probably one of the main reasons that women are traditionally underrepresented in this sector and account for an average turnover and income which is lower than that of men.

Actually the study focused on professionals, tradesmen, craftsmen, farmers, and small businessmen, where the majority are men and self-employed women's problems are mainly linked to practical obstacles caused by double duties at work and at home or to old-fashioned stereotypes. But the varied world of self-employment also includes quasi-subordinated workers, such as workers in projects (*lavoratori a progetto*) or in labour joint ventures (*associati in partecipazione*) where the majority are women. These forms of collaboration – which also include very different situations, from the performance of a professional service for different customers to (in most cases) a job for a single employer, coordinated by the latter and performed within his enterprise – are often organised just to save on social contributions and to avoid the enforcement of labour law rules, but in practice hide an employment relationship. As to counteracting the misuse of such contracts, contribution charges have been gradually increased, reducing the gap in comparison with dependent work, and some strict law requirements for these contracts have been introduced.

The problems that can affect these work relationships are obviously more similar to those of employees, also – because their duties are often performed in

³⁷³ The volume *Lavoratori autonomi: identità e percorsi formativi* (*Self-employment: identity and professional training*) is one of the series of Isfol (the public Institute for the Promotion of Workers' Professional Training). Books of the European Social Fund are published at: <http://sbnlo2.cilea.it/bw5ne2/opac.aspx?WEB=ISFL&IDS=19286>, accessed 11 September 2014. This volume was financed by the National Programmes of the FSE at the Ministry of Labour and was aimed at finding effective measures to sustain continuous professional training of self-employed persons.

the enterprise. In fact, the legislator has also recently extended the protection against the so called ‘white resignation’ to cover these workers.³⁷⁴

2. Transposition of the Directive

Directive 2010/41/EU was implemented by the Code of Equal Opportunities, issued by Decree No. 198/2006,³⁷⁵ and by the Code on the Protection of Motherhood and Fatherhood, issued by Decree No. 151/2001.³⁷⁶

Italy did not benefit from the additional period permitted by Article 16(2) of the Directive. Slight amendments to both Decrees mentioned above were issued by Act No. 228 on 24 December 2012³⁷⁷ to avoid an action for non-compliance.

3. Article 1 – Subject matter

There is no discussion among scholars or any case law on overlap of the coverage of this Directive with Directives 2006/54,³⁷⁸ 79/7,³⁷⁹ and 2004/113³⁸⁰ to be recorded.

4. Article 2 – Scope

The Code of Equal Opportunities does not define self-employment. No specific conditions have been laid down by the legislator. So the notion of self-employment relevant for the enforcement of the principle of equal treatment is very broad and includes a large number of very different categories, as well as self-employed persons who employ other persons. The notions provided by other pieces of legislation define self-employed persons (Article 2222 of the Civil Code) as ‘persons who commit themselves to make a service or a work totally or mainly by means of their labour and without any subordination towards the customer’ and small entrepreneurs (Article 2083 of the Civil Code) as ‘small independent farmers, craftsmen, traders and those who professionally perform an activity which is organised mainly with their work and with the work of their family’. Quasi-subordinated work is not defined by the law. This notion has been elaborated by case law and includes various categories such as *collaborazioni coordinate e continuative*, work on projects, labour joint venture, and occasional self-employment over a certain annual income.

Although the regulations covering the respective categories can be remarkably different, they are fully covered by the Decree implementing Directive 2010/41/EU as they are included in the general notion of self-employment. Here

³⁷⁴ A ‘white resignation’ is an illegal method by which an employer can interrupt a working relationship at any time, and avoid a dismissal procedure. It is facilitated by an employer requiring a worker to sign a resignation letter that is not dated.

³⁷⁵ Decree no. 198 of 11 April 2006, in OJ no. 125 of 31 May 2006, o.s. no. 133, available at: <http://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=2006-05-31&atto.codiceRedazionale=006G0216¤tPage=1>, accessed 11 September 2014.

³⁷⁶ Decree no. 151 of 26 March 2001 on the Sustain of Motherhood and Fatherhood, published in OJ no. 96 of 26 April 2001, available at: <http://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=2001-04-26&atto.codiceRedazionale=001G0200¤tPage=1>, accessed 11 September 2014.

³⁷⁷ Act No. 228 of 24 December 2012, published in OJ No. 302 of 29 December 2012, o.s. no. 212, available at: <http://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=2012-12-29&atto.codiceRedazionale=012G0252¤tPage=1>, accessed 11 September 2014.

³⁷⁸ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) OJ L 204 of 26 July 2006, pp. 23-36.

³⁷⁹ Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security OJ L 6 of 10 January 1979, pp. 24-25.

³⁸⁰ Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services OJ L 373 of 21 December 2004, pp. 37-43.

we should note that the broad notion provided by Article 27 of the Code of Equal Opportunities, which already referred to all forms of work, employment, self-employment or any other, already implements EU requirements. Anyway, the express amendment issued by Act No. 228/2012 which included the 'establishment, equipment or extension of a business or the launching or extension of any other form of self-employed activity' has definitely clarified the personal scope of the Code, defeating all possible doubts rising from the fact that autonomous work and entrepreneurship do not fully correspond.

The agricultural sector has specific regulations but all rights provided by Directive 2010/41/EU are also guaranteed to these self-employed persons.

Italian legislation does not recognise life partners. However, as regards maternity rights, it has to be underlined that under the regulations of the Code on the Protection of Motherhood and Fatherhood these are individual rights. Moreover, also allowances for poor families which are paid by the municipalities do not depend on marriage. In case life partners habitually participate in the activities of the self-employed partner and perform the same or ancillary tasks, this relationship has to be considered as a remunerated work relationship.

5. Article 3 – Definitions

All four definitions in Article 3 of the Directive have been correctly transposed in Italian legislation. Decree No. 198/2006 provides these notions in a text which almost literally repeats the respective concepts set by EU Directives 2010/41 and 2006/54 and applies both to the employment and the self-employment sector.

So, Italian law distinguishes between direct and indirect discrimination. Direct discrimination also includes less favourable treatment related to pregnancy, motherhood or fatherhood, also adoptive, as well as to the respective rights. As regards indirect discrimination, the justification is even stricter than EU law. In fact, neutral criteria which involve a disparate impact are only legitimate if they are essential requirements for the job.

As mentioned above, the notions of harassment and sexual harassment also repeat the wording of the Directive. These definitions have not caused any difficulties and include less favourable treatment based on a worker's rejection of or submission to harassment or sexual harassment.

6. Article 4 – Principle of equal treatment

On the whole the transposition of Article 4(1) of the Directive can be deemed correct.

The very wide formulation of Article 1 of the Code of Equal Opportunities, which already implemented Directive 86/613³⁸¹ as well as Article 14(1) of Directive 2006/54, states that 'Equal treatment between men and women must be assured in all fields, including employment, work and remuneration'. Then, as specifically regards the ban on discrimination, the personal scope of Article 27 was already extended to access to employment, self-employment or any other form of work, as well as to selection criteria, recruitment conditions at all levels of the professional hierarchy, and promotion. It already applied to all sectors and encompassed all types of work relationship, subordinate, autonomous or 'any other'. The same provision was also already enforceable, under Paragraph 3, for vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience and for the membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry out a particular profession (here including the benefits

³⁸¹ 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 of 19 December 1986, pp. 56-58.

provided for by such organisations). A minor change to Article 27 of the Code was introduced by Act No. 228/2012,³⁸² to clarify that the ban on discrimination also applies to entrepreneurship (see Section 4 of this report, above).

7. Article 5 – Positive action

Before the implementation of Directive 2010/41/EU the Code of Equal Opportunities already provided for positive actions in the field of entrepreneurial activity. In fact, the Code implements the principle of substantial equality, providing for the promotion of female self-employment through preferential measures meant to favour access to bank credits and public funds, to improve professional training and qualifications for women in this field, and to promote the presence of businesses owned or managed by a high percentage of women in the most innovative sections of different production sectors.

These kinds of measures can be very helpful, since possible problems of effectiveness are mainly linked to insufficient funds, to bureaucratic aspects such as complexity of the application and timing in estimation and payment of the projects. A study by the Union of Chambers of Commerce has highlighted that positive action plans performed in the last years have had a positive effect on the life of start-up enterprises, while improvements of the enterprises' performances were not homogeneous and their real success seemed quite random.³⁸³ In any case, expectations for these projects are rather high as the applications definitively exceed the amount of funds allocated.

8. Article 6 – Establishment of a company

Neither Article 5 of Directive 86/13 nor Article 6 of Directive 2010/41/EU required any specific implementation as the regulations for the establishment of companies were already non-discriminatory for spouses, and life partners are not recognised by Italian law.

No statistics on how many spouses or life-partner companies have been established are available.

9. Article 7 – Social protection

Self-employed persons are under the protection of social insurance as regards old-age pensions, invalidity benefits and survivors' pensions, industrial accidents and occupational diseases, maternity and family allowance and sickness benefits. The pensions system is contribution based. The self-employed are also covered by the National Health System, as all other Italian citizens. The various categories of self-employed persons are protected by different pensions systems, but all of them are mandatory and contribution based.

As regards helping spouses and life partners, the Italian system includes different notions of family business, which often overlap. What is relevant in relation to social protection, however, is both the form that the work relationship within the family enterprise takes and the fact that the work carried out produces an income. If this relationship takes the shape of a contract of employment, the assisting spouse will be covered by all provisions concerning employees. If the person engaged in a family business is regarded as self-employed – and particularly as a 'helping relative' – the coverage in terms of social protection is provided, as stated above, by specific public schemes.

³⁸² Article 1, Paragraph 338(b) of Act no. 228 of 24 December 2012, published on OJ no. 302 of 29 December 2012, Ordinary Supplement no. 212.

³⁸³ Second national report on Female Entrepreneurship, 2011, available at: <http://www.unioncamere.gov.it/P42A532C311S144/II-Rapporto-nazionale-sull-imprenditoria-femminile.htm>, accessed 2 July 2014.

On the other hand, it is not completely clear which kind of social protection could be reserved to those engaged in the family business of Article 230(bis) of the Civil Code. This is a residual hypothesis: when the work relationship within the enterprise is not classified as one of self-employment or as a contract of employment, it is regulated by Article 230(bis) of the Civil Code. These workers are covered by the old age, invalidity and survivors' schemes of self-employed persons, which are both contribution-based and mandatory.

If the work carried out cannot be regarded as a source of income, then there is no obligation to pay contributions for pension purposes; the sole social insurance provision that covers helping spouses in this case is the accident at work and professional diseases insurance.

10. Article 8 – Maternity benefits

The Code on the Protection of Motherhood and Fatherhood guarantees the right to maternity allowances provided by Article 8 of the Directive to all categories of self-employed persons.

The maternity allowance is granted to quasi-subordinated workers for a period of five months when they are also obliged to stop working. They are entitled to the allowance under a mandatory system on the condition that they have paid at least three months of contributions in the year before the period covered by the allowance. The latter amounts to 80 % of 1/365 of the income,³⁸⁴ based on the contribution that has actually been paid in the preceding 12 months, consistent with Article 8(3)(b) of the Directive. This refers to the average loss of income or profit in relation to a comparable preceding period subject to any ceiling stipulated under national law.

Self-employed women, including helping spouses, are entitled to a maternity allowance, regardless of their decision whether or not to suspend their working activity. The allowance is paid for five months and amounts to 80 % of the minimum pay for contribution purposes. An amendment to Article 66 of the Code issued by Act No. 228/2012 recently extended the right to maternity allowance to self-employed fisherwomen in small-scale coastal and inland fishing.

Women performing the liberal professions and members of the Welfare and Assistance Fund of their category (i.e. barristers, doctors, surveyors, architects, accountants) are also entitled to five months of maternity allowance, regardless of their interruption of work. The allowance amounts to 80 % of five months of the yearly income earned during the two years preceding the birth. Five months of contributions are credited for pension purposes here.

During the leaves mentioned above, figurative contributions are counted towards pension rights and amounts. All these categories are obliged to pay contributions to sustain maternity allowance and they are all covered for this risk, including in cases of national and international adoption and fostering.

Italy does not have services supplying temporary replacements and the only provision which is aimed at favouring the replacement of the working mother in the enterprise has been extended to self-employed persons. Article 4 Paragraph 5 of Decree No. 151/2001 states that in businesses where self-employed women are engaged, if women go on maternity leave they can be replaced, in the first year after childbirth or after the child entered the family in the event of adoption, by an employee working on a fixed-term contract and (if the enterprise employs less than 20 people) with special reductions in contributions for the business.

In any case the maternity allowance is not alternative to any national social service or services supplying temporary replacements. Social service can be accessed by everybody depending on revenue regardless of the subordinate or autonomous nature of the work relationship.

³⁸⁴ The annual income is divided by 365, and 80 % of this amount is then multiplied by the number of days of maternity leave.

Another gap persists after judgment No. 385/2005 of the Constitutional Court, which declared unlawful the provisions that denied maternity leave to the father performing a liberal profession in alternative to the mother.³⁸⁵ The problem remains for all other self-employed categories of fathers as compared with fathers under a contract of employment.

11. Article 9 – Defence of rights

General rules on judicial and administrative proceedings already ensured the defence of rights in cases of gender discrimination of self-employed persons.

As specifically regards Article 9(2) of the Directive, provisions on the Enforcement of Rights of the Code for Equal Opportunities (Article 36-41*bis*) can be deemed to cover discrimination in self-employment as well. In fact, the respective Chapter of the Code expressly refers to cases of discrimination governed by Chapter II, which includes discrimination of self-employed persons.

As a consequence Equality Advisors as well as associations and organisations promoting equal treatment between male and female workers can be deemed entitled to act on behalf or in support of the complainant under the same provisions enforceable for employees. Actually, the Code also provides for a voluntary attempt of conciliation in case of collective discrimination which can be promoted by the National or Regional Equality Advisor and can result in the signature of a plan to remove the discriminatory situation, thus avoiding a trial and possible sanctions.

There only is one procedural aspect that could raise some problems: all provisions on the Enforcement of Rights include a reference to labour dispute rules, which are enforceable only for quasi-subordinated workers and for the sector of agriculture (regardless of the nature of the work relationship). Other self-employed workers should act under a civil-law procedure. As a consequence, the right of associations, organisations, and other legal entities to bring an action to court can only be recognised by interpretation, as mentioned above. Anyway, the possible problem of interpretation has not occurred yet as there are no cases to be recorded.

12. Article 10 – Compensation or reparation

The general remedy of nullity is enforceable for all discriminatory acts. Compensation for economic damage can be awarded following the general principles on contractual and extra-contractual liability, without upper limits.

The compensation of non-economic damage, which in the Italian system is limited to cases expressly stipulated by the law, is also provided by the Code of Equal Opportunities, but only for special and urgent proceedings, with the consequent problems of interpretation mentioned above in Section 11.

Non-economic damages are calculated using a criterion of equity aimed at ensuring full and personalised reparation through the application of tables elaborated by case law.

13. Article 11 – Equality bodies

Under the regulations of the Code for Equal Opportunities Equality Bodies designated in accordance with Article 20 of Directive 2006/54 have to carry out the activities listed in Article 11 Paragraph (2)(a)-(d) of the Directive also as regards self-employed persons, but the implementation of Directive 2010/41 is very recent and no data are available at the moment about the actual performance of these tasks. Official documents published on the website of the

³⁸⁵ Published in OJ 19 October 2005, No. 42 – Special Issue No. 1.

National Equality Advisor show that the activity of this Body has been essentially addressed to the employment field.

As regards independence, the law expressly states that equality bodies shall perform independent activities, but it is up to the Minister of Labour to set the conditions for the organisation and the functioning of the Equality Advisors' staff.

14. Article 12 – Gender mainstreaming

No examples of the implementation of this Article are to be recorded.

15. Article 13 – Dissemination of information

No data are available on the dissemination of information under Article 13 of Directive 2010/41/EU.

Only a short bulletin on the website of the National Equality Advisor highlights the amendments to Decree Nos 198/2006 and 151/2001 aimed at implementing Directive 2010/41/EU.³⁸⁶

16. Article 14 – Level of protection

As regards maternity rights, a maternity allowance is provided for mothers who are not covered by the social security system and earn less than a certain amount.

17. Case law

No case law on Directive 2010/41/EU or on the previous Directive can be recorded here. We can only mention judgment no. 3/1998 of the Constitutional Court,³⁸⁷ which also referred to Directive 86/613/EEC to assess the inconsistency of Article 64 of Decree No. 151/2001. The latter provision ensured only three months of maternity allowance for autonomous working mothers in case of adoption, in contrast with the aim of both the Code on the Protection of Motherhood and Fatherhood and the Directive to equalise the treatment of employed and self-employed mothers as regards maternity rights.

18. Issues regarding the 'duty holder'

The issue of who is the duty holder could actually give rise to an uncertainty if not to a real difficulty in the implementation of the Directive. In fact, in the sector of self-employment, except in most cases for the categories of quasi-subordinated workers, the other party to the contract is actually a customer and not an employer for the worker. Moreover 'third' parties could be considered responsible for possible cases of discrimination, such as the professional associations, which have a remarkable role in governing access both to certain jobs and to training.

Nevertheless, there is no case law or debate to be recorded on this issue.

19. National statistics

According to data available from the National Statistics Institute (ISTAT), in 2012 the percentage of self-employed persons compared to subordinate workers was 22.4 (27.2 % among male workers and 15.8 % among female ones). A decreasing trend as regards self-employment has been recorded from 2007 to 2011 of about 6 %, mainly in the more traditional sector of manufacturing

³⁸⁶ See: http://www.lavoro.gov.it/ConsiglieraNazionale/In_Evidenza/Pages/20130108%20Estratto%20Legge%20di%20stabilita%202013.aspx, accessed 11 September 2014.

³⁸⁷ Judgment No. 3 of 29 January 1998, published on: <http://www.giurcost.org/decisioni/index.html>, accessed 11 September 2014.

industries and craftsmanship, although a light recovery (+1 %) characterised last year.³⁸⁸

These data include all categories of self-employed persons, as for statistical analysis the ISTAT defines self-employed worker as 'a person who performs his/her work in a legal-economic organisation without a relationship of subordination'.

In any case, as the world of self-employment is definitely varied, data are often disaggregated for different categories. For instance, the website of the INPS (the National Social Welfare Institute) includes data for self-employed (craftsmen and traders), quasi-subordinated workers (including professionals and collaborators) and non-dependent farmers.

20. Any other issues?

There are no other issues to be mentioned.

LATVIA – Kristīne Dupate

1. Context

According to official statistics, around 10 % of the economically active persons in Latvia work as a self-employed person. The number of male and female is relatively equal – 59 % and 41 % respectively.³⁸⁹

No specific studies on the situation and problems of self-employed persons have been carried out in Latvia, which makes it complicated to describe the general context and specific problems that self-employed persons face especially in the context of gender equality. However, it is most likely that the most vulnerable situation is that of helping spouses working in individual enterprises and agricultural farms (see in detail below).

2. Transposition of the Directive

In Latvia there is no particular law regulating self-employment, and therefore Directives 86/613/EEC³⁹⁰ and 2010/41/EU³⁹¹ were implemented by the adoption of a special law only regulating the principle of non-discrimination with regard to self-employed persons: the Law on Non-Discrimination of Natural Persons – Performers of Economic Activities.³⁹²

Initially another law with the same title was adopted for the purposes of the implementation of the said directives.³⁹³ The first law had a narrower scope than the current one does. It provided protection against discrimination only on the grounds of sex, race and ethnic origin and only with regard to the access to goods

³⁸⁸ ISTAT Annual Report 2013 on the situation of the country, available at:

http://www.istat.it/it/files/2013/05/Rapporto_annuale_2013.pdf, accessed 11 September 2014.

³⁸⁹ The Central Statistical Bureau of Latvia, available in Latvian at http://data.csb.gov.lv/Selection.aspx?px_path=Sociala_Ikgad%C4%93jie%20statistikas%20dati_Nodarbin%C4%81t%C4%ABba&px_tableid=NB0220.px&px_language=lv&px_db=Sociala&rxid=cdbc978c-22b0-416a-aacc-aa650d3e2ce0, accessed 16 July 2014.

³⁹⁰ 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 of 19 December 1986, pp. 56-58.

³⁹¹ Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC OJ L 180 of 15 July 2010, pp. 1-6.

³⁹² *Fizisko personu — saimnieciskās darbības veicēju — diskriminācijas aizlieguma likums*, OG No.199, 19 December 2012.

³⁹³ OG No.89, 9 June 2009.

and services necessary for the performance of economic activities. The current law protects persons in two respects: (1) with regard to access to the goods and services necessary for the performance of the economic activities, and (2) with regard to the access to self-employment in general, including extension of the business. In addition the principle of non-discrimination protects against discrimination on all six grounds – sex, race/ethnic origin, disability, age, religion/belief and sexual orientation. The current law finally implemented all norms concerned with self-employed persons, of all gender equality and non-discrimination directives (Directives 86/613/EEC and 2010/41/EU, 2000/43/EC,³⁹⁴ 2000/78/EC,³⁹⁵ 2006/54/EC³⁹⁶).

Latvia did not make a use of the possibility to extend the implementation period for Articles 7 and 8 of Directive 2010/41/EU, since in the field of statutory social security the spouses of self-employed persons were already granted all required rights.³⁹⁷

3. Article 1 – Subject matter

No problems were detected with regard to the overlaps of different gender equality directives. There are problems with Directive 2000/78/EC however. Currently, persons are protected against discrimination with regard to access to and supply of goods and services on the grounds of age, religion/belief and sexual orientation only if they need this protection as self-employed persons. If, however, they want obtain goods and services for their own consumption, i.e. outside their professional activities, then discrimination is not prohibited. The paradox in such a situation is the fact that self-employed persons may use some goods and services use as a self-employed person only to a limited extent, e.g. expenses for telephone services, or their car up to 70 % of the expenses (repairs, gasoline etc.).

4. Article 2 – Scope

There are problems with the concept of 'self-employed worker'.

In general Latvian law recognises only two categories of persons: either employees or self-employed persons. It does not recognise a category such as dependent self-employment, which exists in other EU Member States.

Furthermore, Latvian labour law only provides a definition of a worker/employee.³⁹⁸ It does not contain a definition of self-employed person. This is because there is no separate law regulating self-employment. Self-employment may take different forms: a person may be an individual merchant,³⁹⁹ or practise a profession where the law allows self-employment only, like sworn attorneys-at-law, doctors in a private practice⁴⁰⁰ etc. In addition, Latvian law regulating self-employment lacks structure, i.e. the legal regulations on the concept of self-employed are based on the laws regulating different fields like the commercial law regulating the status of individual merchants, or social security laws or tax laws.

³⁹⁴ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19 July 2000, pp. 22-26.

³⁹⁵ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2 December 2000 pp. 16-22.

³⁹⁶ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) OJ L 204 of 26 July 2006, pp. 23-36.

³⁹⁷ Article 5(3) of the Law on Statutory Social Security (*Likums "Par valsts sociālo apdrošināšanu"*), OG No.274/276, 21 October 1997.

³⁹⁸ Article 3 of the Labour Law (*Darba likums*), OG No.105, 6 July 2001.

³⁹⁹ Section VIII of the Commercial Law (*Komerclikums*), OG No.158/160, 4 May 2000. A person must register as an individual merchant if his/her business complies with certain criteria, e.g. amount of annual turnover, number of employees.

⁴⁰⁰ Article 1 of the Law on Statutory Social Security (*Likums "Par valsts sociālo apdrošināšanu"*), OG No.274/276, 21 October 1997.

The only provision stipulating the criteria for the distinction between employment and self-employment with general applicability is the Law on Personal Income Tax.⁴⁰¹

Article 8(2²) stipulates the following criteria for the identification of self-employment:

'It shall be considered that a natural person (payer) acquires income in respect of which salary tax shall be paid if at least one of the following features has been determined:

- 1) the payer has economic dependence upon the persons to whom he or she provides services;
- 2) the assumption of financial risk in the fulfilment of non-profit-making work or in the case of a lost debtor's debt;
- 3) the integration of the payer into an undertaking to which he or she provides his or her services. Integration into an undertaking within the meaning of this Section is the existence of work or recreational areas, a duty to observe the internal procedures regulations of the undertaking and other similar features;
- 4) the existence of actual holidays and leave for the payer and the procedures for the taking thereof in association with the internal procedures regulations of the undertaking or other work schedule of other natural persons employed in the undertaking;
- 5) the work of the payer occurs under the management or control of other persons, and the payer does not have possibility of involving in the implementation of work his or her personnel or to use sub-contractors; or
- 6) the payer is not the owner of fixed assets, material or other assets, which are used in economic activities (this criteria does not apply to personal automobiles or separate personal instruments, which are used for the implementation of work tasks).'

Statutory social security laws do not define the concept of self-employed person. They stipulate certain professions which may be performed as self-employed persons only, like sworn attorneys-at-law, notaries, and doctors in private practices.

Taking into account various forms of employment existing in practice it becomes more and more difficult to distinguish between an employee and a self-employed person, but still Latvian law remains silent with regard to other possible forms of employment.⁴⁰²

In general any person who performs an economic activity outside an employment relationship has the obligation to register with the Revenue Office.⁴⁰³ By such registration a person obtains the official status of a self-employed person.

The law recognises only one group of self-employed person, which means that all self-employed persons are basically treated similarly no matter what kind of business they perform. However there are some fiscal incentives for several types of economic activities, e.g. for seasonal agricultural workers.⁴⁰⁴

Under Latvian law the status of 'small entrepreneurs' and 'business persons' depends on what kind of form of entrepreneurship they have chosen, e.g. limited

⁴⁰¹ *Likums "Par iedzīvotāju ienākuma nodokli"*, OG No.32, 1 June 1993.

⁴⁰² Article 1 of the Law on Statutory Social Security (*Likums "Par valsts sociālo apdrošināšanu"*), OG No. 274/276, 21 October 1997.

⁴⁰³ *Valsts ieņēmumu dienests*; Article 28 of the Law on Personal Income Tax (*Likums "Par iedzīvotāju ienākuma nodokli"*), OG No.32, 1 June 1993.

⁴⁰⁴ The Law on Personal Income Tax (*Likums "Par iedzīvotāju ienākuma nodokli"*), OG No. 32, 1 June 1993. See also the Regulations of the Cabinet of Ministers No.1531 'The procedure under which patent fees are applicable and their amount in the particular professions' (*Kārtība, kādā piemērojama patentmaksa un tās apmēri fiziskās personas saimnieciskajai darbībai noteiktā profesijā*), OG No.252, 28 December 2013.

liability company or micro tax business. It is also possible to carry out such type of business in the capacity of self-employed person, mostly because the Labour Law⁴⁰⁵ allows a natural person (also meaning self-employed person) to have the status of employer. Consequently self-employed persons may hire employees. However, Latvian law as such does not regulate or recognise such concepts as 'small entrepreneur' or 'small business', only different types of entrepreneurship forms, like limited liability companies, joint stock companies or self-employed person.

Latvian law recognises only one form of cohabitation: marriage, irrespective of the fact that a considerable part of society lives in unregistered relationships.⁴⁰⁶ Consequently the provisions of Directive 2010/41/EU are not applicable to all couples having *de facto* partnership.

5. Article 3 – Definitions

The definitions have been implemented by Article 4 of the Law on Non-Discrimination of Natural Persons – Performers of Economic Activities.⁴⁰⁷

The definitions implemented differ from those stipulated by Directive 2010/41/EU mainly because they refer to all six non-discrimination grounds. So the reference 'compared with persons of the other sex' is replaced by 'compared with another person'. There are separate definitions for direct and indirect discrimination. The definition of indirect discrimination does not refer to a comparator, it only requires less favourable treatment related to one of six non-discrimination traits.

The definitions of harassment and sexual harassment have been implemented by one definition: 'unwanted conduct, including unwanted conduct of sexual nature'. Article 4 also explicitly provides that less favourable treatment during pregnancy and maternity (one year after giving birth or during the entire period of breast-feeding) constitutes discrimination.

The main problem with the correct implementation however lies in the fact that Article 3 of the Law on Non-Discrimination of Natural Persons – Performers of Economic Activities provides exceptions which in the author's view are too broad. Article 3(1) allows justification of differential treatment of persons on the grounds of sex, race/ethnic origin, disability, age, religion/belief and sexual orientation with regard to the access to economic activity and access to and supply of goods and services if it is justified by a legitimate aim and the measures chosen are appropriate and necessary. Such exception is much broader than the exceptions allowed with regard to the access to self-employment and profession under Directives 2000/43/EC and 2006/54/EC, recognising only as exceptional situations those where sex or race/ethnic origin is an objective precondition for the performance of the relevant work. Furthermore, Directive 2010/41/EU with regard to the access to and supply of goods and services necessary for the performance of self-employed activities does not allow any exceptions. Consequently exceptions allowed under this Law are much broader than allowed by sex equality directives and Directive 2000/43/EC.

⁴⁰⁵ *Darba likums*, OG No.105, 6 July 2001.

⁴⁰⁶ For example, since 2003 the rate of new-born children born out of marriage is approximately 43 %. *Ārlaulībā Latvijā dzimuši 43 % bērnu*, Diena, available in Latvian at <http://www.diena.lv/sabiedriba/politika/arlauliba-latvija-dzimusi-43-proc-bernu-750255>, accessed 15 July 2014.

⁴⁰⁷ *Fizisko personu — saimnieciskās darbības veicēju — diskriminācijas aizlieguma likums*, OG No.199, 19 December 2012.

6. Article 4 – Principle of equal treatment

Article 4(1) was explicitly implemented only by the Law on Non-Discrimination of Natural Persons – Performers of Economic Activities, adopted in 2012.⁴⁰⁸ The rights stipulated by the respective article have also been extended to the other five non-discrimination grounds.

Article 4(1) of Directive 2010/41/EU naturally added to the protection of the self-employed, because Article 14(1)(a) of Directive 2006/54 only requires equal access but remains silent on what protection a person enjoys during the course of self-employed activities.

7. Article 5 – Positive action

No positive actions have been taken with regard to self-employed persons in Latvia.

8. Article 6 – Establishment of a company

Establishment of a company in Latvia is not complicated in practice. There are many forms which a company may take and the threshold for investment for a company's basic capital is low.

The most widely used form is the Limited Liability Company. Establishment of such a company does not depend on matrimonial or family status. It is an individual right and may involve as many individuals as the parties wish.⁴⁰⁹

There is also a type of company called Family Enterprise. Establishment of such a company is restricted to family members. The Law on Individual (Family) Enterprise and Agricultural and Fishing Farm⁴¹⁰ does not stipulate which persons are considered as family members. Consequently it is the Civil Law⁴¹¹ which defines who is a family member. Since the Civil Law recognises as partners only those who are married, this form of company is not accessible to unmarried couples. However, in practice it may not be very significant, first because such form of entrepreneurship is not widely used, and second, because in substance the Family Enterprise is a full liability company and such form of entrepreneurship is accessible to any combination of individuals, also life partners, under the Commercial Law.

According to the statistics provided by the Enterprise Register there are only 11 active Family Enterprises and only 102 have been registered since 1991 (91 have been liquidated). By way of comparison: there are 55 002 limited liability companies. Consequently, the Family Enterprise as a company form is of minor use in practice.⁴¹²

9. Article 7 – Social protection

There is only one general and statutory social security scheme in Latvia. It includes social insurance, education, healthcare, social assistance and social services.⁴¹³ Private schemes are not widespread.

Statutory health insurance applies on the basis of residence, and economic activity is not relevant, which means that self-employed persons automatically have statutory health insurance based on their residence in Latvia.⁴¹⁴

⁴⁰⁸ Article 2(2).

⁴⁰⁹ The Commercial Law (*Komerclikums*), OG No. 158/160, 4 May 2000.

⁴¹⁰ *Par individuālo (ģimenes) uzņēmumu un zemnieka vai zvejnieka saimniecību*, OG No. 6, 13 February 1992.

⁴¹¹ *Civillikums*, OG No.41, 20 February 1937.

⁴¹² Statistics of the Enterprise Register available in Latvian at <http://www.ur.gov.lv/?a=1111>, accessed 16 July 2014.

⁴¹³ The Law on Social Insurance (*Likums 'Par sociālo drošību'*), OG No. 144, 2 November 1995.

⁴¹⁴ Article 17 of Medical Treatment Law (*Ārstniecības likums*), OG No. 167/168, 1 July 1997.

As a general rule, all employed and self-employed persons are covered by mandatory statutory social insurance.⁴¹⁵ Statutory social insurance for employed persons covers old age, disability, maternity, paternity, parenthood, sickness, unemployment, accidents at work and professional disease risks. Self-employed persons are protected against the risks of old age, disability, sickness, maternity, paternity and parenthood. However, self-employed persons are covered by mandatory statutory social insurance only if their annual income attains a certain level.⁴¹⁶ The income level which obliges them to join the statutory social insurance is regulated by the Cabinet of Ministers' Regulation. Usually, and also currently, such annual income level has to exceed 12 monthly statutory minimum salaries.⁴¹⁷ Currently the statutory monthly salary in Latvia is EUR 320.⁴¹⁸ Self-employed persons, unlike employed persons who have to contribute in proportion to their real earnings, are obliged to provide statutory social insurance contributions only in the amount of the corresponding minimum statutory salary, irrespective of their real income. Higher contributions for self-employed persons are voluntary.⁴¹⁹

The spouses of self-employed persons have the right to access statutory social insurance voluntarily. They may insure themselves against risks of old age, disability, maternity, paternity, sickness and parenthood.⁴²⁰

The author doubts whether these regulations ensure the effective protection of helping spouses in practice, since there only is a right to join the state social security system voluntarily. In a telephone interview with the head of Department of Statistics of the State Statutory Insurance Agency it became clear that this assumption regarding the lack of effectiveness of the social protection of spouses is absolutely true. According to the data provided by the State Statutory Insurance Agency, none of the spouses of self-employed persons contributed for statutory social insurance in 2013. However, the data of the Central Statistical Bureau demonstrates that in 2013 around 7 500 persons were helping family members in Family Enterprises, Individual Enterprises and Agricultural Farms.⁴²¹ This means that in practice there is a considerable group (in relation to the size of the population of Latvia) that is totally unprotected. Not only because of the lack of social insurance, but also because of the lack of any rights to benefits deriving from Individual Enterprises and Agricultural Farms. In particular, according to the decision of the Senate of the Supreme Court of Latvia, in case of divorce a spouse has no right to claim a share of an Individual Enterprise or Agricultural Farm, because according to the Commercial Law it is an individual enterprise.⁴²²

It is also unclear if the social insurance of self-employed persons in general works effectively. Although there are no official comparative data of the State

⁴¹⁵ The Law on Statutory Social Security (*Likums 'Par valsts sociālo apdrošināšanu'*), OG No. 274/276, 21 October 1997.

⁴¹⁶ Article 6(3) of the Law on Statutory Social Security, OG no. 274/276, 21 October 1997.

⁴¹⁷ The Cabinet of Ministers Regulation No.1478 'Regulations on minimum and maximum amount of mandatory statutory social insurance contribution object' (*Noteikumi par valsts sociālās apdrošināšanas obligāto un brīvprātīgo iemaksu objekta minimālo un maksimālo apmēru*), OG No.250, 20 December 2013.

⁴¹⁸ The Cabinet of Ministers Regulation No.665 'Regulations on minimum monthly salary and minimum hourly rate for a work' (*Noteikumi par minimālo mēneša darba algu un minimālo stundas tarifa likmi*), OG No. 169, 30 August 2013.

⁴¹⁹ Article 14(2) of the Law on Social Insurance (*Likums "Par sociālo drošību*), OG No. 144, 2 November 1995.

⁴²⁰ Article 5(3) of the Law on Social Insurance (*Likums "Par sociālo drošību*), OG No. 144, 2 November 1995.

⁴²¹ The Central Statistical Bureau of Latvia, available in Latvian at http://data.csb.gov.lv/Selection.aspx?px_path=Sociala_Ikgad%C4%93jie%20statistikas%20dati_Nodarbin%C4%81t%C4%ABba&px_tableid=NB0220.px&px_language=lv&px_db=Sociala&rxid=cdbc978c-22b0-416a-aacc-aa650d3e2ce0, accessed 16 July 2014.

⁴²² Decision (12 January 2011) in Case No. SKC-14/2011, available in Latvian at: <http://at.gov.lv/lv/judikatura/judikaturas-nolemumu-arhivs/senata-civillietu-departaments/klasifikators-pec-lietu-kategorijam-ar-tezem/visi/11laulato-mantiskas-attiecibas/>, accessed 14 July 2014.

Revenue Office and the State Statutory Insurance Agency on how many persons are registered as self-employed and how many of them declare a sufficient level of income for the social security contributions, the author and the official of the State Statutory Insurance Agency assume that the difference between the number of self-employed and the number of self-employed who contribute to statutory social insurance is huge.⁴²³

All such problems may be explained by the fact that the average income in general is low, and by the existence of a grey economy and insufficient administrative control mechanisms. This creates situations where a person only acknowledges that he/she is totally unprotected *post factum*, i.e. after the emergence of a social risk.

10. Article 8 – Maternity benefits

A woman has a right to maternity allowance for a minimum of 112 days (approximately 56 days before and 56 days after the birth).⁴²⁴

Self-employed persons have the right to a maternity allowance on the basis of the same conditions as employed persons.⁴²⁵ The amount of maternity allowance is 80 % of the statutory social insurance contribution salary,⁴²⁶ i.e. of the total amount (gross salary) based on which the contributions have been made. Such an allowance constitutes a higher income than it would normally be for an employed person, who receives around 69 % of their gross salary.⁴²⁷

However, where the employed person cannot choose the amount of income based on which to make the contributions, meaning that they mandatorily have to make contributions from all income, the self-employed can choose; they are only obliged to contribute from the minimum statutory salary. Taking into account the fact that there is doubt whether the majority of self-employed persons contribute at all and that, if they contribute, it is most likely that the statutory social insurance contribution salary corresponding to the statutory minimum salary and not the real income, it is most likely that in practice self-employed persons are not entitled to the same level of income in case of maternity. However, at least formally such a situation complies with the obligations under Article 8(3) of the Directive. First, regarding subparagraph (b), the loss of equivalent income is a voluntary choice of each self-employed person – either he/she provides minimum amount contributions and becomes entitled to the minimum amount statutory social insurance allowance, or he/she provides contributions corresponding to his/her real income and becomes entitled to the equivalent statutory social insurance allowance. Second, regarding subparagraphs (a) and (c), maternity allowance constitutes 80 % of the statutory social insurance salary (gross salary), which is equal to cases of illness, which also covers 80 % of gross salary. Further, maternity allowance is higher than parental leave allowance, which is only 60 % of gross salary.

Latvian law is silent regarding the rights provided by Article 8(4) of Directive 2010/41/EU.

⁴²³ Telephone interview with the head of Department of Statistics of the State Statutory Insurance Agency, 15 July 2014.

⁴²⁴ Article 5 of the Law on Maternity and Sickness Insurance.

⁴²⁵ The Law on Maternity and Sickness Insurance (*Likums Par maternitates un slimības apdrošināšanu*), OG No. 182,23 November 1995.

⁴²⁶ Article 10 of the Law on Maternity and Sickness Insurance.

⁴²⁷ The income tax for employee salaries is 24 % (the Law on Residents' Income Tax; *likums 'Par iedzīvotāju ienākuma nodokli'*, Official Gazette No. 32, 1 June 1993); statutory social security contributions constitute 34.09 %, but employees only have to pay 10.5 % and 23.59 % must be contributed by the employer (the Law on Statutory Social Security; *likums 'Par valsts sociālo apdrošināšanu'*, Official Gazette No. 274/276, 21 October 1997). After taxes and social security contributions, employees are therefore entitled to approximately 69 %.

11. Article 9 – Defence of rights

The mechanisms for the defence of the rights of self-employed persons in case of discrimination are similar to those applicable to employees and consumers.

Individuals may bring civil claims before regular courts dealing with civil and criminal cases in disputes regarding private-law transactions.

The Law on Non-Discrimination of Natural Persons – Performers of Economic Activities⁴²⁸ provides all ‘traditional’ remedies: Article 4(1) stipulates a reversed burden of proof principle. Article 5 covers the right to compensation, including for non-pecuniary damage, Article 6 covers the protection against discrimination and Article 5 the right to claim access to self-employment/profession and/or access to and supply of goods and services necessary for the performance of the economic activities of self-employed persons.

In addition, in case of discrimination Article 204¹⁷ of the Administrative Violation Code may be applicable. It provides for an administrative penalty of EUR 400 to EUR 700 (LVL 100 to LVL 500) if a person has violated the principle of non-discrimination as laid down in specific laws.⁴²⁹

Non-discrimination norms are enforceable only on an individual basis. Latvian law does not envisage any rights to collective claims⁴³⁰ or rights to claim protection of rights in the name of a person other than the claimant him/herself. Non-governmental organisations may represent victims of discrimination.⁴³¹ The Ombudsperson, performing the tasks of National Equality Body, is also granted the right to represent victims of discrimination before the courts.⁴³² However, no discrimination cases have been represented by the Ombudsperson since 2009. In principle any natural or legal person may represent a claimant before a court,⁴³³ and therefore the norms in special laws granting rights of representation to non-governmental organisations and the Ombudsperson are rather declaratory.

Decisions of Ombudsperson have no legally binding force. They are only recommendations and their implementation depends on the authority of a particular person occupying a post of Ombudsman.

12. Article 10 – Compensation or reparation

Article 5 of the Law on Non-Discrimination of Natural Persons – Performers of Economic Activities provides for the right to compensation, including non-pecuniary damage, and for the right to claim access to self-employment/profession and/or access to and supply of goods and services necessary for the performance of the economic activities of self-employed persons. There is no upper limit to the compensation that may be awarded.

Latvian law does not have any norm stipulating or even giving guidance on how immaterial damages have to be assessed. As a consequence it is left to the courts, which still do not have any more or less uniform approach.

13. Article 11 – Equality bodies

The tasks of a National Equality Body in Latvia are performed by the Ombudsperson, who in general is responsible for independent supervision of the observance of the human rights in Latvia.

⁴²⁸ *Fizisko personu – saimnieciskās darbības veicēju – diskriminācijas aizlieguma likums*, OG No. 199, 19 December 2012.

⁴²⁹ OG No. 51, 20 December 1984, Amendments with regard to the amount of the penalty in connection with the change of currency to Euro, OG No. 201, 15 October 2013.

⁴³⁰ Except for environmental claims.

⁴³¹ Article 10(3) of the Law on Foundations and Associations (*Biedrību un nodibinājumu likums*), OG No. 161, 14 November 2003.

⁴³² Article 13(10) of the Ombudsperson Law (*Tiesībsarga likums*), OG No. 65, 25 April 2006.

⁴³³ Article 82 of the Civil Procedure Law (*Civilprocesa likums*), OG No.326/330, 3 November 1998.

The Ombudsman Law⁴³⁴ only stipulates a general obligation to monitor, carry out inspection in particular cases, issue legally non-binding opinions, and represent persons before the courts in discrimination cases.

Due to the lack of financial and human resources in recent years the Ombudsman has not taken any proactive measures. It has only carried out inspections on the basis of particular complaints lodged by individuals.

No cases have been initiated, and nor have any research or other specific projects been carried out with respect to self-employed persons.

The lack of compliance with the requirements of Article 11 of Directive 2010/41/EU applies not only to the obligations under the directives in question, but also with regard to other gender equality and non-discrimination directives.

14. Article 12 – Gender mainstreaming

The gender mainstreaming principle is hardly observed in practice in any field of life in Latvia. Although Parliament's Order Roll⁴³⁵ provides for an obligation of the legislator to assess the impact of any legislative proposal on society in general and the Cabinet of Ministers Instruction⁴³⁶ provides for an obligation of the executive power to assess proposals from the perspective of equal treatment and equal opportunities, such obligations are scarcely observed in practice.

No respective measures have been taken with respect to the self-employed.

15. Article 13 – Dissemination of information

No special measures apart from the official publication of the relevant laws have been taken with regard to the implementation of Directive 2010/41/EU.

16. Article 14 – Level of protection

The level of protection of the self-employed is formally higher than required by the Directive, because self-employed persons are entitled to parental allowance.⁴³⁷ Currently there is a problem with the practical use of the right to parental leave and social allowance, because only persons not working during such leave are entitled to parental allowance. However, on 1 October 2014 the system will change. If a parent chooses to stay in full-time or part-time employment during the period that the child is under 18 months old he/she will be entitled to 30 % of the parental allowance (30 % of the full allowance (60 % of the salary)).⁴³⁸ In addition, one of the parents will be entitled to another type of allowance: the flat-rate state social allowance, a childcare allowance that applies until the child reaches the age of 18 months, which amounts to EUR 171 per month.⁴³⁹ Such a system, allowing the combination of work and parenthood, is especially important to self-employed persons because of the risks to lose clients.

⁴³⁴ The Ombudsperson Law (*Tiesībsarga likums*), OG No. 65, 25 April 2006.

⁴³⁵ Section 85(5)(2), *Saeimas kārtības rullis*, OG No. 96, 18 August 1994.

⁴³⁶ The Cabinet of Ministers Instruction No. 19 'The Procedure on the Assessment of Initial Impact of Project of a Legal Act' (*Tiesību akta projekta sākotnējās ietekmes izvērtēšanas kārtība*), OG No.205, 30 December 2009.)

⁴³⁷ The Law on Statutory Social Security (*Likums "Par valsts sociālo apdrošināšanu"*), OG No.274/276, 21 October 1997.

⁴³⁸ Example, if a parent's gross salary was EUR 1 000, the amount of parental allowance would be EUR 600 or 60 % of the social insurance contribution salary. This applies to employed parents who will be on full-time parental leave. If, however, a parent decided to stay in active employment, he/she will be entitled to 30 % of the parental allowance, i.e. 30 % of EUR 600 (or normal parental allowance, which would constitute EUR 180).

⁴³⁹ Article 10⁶ of the Law on Maternity and Sickness Insurance. Amendments OG No. 228, 22 November 2013.

17. Case law

No cases have been found relating to Directives 86/613/EEC and 2010/41/EU decided by national courts in Latvia.

18. Issues regarding the ‘duty holder’

The State may fulfil the functions of duty holder by providing adequate social protection in case of maternity and parenthood. It has the means to provide both: social security protection as well as appropriate replacement and childcare infrastructure. Unfortunately, the latter task is not carried out properly in Latvia, because there are no replacement services and childcare facilities are not provided in any sufficient quantity.

19. National statistics

In 2013 there were 103 400 self-employed persons in total. The number of self-employed persons in recent years has only changed slightly and it may be assumed that changes have taken place on account of the economic crisis (2008 – 108 000; 2009 – 104 000; 2010 – 97 800; 2011 – 97 700; 2012 – 99 500).⁴⁴⁰ 45 200 out of 103 400 self-employed persons were also employers, i.e. they were self-employed persons who hired workers. In 2013 58 200 persons were working only as a self-employed person, while 13 300 persons were working in at least in two capacities – as employed and self-employed.⁴⁴¹

The number of men and female self-employed persons is relatively equal – 61 000 male and 42 400 female persons (59 % and 41 % respectively).⁴⁴²

In 2013 there were 790 300 employed persons, consequently around 10 % of all economically active persons work in a self-employed capacity.⁴⁴³

The Central Statistical Bureau applies a classical definition of ‘self-employed person’: it is a person who performs a work independently. The statistical data is gathered in annual pools of inhabitants, according to methodology applied and required by EUROSTAT.⁴⁴⁴

20. Any other issues?

There are no other issues to report.

⁴⁴⁰ The Central Statistical Bureau of Latvia, available in Latvian at http://data.csb.gov.lv/Selection.aspx?px_path=Sociala_Ikgad%C4%93jie%20statistikas%20dati_Nodarbin%C4%81t%C4%ABba&px_tableid=NB0220.px&px_language=lv&px_db=Sociala&rxid=cdbc978c-22b0-416a-aacc-aa650d3e2ce0, accessed 16 July 2014.

⁴⁴¹ The Central Statistical Bureau of Latvia, available in Latvian at http://data.csb.gov.lv/Selection.aspx?px_path=Sociala_Ikgad%C4%93jie%20statistikas%20dati_Nodarbin%C4%81t%C4%ABba&px_tableid=NB0220.px&px_language=lv&px_db=Sociala&rxid=cdbc978c-22b0-416a-aacc-aa650d3e2ce0, accessed 16 July 2014.

⁴⁴² The Central Statistical Bureau of Latvia, available in Latvian at http://data.csb.gov.lv/Selection.aspx?px_path=Sociala_Ikgad%C4%93jie%20statistikas%20dati_Nodarbin%C4%81t%C4%ABba&px_tableid=NB0220.px&px_language=lv&px_db=Sociala&rxid=cdbc978c-22b0-416a-aacc-aa650d3e2ce0, accessed 16 July 2014.

⁴⁴³ The Central Statistical Bureau of Latvia, available in Latvian at http://data.csb.gov.lv/Selection.aspx?px_path=Sociala_Ikgad%C4%93jie%20statistikas%20dati_Nodarbin%C4%81t%C4%ABba&px_tableid=NB0220.px&px_language=lv&px_db=Sociala&rxid=cdbc978c-22b0-416a-aacc-aa650d3e2ce0, accessed 16 July 2014.

⁴⁴⁴ Telephone interview with the head of Employment Statistics Department of the Central Statistical Bureau of Latvia, 16 July 2014.

LIECHTENSTEIN – Nicole Mathé

1. Context

Self-employment was already a topic in the first equality report of Liechtenstein in 1997, which stated that the legislation concerning commerce had to be free from any gender-based discrimination and had to be construed in gender-neutral terms from a material point of view. Provisions in the former Commercial Code (*Gewerbegesetz*) had been amended in 1996 so as to allow widows and widowers to continue a business enterprise based on the trading licence of the deceased spouse. It has since been replaced by a new Commercial Law that no longer contains such a specific norm.⁴⁴⁵ In general the Gender Equality Act is applicable with regard to gender equality in the context of self-employment.⁴⁴⁶

Article 46(a) of the Marriage Act (*Ehegesetz*) regulates the compensation for participating spouses of self-employed persons in the enterprise and entered into force on 1 April 1993.⁴⁴⁷ If one spouse performs work in the enterprise of the other spouse, he or she is entitled to compensation for this work. The amount of the compensation is calculated on the basis of the nature of the work and the period during which it was performed. The standard of living of the spouses as a whole and the maintenance allowance are also taken into consideration in this calculation. The same is applicable for registered partnerships since 2011.⁴⁴⁸

To the knowledge of the expert, no statistical data on the situation of self-employed persons (in particular women) in Liechtenstein are available.

2. Transposition of the Directive

The main legislation transposing this Directive in Liechtenstein is the Gender Equality Act (GLG),⁴⁴⁹ the Sickness Insurance Act (KVG),⁴⁵⁰ and the Act providing for occupational pension schemes (BPVG). The time for implementation was not extended as provided for in Article 16(2) of the Directive.

3. Article 1 – Subject matter

The transposition of this Directive was carried out simultaneously with that of Directives 2006/54⁴⁵¹ and 2004/113.⁴⁵² Liechtenstein did not take additional measures to transpose this Directive because it was considered that national legislation already satisfactorily met its requirements.

4. Article 2 – Scope

Article 2(a) has not been transposed specifically in order to create new definitions of self-employed workers or self-employment. The Commercial Code (CC) contains a definition of self-employment according to which it is a gainful activity at one's own account and risk (Article 2(3) CC). This means that already existing conditions e.g. in the Old-Age Insurance Act⁴⁵³ (AHVG) are relevant when

⁴⁴⁵ State Gazette, LGBl. 2006/184 amended by LGBl. 2013/246, all national legislation can be found at: <https://www.gesetze.li/Seite1.jsp?clearsvs=true&clearlrs=true>, accessed 21 July 2014.

⁴⁴⁶ State Gazette, LGBl. 1999/96 as amended by 2011/212.

⁴⁴⁷ State Gazette, LGBl. 1993/53.

⁴⁴⁸ Registered Partnership Act, State Gazette, LGBl. 2011/350.

⁴⁴⁹ State Gazette, LGBl. 1999/96 as amended by 2011/212.

⁴⁵⁰ State Gazette, LGBl. 1971/50 as amended by 2013/6.

⁴⁵¹ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) OJ L 204 of 26 July 2006, pp. 23-36.

⁴⁵² Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services OJ L 373 of 21 December 2004, pp. 37-43.

⁴⁵³ State Gazette, LGBl. 1952/29 as amended by 2011/541.

defining the income of self-employed persons for the insurance (Article 42 AHVG). In general all self-employed workers are covered when applying the prohibition of discrimination on the grounds of sex (Article 3(2) GLG). Also the agricultural sector is therefore included (Article 15 AHVV – *Regulation to the AHVG*).⁴⁵⁴ National legislation also recognises life partners (Article 54*bis* AHVG),⁴⁵⁵ by ensuring equal treatment of spouses and life partners, marriages and registered life partnerships, and judicial dissolutions of life partnerships and divorces. Furthermore the Act on Registered Partnerships (PartG) provides for the compensation for participating partners of self-employed persons in the enterprise.⁴⁵⁶ The amount of the compensation is calculated on the basis of the nature of the work and the period during which it was performed. The standard of living of the spouses as a whole and the maintenance allowance are also taken into consideration in this calculation.

5. Article 3 – Definitions

Article 1(a) GLG contains all four definitions of Article 3 of this Directive. National legislation draws a distinction between direct and indirect discrimination in the same way as the Directive does. Also the distinction between harassment and sexual harassment has been transposed into national legislation using the very same wording as in the Directive.

6. Article 4 – Principle of equal treatment

Article 3(2)(a) GLG partly transposes Article 4 of this Directive into national law. According to Article 3(2)(a) GLG the prohibition of discrimination applies to the access to self-employment irrespective of the field of activity and professional position, including career advancement. Article 3 GLG was amended in the framework of the transposition of Directive 2006/54 and has not added to the protection for self-employed persons by the implementation of the 2010/41 Directive.

7. Article 5 – Positive action

To the knowledge of the expert no specific positive action has been taken by Liechtenstein regarding gender equality in the area of self-employment.

8. Article 6 – Establishment of a company

In principle no specific obstacles can be observed when establishing a company between spouses or life partners. Normally the conditions for the establishment of a company are governed by the law on persons and companies (PGR).⁴⁵⁷ To the knowledge of the expert there are no specific statistics regarding how many companies between spouses or life partners have been established.

9. Article 7 – Social protection

The system for social protection in Liechtenstein covers sickness, accident, maternity, pensions and invalidity of self-employed workers. The mandatory system for sickness, accident and maternity insurance is laid down in the Sickness Insurance Act (KVG).⁴⁵⁸ Pursuant to Article 7 KVG persons domiciled in Liechtenstein or working in Liechtenstein are insured for the costs of nursing,

⁴⁵⁴ State Gazette, LGBl. 1982/35 as amended by 2011/419.

⁴⁵⁵ State Gazette, LGBl. 1952/29 as amended by 2011/388.

⁴⁵⁶ State Gazette, LGBl. 2011/350.

⁴⁵⁷ State Gazette, LGBl. 1926/4 as amended by 2013/6.

⁴⁵⁸ State Gazette, LGBl. 1971/50 as amended by 2014/149.

which mandatory for self-employed persons and their spouses. Furthermore, self-employed persons can be insured for sickness benefits on a voluntary basis (Article 8 KVG). According to Article 34 of the Old-Age Insurance Act, AHVG, self-employed persons are insured for pensions if they are domiciled in Liechtenstein or if they are employed or self-employed in Liechtenstein. It is mandatory for self-employed persons and their spouses. Spouses and life partners are equally treated (Article 54*bis* AHVG). Under the Occupational Schemes Act (BPVG) self-employed persons can be insured for old age, invalidity and death.⁴⁵⁹ It is voluntary for both the self-employed persons (Article 5 BPVG) and their spouses (Article 3(1)(e) BPVG). For all these insurances, self-employed persons have to pay contributions to the insurance companies periodically based on their regular income.

10. Article 8 – Maternity benefits

Maternity benefits are governed by Article 12-15 KVG and are only granted in cases where self-employed women or helping spouses have been insured on a voluntary basis according to Article 8(2) KVG. Insured women will receive a maternity allowance equivalent to 80 % of the insured income during a period of 20 weeks, of which at least 16 weeks have to be after childbirth, provided that the woman was insured before childbirth for a period of at least 270 days, of which three months must have been consecutive (Articles 15(2) and 14(3) KVG). Therefore the maternity allowance meets the requirement of sufficiency in Article 8(3)(a) of this Directive.

To the knowledge of the expert no specific implementation measures have been taken in relation to Article 8(4) of this Directive.

11. Article 9 – Defence of rights

Article 9 of this Directive has not been implemented by specific measures. Nevertheless, the GLG offers some choice of remedies that can be employed in cases of discrimination. Normally the GLG focuses on rights of employees and the defence of their rights. Still, the GLG is also applicable when it comes to violation of the prohibition of discrimination on the grounds of sex with regard to the access to self-employed work. Then enforcement proceedings will probably also include the application of Article 11 GLG where a compulsory conciliation procedure is foreseen preceding any judicial or administrative proceedings.⁴⁶⁰ These proceedings are brought before a previously defined court. Equality bodies are not especially involved at this stage.

Article 7 GLG gives organisations that have had their seat in Liechtenstein for five years and that deal with equality matters between women and men in a broad sense the opportunity to defend the interests of employees in sex discrimination cases before the courts. Individual persons affected by sex discrimination need to give their prior authorisation when the legal action in the name of the organisation is to state that discrimination has taken place. Before bringing the case to court the employer's opinion has to be heard. The court's decision takes the form of a declaration that discrimination has (not) been shown. In order to receive compensation, the individuals concerned will each have to start separate and individual proceedings, although this will be much easier following a group action. It should be mentioned that the GLG includes the possibility for organisations to bring a claim on behalf of the person concerned, to participate in the name of that person or only to participate in the procedure to help the person concerned.⁴⁶¹

⁴⁵⁹ State Gazette, LGBl. 1988/12 as amended by 2013/6.

⁴⁶⁰ Compare Article 15b GLG by analogy.

⁴⁶¹ Article 7(1)(b) GLG.

12. Article 10 – Compensation or reparation

As already mentioned in Section 3 of this country report, Liechtenstein did not explicitly transpose this Directive into national legislation. Therefore the norms concerning compensation or reparation regulated in Article 10 of this Directive are not included in the GLG. There are existing norms on compensation in Article 7(c) GLG, but they focus on discrimination due to the refusal or dismissal of an employment contract and also contain prior upper limits under specific conditions. It seems that Article 10 of this Directive has not yet been properly implemented into national legislation.

13. Article 11 – Equality bodies

Articles 18 and 19 GLG provide for the Gender Equality Commission and the Gender Equality Office. Since March 2005 the Equality Office has dealt with equal opportunities. Its competence has been modified with regard to its independent position. Article 19(3) GLG explicitly states that the Equality Office shall be independent with respect to its tasks of counselling authorities and the private sector, executing public relations as well as studies and recommendations on the appropriate measures to authorities and the private sector.

It does not seem that Article 11 of this Directive has been fully implemented into national law because Articles 18 and 19 GLG were not amended in any sense with regard to the elements of Article 10 of this Directive.

In fact the Gender Equality Office is currently in flux so that its position will probably be modified in the framework of the new structural administrative reform initiated by the Government. This is related to the fact that the Gender Equality Commission resigned from its tasks in May 2013 before the end of its mandate period in order to protest against the unsatisfactory situation of the Gender Equality Office.

14. Article 12 – Gender mainstreaming

As already mentioned above in Section 3 of this country report, this Directive has not been explicitly transposed, and therefore no specific measures can be referred to.

15. Article 13 – Dissemination of information

As already mentioned above in Section 3 of this country report, this Directive has not been explicitly transposed, and therefore no specific measures can be referred to.

16. Article 14 – Level of protection

As already mentioned above in Section 3 of this country report, this Directive has not been explicitly transposed, and therefore no specific measures can be referred to.

17. Case law

To the expert's knowledge there is no case law available.

18. Issues regarding the 'duty holder'

As already mentioned above in Section 3 of this country report, this Directive has not been explicitly transposed, and therefore no specific measures or debates can be referred to.

19. National statistics

To the expert's knowledge no such statistics are available.

20. Any other issues?

There are no other issues to be mentioned.

LITHUANIA – Tomas Davulis

1. Context

A unified definition of 'self-employed person' is lacking in Lithuanian legislation. In fact, only the Law on State Social Insurance⁴⁶² provides a definition of 'self-employed persons' for social insurance purposes only. The following categories of persons are recognised as 'self-employed':

- owners of individual enterprises;
- members of small partnerships and limited partnerships; and
- persons engaged in a registered individual economic activity.⁴⁶³

However, in Lithuania there are also other types of economically active persons who can be considered as self-employed:

- persons engaged in economic activity with a business certificate;⁴⁶⁴
- farmers and their partners; and
- sportsmen and artists.⁴⁶⁵

In tax-related cases, when interpreting the nature of work of persons engaged in independent and registered individual economic activity, the courts simply refer to work based on civil-law contracts to engage in an independent activity with the aim to generate revenue or other economic benefits.⁴⁶⁶ Independency of the person means operating the business at the person's own expense, i.e., the purchase of work equipment, arrangement of place of work and its maintenance, acting on his/her own will and discretion and receiving the income.⁴⁶⁷

Unfortunately there are no sources in Lithuania providing data on working hours, place of work, work-life balance, job satisfaction or life-long learning of self-employed persons. According to the available data, most self-employed individuals who work under business certificates are retail traders. Along with the decreasing total number of employees in agriculture, the portion of self-employed individuals in agriculture is also falling. On the other hand, the number of self-employed individuals in construction and real estate, renting and business activities has increased considerably. Most individuals who are self-employed in manufacturing are engaged in economic activities related to wood and wood products manufacturing, which is also associated with the growing construction

⁴⁶² Law No. I-549 of 18 July 1994. State Gazette, 1994, No. 59-1153.

⁴⁶³ A very broad range of activities is available here (from lawyers and notaries, to tradesmen or manufacturers).

⁴⁶⁴ A narrow range of activities is available here. The principal difference with 'persons engaged in a registered individual economic activity' is the fact that the purchase of a business licence is a form of predefined taxation, whilst persons engaged in a registered activity are subject to the payment of taxes and social insurance contributions, the amount of which depends on their income.

⁴⁶⁵ In Lithuania different laws deal with different types of self-employment. Even if some very minor groups, for example sports trainers, are not mentioned in this report, it does not necessarily mean they are excluded from the category of self-employed persons. However, there is still a limited risk of some individuals being excluded.

⁴⁶⁶ See, for instance, the ruling of the Higher Administrative Court of 16 January 2009 in administrative case no.N-575-3332/2009.

⁴⁶⁷ Ruling of the Higher Administrative Court of 30 June 2011 in administrative case no.A502-2801/2011.

sector in the country (for further details on the share of the self-employed in the population, see Section 19 of this country report).⁴⁶⁸

2. Transposition of the Directive

On 13 March 2012, the Lithuanian Parliament (*Seimas*) adopted the amendment⁴⁶⁹ to the Equal Opportunities Act for Women and Men (EOAWM).⁴⁷⁰ This amendment is to be regarded as the act of transposition since it expressly refers to Directive 2010/41/EU. Apparently, the possibility of extension of the deadline for transposition was not used by the Republic of Lithuania.

The new amendment is rather short. Article 3, which is named 'The Duties of State and Municipal Institutions and Agencies to Implement Equal Rights for Women and Men', was supplemented by a new provision that reads: 'the state and municipal institutions and agencies, within their competences, must respect equal rights for women and men when providing public and administration services'.

This insertion does not seem to change the existing legal attitude towards self-employed persons. In fact, the public institutions were already prohibited from discriminating on the ground of sex by virtue of the directly applicable Article 29 of the Constitution. In addition, the preparation or adoption of discriminatory legislation has already been expressly prohibited by Article 3(1) of the EOAWM since 1998.

The picture of national transposition would not be complete without mentioning one previous, important amendment from 2008.⁴⁷¹ On 19 June 2008 the legislator inserted the new Articles 5-3 and 7-3 into the EOAWM to explicitly prohibit discrimination on the ground of sex in both private and public social security schemes. The amendment was supported by the need to transpose Directive 2006/54/EC,⁴⁷² but self-employed persons were explicitly mentioned here for the first time. Article 5-3 'Prohibition of Discrimination on Grounds of Sex in Social Security Systems' states that it shall be prohibited to discriminate persons on grounds of sex when establishing and applying social security provisions including those that amend or supplement the state social insurance system 'when establishing possibilities for participation, the level of contributions and benefits including additional benefits for widows and dependent persons as well as when establishing the duration of the right to benefits and its retention'. Furthermore, Section 2 of the new Article 5-3 prohibits discrimination in establishing and applying social security provisions in cases of sickness, disability, old-age, early retirement, accidents at work and occupational diseases or unemployment and social security provisions that provide for any type of social benefits including survivor's and orphan's pensions, benefits and material allowances. In addition, the law expressly defines the scope of application which also includes self-employment: 'the prohibition of discrimination on grounds of sex shall apply for employed persons including self-employed persons'.

3. Article 1 – Subject matter

The EOAWM was logically chosen as the appropriate instrument for the transposition of Directive 2010/41/EU. In fact, the EOAWM is the principal piece

⁴⁶⁸ I. Blaziene *Lithuania: Self-employed workers*, available at <http://www.eurofound.europa.eu/comparative/tn0801018s/lt0801019g.htm>, accessed 8 August 2014.

⁴⁶⁹ Law No. XI-1926 of 13 March 2012. State Gazette, 2012, no. 36-1769.

⁴⁷⁰ Law No. VIII-947 of 1 December 1998. State Gazette, 1998, no. 112-3100. English version available at http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=421709, accessed 8 August 2014.

⁴⁷¹ Law No. X-1631 of 19 June 2008, State Gazette, 2008, no. 75-2923.

⁴⁷² Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) OJ L 204 of 26 July 2006, pp. 23-36.

of legislation transposing all gender discrimination related EU legislation, including Directives 2006/54/EC, 79/7/EEC⁴⁷³ and 2004/113/EC.⁴⁷⁴

However, one particularity of Lithuanian anti-discrimination law should be mentioned here. The EOAWM is a special law particularly dealing with gender discrimination whilst another law, the Equal Opportunities Act (EOA), was designed to deal with discrimination on the grounds stipulated by the EU equality directives of 2000 and a number of other domestic grounds, such as nationality, language and social origin. With the EOA amendments of 2008, sex was also added to the list of the prohibited grounds of discrimination under the EOA. This double coverage of the ground of sex has created misunderstandings with respect to clarity and legal certainty, as both laws regulate the contextually same issue in slightly different ways, and to different extents. The EOAWM is a *lex specialis*, but the later EOA is more advanced in terms of coverage, including a precise description of obligations. However, the EOA was not amended to address the principle of equal treatment of self-employed persons (Directive 2010/41/EU). In fact, the EOA does not even address self-employed persons.

4. Article 2 – Scope

As indicated above in Section 1, Lithuanian law does not contain a definition of 'self-employed person' or 'self-employment'.

The Lithuanian legislator has chosen not to explicitly confer the relevant rights on self-employed persons and their spouses (see Section 2 of this report, above), with an exception for social security schemes. Instead, state and municipal institutions and agencies are obliged to 'respect equal rights for women and men when providing public and administration services'.

This approach allows one simple conclusion: except for social insurance schemes, the prohibition of discrimination of self-employed persons on the grounds of sex is implemented by a general obligation for state and municipal institutions and agencies. The scope of application of the principle of equal treatment is limited to:

- state and municipal institutions and agencies; and
- issues related to public services⁴⁷⁵ and administrative services.⁴⁷⁶

Life partners are not recognised in Lithuania.

5. Article 3 – Definitions

Article 2 of the EOAWM provides definitions of 'discrimination', 'direct discrimination', 'harassment' and 'sexual harassment' which are generally applicable within the scope of the EOAWM. Following amendments of 2012, all four national definitions are now literal repetitions of the corresponding definitions provided by Directive 2006/54/EC.

There are no cases where these definitions have been applied in practice by domestic courts or the Equal Opportunities Ombudsperson with respect to the self-employed.

⁴⁷³ Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security OJ L 6 of 10 January 1979, pp. 24-25.

⁴⁷⁴ Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services OJ L 373 of 21 December 2004, pp. 37-43.

⁴⁷⁵ The Law on Public Services defines the public services as activities of state or local government-controlled legal entities in providing social, educational, scientific, cultural, sports and other statutory services.

⁴⁷⁶ The Law on Public Services defines administrative services: actions of public administration bodies involving the issue of permits, licenses or documents confirming certain legal facts, as well as the reception of, counselling on and management of individual declarations, provision of information to individuals, and enforcement of administrative procedures.

6. Article 4 – Principle of equal treatment

In the view of the expert, the principle of equal treatment has not been correctly transposed in Lithuania. As indicated in Section 4 of this report, the Lithuanian legislator has not laid down the principle of equal treatment of self-employed persons, except in the area of social security schemes (see Section 2). In addition, it does not grant explicit rights not to be discriminated against on the grounds of sex for spouses of self-employed persons.

The novelty of the amendment of 13 March 2012 is significant only because previously there was no similar stipulation in the EOAWM. However, there is nothing that could prove even the hypothetical possibility for increased protection of self-employed persons in the access to self-employment or other areas of life.

7. Article 5 – Positive action

Lithuania has not used the power to take or allow positive action. Moreover, the Lithuanian EOAWM even generally prohibits positive action, if this affirmative action is not regulated by special law. No such laws have been adopted in Lithuania since 1998, when the EOAWM was adopted.

8. Article 6 – Establishment of a company

There is no special provision addressing non-discrimination in the establishment of a company between spouses. There is no evidence that spouses have any problems in creating a company – the conditions or formalities for establishing a firm are the same for everyone.

There are no surveys or information available on how many such companies exist in Lithuania – these statistics simply are not collected.

One interesting development was observed in a time of crisis (2008-2011) when the families of major shareholders or businessmen (not necessarily self-employed) suffered from the increased pressure from the banks demanding additional guarantees to secure the payment of loans. A large majority of them were forced to give their consent to guarantee the payment of credits and loans taken by their husbands or their businesses with the family's or their own personal property. Some of them were even forced to risk their homes afterwards and only in 2012 did the courts start to annul these consents of family members. However, there is no information on the exact impact of this malpractice on self-employed persons or their family members.

9. Article 7 – Social protection

The Lithuanian state social protection system is quite complicated in terms of coverage, types of contributions and benefits. The rules on social protection of self-employed persons cannot be considered as a system – it rather is a mixture of different provisions of distinct types of social insurance or even taxation which sometimes also covers self-employed persons. After amendments of 2008, many self-employed persons were covered for the first time by different types of social and health-related insurance on a mandatory basis. There are still considerable differences between those under contract of employment and those engaged in individual activity. Obviously, the benefits for self-employed persons are limited in terms of risk and types of allowances (not all risks are covered) as well as regarding the amount of the benefits (the contributions of self-employed persons to the social scheme are prefixed or subject to upper limits while contributions of employees and public servants are not).

	Pensions	Maternity and sickness benefits	Unemployment benefits	Work-related accidents benefits	Health insurance
Owners of individual enterprises	No, unless on a voluntary basis	No, unless on a voluntary basis	No	No	Yes
Members of small partnerships and limited partnerships	No, unless on a voluntary basis	No, unless on a voluntary basis	No	No	Yes
Persons in registered individual economic activity	Age, disability and widow/widower pensions. Additional voluntary insurance possible	Only maternity (paternity) and parental benefits. Voluntary insurance possible	No	No	Yes
Persons with business certificates	Only basic part of the pension. Additional voluntary insurance possible	No, unless on a voluntary basis	No	No	Yes
Farmers and their partners	Age, disability and widow/widower pensions. Additional voluntary insurance possible	Only maternity (paternity) and parental benefits. Voluntary insurance possible	No	No	Yes
Sportsmen and artists	Age, disability and widow/widower pensions. Additional voluntary insurance possible	Only maternity (paternity) and parental benefits. Voluntary insurance possible	Yes	No	Yes

The spouses of self-employed persons are not covered explicitly by social protection legislation. We can only report that helping spouses of farmers are covered by the mandatory health social insurance scheme only if they are registered as partners. Spouses of other categories of self-employed persons are not specifically mentioned in legislation – they may be insured against certain risks (pension and maternity (paternity) and parental benefits – see above) on a voluntary basis like any other natural person legally residing in the territory of Lithuania. Still, there are national social schemes granting certain services and cash benefits to these women regardless of their social insurance, financial situation or professional activity (e.g. birth grants).

However, strong protection against any attempts of discrimination in the area of social protection is provided by Articles 5-3 and 7-3 of EOAWM, which expressly prohibit discrimination of self-employed persons. Their family members are mentioned there as well –there shall be no discrimination on the grounds of sex when establishing the level of contributions, when establishing benefits including additional benefits for widows and dependent persons as well as when establishing the duration of the right to benefits and its retention. However, there are no examples of practical application of said provisions in courts or by the Equal Opportunities Ombudsperson.

10. Article 8 – Maternity benefits

In Lithuania different groups of self-employed persons are differently covered by rules on maternity benefits. Persons engaged in a registered economic activity and farmers and their partners as well as sportsmen and artist are insured on a mandatory basis whilst the others may be insured on a voluntary basis. The mandatorily ensured categories of self-employed persons will receive the benefits (subject to maximum limits) which amount to 100 % of the insured salary (the salary which was the basis for the social insurance contributions) for a maximum of 126 days of leave, if they were ensured for at least 12 months in the period of the last 24 months. No option is available to choose the maternity allowance system. Depending on the type of activities, payment of contributions may be made by the client or by the self-employed person (either four times per year, or once per year together with an annual declaration of income).

The level of maternity benefits depends on the insured salary – the level of income which was the basis for the calculation of maternity insurance contributions. The contributions were 2.2 or 3.4 % of the income. The same rules apply for persons working under employment contracts.

The comparison with the allowances awarded to a person in case of sickness (Article 8(3)(a) of Directive 2010/41/EU) is not difficult to make since the sickness-related level of allowance is lower than maternity benefits. However, if the person's income was lower than the minimum wage, the maternity benefits will be proportionately lower.

There is no legislation in Lithuania which provides for any payments in cases of loss of income or profit or any other family-related allowance (benefits stipulated in Article 8(3)(b)-(c) of Directive 2010/41/EU)

Temporary replacement services or similar national social services are not provided in Lithuania.

Spouses of self-employed persons are not subject to regulation on maternity allowances. Life partners are not recognised in Lithuania.

11. Article 9 – Defence of rights

There are no special rules transposing Article 9 of Directive 2010/41/EC and therefore the general rules of the EOAWM on the defence of rights of victims apply. The access to the courts (civil or administrative courts) is generally safeguarded for alleged victims of discrimination but these cases are very rare. The EOAWM allows the victim to be represented (only with written consent of the victim) in administrative and court proceedings by organisations of workers and employers and by other legal persons having a legitimate interest. This means that these organisations cannot act in their own name as claimants, even if on behalf of the victim.

The victim may file a complaint with the Office of the Equal Opportunities Ombudsperson. The Office investigates complaints, hears cases of administrative offences and imposes administrative sanctions. Administrative fines from EUR 29 (LTL 100) to EUR 1 160 (LTL 4 000) for a breach of the EOAWM may be imposed by the Equal Opportunities Ombudsperson, but in many cases the Ombudsman only issues a simple warning. The violation of equal opportunities for women and men or the sexual harassment of colleagues, subordinates or customers may (but not necessarily shall – this is left to the employer to decide) be followed by disciplinary sanctions against an employee: dismissal.

The Office of the Equal Opportunities Ombudsperson may also be invited to give their impartial opinion in legal proceedings before a civil or administrative court.

The rules on the judicial enforcement of rights are no less favourable than those governing similar domestic actions.

12. Article 10 – Compensation or reparation

Under the applicable rules of the EOAWM, victims of discrimination may submit their case to court and the court may award financial compensation for material and non-material damage caused by the relevant discrimination. The compensation for non-material damage is not restricted by a prior upper limit. However, courts are reluctant to award a high compensation amount for non-material damage. For example, for the discriminatory refusal to employ a Roma woman as a waiter in a bar the employer was obliged to pay a compensation of approximately two and a half times the minimum wage in non-material damages, instead of employment.

13. Article 11 – Equality bodies

The insertion of the new short provision into Article 3 of the EOAWM obliges the Equal Opportunities Ombudsperson and its office to supervise its implementation (Article 10(1) of the EOAWM). The Equal Opportunities Ombudsperson is appointed directly by Parliament and the Office is organised as an independent institution. The Office investigates complaints, supervises the implementation by public institutions and employers, hears cases of administrative offences and imposes administrative sanctions, consults the victims of discrimination, assists public organisations and NGOs, collects, analyses and summarises data on equal opportunities in Lithuania, and submits recommendations.

However, if the Office has the statutory duty to promote, analyse, monitor and support equal treatment, it has never paid special attention to the self-employed. The annual reports do not address this category and no statistical information or specific surveys are collected or provided.

14. Article 12 – Gender mainstreaming

On 2 July 2014, Article 3 of the EOAWM on the duties of state and municipal institutions and agencies was amended to include gender mainstreaming in their activities. However, this obligation is formulated in rather a soft way: state and municipal institutions and agencies are to introduce measures designed to implement equal opportunities for men and women in their strategic planning documents.

However, there is no evidence regarding how the abovementioned obligation works in practice. Sometimes, low-level administrative acts- regulating activities of public bodies -contain a very formal reference merely stating that the activity will be provided by ensuring equal opportunities of men and women.

15. Article 13 – Dissemination of information

There is no information available on how Lithuania has implemented this obligation. Currently, there is nothing on the Internet or on websites of Ministries, the Office of the Equal Opportunities Ombudsperson or other public institutions to draw the attention of the self-employed to the 'new' or 'increased' protection. It is rather difficult to announce the fact that from now on public bodies will not discriminate against the self-employed on the grounds of sex. In fact, there are no examples of this type of information (related to other EU transposition acts) having been provided to the beneficiaries of those provisions.

16. Article 14 – Level of protection

The level of national protection is in no way greater than the protection provided by the Directive.

17. Case law

There is no case law to be reported.

18. Issues regarding the ‘duty holder’

The question regarding the duty holder is problematic in the Lithuanian context. Self-employed persons conclude various types of civil-law contracts and the genuine holder of various equality duties is difficult to identify. There is no practice or even deeper legal analysis on how the problem could be addressed at the national level. Clearly, this makes the implementation and the application of the Directive more difficult. In fact, this probably is a major obstacle for the Directive to be effective.

19. National statistics

The absolute number of self-employed persons demonstrated a clear decrease by 45 %, from 206 300 in 2005 to 115 200 in 2011. A slight increase could be observed in 2013 when the total number of self-employed reached 137 100. The share of women in self-employment remains constant below 40 %: in 2005 women represented 37 % of all self-employed persons, in 2011 40 %, and in 2013 39 %.⁴⁷⁷ The general data show that in 2013, 10.6 % of the labour force was engaged in economic activity. 13.1 % of all men and 8.2 % of women were self-employed.

For the compilation of these data, the categories of persons and the data of state social insurance and state taxation was used by the Department of Lithuanian Statistics. Fact is that these categories of self-employed persons (see Section 2 of this report) shall either be insured under the State Social Insurance Fund or be registered with the State Taxation Office.

20. Any other issues?

The Lithuanian legislator held that the situation in Lithuania already sufficiently satisfied the requirements of Directive 2010/41, and therefore only minor legislative changes were introduced. In reality, the adoption of the Directive has had almost no effect on the creation of a truly discrimination-free environment for the self-employed. Since the activities of the self-employed are considered a matter of private law, provisions that prohibit conduct are lacking. In addition, it is difficult to identify case-law concerning genuine discrimination on the grounds of sex in the context of self-employment. The protection of spouses seems to be the major problem of implementation of the Directive in Lithuania.

LUXEMBOURG – Anik Raskin

1. Context

Self-employment represented 6.2 % of total employment in Luxembourg in 2012.⁴⁷⁸ The part of female self-employed persons was 5.5 % and the part of male self-employed persons was 6.4% of total employment.

Female self-employment has been a subject in public debate for several years now. The Government encouraged women to choose to be self employed by supporting positive actions, such as a team of female ‘ambassadors’ which is composed of women running their own business. The Ministry of Equal

⁴⁷⁷ Source: Lithuanian statistics.

⁴⁷⁸ Employment and Social Developments in Europe in 2013, <http://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=7684>, accessed 14 July 2014.

Opportunities also encouraged the foundation of the Federation of Women Entrepreneurs (*Fédération des Femmes Cheffes d'Entreprises du Luxembourg*).

There are no data on specific problems. However, women who want to start their own business often report that they face more difficulties than men regarding loans.

Discrimination in self-employment is not at all discussed; neither in the public debate nor in discussions in the business world.

2. Transposition of the Directive

There are no specific legislative measures transposing Directive 2010/41. Legislation has been adapted, where considered necessary.⁴⁷⁹

3. Article 1 – Subject matter

There have been no particular problems in Luxembourg with the coverage of Directive 2010/41 and Directives 2006/54,⁴⁸⁰ 79/7,⁴⁸¹ and 2004/113.⁴⁸²

4. Article 2 – Scope

Every person exercising a professional activity on the territory of the Grand Duchy of Luxemburg for their own account (in their personal name) is considered as self-employed. The legislation covering self-employed persons is the same for each category of self-employed worker.

The agricultural sector is treated differently regarding the legal provisions covering helping spouses. In the agricultural sector helping spouses are subject to a mandatory affiliation to the social security system, which is not the case in the other sectors.

Life partners have been recognised since 2004 in Luxembourg. They are defined as a domestic community of two people living as a couple and having drawn up a statement of partnership before the registrar of their common place of residence. Life partners enjoy the same social security rights and benefit from the same tax regulations as married people.

5. Article 3 – Definitions

Since 2008, definitions have been transposed and are applicable to self-employed workers. The Labour Code provides that harassment in the workplace when it is based on sex constitutes discrimination and is prohibited. Article L.241-1 (2) of the Labour Code stipulates a definition of harassment under 'discrimination based on sex'. This is the situation where unwanted behaviour occurs, related to the sex of a person and with the purpose or effect of violating the dignity of a person and creating an intimidating, hostile, degrading, humiliating or offensive atmosphere.

Article L.245-1 and subsequent articles of the Labour Code deal with sexual harassment by covering it with legislation of its own. Any sexual or gender-based harassment therefore constitutes discrimination based on sex. The law specifies

⁴⁷⁹ Specific information from the Government regarding which legislation was adopted was unavailable at the time of writing.

⁴⁸⁰ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) OJ L 204 of 26 July 2006, pp. 23-36.

⁴⁸¹ Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security OJ L 6 of 10 January 1979, pp. 24-25.

⁴⁸² Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services OJ L 373 of 21 December 2004, pp. 37-43.

that the rejection of such conduct by a person or submission to it can be used as a basis for a decision affecting that person.

6. Article 4 – Principle of equal treatment

The principle of equal treatment has been integrated in the general legislative framework on equal treatment between women and men regarding employment which is part of the law adopted in 2008. The text has not been changed since then.

7. Article 5 – Positive action

The Ministry in charge of gender equality supports associations that promote women in decision making and women as entrepreneurs. However, there is no specific positive action in place enacting campaigns to promote self-employment among women.

8. Article 6 – Establishment of a company

There are no special rules for the establishment of a company by spouses or life partners, however the principle of equal treatment applies to all persons in the context of establishing a company.

9. Article 7 – Social protection

Self-employed workers are insured by the social protection system which covers the risk of sickness, maternity, disability, death, old age, occupational accidents and travel. Self-employed persons are required to affiliate to the national social protection system.

They can join the employers' mutual insurance scheme in order to compensate for financial loss resulting from sickness.

Luxembourg has a public mandatory social security system. All workers, including self-employed workers, have to contribute to the system on a monthly basis. Naturally, people are free to subscribe to a private social security system in addition.

Social security is mandatory for the self-employed worker himself/herself. As mentioned under 4, social security is mandatory for helping spouses/partners in the agricultural sector. In all other sectors helping spouses/partners may choose not to contribute to the social security system.

10. Article 8 – Maternity benefits

Self-employed workers are entitled to the maternity allowance on the same conditions as dependent workers. They have to be affiliated for at least six months during the year preceding the maternity leave. For non-employees, the maternity allowance is the contributory base applied at the time of the occurrence of the disability. Self-employed workers have to declare their income in order to calculate their contributions to social security. Any modification of the contributory base involves a recalculation of the financial compensation.

As self-employed workers have to contribute to the public social security system on a mandatory basis, there is no choice of system. They can of course subscribe to any other social security system in addition to the mandatory one.

There are no public services supplying temporary replacements.

11. Article 9 – Defence of rights

Judicial and administrative proceedings are the same as those established for dependent workers. Disputes will mostly be settled by civil courts, and criminal proceedings will be reserved for serious or systematic cases. A person can act alone and initiate penal action. However, it is the Public Ministry that decides whether to act on it.

Administrative and judicial proceedings have to be initiated by the victim. In matters of discrimination based on gender, it is sufficient to establish before the court facts from which it may be presumed that there has been direct or indirect discrimination. It is then up to the defendant to prove that there has been no violation of the principle of equal treatment. The same rules of evidence apply to trade unions and non-profit organisations who act in accordance with their rights against discrimination.

Non-profit organisations with legal personality for at least one year, which have been approved by the Minister of Justice and whose statutory activity is to combat discrimination, are allowed to exercise before the courts or tribunals the rights of the victim of discrimination. This will be in respect of the facts constituting a violation of the principle of equal treatment. Furthermore, this may apply in cases where the non-profit organisation has either a direct or indirect relation to the collective interests they are intended to defend under their statutory purpose, even if they do not warrant a material or moral interest.

When action on equal treatment in the field of the collective agreement or agreement on cross-industry social dialogue is initiated by a person bound by a collective of these contracts, any trade union party to this agreement or dialogue may still join in the proceedings initiated. This can occur if the dispute is of a common interest to the members of the trade union, and when the person who brought the action does not object to this in writing.

Trade unions supporting the national representative or a sectoral representative are authorised to act in representation of a victim of discrimination if the facts of the case harm either directly or indirectly the collective interest that this union defends, even if they do not warrant a material or moral interest, provided that the victim does not expressly object.

The equality body, the Centre for Equal Treatment (CET), is in charge of victim assistance, including conciliation. The equality body can only suggest and assist. Its proposals are not binding.

12. Article 10 – Compensation or reparation

There are no specific sanctions for self-employed victims. However, each contract which is in contradiction with the principles laid down by the law regarding equality between women and men are declared null. Compensation may be claimed by the victim. There is no upper limit to compensation. Immaterial damage can be awarded. All this is very theoretical as there are no cases upon which to rely.

13. Article 11 – Equality bodies

The national equality body (the CET) is competent for the promotion, analysis, monitoring and support of equal treatment of self-employed workers.

However, the equality body is not able to carry out all the activities listed in Article 11 because of a lack of resources. This is not specific to Directive 2010/41; the work of the equality body primarily concerns assisting victims. The body simply does not have the financial or human resources to conduct other related activities.

14. Article 12 – Gender mainstreaming

There are no concrete examples of a public activity meant to take into account the objective of equality between women and men.

15. Article 13 – Dissemination of information

There have been no public information campaigns regarding the subject of equality between women and men in self-employment. However, the fact that self-employed workers are entitled to maternity allowance and to parental leave is well known among the persons concerned.

Concerning social security in general, self-employed workers have been mandatorily insured for years. This is not a subject which needs to be focused on.

16. Article 14 – Level of protection

The level of protection on the national level is the same as that required by the Directive.

17. Case law

There has been no case law available to the public on Directive 2010/41 and Directive 86/613 or their implementation.

18. Issues regarding the ‘duty holder’

There is no public debate whatsoever about the issue of the ‘duty holder’ regarding equality between women and men in self-employment.

As mentioned, the fact that there is specific legislation addressing this subject is not well known. As there is no case law and there have been no decisions of the equality body on this issue it remains quite uncertain how the problem is to be considered.

19. National statistics

There are only a few statistics on self-employment which are sex segregated. According to the publication ‘*L’entrepreneuriat féminin et masculin au Luxembourg*’ (‘Female and male entrepreneurship in Luxembourg’), the creation of self-owned enterprises by women has increased over the last few years.⁴⁸³ The number of requests registered by the Chamber of Commerce rose from 131 to 214 from 2006 to 2010. In the artisanal sector the statistics are not sex segregated. In the Grand Duchy of Luxembourg, a self-employed worker is any person who performs for their own account a craft, an occupation, a trade occupation, or an independent profession (e.g. doctors, solicitors, lawyers, architects, consulting engineers).⁴⁸⁴

20. Any other issues?

There are no other issues to be mentioned.

⁴⁸³ Ministère de l’Egalité des chances, *L’entrepreneuriat féminin et masculin au Luxembourg*, available at: <http://www.mega.public.lu/fr/publications/publications-ministere/2011/12-entrepreneuriat-f-et-m-au-lux/index.html>, accessed 9 November 2014.

⁴⁸⁴ See the website for the Common Centre of Social Security (*Centre commun de la Sécurité sociale*) at: www.ccss.lu, accessed 12 November 2014.

FORMER YUGOSLAV REPUBLIC OF MACEDONIA – *Mirjana Najcevska*

1. Context

Self-employment in the former Yugoslav Republic of Macedonia should be seen in the context of the very high unemployment rate of the last 15 years, which has been between 37 and 28 %. Women constitute 63.2 % of the inactive population in the country and 100 % (207 847) of a specific category of the inactive population: housewives. According to the State Statistical Office 'The employment in the Republic of Macedonia is characterised by a very unfavourable gender structure. This structure has remained unchanged over a longer period of time due to: unstable economic and social conditions in the country and imbalance between the available and required profiles on the labour market'.⁴⁸⁵ A smaller number of women are self-employed compared with men (only 18.8 % of all self-employed persons are women) and they are still much more present as unpaid family workers.

Research⁴⁸⁶ and official statistical data show that most people (especially women) become self-employed because they do not have any other opportunities, in other words most self-employed women are self-employed because they cannot find a job.⁴⁸⁷ Most self-employed women are single-person businesses and they are full-time employees.

The largest number of self-employed women is aged between 23-34 and their net salary is up to EUR 80 (MKD 5 000) per month.⁴⁸⁸

Some studies⁴⁸⁹ have underlined that 'Women are more likely than men to work as unpaid family workers or employees than to be self-employed'. Also, it is noted that 'Female participation in self-employment and entrepreneurship is very low, and fewer women start their own businesses than men. Success rates for entrepreneurship, however, do not differ according to gender. Moreover, female-managed businesses appear to be as productive as male-managed businesses regardless of whether productivity is measured in terms of volume of sales or value added per worker'.

Some regional studies have focused on specific reasons for non-engagement of women in self-employment. For example, in the analyses of the MEDF,⁴⁹⁰ from interviews conducted with stakeholders of the community, regarding difficulties in self-employment, rural women are associated with a 'lack of entrepreneurial skills, work experience, financial resources for starting a business and lack of self-confidence to start a business'. Furthermore, although 'the self-employment could be realised in all areas of the economy, some of those interviewed believe that most adequately for women belonging to ethnic communities in rural areas, would be engagement in aged persons care, childcare, sewing and embroidery, as well as agriculture and stockbreeding.'

⁴⁸⁵ *Women and men in the Republic of Macedonia*, 2014, Republic of Macedonia State Statistical Office.

⁴⁸⁶ K. Kareska *Gender equality in the labour market in the Republic of Macedonia* UDK 331.5:305(497.7) '2009/2011', 331.5:305(4-672EU) '2009/2011', <http://www.mnd-bitola.mk/attachments/article/24/Gender%20equality%20in%20the%20labor%20market%20in%20the%20Republic%20of%20Macedonia.pdf>, accessed 18 July 2014.

⁴⁸⁷ Labour Force Survey, 2012, Republic of Macedonia State Statistical Office (2.4.13.06).

⁴⁸⁸ Labour Force Survey, 2012, Republic of Macedonia State Statistical Office (2.4.13.06).

⁴⁸⁹ E. Gamberoni & Z. Posadas *FYR Macedonia: Gender Diagnostic: Gaps in Endowments, Access to Economic Opportunities and Agency*, World Bank, 2013 http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/11/14/000456286_20131114141730/Rendered/INDEX/777440WPOENGLIOBox0379792B00PUBLIC0.txt, accessed 18 July 2014.

⁴⁹⁰ J. Bliznakovski & M. Popovic *Analysis of the labour market in the Eastern region of Macedonia focused on women from ethnic minorities* Skopje, Macedonian Enterprise Development Foundation (MEDF), 2013; <http://m-prospect.com/wp-content/uploads/2013/08/MRFP-istrazuvacki-izvestaj.pdf>, accessed 18 July 2014.

2. Transposition of the Directive

From a legal point of view, the Directive has not been transposed. However, there are several laws where the definition of self-employed persons is in line with the Directive (Law on Safety and Health, Law on Employment and Insurance against Unemployment, Law on Health Insurance, Law on Pension and Disability Insurance, Law on Contributions for Mandatory Social Insurance).

Article 16(2) of the Directive has been partially implemented: the spouses referred to in Article 2(b) can benefit as any other spouse of an insured worker from a social protection in accordance with national law, but not life partners. Life partners are excluded from any benefits related to the self-employment of their partner. Although in the Family Law formal and non-formal marriage are equalised, this only relates to the care of children, but not to social security and pension benefits.

3. Article 1 – Subject matter

Since Directive 2010/41/EU (or Directive 86/613/EEC for that matter) has not been formally transposed in Macedonian legislation, there have been no problems with overlap of the coverage with Directives 2006/54, 79/7 and 2004/113.

4. Article 2 – Scope

Macedonian law defines self-employed persons, but not self-employment itself. According to the law: 'Self-employed person means any natural person who performs an independent economic activity, or professional or other intellectual service generating income, in accordance with law',⁴⁹¹ or 'self-employed person is a natural person that performs an independent economic activity or renders expert or other intellectual services which generate income for his/her own benefit, under the conditions determined by law.'⁴⁹² There are no categories of self-employment and therefore no risk of exclusion. However, the laws on health and on retirement insurance mention individual farmers' rights *after* self-employed persons.

The same term, 'self-employed', is used in the publications of the State Statistical Office. However, in some official statistical publications⁴⁹³ the term 'own-account worker' is used (see Section 19 of this report, National statistics).

Macedonian national legislation does not recognise life partners in relation to self-employed persons. It only recognises spouses/formal marriage as a ground for some benefits.

5. Article 3 – Definitions

All four definitions have been transposed in the Law on Prevention and Protection from Discrimination and the Law on Equal Possibilities for Women and Men.

National law in the former Yugoslav Republic of Macedonia draws a distinction between direct and indirect discrimination. In the Law on Prevention and Protection from Discrimination, direct discrimination is defined as: 'any unfavourable treatment, differentiation, exclusion or limitation which results or may result in deprivation, violation or limitation of the equal recognition or enjoyment of the human rights and fundamental freedoms, compared to the treatment another person gets or may get in the same or similar situation'. Indirect discrimination according to this law is: 'placement of a person or a group

⁴⁹¹ Law on Contributions for Mandatory Social Insurance, Official Gazette No. 142/2008.

⁴⁹² Law on Employment and Insurance against Unemployment, Official Gazette No. 37/1997.

⁴⁹³ *Women and Men in the Republic of Macedonia*, 2014, Republic of Macedonia State Statistical Office, <http://www.stat.gov.mk/Publikacii/8.4.9.02.pdf>, http://www.stat.gov.mk/obrasci/Obrazovanie/SV_70.pdf, accessed 18 July 2014.

in an unfavourable position compared to other persons by adopting apparently neutral provisions, criteria, or by accepting certain practices, unless such provisions, criteria or practices result from a justified aim, while the means for achievement of the referred aim are appropriate and necessary’.

The distinction between ‘harassment’ and ‘sexual harassment’ has been drawn in the Law on Prevention and Protection from Discrimination and in the Law on Equal Opportunities for Women and Men. However, in the special Law on Harassment in the Workplace from 2013,⁴⁹⁴ both types of harassment have been mixed up (placed together).

6. Article 4 – Principle of equal treatment

Since self-employment is not mentioned in the Labour Law or in the Law on Prevention and Protection from Discrimination, in spite of the declared intent to transpose (the repealed) Directive 86/613/EEC,⁴⁹⁵ Article 4(1) cannot be considered to have been transposed at all, let alone transposed and in any way modified. The same is true for the issue of adding to the protection for self-employed persons in access to self-employment, as set out in Article 14(1)(a) of Directive 2006/54.

The principle of equal treatment per se is stipulated in legislation dealing with self-employment as well as in general antidiscrimination legislation (Law on Equal Opportunities for Women and Men, and Law on Prevention and Protection from Discrimination) although there is no formal transposition, and spouses and partners are not covered in general articles.

7. Article 5 – Positive action

In recent years, the Government has initiated a significant number of projects and programmes aimed at promoting entrepreneurial initiatives among women, e.g. trainings,⁴⁹⁶ government support for enterprises owned and operated by women,⁴⁹⁷ mentorship,⁴⁹⁸ and gender-sensitive development of human resources.⁴⁹⁹ The positive measures related to self-employment of women are outlined in the ‘National strategy for reducing poverty and social exclusion in the Republic of Macedonia’.⁵⁰⁰ In the strategy for gender equality adopted by Parliament on 20 February 2013, self-employment and support for women in starting enterprises is included as a significant element in the efforts to reach gender equality.

There are no sufficient analyses to assess the effectiveness of these measures. According to the statistical data the percentage of self-employed women has increased (which is considered a positive result). However, in 2013 only 3.3 % of all active women were employers.⁵⁰¹

⁴⁹⁴ <http://www.stomfak.ukim.edu.mk/upload/ogl/25756835.pdf>, accessed 18 July 2014.

⁴⁹⁵ In the process of amending the Law on Employment and Insurance against Unemployment the transposition of Directive 86/613/EEC was given as one of the reasons for proposing the change of law.

⁴⁹⁶ <http://www.slvesnik.com.mk/Issues/9d01686c914343d28b15b2605b82272b.pdf>,
<http://www.bsorbitola.org/images/stories/Obuki/brosura-bpz-ohrid.pdf>, accessed 18 July 2014.

⁴⁹⁷ http://www.economy.gov.mk/javni_konkursi/oglasji/3705.html, accessed 18 July 2014.

⁴⁹⁸ <http://www.deso.mk/Item.aspx?i=14&r=1&l=54&c=2>, accessed 18 July 2014.

⁴⁹⁹ http://www.mtsp.gov.mk/content/pdf/lpa_tek.pdf, accessed 18 July 2014.

⁵⁰⁰ http://www.siromastija.mk/wp-content/uploads/2014/05/revidirana_str_siromastija-NEW.pdf,
accessed 18 July 2014.

⁵⁰¹ *Women and Men in the Republic of Macedonia*, 2014, Republic of Macedonia State Statistical Office, <http://www.telegraf.mk/aktuelno/ekonomija/116229-biznis-zenite-osnovaci-na-32-procenti-od-firmite-vo-makedonija>, <http://www.vicepremier.gov.mk/?q=node/40>,
<http://pretpriemac.mk/index.php/faq-menu/133-2009-08-20-10-56-20.html>,
<http://www.recs.org.mk/Sub.asp?ID=7&SM=10>, http://kanal5.com.mk/vesti_detail.asp?ID=2859,
accessed 18 July 2014.

8. Article 6 – Establishment of a company

According to Macedonian legislation there are no specific/different conditions for the establishment of a company between spouses. There are some restrictions related to protection of competitiveness, however, in the Law on Trade Companies:⁵⁰² spouses 'cannot be elected as members of the supervisory board, that is a controller' (Article 246).

9. Article 7 – Social protection

Self-employed workers are covered by the same legislation on social protection as other employees. Social protection covers pensions, health, disability and periods of unemployment according to the law: 'Entity obliged to calculate and pay contributions, means any employer, self-employed person, individual farmer, authorised person of a religious community, state institutions, body, or organiser which is obliged, at the expense and on the account of the person obliged to pay contributions, to calculate, withhold and pay the contributions'. According to the Law on Contributions for Mandatory Social Insurance self-employed persons are 'Persons obliged to pay contributions for mandatory pension and disability insurance' and 'Person obliged to pay contribution shall be also the insured person who has become part of the extended pension and disability insurance in accordance with law'. (Article 7). A self-employed person is also referred to as 'Person obliged to pay contributions for mandatory health insurance' (Article 10). A self-employed person is also referred to as 'Person obliged to pay contributions for mandatory insurance in the event of unemployment' (Article 12).⁵⁰³

The basis for the calculation of the contributions is the 'monthly advance payment of the net income, i.e. the determined lump-sum net income being subject to tax payment, in accordance with the Law on Personal Income Tax, for self-employed person'. At personal request, the insured person – a self-employed person, and a holder of an agricultural holding of the first, second and third category in accordance with the Law on Agriculture and Rural Development – may also pay the contributions using a higher basis.

For a self-employed person performing professional and other intellectual services the basis for the calculation and payment of contributions, i.e. the basis for insurance in the current year, cannot be less than the average salary per employee in the former Yugoslav Republic of Macedonia announced in January of the current year according to the data of the State Statistics Office. Self-employed persons can be part of the Voluntary Fully-Funded Pension Insurance.

Official marriage is a requirement to ensure that spouses can benefit from social protection in accordance with national law. Spouses are provided with health protection and they can inherit the pension of their spouse. Life partners cannot benefit from life pensions in the same way as spouses.

There are no schemes in the former Yugoslav Republic of Macedonia which are mandatory for the self-employed worker but voluntary for his/her spouse or life partner, or vice versa.

10. Article 8 – Maternity benefits

The legislator has chosen not to mention self-employed persons in the main law, the Labour Law, but to do so in other laws that deal with these matters. Voluntary maternity benefits, for example, are covered by the Law on Health Insurance, and specifically Articles 12 and 14, but only for self-employed women. They are entitled to compensation of the average loss of income or profit at the level at which the health contributions were paid, in relation to a comparable preceding

⁵⁰² Law on Trading Companies, Official Gazette No. 28/2004.

⁵⁰³ Law on Contributions for Mandatory Social Insurance, Official Gazette No. 142/2008.

period (twelve months) and are subject to a ceiling of not more than four average monthly salaries at state level. The means are covered in the State Budget. This calculation does not correlate to the criteria stipulated in Article 8(3) subparagraphs (a)-(c) of the Directive. For self-employed women, the compensation relates only to the level of insurance that the woman paid before maternity leave.

The female spouse or life partner is not covered, i.e. cannot enjoy maternity leave. Furthermore, according to Article 15 of the Law on Contributions for Obligatory Social Insurance, the self-employed person pays minimum contributions at the level of the average monthly salary at state level, whereas the general rule is that the level is 50 % of that salary.

There are no existing services supplying temporary replacements or any similar concept.

Since self-employed persons are not mentioned in the Labour Law, it results that, for instance, they are not entitled to reduced working hours because of breastfeeding or by the ban on night work or prolonged working hours etc. However, in theory one could argue that all these rights should be extended to a pregnant self-employed person who has been engaged by a company based on a so-called Special Contract according to Article 252 of the Labour Law (concerning services not covered by the mandate of that company).

11. Article 9 – Defence of rights

There are no special proceedings envisaged in Macedonian legislation regarding self-employed persons. If they believe that the principle of equal treatment concerning them has been violated, they can either use the regular procedure at the Administrative Court, regarding decisions of state organs, or the possibility of a so-called 'constitutional complaint'. However, they also have the two options envisaged by the Antidiscrimination Law: a) file a complaint with the Antidiscrimination Commission; and b) initiate a specific antidiscrimination lawsuit at a regular court.

From the point of view of a genuine self-employed person, meaning a single-person enterprise, both of these procedures are rather discouraging. For the complaint to the Antidiscrimination Commission the applicant is supposed to: *'provide proofs and facts whereby the act or the action of discrimination may be determined'* (Article 25 Paragraph 2 of the Antidiscrimination Law) while the burden of proof is not shifted to the opposing party.

For court proceedings, participation of third parties is the doubtful part. Proxy involvement is, formally, available in both options, as support and on behalf. However, not all legal entities may intervene, but only those of so-called civil society and if they have a legitimate interest. Furthermore, the viability of these options in practice could be doubted, because the court has to *'decide for the participation of the [intervener] by applying the provisions of the Law on Litigation Procedure'*, and yet, unlike any other intervener *'Regardless of the outcome of the lawsuit, the [intervener] referred to in paragraph (1) of this Article shall bear the costs for its participation in the lawsuit'* (Article 39, Paragraphs 1 and 4 of the Antidiscrimination Law).

Concerning the 'on behalf' part, the wording in the Antidiscrimination Law is not quite clear: according to Article 41, a joint lawsuit including a third party is possible, but only if they join as 'co-litigants'. This most probably means that there is at least one individual litigant, whereas the third party can join the lawsuit on behalf of all other persons if they *'render probable that the right to equal treatment of greater number of persons has been violated by the treatment of the defendant'*. Even this interpretation is doubtful, since the Constitutional Court has decided that no legal entity can engage itself on behalf of an individual citizen in a case of discrimination (Article 110 Paragraph 3 of the Macedonian

Constitution) that is brought before the Constitutional Court.⁵⁰⁴ However, the equality body can hold conciliations, but cannot issue decisions until a court procedure is invoked.

12. Article 10 – Compensation or reparation

The Antidiscrimination Law stipulates a mixed system covering both compensation and reparation. The applicant can request the Court deciding the lawsuit not only to determine that the defendant has violated the right to equal treatment, but also to prohibit any activities which violated the right of the claimant to equal treatment and/or order that activities be carried out to eliminate the discrimination or its consequences, and can request to be compensated for the material and non-material damage caused by that violation of rights. There are no prior upper limits, but neither is any method envisaged of calculating the compensation for immaterial damages. In practice, medical expertise is needed and essential, although courts follow the practice of insurance companies, which amounts are closely related to the average costs of living in the former Yugoslav Republic of Macedonia.

The Antidiscrimination Commission cannot rule on compensation, but its main duty if discrimination has been found is, by written opinion, to recommend the manner to eliminate the violation of rights. The person to whom the recommendation is directed shall be obliged to act upon this recommendation and to eliminate the violation of the right within a given time, as well as to notify the Commission thereof.

Finally, the preventive function is covered in general by punitive fines for misdemeanour against health institutions if they deprive or limit the rights of an insured person, self-employed persons included (Law on Health Insurance, Article 84 Paragraph 3).

13. Article 11 – Equality bodies

Neither the Antidiscrimination Commission nor the Ombudsperson have any mention of self-employed persons in their mandate or have publicly declared any activities in relation to the tasks stipulated in Article 11(2)(a)-(d). Neither have there been any reports of these bodies acting upon cases of discrimination against self-employed persons.

The Antidiscrimination Commission is a member of the EQUINET. By default the Ombudsperson and the Antidiscrimination Commission are different institutions and they operate independently of each other.

14. Article 12 – Gender mainstreaming

The former Yugoslav Republic of Macedonia does not actively take into account the objective of equality between men and women when formulating and implementing laws. However, in the development of regulations, administrative provisions, policies and activities related to self-employment, the objective of equality between men and women is taken into account, e.g. in financial support for women's entrepreneurship⁵⁰⁵ and targeted loans.⁵⁰⁶

In June 2012 the Government adopted the Strategy for implementation of gender-responsive budgeting from 2012 to 2017, as a national document which

⁵⁰⁴ Decision of the Constitutional Court of the Republic of Macedonia number Y.6p.65/2013 of 6 November 2013, accessed 18 July 2014.

⁵⁰⁵ See: <http://www.konkurentnost.mk/ActionDetailView.aspx?idMerka=2fa5396c-b3bb-4d53-8948-34429512162a>, accessed 12 November 2014.

⁵⁰⁶ See: <http://www.avrm.gov.mk/content/06.06.2014kreditiranje.pdf>, <http://www.avrm.gov.mk/content/Oglasi%20AM/07.05.2014.JavenOKreditiranjeMK.pdf>, accessed 18 July 2014.

aims to promote gender equality through gender mainstreaming.⁵⁰⁷ The special programmes that are part of the Operational Programme ‘Human Resources Development’ have been designed with a clear gender equality orientation.⁵⁰⁸

15. Article 13 – Dissemination of information

The former Yugoslav Republic of Macedonia has not disseminated information on provisions adopted pursuant to this Directive, together with the relevant provisions already in force.

16. Article 14 – Level of protection

The level of protection provided in the former Yugoslav Republic of Macedonia is not greater than that required by the Directive.

17. Case law

There is no national case law, on either the Directive 2010/41 or its predecessors.

However, there has been one case⁵⁰⁹ related to a self-employed woman who tried to obtain early retirement based on her invalidity. This was refused by the Medical Commission, as well as the Appellate Administrative Commission and the Administrative and the Higher Administrative Court. The claimant insisted that the Medical Commission only regarded her as ‘director’ while in fact she was self-employed and had to perform all related physical tasks herself.

18. Issues regarding the ‘duty holder’

The main problem, i.e. the inherent contradiction in terms of its legal requirements, has not been tackled by the Macedonian legislator. However, the legislator has implicitly admitted that they failed to offer a real solution since self-employment was not included in the main piece of labour legislation: the Labour Law. Therefore, it may be concluded that they believe there is no ‘duty holder’ as such. Exclusively mentioning self-employment in the laws regulating various social insurances means, *per se*, that the State in a way is the indirect ‘duty holder’.

Indeed, since all expenses, including maternity and parental allowance, are to be paid from the State Budget, there is no employer to impose those obligations on.

However, this also means that self-employed persons are not entitled to breastfeeding breaks, and their unmarried partner must therefore be registered as an employee in order to be eligible for the maternity rights granted to employees under the general social security system.

Adoptive leave for self-employed workers is not mentioned as such in the Macedonian legislation (only pregnancy, birth, and motherhood leave), yet in practice there should not be any obstacles.

It should also be noted that people working in the agricultural sector are regularly mentioned in legislation as a separate category, although they are treated in practically the same way.

These legislative inconsistencies certainly do not create favourable conditions for the proper implementation of the Directive, particularly keeping in mind that same-sex marriages or partnerships are completely excluded from this area of legislation.

⁵⁰⁷ See: <http://www.mtsp.gov.mk/dokumenti.nsp?x>, accessed 18 July 2014.

⁵⁰⁸ Projects for employment and social inclusion of people disadvantaged in the labour market, Government of the Republic of Macedonia, 2013.

⁵⁰⁹ Decision of the Higher Administrative Court number [Уж.6п.671/2013](#), accessed 18 July 2014.

19. National statistics

According to official statistical data, at present there are 20 045 self-employed women and 8 988 female employers.

The number of self-employed women decreased for several years (in 2003, 18 % of all self-employed persons were women, in 2004 17 % and in 2007 16 %). 2013 was the first year in which the percentage of self-employed women and female employers increased. Of all working women, 3.3 % were employers and 7.4 % were self-employed. Although the number of self-employed women has lately increased, when looking at sex distribution of self-employed persons the percentage of self-employed women is decreasing compared to the percentage of self-employed men (from 25 % in 2011 and 26 % in 2012, it fell to 20 % in 2013).⁵¹⁰

In 2011 and 2012,⁵¹¹ 3 % of all working women were employers (7 % of men) and 6 % were self-employed (18 % of men).

In official statistical publications, the terms 'own-account worker' or 'self-employed person' are used with the same meaning. There is a difference between the meaning of the terms in legislation and in statistical data. Self-employed persons according to the State Statistical Office are 'persons who work in their own business, professional practice or farm for the purpose of earning a profit and who do not employ any other person'. At the same time employers are 'persons who run their own business entity or owners who work in their shops or owners of an agriculture estate, who employ other people'. In contrast, legislation distinguishes between self-employed persons and farmers (farmers are not self-employed persons and are a separate category).⁵¹²

According to the State Statistical Office of the Republic of Macedonia, the number of active enterprises in 2013 was 71 290, which constituted a 4.2 % decrease compared to 2012.⁵¹³

20. Any other issues?

The number of female entrepreneurs is still small⁵¹⁴ and the figures of employers categorised by sex and size of enterprise show a decrease in the number of female employers in enterprises with more than 20 employees (from 18 % in 2011, to 6 % in 2012 to 0 % in 2013).

MALTA – Peter G. Xuereb

1. Context

The following illustrates one problem that can arise and has arisen: the dividing line between self-employment and employment. The industrial tribunal has now delivered its ruling in the *Psaila Savona* Case.⁵¹⁵ This case had been pending for

⁵¹⁰ *Women and Men in the Republic of Macedonia*, 2013 and 2014, Republic of Macedonia State Statistical Office

⁵¹¹ Labour Force Survey, 2012, Statistical Review 2.4.13.06 745.

⁵¹² Law on Health Insurance, Official Gazette No. 25/2000, and Law on Pension and Disability Insurance, Official Gazette No. 98/2012.

⁵¹³ *Macedonia in numbers* 2014, State Statistical Office.

⁵¹⁴ http://www.kapital.mk/mk/makedonija/92537/makedonija_ima_mal_broj_zheni-pretpriemachi.aspx, accessed 18 July 2014.

⁵¹⁵ Legislation discussed in the case: Employment and Industrial Relations Act 2002, Chapter 456 Laws of Malta; Protection of Maternity (Employment) Regulations, Legal Notice 439 of 2003, as amended by Legal Notices 3 of 2004 and 427 and 431 of 2007; and Employment Status National Order, Legal Notice 44 of 2012, available at <http://justiceservices.gov.mt/DownloadDocument.aspx?app=lp&itemid=22846&l=1>, accessed 15 July 2014.

- A. Massa Tribunal takes four years on pregnant woman's case. And then it decides it has no jurisdiction over sacked mother's claim Sunday Times of Malta, March 16, 2014, 00:01 available

four years, only to end with the Tribunal deciding in March of this year that it had no competence to hear the case on the merits since there was no employment relationship between the parties but rather a consultancy agreement. In effect, the Tribunal held that there was no contract of service and therefore no employer-employee relationship, so that the relationship was not governed by the law relating to employment relationships. Nor did the Industrial Tribunal have competence to decide disputes other than those arising from a contract of employment.

Dr Anika Psaila Savona, a lawyer, had alleged unfair dismissal on grounds of pregnancy. Her employer, a leading hotel group, argued that she was not an employee but a 'legal consultant' operating as a self-employed person, and that she was therefore not covered by employment legislation, as well as that she was not dismissed on grounds of pregnancy.

The case was to test the limits of the anti-discrimination provisions of the Employment and Industrial Relations Act of 2002 (Chapter 452 of the Laws of Malta, hereafter 'EIRA') and the Protection of Employment (Maternity) Regulations by reference to the definitions of 'employer', 'employee', 'contract of service' and 'contract of employment'.

The claimant argued that irrespective of profession and designation, and even the signing by her of a 'consultancy agreement' she was in fact and in law an employee at the time of her dismissal, albeit as a highly qualified professional. Dr Psaila Savona argued that she only signed the agreement presented to her – which inter alia provided that the agreement was not to be construed as creating an employment relationship – pending a re-ordering of her employment relationship and on the assurance of her employer that this would occur.

The Employment Status National Standard Order of 2012 sets out, in Paragraph 3, a presumption in favour of an employment relationship.⁵¹⁶ The criteria to be applied in supporting the presumption centre around the concepts of dependent work.⁵¹⁷

The proviso added, to the definitions in the EIRA of 'contract of service' and 'contract of employment', by the Employment Status National Order (Legal Notice 44 of 2012) appeared possibly to indicate an outcome in favour of the claimant if the facts showed that in the course of carrying out her duties she acted under instruction to a high degree. Legal Notice 44 had the object of 'clarifying' certain provisions of the EIRA. The case might also have led to the sort of preliminary reference to the Court of Justice that may bring before the Court of Justice the issue of the personal (and/or relational) scope of EU anti-discrimination employment law. Here, no reference was made, since the Tribunal dismissed the case for lack of jurisdiction, arguing that as there was no employment the Industrial Tribunal was not the proper forum (and this after a number of years after the filing of the case). The claimant has since filed a case before the civil court and the possibility of a reference to the Court of Justice may arise there.

The above case illustrates one potential problem, as faced by those in unclear territory between employment and self-employment. Having said this, discrimination on grounds of sex is prohibited by the general legislation on equality for men and women, the Equality for Men and Women Act of 2003,

at: <http://www.timesofmalta.com/articles/view/20140316/local/Tribunal-takes-four-years-on-pregnant-woman-s-case.510749>, accessed 15 July 2014.

Av Dr Anika Psaila Savona v. CHI Ltd. Case Number 2757 /MF, Decision Number 2275, Industrial Tribunal, 3 March 2014, available at: <http://www.google.com.mt/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=OCD4QFjAC&url=http%3A%2F%2Findustrialrelations.gov.mt%2Fdownload.aspx%3Fid%3D2262&ei=ba5qU-noEKOR4AT04YHoDg&usq=AFQjCNEUnT-xFLCMyMEf4NmJdg9MtxWqgA>, accessed 15 July 2014.

⁵¹⁶ S.L. (Subsidiary legislation) 452.108 of 31 January 2012, Legal Notice 44 of 2012, as amended by Legal Notices 110 and 364 of 2012.

⁵¹⁷ It has been observed by noted academics that Maltese law, like UK law, can blur the divide between 'worker' and self-employed person. C. Barnard *EU Employment Law* (4th Edition), Oxford University Press, 2012, at p. 348.

Chapter 456 Laws of Malta (hereafter ‘EMWA’) which provides that the word ‘employment’ in the Act shall mean any gainful activity including self-employment. ‘Self-employed workers’ are then defined in a manner stated to be in line with Directive 2010/41. Also, the Equal Treatment in Self-Employment and Occupation Order of 2007⁵¹⁸ (hereafter ‘ETSEO Order’) as amended in 2012 to give effect to Directive 2010/41 makes clear provision for the female self-employed and spouses (and presumably life partners at least to the extent that there is a registered civil union).

More generally, the rate of self-employment for women is low when compared to that for males. However, women’s organisations and government agencies have been spurring women on to become entrepreneurs as a means of utilising their skills and education (the majority of graduates are women) in a flexible manner so as to combine work and family life with success. Women who do not possess qualifications or skills in commercial demand otherwise often find themselves in poorly paid and often precarious employment, and form a disproportionate part of the part-time workforce, often for reasons of care responsibilities.

2. Transposition of the Directive

The Directive was sought to be transposed by amendment of the Equality for Men and Women Act of 2003, Chapter 456 of the Laws of Malta, by the Equality for Men and Women (Amendment) Act of 2012,⁵¹⁹ and by the Equal Treatment in Self-Employment and Occupation (Amendment) Order 2012,⁵²⁰ which amended the ETSEO Order of 2007.⁵²¹ The first amending Act introduced a new definition of ‘self-employed worker’ into the definition Article, Article 2, in a manner that combines into one provision Paragraphs (a) and (b) of the Directive. It is expressly stated in the definition that this meaning is ‘in line with Directive 2010/41 of the European Parliament and the Council of 7 July 2010’. The Equal Treatment in Self-Employment and Occupation (Amendment) Order of 2012 amended the ETSEO Order of 2007 in order expressly to bring the law into line with the Directive. The broad effect of the above legislation was to apply many of the provisions of the Equal Treatment in Employment Regulations, to the self-employed and to their spouses and to implement Directive 2010/41.⁵²²

Malta did not ask for an extension of the time for implementation.

3. Article 1 – Subject matter

No overlap problems between Directives 2006/54,⁵²³ 79/7,⁵²⁴ or 2004/113⁵²⁵ have come to light.

⁵¹⁸ S.L. 460.16. Legal Notice 86 of 2007, as amended by Legal Notices 379 of 2009 and 260 of 2012.

⁵¹⁹ <http://justiceservices.gov.mt/LegalPublications.aspx?pageid=30&year=2012&type=1>, accessed 10 July 2014.

⁵²⁰ Legal Notice 260 of 2012.

⁵²¹ Legal Notice 86 of 2007, no amended by Legal Notices 379 of 2009 and Legal Notice 260 of 2012.

⁵²² Article 4 of ETSEO 2007 as amended in 2012.

⁵²³ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) OJ L 204 of 26 July 2006, pp. 23-36.

⁵²⁴ Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security OJ L 6 of 10 January 1979, pp. 24-25.

⁵²⁵ Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services OJ L 373 of 21 December 2004, pp. 37-43.

4. Article 2 – Scope

Article 2(a) has been transposed via the definition of ‘self-employed worker’ as inserted by amendment into the Equality for Men and Women (Amendment) Act of 2012. The relevant part reads: ‘self-employed workers... means all persons pursuing a gainful activity for their own account’ and then goes on to assimilate to the above ‘spouses of self-employed workers not being employees or business partners, where they habitually participate in the activities of the self-employed worker and perform the same tasks or ancillary tasks’. In short, the two categories listed separately under the two paragraphs of Article 2 of the Directive are assimilated and brought under the definition of ‘self-employed worker’. Also relevant is Article 4 of the ETSEO Order 2007, as amended in 2012.

The definition is now the standard. Any reference to the self-employed in other legislation is now normally a reference to the definition in the amended EMWA. By virtue of the scope of the Directive as set out in Article 2 of the Directive, which has been transposed as a matter of the definition also of ‘self-employed worker’, business partners are excluded. There is no special provision for the agricultural sector.

Neither Article 2 of the EMWA nor the ETSEO Order refer to ‘life partners’. However, it would now seem to be the position at law that the word ‘spouse’ in the Act will be interpreted to cover a life partner if there is a civil union registered under the Civil Unions Act 2014⁵²⁶ which, in Article 4, assimilates a civil union to marriage and declares that save as provided in the Act a civil union, once registered, shall have the corresponding effects and consequences in law of a properly contracted civil marriage. No judicial interpretation has so far been given of this provision, but it would seem that unregistered unions will not produce any legal effects.

5. Article 3 – Definitions

In Article 2 of EMWA, ‘discrimination’ is defined as follows:

“discrimination” means discrimination based on sex or because of family responsibilities, sexual orientation, age, religion or belief, racial or ethnic origin, or gender identity and includes the treatment of a person in a less favourable manner than another person is, has been or would be treated on these grounds’.

There is therefore no express reference to, and no formal distinction, in this Act between ‘direct’ and ‘indirect’ discrimination. However, sub-Article 3 of Article 2 goes on to provide that:

‘(3) For the purposes of sub-article (1) discrimination based on sex or because of family responsibilities or sexual orientation, age, religion or belief, racial or ethnic origin, or gender identity is:

(a) the giving of less favourable treatment, *directly or indirectly*,⁵²⁷ to men and women on the basis of their sex or because of family responsibilities or because of their sexual orientation, age, religion or belief, racial or ethnic origin, or gender identity;...

(d) *any treatment based on a provision, criterion or practice which would put persons at a particular disadvantage compared with persons of the other sex of the other sex or sexual orientation, age, religion or belief, racial or ethnic origin, or gender identity, unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex.*⁵²⁸

⁵²⁶ Available at: <http://justiceservices.gov.mt/LegalPublications.aspx?pageid=30&year=2014&type=1>, accessed 9 July 2014.

⁵²⁷ Author’s italics.

⁵²⁸ Author’s italics.

This means that indirect discrimination is not expressly referred to as such, but is treated by the Act. The terminology of 'direct' and 'indirect' does feature in the Employment and Industrial Relations Act 2002, Chapter 452 Laws of Malta, and can be drawn upon. Indeed, Article 4A of the EMWA states that 'indirect discrimination may be proved by any means of evidence including statistical evidence'. Also, Article 2 of the ETSEO Order cross-refers to the Equal Treatment in Employment Regulations (the ETE Regulations)⁵²⁹ which contain in their Regulation 3 the correct definitions of direct and indirect discrimination and of harassment and sexual harassment. Although this is cross-reference drafting, it is thought that the required effect is therefore given to the Directive on this score. As far as the principal equality act, the EMWA, is concerned, harassment is not expressly defined and sexual harassment is defined in Article 9(1) of EMWA by reference to a number of proscribed 'activities', but with departure from the strict language of the Directive. For example, there is no reference in this Act to 'purpose or effect' in the context of harassment or sexual harassment, nor to the actual purpose or effect (violating dignity and creating an intimidating etc. environment) as laid down in the Directive. There is a potential 'uniformity of law' problem here, in my view, but it is important to note in mitigation that the ETE Regulations do provide proper definitions that would be applied.

6. Article 4 – Principle of Equal Treatment

The EMWA is framed in terms of non-discrimination, rather than in terms of equal treatment or equal opportunities. The emphasis is on formal rather than substantive equality, despite a provision allowing positive action measures. On the other hand, it is not clear how much more is required by the actual wording of Article 4(1) of the Directive. Article 4 of the Directive is otherwise implemented by Article 4A of the ETSEO order 2007 as amended in 2012.

7. Article 5 – Positive action

No positive action has been taken, although Article 2(4)(b) of the EMWA provides that nothing shall be deemed to constitute discrimination insofar as the 'treatment' at issue constitutes measures of positive action for the purpose of achieving substantive equality for men and women.

8. Article 6 – Establishment of a company

The conditions for the setting up of a company have not been more restrictive between spouses (or life partners) than those that apply between persons who are not so related. There has therefore been no need to legislate in this matter.

9. Article 7 – Social Protection

Social protection is available to all in work on a compulsory basis through the payment of weekly contributions. The contributory scheme is universal as a system where an employee, self-occupied or self-employed person pays weekly contribution as laid down by the Social Security Act. All employed, self-employed, self-occupied,⁵³⁰ and unemployed persons may be insured. Therefore as long as one is registered with the Department of Social Security and makes the minimum payments as required one is covered for pension and all other benefits (health, unemployment, maternity etc.). There is no provision at the moment for

⁵²⁹ S.L. 452.95.

⁵³⁰ The Social Security Act, Chapter 318 of the Laws of Malta, Article 2 defines a self-occupied person as a self-employed person who is engaged in any activity through which he or she earns more than EUR 910 per annum. See: <http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8794>, accessed 19 February 2015.

occupational pensions. Some occupational pensions do exist but these are very few. One presumes that the Civil Unions Act has put life partners so determined according to the Act in the same situation as spouses. The spouse or life partner would have to declare their work situation as either an employee or as self-employed person and pay contributions as required in order to benefit from social security provisions.

10. Article 8 – Maternity benefits

Under Maltese law, maternity benefits are payable to all women who are in employment, self-employment or self-occupation, as defined in the Social Security Act (Chapter 318 Laws of Malta), and who have paid the minimum number of contributions. The expert believes that these maternity benefits meet the requirement of sufficiency under sub-paragraph (a) of Article 8(3). No specific provision has been made with regard to ensuring access to temporary replacement services. There is an absence of temporary agencies in Malta still.

11. Article 9 – Defence of rights

Remedies are available under Article 30 of the EIRA, under Article 19 of the EMWA and under Article 6 of the ETSEO Order of 2007. There is a right of action in the Industrial Tribunal, as well as in the ordinary Courts, if the case comes within the scope of the EIRA as an ‘employment’ case (see above in the first section of this report on *Psaila Savona*) but in any event an action will lie in the ordinary courts under EMWA and the ETSEO Order in the case of a self-employed person. Claimant can seek an order to desist against the defendant as well as an order for compensation for damage suffered.⁵³¹

Article 9(2) applies to the main equality body, the National Commission for the Promotion of Equality (the NCPE) under the EMWA and under Article 7 of the ETSEO Order of 2007 as amended in 2009. Any such body can in principle only act with the approval of, and in support of, a complainant. There is no report of this power having been used in this context. The NCPE does have the power to investigate a complaint and call upon the person against whom the complaint is proven to make a reply. All correspondence is admissible in court proceedings.⁵³² The NCPE provides mediation and its determinations are stated to be binding if the parties consent in writing to be bound by them. The Procedure for Investigations Regulations provide that the NCPE can ask the Civil Court to order a person failing to abide by the terms of the mediation to undertake all the necessary remedial action as may be ordered by the Court.⁵³³ Moreover, in the case of an alleged discrimination by one person against another and where the Commission considers it appropriate, the Commission may refer the matter to the competent court or to the Industrial Tribunal for redress; it may also join and become a party to the suit.⁵³⁴ Associations do not have representation rights.

12. Article 10 – Compensation

As noted above, there is a right to compensation both under the EIRA and under the EMWA, as also under Article 6 of the ETSEO Order. Compensation is stated to be for ‘damage’ suffered without upper limit. This is normally interpreted as covering direct pecuniary loss or damage resulting from the unlawful act. Maltese law has begun to recognise the possibility of the award of moral damages, such as in the personal injury context, but not as yet in the current context.

⁵³¹ See also Article 6 of the ETSEO Order 2007 as amended in 2009.

⁵³² Article 5, ETSEO Order 2007.

⁵³³ Legal Notice 316 of 2011, Regulation 8.

⁵³⁴ Legal Notice 316 of 2011, Regulation 9.

13. Article 11 – Equality bodies

Article 11 has been implemented in terms of legislation passed. The main equality body, the National Commission for the Promotion of Equality, is active in terms of public outreach, but the number of investigations, and more worryingly the number of complaints received every year within the remit of the NCPE and then (within that) within the gender remit, have seen a marked reduction in recent years. This has happened contrary to expectations in light of greater public awareness and better legislation.⁵³⁵ By all accounts, the NCPE is operating independently of Government, as it should, although it must be said that it has close links with Government. It does not appear to have carried out significant studies or taken particularly significant action in relation to the self-employed.

14. Article 12 – Gender mainstreaming

While much attention has been paid to gender mainstreaming in public sector employment, little attention has been paid to it in the self-employment context.

15. Article 13 – Dissemination of information

Promulgation of the law and dissemination of related information has been facilitated by publishing laws in both paper format and on-line, as for all legislation. However, there has been no Government information campaign .

16. Article 14 – Level of protection

The level of protection is as is required by the Directive, with no stated intention to go beyond that.

17. Case law

Besides the *Psaila Savona* case (Section 1 of this report), it is noteworthy that the Magistrate's Court of Gozo has stated obiter that the EMWA applies in a wider context than employment, so that not only self-employment but many other work contexts fall within its scope. However, such a statement may have limited impact, as the Magistrate's Court of Gozo is a lower court with no significant persuasive authority. In this case the court held that obscene messages sent by mobile phone to the victim in no particular context would not amount to sexual harassment, but should be prosecuted as harassment under the Criminal Code rather than as sexual harassment under the EMWA.⁵³⁶

18. Issues regarding the 'duty holder'

There is little information on this issue. One well-known case in which the issue might have arisen, that of *Psaila Savona* (Section 1 of this report), was decided on the question of the Industrial Tribunal having or not having jurisdiction, with a decision that there was no jurisdiction since the relationship was not one of employer/employee. It is understood in general that the self-employed will be protected against anyone who in one way or another seek to discriminate against

⁵³⁵ The Annual reports of the NCPE are to be found at the NCPE's website at: http://msdc.gov.mt/en/NCPE/Pages/Our_Publications_and_Resources/NCPE_Annual_Reports.aspx, accessed 11 July 2014. According to the latest report (2013) 31 out of 53 complaints were totally outside the now very broad remit of the NCPE. Of the other complaints, only 12 were gender related and of those only six were complaints by females. Only one *ex officio* investigation was carried out.

⁵³⁶ *Police v. Dr Alfred Grech*, Magistrate's Court of Gozo, Case No. 106/2011 of 12 June 2012. See <https://www.google.com/search?q=Police+v.+Dr+Alfred+Grech+sentenzi&ie=utf-8&oe=utf-8>, (various) accessed 19 February 2015.

them in a broadly defined work context. Moreover, while there have been no cases specifically on this question related to the ETSEO Order, the obiter statement of the Magistrate's Court of Gozo that the EMWA applies in many contexts besides that of work suggests that there can be several duty holders depending on the circumstances.

19. National statistics

In 2013, the Labour Force Survey for the first quarter reported that 2 844 women (4 %) were self-employed without employees (men: 13 464; 12.3 %) while there were apparently some 900 self-employed women with employees (men: 6 844; 6.3 %).⁵³⁷ The Labour Force survey defines a 'self-employed' person as 'a person who runs a trade or business, rather than working as an employee for someone else. A person is self-employed if s/he is a sole proprietor or a partner working in a business'.

20. Any other issues?

There are no other issues to be mentioned.

THE NETHERLANDS – Rikki Holtmaat

1. Context

Over the past decades, the Dutch labour market has experienced several far-reaching shifts. The first development is the flexibilisation of the labour market: more and more workers have a fixed-term contract or are working on a temporary basis. The second development is the increasing importance of a new category of workers: the so-called *zzp'ers* (self-employed workers without employees). According to Statistics Netherlands (CBS), this group has almost doubled over the last 14 years, from 445 000 people in 2000 to 791 000 in 2014 (while the total labour force remained stable).⁵³⁸ Both workers with a fixed-term contract/temporary workers and self-employed persons have experienced serious consequences of the recent economic downturn.

The key problem faced by self-employed persons is the lack of social security. First of all, they cannot automatically rely on employee insurance schemes, such as unemployment and disability benefits. Instead, they need to take out private insurance, or they can, in certain cases, choose to join the insurance schemes for employees voluntarily. Also, they do not (yet) have access to a supplementary collective pension scheme. Self-employed persons can rely on national statutory social benefits schemes, which provide for the basic welfare allowance (*bijstand*) and the statutory old-age pension (see Section 9 below).

A matter of great concern has been the pregnancy and maternity benefits for self-employed women. These were abolished in 2004, without any transitional measures, only to be reintroduced in 2008. Since then, self-employed women are again entitled to pregnancy and maternity benefits, but women who gave birth before 4 June 2008 cannot retroactively claim an allowance under this new legislation. It is now expected that the Dutch Government will compensate this group of women, in response to a recent CEDAW Committee communication.⁵³⁹

⁵³⁷ Labour Force Survey: Q1/2013, NSO News Release, 26 June 2013, 123/2013. http://www.nso.gov.mt/statdoc/document_view.aspx?id=3549&allEditions=true, accessed 26 August 2014.

⁵³⁸ See Netherlands Statistics, 21 May 2014, available at: <http://statline.cbs.nl/StatWeb/publication/?DM=SLNL&PA=80150NED&D1=a&D2=0-7&D3=4.I&HDR=T&STB=G2,G1&VW=T>, accessed 23 June 2014.

⁵³⁹ Various women had sought a declaratory decision by the District Court of The Hague, claiming that the State had violated Article 11(2)(b) of the CEDAW Convention through its failure to provide self-

As to the position of assisting spouses and life partners, this issue was discussed in the past specifically in relation to the agricultural sector. The main fiscal and social security problems were solved in the 1970s and 1980s. The situation of assisting spouses or partners has not been an issue in law or politics in recent decades.

Insofar as there are problems for co-working or assisting spouses or partners, these mainly concern family law and inheritance law, areas which do not fall under the scope of the Directives, nor its predecessor.

2. Transposition of the Directive

No implementation measures were taken by the Dutch Government with respect to Directive 2010/41.⁵⁴⁰ Equal treatment legislation was already in compliance with the Directive's provisions. Article 2(1) Equal Treatment Act for men and women in employment relations (ETA) and Article 6 General Equal Treatment Act (GETA) prohibit discrimination in the 'liberal professions'.⁵⁴¹ No other amendments or adaptations of legislation were deemed necessary. The Netherlands did not extend the time for implementation, as no implementation measures were needed.

3. Article 1 – Subject matter

There have not been any problems in the Netherlands with overlap of the coverage of this Directive with Directives 2006/54,⁵⁴² 1979/7/EEC,⁵⁴³ and 2004/113.⁵⁴⁴

4. Article 2 – Scope

Dutch equal treatment legislation uses the term 'liberal professions', which might appear to be slightly narrower in scope than 'self-employment'. In the Dutch interpretation of this concept, however, not only doctors, architects etc. are covered, but also freelancers, sole traders, entrepreneurs, etc.⁵⁴⁵ Articles 2 ETA and 6 GETA do not mention any norm addressees or rights holders. The material scope of both these articles concerns 'the conditions for access to and the possibilities to exercise and to develop oneself within a liberal profession'. Whether the definition of liberal professions in equal treatment legislation is

employed women with a maternity allowance between 2004 and 2008. The Court rejected their claim, and this ruling was upheld by the Court of Appeal of The Hague and the Supreme Court. The claimants then decided to take their case to the CEDAW Committee. The Committee has now judged that the Dutch State, by abolishing the maternity leave scheme applicable to self-employed women existing up to 2004, violated the Convention. See CEDAW/C/57/D/36/2012, 23 March 2014. See also *Elisabeth de Blok et al. v. the Netherlands*. Dutch Supreme Court, 1 April 2011, ECLI:NL:HR:2011:BP3044.

⁵⁴⁰ Official announcement in the Staatscourant ('Mededeling van de Minister van Sociale Zaken en Werkgelegenheid van 20 december 2010, nr. WBJA/B&I/10/25642, houdende bekendmaking van de uitvoering van een tweetal richtlijnen.') Staatscourant, 31 Dec 2010, 21528. Available for download from: <https://zoek.officielebekendmakingen.nl/stcrt-2010-21528.pdf>, accessed 10 July 2014.

⁵⁴¹ See Section 4 below for an explanation of this terminology.

⁵⁴² Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) OJ L 204 of 26 July 2006, pp. 23-36.

⁵⁴³ Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security OJ L 6 of 10 January 1979, pp. 24-25.

⁵⁴⁴ Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services OJ L 373 of 21 December 2004, pp. 37-43.

⁵⁴⁵ Insofar as this cannot be read in the provision itself, this interpretation has been deduced from the definition of *vrije beroepsbeoefenaren* in the *Wet Arbeidsongeschiktheidsverzekering Zelfstandigen* (WAZ). See Tweede Kamer 1995-1996, 24 758 no. 3, p. 2.

similar to the definition used for all other legal purposes goes beyond the scope of our expertise and the time available for this report, as this would require in-depth research into all areas of Dutch law (particularly economic laws and regulations, social security and tax law).

Dutch equal treatment legislation does not make a distinction between the various categories of self-employed workers. Still, in practice there is a distinction between self-employed persons with and self-employed persons without employees (the aforementioned *zzp'ers*), which distinction is relevant for tax purposes but not in the field of equal treatment.

Dutch legislation recognises life partners. Again, no implementation measures were needed, as spouses and life partners already enjoyed social security rights similar to self-employed persons. They too can rely on the basic welfare benefits scheme (*bijstand*), the Surviving Dependents Act (*Algemene Nabestaandenwet*, ANW) and, approximately from the age of 65 years, receive the statutory old-age pension benefits (based on the *Algemene Ouderdomswet*, AOW).

5. Article 3 – Definitions

All four definitions in this Article have been transposed correctly into Dutch national law.

Before 2011, Dutch equal treatment legislation contained its own (different) definition of direct and indirect discrimination. In November 2011, equal treatment legislation was amended in order to bring the definitions of direct and indirect discrimination in line with the EU directives.⁵⁴⁶ This amendment was made in response to a request by the European Commission, who maintained that, as a consequence of the different wording of the definitions, victims of discrimination were offered less protection than the EU directives require.⁵⁴⁷ One difference between the language in these directives and Dutch legislation still remains: the usage of the word 'distinction' instead of the word 'discrimination'. This wording, however, does not have any substantial consequences for the interpretation and application of these definitions.

The Dutch definition of harassment is similar to that in the directives. The Dutch definition of sexual harassment is identical to the definition in the directives, apart from one single word; the word 'unwanted' was left out by the Dutch legislator, in order to avoid that the evaluation of the facts depends on the subjective experiences of the victim.

6. Article 4 – Principle of equal treatment

Article 4 has been transposed correctly, although some have argued that the scope of Article 4 of the Directive is broader than that of Article 6 GETA.⁵⁴⁸ No implementation measures seem necessary however, given the definition of Article 6 GETA ('the conditions for access to and the possibilities to exercise and to develop oneself within a liberal profession') and its broad interpretation. The implementation has not been modified as a result of the adoption of the new Directive and no changes have been made.

⁵⁴⁶ *Wet van 7 November 2011, Staatsblad 2011, 554.*

⁵⁴⁷ Letter dated 31 January 2008, with reference to the infringement procedure of 18 December 2006, Infringement no. 2006/2444.

⁵⁴⁸ See for this opinion: S.D. Burri 'Kroniek gelijke behandeling in het Unierecht' ('Equal treatment in Union law'), *Nederlands tijdschrift voor Europees recht*, May 2011, no. 4.

7. Article 5 – Positive action

The Dutch State has not used the power to take positive action to the benefit of self-employed persons of the underrepresented sex.

8. Article 6 – Establishment of a company

The existing legal conditions for establishing a company do not make any distinction on the basis of marital status, including the status of registered partnership: under Book 2 of the Dutch Civil Code, companies are simply founded by one or more persons, regardless of who they are. Therefore, there was no reason to implement the old Article 5 or the new Article 6.

The expert has no indication whatsoever of any problems existing in this area. The tax regulations that facilitate the founding of a company include a special regulation for companies that are run by a couple (spouses/life partners).⁵⁴⁹ No statistics concerning such 'spouse companies' or 'partnership companies' are available.

9. Article 7 – Social protection

The Netherlands does not have a system for social protection specifically intended for self-employed workers. Self-employed persons are covered by the national insurance schemes, which provide for the basic welfare benefits (*bijstand*), by the Surviving Dependents Act (ANW) and, approximately from the age of 65, the General Old-Age Pensions Act (AOW). They cannot, however, automatically rely on employment-related insurance schemes, such as unemployment and disability benefits. Instead, they can choose to join these insurance schemes voluntarily (but will only benefit if they meet certain criteria, such as having paid contributions for at least three years), take out (generally more costly) private insurance or choose to go uninsured. Also, they do not (yet) have access to a supplementary collective pension scheme, but plans exist to found a pension fund specifically meant for self-employed *zzp'ers*.⁵⁵⁰ The provisions of such a plan are not yet known, but it is likely that spouses and life partners would attain the right to receive part of the pension in the event of the pension holder's death, as this is generally the case for pension schemes in the Netherlands.

10. Article 8 – Maternity benefits

The current maternity allowance was introduced in 2008 and meets the requirement of sufficiency as set in Article 8(3) of the Directive (see Section 1 above about the period between 2004 and 2008). The criterion used falls under Subparagraph (c).

The maternity allowance is granted on a voluntary basis, i.e. self-employed women can address the government agency UWV to receive maternity and pregnancy benefits. The maternity benefits are paid from general tax revenues (no specific contributions are levied here). Self-employed women are eligible for maternity benefits during a period of 16 weeks (similar to employees), if they can prove having done paid work for at least 1 225 hours over the last year. Their benefits are significantly lower however, as the maximum benefits available to self-employed women are the equivalent of the statutory minimum wage, whereas women in paid employment are entitled to receive benefits equal to 100 % of their salary, up to a maximum daily wage of approximately EUR 196.

⁵⁴⁹ See the website of the tax revenue services, at: <http://www.eenmanszaakoprichten.nl/belasting/partner-werkt-mee-in-het-bedrijf-de-keuzes/>, accessed 30 June 2014.

⁵⁵⁰ See *De Volkskrant*, 19 June 2014, 'ZZP'ers krijgen eigen pensioenfonds' ('Self-employed persons to get their own pension fund'), at: <http://www.volkskrant.nl/vk/nl/2680/Economie/article/detail/3674710/2014/06/19/ZZP-ers-krijgen-eigen-pensioenfonds.dhtml>, accessed 23 June 2014.

The expert is not aware of any existing services supplying temporary replacements or national social services in this regard.

11. Article 9 – Defence of rights

Article 9 has not been implemented into Dutch national law, as there already was an accessible system in place for judicial proceedings. Cornerstone of this system is the Dutch equal treatment body, the Netherlands Institute for Human Rights (NIHR), which is a pseudo-judicial body (formerly the Equal Treatment Commission) with a section that deals with complaints about discrimination and which renders non-binding opinions. The NIHR is a low-threshold body, as no legal representation is required, and its procedures are non-compulsory. After it has issued an Opinion, a complaint may still be lodged before a conventional civil or administrative court if the applicant wishes to obtain a legally binding judgment.

Article 9(2) has not been used to extend representation rights to associations, organisations and other legal entities, as these rights already existed under Dutch civil law. Under Article 3:305a of the Civil Code interest groups that have the form of an association or foundation with full legal powers can take legal action in court on behalf of people whose (similar) interests have been infringed, which therefore also applies to victims of discrimination. In addition, public-law organisations, like the State, local Councils or public bodies like the Bar Association are entitled under Article 3:305b of the Civil Code to act on behalf of victims of discrimination. Under this legislation, anti-discrimination organisations can also act on behalf of victims. We have no data on the extent to which these powers are actually used.

12. Article 10 – Compensation or reparation

Persons who suffer damages as a consequence of discrimination can either request a court order on the basis of contractual obligations of the other party or on the basis of tort. Still, in practice it is rather difficult to be awarded (especially immaterial or moral) damages, in particular in tort cases. It is important to note that damages are hardly ever awarded in discrimination cases. It is, in general, seriously doubted in legal circles whether the range of remedies and sanctions available under Dutch equal treatment legislation is in conformity with the EU directives' requirement that sanctions be 'effective, proportionate and dissuasive'. Dutch courts, moreover, are not very lenient with regard to moral damages – and in the extraordinary event that such damages are awarded, they tend to be fixed at a symbolic amount.

13. Article 11 – Equality bodies

The NIHR is competent to perform its tasks independently, including the promotion, analysis, monitoring and support of equal treatment of all self-employed workers without discrimination on grounds of sex, in full conformity with the Directive's requirement. No specific attention is paid by the NIHR to self-employed workers.

14. Article 12 – Gender mainstreaming

There are no examples in the Netherlands of the implementation of this Article in practice.

15. Article 13 – Dissemination of information

No special campaigns have been held, as no implementation measures were deemed necessary. The expert is not sure whether among self-employed persons or the organisations that hire their services the current level of awareness of the Directive's substantive provisions is sufficient. No research has been done in this regard. Since most self-employed persons are not organised in associations that represent their interests and support their position, we believe that there might well be a lack of awareness, in particular because the number of self-employed persons without employees (*zzp'ers*) is growing rapidly (see Section 1 of this report).

16. Article 14 – Level of protection

The level of protection against discrimination provided in the Netherlands is equivalent to the requirements of the Directive.

17. Case law

Very few cases of the NIHR concern the equal rights of self-employed persons.⁵⁵¹ One case in which the NIHR, in the view of the expert, was not fully aware of the especially vulnerable position of self-employed persons, concerned sexual harassment. The case was filed by a freelance graphic designer who was hired by the Dutch Association of Occupational Therapists to take care of the formatting, editing, and coordination of a magazine. The case was brought to the NIHR because of the refusal by the Association to grant the claimant a new assignment, after she had refused to start a relationship with one of the Association's employees.⁵⁵² The NIHR found in favour of the Association, because it held both persons equally responsible for blurring their relationship (professionally and personally). Even though the claimant had repeatedly stated that she only wanted a civil, friendly relationship; this was apparently insufficient reason for the NIHR to find a situation of *quid pro quo* harassment, leading to a threatening situation. This is despite the fact that her status as a freelancer was relatively insecure, and that the claimant was threatened that she would lose her assignments; which indeed she did.

There are no outstanding judgments concerning self-employed persons of civil and administrative courts, related to the issues covered under the Directive or its predecessor, apart from the case law concerning the abolishment of the pregnancy benefits between 2004 and 2008 (mentioned in Section 1 of this report).

18. Issues regarding the 'duty holder'

The duty holders as regards the equal treatment norms of the Directive are the persons or organisations who hire the services of self-employed persons. Duty holders are not listed explicitly, but this is indirectly clear from equal treatment legislation (see the contribution of the Netherlands in *The Personal Scope of the EU Sex Equality Directives*⁵⁵³). For example, a company may enter into a contract or terminate a contract with a self-employed person based on objective (business) reasons. However, it may not terminate a contract with a self-

⁵⁵¹ See the annual reports of the Netherlands Institute for Human Rights (NIHR), published on its website: www.mensenrechten.nl, accessed 6 October 2014.

⁵⁵² NIHR Opinion 2013-99, available at: <http://www.mensenrechten.nl/publicaties/oordelen/2013-99>, accessed 30 June 2013.

⁵⁵³ R. Holtmaat 'The Netherlands' in: European Network of Legal Experts in the Field of Gender Equality, *The Personal Scope of the EU Sex Equality Directives* at pp. 159-170, European Commission 2012, available at: http://ec.europa.eu/justice/gender-equality/files/your_rights/personal_scope_eu_sex_equality_directive_final_en.pdf, accessed 23 October 2014.

employed person for reasons based on any of the protected anti-discrimination grounds, such as sex, ethnic background; the company in this example is the duty holder. Under equal treatment law, the State is not legally accountable for any discrimination in legislation or in any unilateral administrative decisions. However, if the State makes discriminatory distinctions in legislation, this can be contested on the ground of international human rights treaties. If it makes a distinction in a unilateral decision (e.g. granting a permit) it is accountable under Article 1 of the Constitution, and under general principles of administrative law (including the general principle of equal treatment). As regards the other issues that are regulated in the Directive (social security, pregnancy leave, etc.): it is mainly the State who is responsible for any discrimination in this regard (if this were based on any applicable law or its application, which we think is not the case). In order to seek redress for any such discrimination, a victim would have to claim that the State's social security legislation or social (pregnancy) policies run contrary to the Directive and the Dutch court would then have to test this assumption or send ask preliminary questions to the Court of Justice of the EU (CJEU).

19. National statistics

As mentioned in Section 1 of this report, the group of self-employed persons without employees, according to Statistics Netherlands, has almost doubled over the last 14 years, from 445 000 people in 2000 to 791 000 in 2014 (while the total labour force remained stable).⁵⁵⁴ This means that in 2014 approximately 11 % of the Dutch labour force belongs to this group (2000: 6 %), with an additional 5 % being self-employed with employees/co-workers, including spouses and life partners (2000: 5 %). Self-employed persons are defined by Statistics Netherlands as 'workers who perform remunerated labour without a labour contract'.

20. Any other issues?

There are no other issues to be mentioned.

NORWAY – Helga Aune

1. Context

A self-employed person is legally defined as a person not employed by an employer. This definition is not included in the text of the law but is evident in practice from the consequences of the chosen company regulation. Usually, a self-employed person will have a company of some sort registered in the Brønnøysund Register Centre, which is a government body under the Ministry of Trade, Industry and Fisheries. The Brønnøysund Register Centre consists of several different national computerised registers.

2. Transposition of the Directive

Directive 2010/41⁵⁵⁵ was made part of the EEA Agreement through EEA Committee Decision no. 41/2011 of 1 April 2011, which made the Directive

⁵⁵⁴ See Netherlands Statistics, 21 May 2014, at: <http://statline.cbs.nl/StatWeb/publication/?DM=SLNL&PA=80150NED&D1=a&D2=0-7&D3=4,I&HDR=T&STB=G2,G1&VW=T>, accessed 23 June 2014.

⁵⁵⁵ Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a

effective from 2 July 2011.⁵⁵⁶ The Directive is generally covered by the Gender Equality Act (GEA)⁵⁵⁷ as well as by relevant provisions in the National Insurance Scheme Act (NIA).⁵⁵⁸

3. Article 1 – Subject matter

There appear to be no specific problems with overlap of the coverage of this Directive with Directives 2006/54,⁵⁵⁹ 79/7,⁵⁶⁰ and 2004/113.⁵⁶¹

4. Article 2 – Scope

Self-employed activity is negatively defined as an activity not carried out under an employment contract. Article 2(a) of the Directive defines self-employed persons as persons who are pursuing a gainful activity for their own account, under the conditions laid down by national law. Norwegian law has set the requirement to register a company of a self-employed person as an '*enkeltpersonforetak*' (single-person enterprise) which is the simplest form of company registration. A company registered as an *enkeltpersonforetak* will not have any employees in their entity besides the self-employed person herself/himself. In addition to the company registration requirement, there is also the obligation to report taxes to the Tax Authorities.

All self-employed workers are considered to be part of the same category. The agricultural sector is not treated differently. National legislation recognises life partners in tax law as well as in family and inheritance law. The Tax Act Section 2-11 allows treating spouses and life partners under common taxation.⁵⁶² However, if the spouses or life partners do not agree on how to divide the income regarding the individual parts, the tax authorities will 'place' the income and taxation with the one of the spouses who has earned most of the income.⁵⁶³ This provides for a lower level of security for the assisting spouse as regards the earning of pension points for the retirement pension, which is accrued on the basis of tax payments in the National Insurance System.

5. Article 3 – Definitions

All definitions in Article 3 of the Directive have been transposed in the GEA. Direct and indirect discrimination are defined in GEA Sections 5 and 6. Harassment is defined in Section 8, first sentence, while sexual harassment is defined in the same Section, second sentence. The distinction between the two has not any caused difficulties.

self-employed capacity and repealing Council Directive 86/613/EEC OJ L 180 of 15 July 2010, pp. 1-6.

⁵⁵⁶ http://www.regjeringen.no/nb/sub/europaportalen/eos/eos-notatbasen/notatene/2010/apr/forslag-til-europa-parlamentets-og-radet.html?regj_oss=1&id=603600, accessed 21 July 2014.

⁵⁵⁷ *Lov om likestilling* of 21 June 2013 no. 59.

⁵⁵⁸ *Lov om folketrygd (folketrygdloven)*, LOV-1997-02-28-19.

⁵⁵⁹ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) OJ L 204 of 26 July 2006, pp. 23-36.

⁵⁶⁰ Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security OJ L 6 of 10 January 1979, pp. 24-25.

⁵⁶¹ Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services OJ L 373 of 21 December 2004, pp. 37-43.

⁵⁶² <http://www.skatteetaten.no/no/radgiver/rettskilder/handboker/lignings-abc/>, accessed 25 July 2014.

⁵⁶³ See *Lignings ABC*, Chapter 4.1.1, last sentence: <http://www.skatteetaten.no/no/radgiver/rettskilder/handboker/lignings-abc/>, accessed 25 July 2014.

6. Article 4 – Principle of equal treatment

The principle of equal treatment is included in GEA Section 1 as well as Section 5, but it is not explicitly stated as regards self-employed persons. The self-employed are merely covered by the GEA's general application.

7. Article 5 – Positive action

The expert is not aware of any positive action measures for self-employed persons.

8. Article 6 – Establishment of a company

The expert is not familiar with any requirements or conditions making it difficult to establish a company between spouses or life partners.

9. Article 7 – Social protection

All persons living in Norway for 12 months or more are covered under the National Insurance System (NIS) through the NIA, Section 2-1. The NIA provides basic health rights and social support. There are basic old-age retirement benefits to all persons with a legal right of residence in Norway. Entitlement to the minimum retirement pension is that the person has been covered by the NIS for a minimum period of 3 years (NIA Section 3-2). Self-employed persons earn additional pension through their tax contributions. Under the Tax Act, there is an opportunity for self-employed persons to share the reported income with a spouse/life partner (Tax Act Section 2-11). Where the spouse or life partner works in the self-employed person's business, the spouse is not an employee but the profit is to be divided between the two. How much profit is to be registered for each of the spouses is based on an overall assessment of the spouses' input into the business.⁵⁶⁴ The registered profit is the amount that forms the basis for the calculation of taxes as well as for the rights from the NIA.⁵⁶⁵

Sickness benefits are provided to self-employed persons under the NIA. The self-employed person must be incapacitated for work due to a loss of functional ability that is clearly due to an illness or injury. To be entitled to benefits the requirement is that the self-employed person has been working for at least four weeks immediately prior to becoming incapacitated for work. The basic requirement is that there is a loss of pensionable income due to the incapacity for work. It is a requirement that the income, based on which the sickness benefits are calculated is equivalent to at least fifty percent of the National Insurance basic amount (1/2 G⁵⁶⁶) (Euro), see NIA Sections 8-34, 8-35, and 8-36. The sickness benefits for a self-employed person amount to 65 % of the average income of the last three years, limited to a maximum of 6 G (Euro).

The incapacity for work must be documented by a medical certificate issued by a doctor. Sickness benefits for those who are self-employed or for freelancers are not paid for the first 16 calendar days from the date on which the incapacity for work arose. This 16-day waiting period only starts on the day of the doctor's visit or the date that the Norwegian Labour and Welfare Administration (NAV) is notified of the incapacity for work (Section 8-34, first sentence). Sickness benefits

⁵⁶⁴ <http://www.skatteetaten.no/no/radgiver/rettskilder/handboker/lignings-abc/>, accessed 25 July 2014.

⁵⁶⁵ <https://www.altinn.no/no/Starte-og-drive-bedrift/Drive/Skatt-og-avgift/Foretakets-skatt/Skatt-for-enkeltpersonforetak-forskuddsskatt/>, accessed 21 July 2014.

⁵⁶⁶ The Public pension base rate is called 'Grunnpensjon' or 'G' – and is basis for calculating the Norwegian state pension. The Public pension base rate is adjusted annually, approved each year by the [Norwegian parliament](#) on the basis of the negotiations made in the annual insurance settlement. As of May 1, 2014, the amount of the Public pension base rate is EUR 10 796.77 (NOK 88 730) per year. DNB Currency converter 12 October 2014.

are only paid when the 'Medical evaluation of work options while sick' certificate (*Medisinsk vurdering av arbeidsmulighet ved sykdom*), filled in by a doctor, has been submitted. It is possible for self-employed persons to take out insurance to obtain better coverage.⁵⁶⁷ It is possible to receive sickness benefits for a maximum of one year.

In addition to the public NIS/NIA system there are various options to purchase additional insurances and pension funds.

10. Article 8 – Maternity benefits

NIA Section 14-4, second paragraph, states that a pregnant self-employed person is entitled to paid pregnancy leave if she is unable to carry out her job without health hazards. The right to paid pregnancy leave applies on the condition that it is impossible to rearrange the tasks, and the risk factors need to be documented. Freelancers are provided an equal right to paid leave on the same conditions.⁵⁶⁸

Maternity leave and parental leave are provided for self-employed persons on terms that are equal to those applying to employees (NIA Section 14-7). Self-employed persons have had this right since 1 July 2008. As for regular employees, the maximum benefits provided are a maximum of 6 G. After the birth, there is a six-week obligatory maternity leave. It is only possible to avoid this maternity leave if the woman presents a doctor's note which states that returning to work will be best for her.⁵⁶⁹ The rules on parental leave are stated in WEA Section 12-5, and the rules regarding payment are stated in the NIA. Altogether, there is a 12-month paid leave per child and the rights of self-employed persons equal those of employees (NIA Section 14-7 and 14-9). All the criterions of sufficiency of payment stipulated in Directive 2010/41 Article 8(3) (a)-(c) are met, as all the alternatives are fulfilled under the compensation system in the NIA. Temporary replacements and services are to be arranged by the employer, or for self-employed persons, by the self-employed person, before going on leave.

11. Article 9 – Defence of rights

In addition to being submitted to court, a complaint about a violation of the provisions of the GEA may be presented to the Equality and Anti-Discrimination Ombud (Ombud),⁵⁷⁰ which is linked to a possibility to appeal to the Norwegian Equality Tribunal (Tribunal) complaint system.

The main feature regarding access to justice in discrimination cases in Norway is therefore the dominant role played by the Ombud and the Tribunal. Their role and the number of cases they handle each year demonstrate the need for this kind of low-cost service in assessing whether or not discrimination has taken place. However, the fact that neither the Ombud nor the Tribunal has the power to award damages or impose other effective sanctions might be questioned in light of the EU requirement of 'dissuasive and effective' sanctions.

Article 9(2) has been fulfilled as organisations and other legal entities may represent an individual and act on behalf of a victim based on the general rule in the Civil Procedure Act⁵⁷¹ (Sections 1-3 and 1-4).

⁵⁶⁷ Read more about insurance for self-employed persons and freelancers at:

<https://www.nav.no/Forsikring+for+frilansere.301539.cms>, accessed 21 July 2014.

⁵⁶⁸ See the NIA: http://lovdata.no/dokument/NL/lov/1997-02-28-19/*#*, accessed 21 July 2014.

⁵⁶⁹ Sections 12-3 and 12-4 of the WEA provide this information.

⁵⁷⁰ <http://www.ldo.no/no/Dine-rettigheter/Likestillings--og-diskrimineringsnemnda/>, accessed 21 July 2014.

⁵⁷¹ See *Lov om mekling og rettergang i sivile tvister (tvisteloven)* of 17 June 2005 no. 90.

12. Article 10 – Compensation or reparation

The rules on compensation and reparation are stated in GEA Section 28, which regulates liability for damages. Any person who has been subjected to illegal differential treatment in contravention of sections in the GEA regarding equal treatment, direct or indirect discrimination is entitled to compensation. Compensation must be fixed at the amount that is reasonable, with reference to the financial loss that was suffered, the situation of the parties and all other relevant circumstances. Compensation is also awarded for immaterial damage.

The very few cases handled by the courts show that the level of compensation awarded in cases of e.g. pregnancy discrimination is adequate, dissuasive and proportionate. However, as most cases are brought to the Ombud/Tribunal for gender equality issues and these are not, according to the law, entitled to award damages, this signifies weak protection against discrimination and weak access to the court structure. People tend to file complaints with the Ombud as this is a no-cost system and many cases are resolved when employers choose to follow the advice of the Ombud. However, insofar as Norwegian legislation does not fully respect the requirements of the Directive, e.g. that a maternity leave of 14 weeks is not specifically stated in the Act, individuals need to bring a complaint to the European Surveillance Agency⁵⁷² but this has not yet happened..

13. Article 11 – Equality bodies

The Ombud carries out, independently, all the activities listed in the Directive's Article 11 Paragraph (2) (a)-(d) and (3) (a)-(d).

14. Article 12 – Gender mainstreaming

The expert has no information regarding specific gender mainstreaming measures in relation to this Directive. However, laws and policies are made gender neutral in their terms and the gender consequences are often commented upon during legislative processes.

15. Article 13 – Dissemination of information

The expert has no specific information about the rights following Directive 2010/41. Indirectly, through the GEA and the Ombud's work, most people are aware of the general prohibition against discrimination.

16. Article 14 – Level of protection

Norway provides self-employed persons with pregnancy leave and parental leave which are equal to those offered to employees, and regarding the length of these leaves they seem to exceed the requirements of the Directive.

17. Case law

A search in databases on case law for all court cases and a search in the databases of cases from the Ombud and the Tribunal have provided no results related to Directive 2010/41.

⁵⁷² See ESA at: <http://www.eftasurv.int/about-the-authority/the-authority-at-a-glance/>, accessed 21 July 2014.

18. Issues regarding the ‘duty holder’

Implementation and application of the Directive are difficult in practice as self-employed persons only have two options if the framework of laws and policies may violate the Directive, and that is to a) lobby among politicians, or b) submit a complaint to court or to the EFTA Surveillance Agency (ESA). Both strategies are demanding in energy and resources. A self-employed person can bring a claim against the national authorities for not having implemented the rights according to the Directive, but to the knowledge of the expert this has not yet happened.

19. National statistics

In 2010, 11.5 % of the Norwegian male population aged 16-64 was engaged in early-stage entrepreneurial activity (in the process of starting or operating a new business up to three and a half years old), whereas the corresponding proportion among women was 4.5 %.⁵⁷³

20. Any other issues?

The Ombud and the Tribunal cannot present evaluations or decisions which are binding on public authorities such as the Government or the Ministries. This may be a practical explanation as to why the Ombud has not even made any use of the Directive.

POLAND – Eleonora Zielińska

1. Context

In Poland self-employment is currently widespread. According to Eurostat data, in 2012 there were 2.9 million self-employed persons (16.6 % of the entire economically active population), of which 986 000 were women (12.7 % of the economically active female population).⁵⁷⁴ 43 % of all self-employed persons worked in agriculture.⁵⁷⁵ According to research ordered by the European Commission and published in January 2013, 47 % of Poles would prefer to be self-employed. This percentage is higher than the European average (37 %).⁵⁷⁶

⁵⁷³ Bullvåg, Report: *Entreprenørskap i Norge 2011*, Global Entrepreneurship Monitor, at p. 38. See: <http://www.gemconsortium.org/docs/download/2783>; and M. Rønsen *The family – a barrier or motivation for female entrepreneurship?* Discussion Papers, Statistics Norway, Research department, no. 727, December 2012, both accessed 12 October 2014.

⁵⁷⁴ By the end of 2014 there were 17.489 million economically active persons in Poland, 7.832 million of which were women. See: *Labour force survey in Poland*, Warsaw 2015, Statistical Information and Elaborations, Central Statistical Office, available at: http://stat.gov.pl/download/gfx/portalinformacyjny/en/defaultaktualnosci/3293/2/14/1/labour_force_survey_in_poland_3q.pdf, accessed 25 February 2015.

⁵⁷⁵ Comparison table available at: http://epp.eurostat.ec.europa.eu/statistics_explained/index.php?title=File:Self_employed_status_2012.png&oldid=133220, accessed 17 July 2014. This data relies on data from the National Business Registry Number (REGON). It is uncertain, however, how many of the companies listed in this register actively conduct commercial activities and how many of these entrepreneurs are own-account workers, without employing others. As a result the actual number of ‘self-employed’ persons is difficult to determine precisely, as such a group is not recorded separately in the statistics. It is estimated that they constitute between 60 % and 70 % of the general number of registered enterprises. In 2012, 1.3 Million single-person companies were registered in the Social Security Institution (ZUS). This is also the officially estimated number of self-employed persons. See further: Ł. Piechowiak *Czy to koniec samozatrudnienia w Polsce (Is this the end of self-employment in Poland)*, available at http://euro.bankier.pl/news/article.html?article_id=2466703, accessed 17 July 2014.

⁵⁷⁶ Flash Eurobarometer FL354 *Entrepreneurship in the EU and beyond* provides data for the first six months of 2012. See: http://europa.eu/rapid/press_release_MEMO-13-7_en.htm, accessed 17 July 2014. According to other research this number was even higher (73 %), with a European average

Data from the Polish part of this research shows that Poles would prefer to be self-employed mostly because of the independence and self-fulfilment associated with this status (65 %). On the other hand, 27 % of Poles does not consider self-employment, because they do not have the necessary means and the current situation does not favour starting such business activity. 39 % fears bankruptcy and 41 % is discouraged by the potential irregularity of income.⁵⁷⁷ Other research indicated handicaps such as administrative difficulties and barriers, and the lack of good business ideas.⁵⁷⁸

Self-employment in Poland is associated with specialisation of professional activity (e.g. in the IT sector, publishing, advertising, as well as legal and financial services). At the turn of the century, creating your own company was frequently seen as a means to combat unemployment. A significant number of women took advantage of such opportunities, encouraged by special programmes and loans.⁵⁷⁹ There is no data as to how many of those companies have survived, although the common belief is that this number is rather small. A current problem in Poland is the large scale of forced self-employment.⁵⁸⁰ A significant number of self-employed persons were given the choice by their employers to either change to self-employment or to be made redundant. The main goal of such form of self-employment was to lift the employer's burdens and complications associated with contract-based employment. In such cases, self-employed persons work just as if they were employed in the company, with the difference however, that they pay their own insurance contributions. Also, they do not benefit from the protection provided for in the Labour Code and are **not covered by standard safety nets**. Such economically dependent self-employment is frequently referred to as superficial, since it is often not based on the genuinely free choice of the employee.⁵⁸¹ In this context it should be noted that, due to tax reasons, self-employment is not in general beneficial for persons previously employed and

of 69 %. See further: Report from research conducted in November 2012 by Amway Europe, with cooperation of the Center of Entrepreneurship of the Ludvik Maximilian University in Munich and the GFK Institute *Raport na temat przedsiębiorczości w Polsce w 2012 roku* (*Report on the entrepreneurship in Poland in 2012*) available in Polish at: <http://news.amway.pl/files/2012/11/Przedsi%C4%99biorczo%C5%9B%C4%87-i-m%C5%82odzi-przedsi%C4%99biorcy.pdf>, accessed 18 July 2014.

⁵⁷⁷ http://ec.europa.eu/public-opinion/flash/fl_354_nat_pl_en.pdf, accessed 17 July 2014.

⁵⁷⁸ See research conducted in November 2012 by Amway Europe, with cooperation of the Centre of Entrepreneurship of the Ludvik Maximilian University in Munich and the GFK Institute. *Raport na temat przedsiębiorczości w Polsce w 2012 roku* (*Report on the entrepreneurship in Poland in 2012*) available in Polish at: <http://news.amway.pl/files/2012/11/Przedsi%C4%99biorczo%C5%9B%C4%87-i-m%C5%82odzi-przedsi%C4%99biorcy.pdf>, accessed 18 July 2014.

⁵⁷⁹ E. Lisowska *Przedsiębiorczość kobiet w Polsce na tle krajów Europy Środkowej i Wschodniej* (*Entrepreneurship of woman in comparison to East and Central European Countries*). Monografie i Opracowania nr 494, Szkoła Główna Handlowa, Warszawa 2001. Compare also *Samozatrudnienie* (*Self-employment*). Report prepared by the Polish Agency for Entrepreneurs Development (PARP), Warszawa 2004.

⁵⁸⁰ In the literature this is referred to as economically dependent self-employment. See A. Musiała *Prawna problematyka świadczenia pracy przez samozatrudnionego ekonomicznie zależnego* (*Legal problems of performing work by economically dependent self-employed persons*), Monitor Prawa Pracy 2014 No. 2

⁵⁸¹ See *Samozatrudnienie w odwrocie: Ubyło jednoosobowych firm* (*The number of one person's enterprises have decreased*). *Gazeta Prawna*.pl z dnia 28 February 2013 available at: http://serwisy.gazetaprawna.pl/msp/artykuly/685965.samo-zatrudnienie_w_odwrocie_ubylo_jedno_osobowych_firm.html, accessed 28 July 2014 and K. Rączka *Samo-zatrudnienie. Przyczyny zjawiska i jego skutki w sferze zatrudnienia* (*Self-employment. Background of the phenomenon and its consequences in the sphere of employment*). Conference materials publication. Office of the Defender of Citizen's Rights, Warszawa 2005. pp. 17-18. This was also mentioned by the Supreme Court in its rulings from 12 February 2013 (II UK 184/12) and from 10 April 2013 (II UZP 2/13). The court noted with approval the existence of provisions aimed at preventing situations in which employers would force workers to dissolve their employment contracts and change to so-called self-employment, i.e. take up a commercial activity that would be identical to their previous task as workers based on the employment contract.

continuing the work for the same employer. It has some advantages only for persons with high incomes.⁵⁸²

From the legal perspective the status of self-employed persons does not differ from the situation of other commercial entities. The main legal document regulating non-agricultural commercial activity in Poland is the Law on Freedom of Economic Activity.⁵⁸³ The legal status of farmers is regulated in various legal Acts. The matter of social insurance of persons conducting agricultural activity is regulated in the Law of 20 December 1990 on the social security system of farmers.⁵⁸⁴

2. Transposition of the Directive

Answering the question what legislation transposes the self-employment directives in Poland is not easy, since the laws regulating different aspects of the legal situation of self-employed persons seldom refer to EU directives. The implementation of Directive 86/613,⁵⁸⁵ in the areas requiring such actions, occurred in the Law of 3 December 2010 on the implementation of selected EU provisions on equal treatment.⁵⁸⁶ This law was criticised inter alia because the legislator seemed to have neglected the fact (in the law as well as in the reasoning) that, at the time of its adoption, Directive 2010/41 (which repealed Directive 86/613), was already in force.⁵⁸⁷ As implementation of Directive 2010/41 with regard to childbirth-related leaves, reference can be made to the Law of 28 May 2013 on amendment of the Labour Code and other laws,⁵⁸⁸ as well as the law of 26 July 2013 on the amendment of the Law on the system of social security.⁵⁸⁹ Formally these laws do not refer to the Directive however,⁵⁹⁰ which should be considered as not fulfilling the obligation stipulated in Article 16(1) of the Directive, requiring the implementing provisions to contain a reference to the Directive. In the official document, entitled Listing of directives requiring implementation,⁵⁹¹ no intention was expressed to extend the time for implementation of this Directive.

⁵⁸² It allows them to pay lower taxes (the flat-rate tax amounts to 19 %, whereas the regular income tax for persons with high incomes may even amount to 35 %).

⁵⁸³ Law of 2 July 2004, JoL 2004 No. 173 item 1807.

⁵⁸⁴ Unified text: JoL 2013, item 1403.

⁵⁸⁵ 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 of 19 December 1986, pp. 56-58.

⁵⁸⁶ JoL 2010 No. 254 Item 1700. Hereafter cited as Anti-Discrimination Law or AL. This Law e.g. implemented Directives 2006/54/EC and 86/613/EEC, but did not transpose Directive 2010/41/EU.

⁵⁸⁷ See Remarks to the draft law on the implementation of selected EU provisions with regard to the European Union submitted by the Supreme Court, on 13 October 2010. Parliamentary Document No. 3386.

⁵⁸⁸ JoL 2013 Item 675.

⁵⁸⁹ JoL 2013 Item 983.

⁵⁹⁰ The introduction of all childbirth-related leaves has been justified by pro-natalist government policy. At the same time the reasoning to the draft law emphasised the fact that its contents lie outside the scope of EU law (Parliamentary Print No. 939, <http://www.sejm.gov.pl/sejm7.nsf/druk.xsp?nr=939>, accessed 5 April 2014).

⁵⁹¹ [http://orka2.sejm.gov.pl/IZ6.nsf/klucz/27BC1582/\\$FILE/19340wykaz.pdf](http://orka2.sejm.gov.pl/IZ6.nsf/klucz/27BC1582/$FILE/19340wykaz.pdf), accessed 14 October 2014.

3. Article 1 – Subject matter

There have been no signals regarding any overlap of the coverage of this Directive with Directives 2006/54,⁵⁹² 79/7,⁵⁹³ and 2004/113.⁵⁹⁴ All of them were mostly transposed on 3 December 2010 by one Act (Anti-Discrimination Law).

4. Article 2 – Scope

Polish legislation does not have an evident and common definition of self-employment.⁵⁹⁵ This term, however, is used to describe work activities performed individually or for commercial entities, based on grounds other than a labour contract.⁵⁹⁶ The definition nearest to self-employment is that of an entrepreneur. It exists in various legal Acts and varies depending on the goal of those regulations. The most general one is contained in the Civil Code (Article 43¹), also being very similar to the definition included in the Law on freedom of economic activity. According to Article 4 of the latter Law, an entrepreneur is a natural person, legal person and/or organisational entity without legal personality, on which the separate law confers legal capacity, pursuing the economic activity on its own behalf. Partners in a civil-law partnership (companies) are also considered as entrepreneurs, as far as their economic activity is concerned). This definition encompasses 'small entrepreneurs' or 'business persons'.

All self-employed works are considered to be part of the same category, but some issues in the agricultural sector are regulated separately and partially differently (e.g. taxes and social security).

The Law on freedom of economic activity does not directly refer to spouses of self-employed workers. However, the Law on statutory social security⁵⁹⁷ provides for the same protection mechanisms for almost all social and professional groups, including self-employed workers and persons collaborating with them (Article 6(2), Point 5). The category of persons collaborating with self-employed includes not only the spouse, but also other persons (children, including adopted children; parents, including step- and adoptive parents) (Article 6(11) of the Law on statutory social security). Also the Law on the social security system of farmers from 1990⁵⁹⁸ applies both to farmers themselves and to members of their household working with them, including their spouses. Neither law includes life partners.

5. Article 3 – Definitions

The definitions of direct and indirect discrimination and harassment and sexual harassment related to self-employed persons are provided for in Article 3 (1)-(4) of the Anti-Discrimination Law. They are formulated rather correctly, with the

⁵⁹² Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) OJ L 204 of 26 July 2006, pp. 23-36.

⁵⁹³ Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security OJ L 6 of 10 January 1979, pp. 24-25.

⁵⁹⁴ Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services OJ L 373 of 21 December 2004, pp. 37-43.

⁵⁹⁵ The term 'self-employment' occurs sporadically (without a definition) in legal provisions, e.g. Article 11 Section 1 of the Notary Act, or Article 38 Section 1. pt. 1a of the Law on promoting employment in labour market institutions.

⁵⁹⁶ The essence of self-employment is mainly connected to personal and functional features of this form of activity. Compare: A. Powalowski *Samozatrudnienie na gruncie prawa polskiego (Self-employment in Polish law)*. Gdańskie Studia Prawnicze tom XXX, 2013, pp.89-90.

⁵⁹⁷ Law on statutory social security (*Ustawa o systemie ubezpieczeń społecznych*) of 13 October 1998, unified text: JoL 2009 No. 205 Item 1585, with amendments.

⁵⁹⁸ Law on the social security system of farmers of 20 December 1990, unified text: JoL 1998 No. 7 Item 25, with amendments.

exception of harassment and sexual harassment, which both quite unfortunately are labelled as sexual harassment.

6. Article 4 – Principle of equal treatment

The Law on freedom of economic activity generally stipulates that everyone has equal opportunities and rights to take up, pursue and terminate economic activity under the conditions provided for in the law (Article 6(1)). The Law further states that, with due respect to the principles of equality and fair competition, the State will provide state aid to entrepreneurs on terms and in the manner provided for in separate regulations (Article 7). Article 3(5) of the Anti-Discrimination Law may be considered to have transposed Article 4 of the Directive. This Law transposes various equality directives, including 86/613 and 2006/54, and therefore the wording of this provision is more general than that of Article 4, regarding self-employment. The Anti-Discrimination Law specifies in Articles 4(2) and 8(2) that it is applicable to conditions of undertaking and performing commercial and professional activity, especially with regard to labour-code or civil-contract based employment.⁵⁹⁹ There is no prohibition, however, to discriminate with regard to equipment, or extending business activities. Also, it does not explicitly protect from discrimination with regard to terminating commercial activity.⁶⁰⁰ The issue of whether self-employed persons, in the event of direct or indirect discrimination, harassment or sexual harassment experienced with regard to the equipment or extension of business activities, will benefit from the horizontal protection provided for by the Anti-Discrimination Law, depends on the interpretation of the terms 'conditions of undertaking and performing... activity', by courts.

7. Article 5 – Positive action

The Anti-Discrimination Law provides in Article 11 for the possibility to take positive action. Positive action was taken in the form of micro-loans for unemployed persons opening small businesses, in particular for women conducting commercial activities.⁶⁰¹

8. Article 6 – Establishment of a company

In the light of the equality clause cited above contained in Article 6(1) of the Law on freedom of economic activity, the establishing and conducting of economic activities by one of the spouses does not depend on the other spouse approving or being informed. Also, it does not depend on the marital property regime. There

⁵⁹⁹ The use, in addition, in both of these rules of the phrase 'in particular' means that this listing is not exhaustive. It covers all forms of professional performance, such as broadly defined self-employment and performance of public trust professions (such as attorneys or doctors).

⁶⁰⁰ However the Law on the Freedom of Economic Activity explicitly provides for the prohibition of discriminatory termination of somebody's activity or profession. Doubts have arisen, since the AL does not mention 'termination', whether the horizontal protection of the AL applies in such cases (see more on this issue in E. Zielińska 'Poland' in: European Network of Legal Experts in the Field of Gender Equality, M. Freedland & N. Countouris *The Personal Scope of the EU Gender Equality Directives*, pp. 175-184, European Commission 2012, in which authors also pay attention to self-employment. This report is available at: http://ec.europa.eu/justice/gender-equality/files/your_rights/personal_scope_eu_sex_equality_directive_final_en.pdf, accessed 12 December 2014.

⁶⁰¹ Of some effectiveness was the project 'How good to be women with initiative'. The aim of this project was to assist unemployed women in starting up their own businesses by providing theoretical and practical guidance and small subsidies or loans. See more in E. Zielińska 'Poland' in: European Network of Legal Experts in the Field of Gender Equality, G. Selanec & L. Senden *Positive Action Measures to Ensure Full Equality in Practice between Men and Women, including on Company Boards* European Commission 2011, pp. 171-180, available at: http://ec.europa.eu/justice/gender-equality/files/gender_balance_decision_making/report_gender_balance_2012_en.pdf, accessed 12 November 2014. See also: <http://www.fundacijakobiet.org/program-twoje-prawo-do-biznesu/>, accessed 20 July 2014.

are no legal barriers to spouses establishing a company. No statistical data on how many such companies have been established could be identified.

9. Article 7 – Social protection

The statutory social security system in Poland⁶⁰² provides for the same mechanisms for all social and professional groups, including self-employed workers and persons cooperating with them (only farmers are subject to specific regulations). In the context of this Law on statutory social security, in order to be covered by the insurance, the spouse and other family members must not only cooperate with the self-employed person, but must also share a common household with them. Both self-employed persons and persons cooperating with them are subject to compulsory old-age and disability insurance and insurance against accidents at work and occupational diseases (Article 6(1) point 5).⁶⁰³ The insurance covering sickness and motherhood may be joined by these persons on a voluntary basis (Article 11(2)). Pursuant to the Law of 20 December 1990 on social security of farmers,⁶⁰⁴ this social insurance covers the farmers themselves, as well as members of their household working with them or in a farm directly connected with the farm of the farmer, including their spouses (Article 5). The social insurance for farmers includes insurance in case of accidents, sickness and motherhood, as well as old-age and disability pensions (Article 1(2)). For farmers (and members of their households) operating an agricultural farm larger than one hectare, the insurance is obligatory. For other farmers or members of their households it is optional (Articles 7 and 16). The State provides support if the total amount of collected social insurance contributions is not sufficient to cover all benefits.

10. Article 8 – Maternity benefits

Insurance covering sickness and maternity benefits may be joined by self-employed persons and persons cooperating with them on a voluntary basis (Article 11(2)).

According to provisions introduced by the law of 28 May 2013 on amendment of the Labour Code and certain other laws (mentioned above), a woman conducting an economic activity may collect paid maternity benefits, not only during maternity leave, but also during additional maternity leave and parental leave (a total of 52 weeks), just like a person employed on the basis of a labour-law contract. In order to qualify for such benefits, no minimum insurance period is required. A mother conducting an economic activity may combine running the company with taking care of a child, which will not result in losing the right to maternity benefits. While collecting maternity benefits, she will be released of the obligation to pay accidents, sickness and maternity insurance contributions, and pension insurance contributions (which are paid by the State), but she will have to pay health insurance contributions.⁶⁰⁵ If however, after giving birth, the person decides to suspend her activity for the period of collecting the benefits, she will be released from all of the above contributions.

According to Article 15(1 -1a) of the Law on social insurance of farmers, with amendments in force since 1 September 2013, an insured person (farmer or

⁶⁰² This system covers: old-age insurance, disability insurance, insurance in case of sickness and maternity (sickness insurance) and insurance against accidents at work and occupational diseases (work accidents insurance) (Article 1 of the Law on statutory social security).

⁶⁰³ To old-age and disability insurances are also entitled persons who conducted an economic activity for at least six months and suspended it because of taking care of a child (Article 6a of the Law on statutory social security).

⁶⁰⁴ Unified text, . JoL 2013, Item 1403.

⁶⁰⁵ This type of obligatory insurance entitles the insured person to health services covered by the fund from public money. In case of farmers and registered unemployed person the contribution on health insurance are paid from State budget.

household member) is on an obligatory basis entitled to maternity benefits, with regard to the birth of a child, or accepting a child up to 7 years old for adoption. These benefits amount to four times the basic retirement benefits (*emerytura podstawowa*), and according to Article 6(7) of the Law on Social Insurance of Farmers it is equal to the minimum old age pension (which in 2014 amounted to EUR 200; PLZ 844). The difference in maternity-related benefits may, to a certain extent, be explained by much lower insurance contributions paid by farmers.⁶⁰⁶ However, the criterion of sufficiency applied in Polish provisions does not correspond with indicators provided for in Article 8(3) of Directive 2010/41. A self-employed person in Poland has no right to childcare leave (*urlop wychowawczy*). However, during the period of time devoted to taking care of the child, the State pays the contributions for pension insurance for farmers or members of household.⁶⁰⁷ There are no services supplying temporary replacements or national social services. With these exceptions, Polish legislation seems to be in compliance with the requirements laid down in EU law.

11. Article 9 – Defence of rights

According to Article 12 of the Anti-Discrimination Law, on violation of the rule of equal treatment, inter alia for reasons connected to childcare-related leaves, each person who has been discriminated against has the right to claim damages. Competent to hear such cases are courts adjudicating civil matters. These courts follow the Code of Civil Procedure (CPC). According to Article 8 of this Code, non-governmental organisations whose statutory duties do not involve economic activities may, for the protection of citizens and in cases provided for by the law, bring an action and participate in pending proceedings. Article 61 CPC covers matters in which non-governmental organisations may bring actions, explicitly mentioning matters regarding protection of equality and non-discrimination by directly or indirectly differentiating between the rights and obligations of citizens in an unjust manner. Since 3 May 2012 (amendment of the CPC), a complaint or letter whereby a non-governmental organisation joins a natural person in proceedings shall be accompanied by the natural person's written consent.

In the light of Article 8 of the Law of 15 July 1987 on the Human Rights Defender,⁶⁰⁸ the Ombudsperson who since 2011 performs tasks of the equality body conducts activities provided for in the law, if he takes notice of signs indicating the infringement of freedoms or citizens and human rights, including the rule of equal treatment. However, with regard to the implementation of the rule of equal treatment between private entities, the competences of the Ombudsperson are limited to indicating the means of action available to the applicant (Article 11(2) of the Law). In other cases she/he may inter alia initiate own proceedings, as well as initiate and join pending court proceedings. The mandate of the Human Rights Defender does not explicitly cover reconciliation in

⁶⁰⁶ The amounts of social security contributions, which have to be paid by farmers owning less than 50 hectares of land in the first quarter of 2014, was established at approximately EUR 20 (PLZ 83). It constitutes 10 % of the basic farmer's retirement benefits for last month of 2013.

<http://www.krus.gov.pl/komunikaty/dokument/artikul/skladki-na-ubezpieczenie-spoeczne-rolnikow-w-i-kw-2014-r/>, accessed 17 August 2014. Self-employed persons performing non-agricultural activities in 2014 pay monthly social security contributions in a minimum amount of EUR 190 (PLZ 716) (the basis for it is the declared amount of salary, which cannot be lower than 60 % of the national average salary (in 2014: EUR 973 (PLZ 3895)); http://www.Wskazniki.pl/?doc_id216866, accessed 27 August 2014.

⁶⁰⁷ However, for no longer than 3 years (and until the child reaches the age of 5). It is guaranteed by law for those farmers who are entitled to obligatory or voluntary pension insurance – Article 16(a)-(b) of the Law on the Social Insurance of Farmers. However, pursuant to Article 16(c)-(d) of this Law, other uninsured farmers or members of household taking care of the child may also request the State to cover his/her pension insurance contributions during the time indicated above for taking care of a child.

⁶⁰⁸ Unified text JoL 2001 No. 14 Item 147, with further amendments.

individual cases, so practically speaking there is no legal basis for the Ombudsperson to mediate in this area.

12. Article 10 – Compensation or reparation

The Anti-Discrimination Law provides for compensation (Article 13) without setting a minimum or a maximum limit. This law makes the reservation that, with regard to compensation, the general tort liability rules of the Civil Code apply. This means that the amount of compensation must not exceed the actual harm suffered. The law specifies if the harmed person is entitled to compensation for immaterial damages. The doctrine assumes however that this is the case, which is also proved in case law in different discrimination cases not connected with self-employment.

13. Article 11 – Equality bodies

Among the obligations of the Ombudsperson are analysing, monitoring, and supporting equal treatment. In the activities of the current Ombudswoman no special actions regarding equal treatment of self-employed person could be identified. It should be noted that in 2005, the Human Rights Defender lodged a case with the Constitutional Tribunal, questioning the constitutionality of the planned amendment of the Law on the professions of a nurse and midwife, limiting the rights of nurses conducting commercial activities in the form of a group practice (civil-law companies) to be employed in public healthcare institutions. In its ruling of 21 December 2005 (K 45/05), the Tribunal found the motion to be justified. In the reasoning however (similar to that of the Ombudsman in his motion) the Tribunal did not find that the overruled provision might constitute a form of direct discrimination with regard to sex, due to the fact that in Poland this profession is mainly practised by women. Also, the issue of equal treatment of self-employed persons has not been a Directive 2010/41/UE of special interest of the independent Ombudswoman since 2011, when she was entrusted with the function of equality body in the meaning of EU equality directives. There is no mentioning of such actions in the annual reports until 2013.⁶⁰⁹

14. Article 12 – Gender mainstreaming

No examples could be identified of the implementation of this Article in practice.

15. Article 13 – Dissemination of information

There are no data on the explicit dissemination of the information regarding the Directive, although information regarding the legal amendments with respect to childbirth-related leaves has been disseminated.

16. Article 14 – Level of protection

The level of protection can be considered as greater than required by the Directive with respect to the length of the maternity leave and other childbirth-related leaves.

⁶⁰⁹ See Yearly reports of the RPO, presented to the Sejm; <http://orka.sejm.gov.pl/Druki7ka.nsf/0/5188262CC5847F2DC1257CAE0035E4CE/%24File/2274.pdf>, accessed 12 November 2014.

17. Case law

There have been some rulings regarding unequal treatment of workers and self-employed persons, although not with regard to sex.

The Constitutional Tribunal in its ruling of 24 May 2012 (P 12/10) decided on the unconstitutionality of differentiation of between the situations of two groups of insured persons – workers and entrepreneurs – regarding the possibility to supplement the base for calculating the amount of social benefits (when inability to work occurred before the end of the full calendar month of sick leave). For workers such possibility existed, while entrepreneurs were not able to do so. This ruling was connected with a legal question lodged by a regional court, hearing the case of a man who went on sick leave two weeks after he changed his status from full-time employment to self-employment, and later took over from his wife a part of maternity leave. This change of employment also resulted in a change to his sickness insurance: from compulsory to voluntary. The Social Security Institution calculated the base for calculating the amount of social benefits based on the first unfinished month of sickness insurance for persons conducting commercial activities, without taking into consideration that the insured person was in fact continuing his previous insurance.

Recent case law of the Supreme Court includes cases regarding the base for calculating the amount of retirement and disability insurance contributions of an attorney at law, who had been working for another employer during his apprenticeship.⁶¹⁰ The Court found that in such a case it is possible to apply special insurance contributions for persons who take up a commercial activity for the first time. This ruling does not concern discrimination based on sex however.

18. Issues regarding the ‘duty holder’

The requirement of equal treatment in economic activity is addressed mainly to the local public authorities of territorial self-government that are competent to register such activity. As regards starting and pursuing commercial activities, the duty holders of the anti-discrimination norms are the authorities competent to grant licenses to practise a particular profession,⁶¹¹ i.e. professional associations (e.g. Chamber of Physicians, Council of Attorneys, etc.).

19. National statistics

As already mentioned the category of self-employed persons is not reflected in official statistical data. The Statistical Yearbook of the General Statistical Office (GUS) recognises the general category of employment (employed persons),⁶¹² which includes employers that own farms or enterprises outside agriculture (together with cooperating family members), and ‘own-account’ workers (e.g. lawyers and artists). These two categories correspond with the notion of self-

⁶¹⁰ E.g. the case from 10 April 2014, (II UZP 2/13).

⁶¹¹ Such competences are provided for in special laws governing the performance of particular professions of public trust and/or in the laws on self-government organisations of those professions: e.g. the Law on the Executing of the Professions of Physician and Dentist of 5 December 1996, JoL 1997 No. 28 Item 152 with amendments, and the Law on Physicians Chamber of 2 December 2009, JoL 2009 No. 219 Item 1708 with amendments.

⁶¹² In Polish: ‘*pracujący*’. The data regarding employment concerns persons performing work and providing earnings or income, and include e.g.: 1) employees hired on the basis of an employment contract (labour contract, posting, appointment, or election) or service relation; 2) employers or own account workers. This second category, which corresponds with the notion of self-employed persons, covers 1) owners, co-owners, or leaseholders of private farms in agriculture (including contributing family members) working in private farms; b) owners and co-owners of entities conducting economic activity outside agriculture (including contributing family workers); and c) other self-employed persons that practice learned professions. See *Rocznik Statyczny RP (Statistical Yearbook of the Republic of Poland) 2012*, Główny Urząd Statystyczny (Central Statistical Office; further referred as GUS), Warsaw LXXII, at p. 218.

employment. In the years 2011 and 2012 the overall number of self-employed persons amounted to 3 735 000, among which 1 611 700 were women. From the whole group, 2 216 200 were employed on private farms in the agricultural sector.⁶¹³ According to GUS data the number of employers and own-account workers in 2005-2012 showed a gradual increase, although there is no data allowing to determine to which of the two combined groups this phenomenon actually relates. In the last two years the number of self-employed persons has decreased.⁶¹⁴ For example the number of farmers decreased by 33 000 in the previous year.⁶¹⁵ In the sphere of economically dependent self-employment this is explained by the fact that employers, when facing the need for further reduction of labour costs, often first terminate the cooperation with self-employed persons. Another significant reason for the decrease of self-employment is the structural changes in agriculture. Economists indicate that decreasing subsidies from the Labour Fund and smaller funds coming from the European Union have also negatively influenced the number of self-employed persons. For many self-employed persons the necessity to pay higher social insurance contributions after the first two years of self-employment is a barrier that is difficult to overcome.

20. Any other issues?

There are no other issues to be mentioned.

PORTUGAL – Maria do Rosário Palma Ramalho

1. Context

Under Portuguese legislation, self-employment is a wide concept that includes all forms of employment that do not fall under the definition of employment contract either in the private sector or in the public sector.

For the private sector, an employment contract is defined in Article 11 of the Labour Code (LC)⁶¹⁶ as the contract in which one person develops his/her activity for another person against remuneration, integrated in the employer's organisation and under his authority. As regards the public sector, a similar notion is established in Article 6 No. 2 of Law No. 35/2014, of 20 June 2014 (*Lei Geral do Trabalho em Funções Públicas*) that regulates the employment relationship of public servants.⁶¹⁷

The main criteria to identify an employment relationship is the subordinated position of the employee, in the sense that he is bound to perform the work according to the instructions of the employer and he is also subjected to disciplinary rules and sanctions applied by the employer. If there is no

⁶¹³ See *Rocznik Statyczny RP (Statistical Yearbook of the Republic of Poland) 2012*. Główny Urząd Statystyczny (Central Statistical Office; further referred as GUS). Warszawa LXXII, p.227.

⁶¹⁴ This is one of the strongest decreases among EU countries.

Por. Badania aktywności ekonomicznej ludności (research on economic activity of the population) BAEL, <http://www.stat.gov.pl?cpsd/rde/xbcr/gus> and <http://archiwum.rp.pl/artukul/1186474-Coraz-mniej-pracujacych-na-wlasny-rachunek.html#.U-hzGqN4xWk>, also see <http://instytutwolnosc.pl/2013/04/18/polacy-rezygnuja-z-samozatrudnienia/.html>; accessed 17 July 2014.

Por. Badania aktywności ekonomicznej ludności (research on economic activity of the population) BAEL, <http://www.stat.gov.pl?cpsd/rde/xbcr/gus> and <http://archiwum.rp.pl/artukul/1186474-Coraz-mniej-pracujacych-na-wlasny-rachunek.html#.U-hzGqN4xWk>, also see <http://instytutwolnosc.pl/2013/04/18/polacy-rezygnuja-z-samozatrudnienia/.html>; accessed 17 July 2014.

⁶¹⁵ W. Polkowski *Coraz mniej pracujących na własny rachunek (Less and less own-account)* 17 April 2013. Rzeczpospolita, <http://archiwum.rp.pl/artukul/1186474-Coraz-mniej-pracujacych-na-wlasny-rachunek.html#.U-hzGqN4xWk>, accessed 28 July 2014.

⁶¹⁶ The present Labour Code was approved by Law No. 7/2009, of 12 February 2009.

⁶¹⁷ This Act has been recently published and replaces Law No. 12-A/2008, of 27 February 2008, and Law No. 59/2008, of 11 September 2008. The new legislation entered into force on 1 August 2014.

subordination of the worker, he/she is qualified as self-employed, and the professional relationships that he/she establishes as independent contractor are ruled by the appropriate civil or commercial provisions.

The fact of being determined by a sort of 'exclusion' criterion (the absence of subordination of the worker) explains that self-employment accommodates many different jobs in different areas. In this sense there is self-employment in traditional areas like agriculture, but also in industry, commerce and services. Self-employment also accommodates small entrepreneurs with a personal business, traditionally independent professions (attorneys at law, architects, doctors, artists, etc.), people who work for corporations as independent contractors, consultants or agents, workers within cooperatives and members of company boards. The problems that arise in all these situations may be quite different.

Finally, in the grey area between (subordinate) employment and self-employment there are independent workers (in the sense that they do not integrate their creditors' organisation and are not subjected to the organisation's rules) that economically depend, however, on the creditor of their work e.g. in terms of pay, due to the fact of working for only one creditor. This category of 'quasi-subordinate' or as it is called in Portuguese 'economically dependent workers' (*trabalhadores com dependência económica* – Article 10 of the LC) faces specific problems that have to be addressed separately.

In Portugal, self-employment is very common for women in the area of agriculture, especially in small farms, which are often a secondary business for the families in the country, and often women are in charge of that business while men have another job. In commerce, another area where the presence of women is significant is small entrepreneurship in shops, restaurants, cafés or hairdressers but also as independent contractors or agents of small or large companies, in several commercial areas. A third area where self-employment has been growing in the last few years is online selling and, here again the presence of women is impressive. In contrast however, the presence of women in company boards, both in private and in public companies, is very low.

'Quasi-subordinate' working women are to be found in all areas, but mainly in agriculture, where the phenomenon of assisting spouses is also more common.

Given the wide range of self-employment the problems affecting women in the various areas are different. As regards agriculture, the main problem until some years ago were assisting spouses, due to the lacunae in social security protection, but this problem has since been solved. In commerce, the starting of a business is often difficult but we have no data indicating that women experience more difficulties than men in this area. As regards the participation of women in company boards, the number of women is much lower than the number of men, thus allowing for the conclusion that systemic discrimination is in place in this area.

Finally, a problem common to self-employed women in the various areas regards maternity and care provisions. Often, self-employed women receive maternity allowances but do not enjoy time off on the grounds of maternity, let alone parental leave, because there is no replacement for their professional activity.

2. Transposition of the Directive

Directive 2010/41/EU has not yet been formally transposed into Portuguese legislation, because national legislation is already considered to be in compliance with the Directive. Four acts are to be taken into consideration for the several purposes of the Directive, in the area of employment and in the area of social security:

- Law No. 3/2011 of 15 February 2011 that establishes the general frame for the protection of self-employed persons as regards the prohibition of discrimination in the access to and the development of independent work in the private sector, in the public sector, and in the cooperative sector;
- Law No. 110/2009 of 16 September 2009, which approved the Social Security Code (*Código dos Regimes Contributivos do Sistema Previdencial de Segurança Social* – CRCSS) that has some provisions regarding social security for independent workers, including assisting spouses, and also separate provisions applicable to the members of company boards;
- The Labour Code (LC) approved by Law No. 7/2009 of 12 February 2009, which extensively regulates equality and non-discrimination in employment, which is important because these provisions are also applicable to the category of ‘quasi-subordinate’ workers (Article 10) and, under the new General Law for Civil Servants, also to workers of the public sector, including independent workers;⁶¹⁸ and
- Law No. 91/2009 of 9 April 2009 that establishes social security provisions attached to maternity and maternity rights. These provisions are applicable to subordinate workers in the private sector and in the public sector and to independent workers (Article 4 No. 1).

No extended time for the implementation was required by Portugal, as far as we know.

3. Article 1 – Subject matter

To the knowledge of the expert, no problems have occurred in Portugal concerning a possible overlap of the coverage of this Directive with Directives 2006/54,⁶¹⁹ 79/7,⁶²⁰ and 2004/113,⁶²¹ but again it is important to remember that Directive 41/2010 was not transposed.

Still, given the different perspective of national law as regards non-discrimination in the starting of a business or in the creation of a company – as explained below in Section 6 – possible problems regarding this specific issue (mainly the access to credit or other financial support when creating a company) may have to be dealt with in the national legislation that has implemented Directive 2004/113 (Law No. 14/2008, of 12 March 2008), rather than under the general legal frame for equality in self-employment, indicated above (Law No. 3/2011).

4. Article 2 – Scope

Portuguese legislation defines self-employment for the purposes of non-discrimination provisions in the access to and development of self-employment and also for the purpose of social security rights, but not exactly in the same sense.

For the purpose of non-discrimination in the access to and development of independent work, Law No. 3/2011, of 15 February 2011, defines independent work in accordance with Directive 2010/41/EU, in Article 2 No. 2, as a

⁶¹⁸ Article 4 No. 1 c) and d) of the General Law for the Public Servants Employment Relationship.

⁶¹⁹ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) OJ L 204 of 26 July 2006, pp. 23-36.

⁶²⁰ Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security OJ L 6 of 10 January 1979, pp. 24-25.

⁶²¹ Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services OJ L 373 of 21 December 2004, pp. 37-43.

professional activity developed outside an employment contract or a legally equivalent situation.

This notion is wide, accommodating very different situations, such as traditional independent professions (e.g. doctor, attorney at law, and architect), small entrepreneurs, independent workers in agriculture, in commerce or in services, members of the boards of companies, workers in cooperatives, etc. However, this notion does not explicitly mention assisting spouses.

For the purposes of social security, the Social Security Code (CRCSS) defines independent worker as a person performing a professional activity outside an employment contract or a legally equivalent situation, or a person performing a professional activity for another person without being integrated in the social security scheme applicable to subordinate workers (Article 132 of this CRCSS).

Following this general definition, the Code indicates several categories of independent workers (Articles 133 and 134), which include the following situations: persons pursuing a gainful activity for their own account; business partners; persons developing independent work in agriculture, including running a farm or exploring a business in this area; small entrepreneurs; authors and artists. Other categories of independent workers are also considered under specific social security schemes – this is the case for workers in the cooperative sector (Article 135 of the CRCSS), for members of company boards (Article 61 of the CRCSS), and for ‘quasi-subordinate’ workers (Article 71 of the CRCSS). There is no risk of exclusion.

The CRCSS explicitly mentions the category of assisting spouses or life partners of independent workers, defining them as those who perform a regular and permanent (but not necessarily full-time) professional activity with their partners (Article 133 No. 1(c)). Under the category of independent workers for the purposes of social security, the Code also mentions independent workers in agriculture and small entrepreneurs and their spouses or life partners (Article 134 No. 1(a) and (b)).

As a general conclusion, the expert would say that Portuguese legislation includes a wide notion of self-employment, but this notion and therefore the scope of the applicable rules are not the same for all purposes. Also, the category of assisting spouses or life partners is only explicitly recognised and covered for the purpose of social security provisions.

5. Article 3 – Definitions

The definitions of direct and indirect discrimination, harassment and sexual harassment in relation to self-employment are dealt with in Article 5 Nos 2.5 and 6 of Law No. 3/2011 of 15 February 2011, which, as said above, is applicable to self-employed persons in all sectors. Specifically as regards self-employment for the State, and as regards ‘quasi-subordinate’ workers, the notions of direct and indirect discrimination, harassment and sexual harassment as established by the LC (Articles, 23, 24 and 29) apply.

The definitions in both Acts are very similar and in compliance with EU law. National legislation distinguishes direct and indirect discrimination, by considering that there is indirect discrimination whenever an apparently neutral provision, practice or criteria places someone in a disadvantaged position as regards other people due to a discriminatory factor.

As regards discriminatory harassment, the distinction between sexual harassment and other discriminatory harassment is also clear and poses no problems. Discriminatory harassment is defined as an attitude from the beneficiary of independent work unwanted by the worker and based on a discriminatory ground, which is intended to trouble, or affect his/her dignity or creates a hostile, humiliating or degrading environment around the worker. Discriminatory harassment includes sexual attitudes, in physical or verbal forms.

6. Article 4 – Principle of equal treatment

Although Directive 2010/41 has not been transposed into national law, the principle of equal treatment in independent work is established in national law. Article 3 and Article 5 No. 1 of Law No. 3/2011, of 15 February 2011 establish that no one can be subjected to different treatment in the access to and during the development of self-employment, due to a discriminatory ground.

This protection includes direct and indirect discrimination and discriminatory harassment (including sexual harassment) as indicated above (Article 5 Nos 2, 3, 5 and 6) and covers the access to self-employment (including ads, selection criteria and the affiliation of the worker to professional associations), and the development of independent work (including pay, access to vocational training and the conditions for the termination of the contract) – Article 3 Nos 2 and 3, and Article 4, specifically as regards equal pay. An instruction to discriminate is also qualified as discriminatory practice (Article 5 No. 3).

The main differences between national legislation and Article 4 of Directive regard two points: first, national legislation considers all grounds of discrimination together, so sex discrimination is not treated separately; secondly, the principle of non-discrimination in relation to self-employment makes no explicit reference to the launching or creation of a business or company by independent workers (as expressed in Article 4 No. 1 of Directive 2010/41) since the perspective of national law is more focused on the rights of the independent worker vis-à-vis the counterparties of his/her work and the duties of the counterparty vis-à-vis the independent contractor. From this perspective, equality issues related to the creation of a business would be more likely dealt with by Law No. 14/2008, of 12 March (that transposed Directive 2004/113), for instance to deal with different conditions granted to a person in the access to financial credit to start a business or create a company. In addition to this issue, national legislation is not clear as to the extension of the protection to the creation of a company or the establishment of a new business.

As to the relation with Article 14(1)(a) of Directive 2006/54, the question does not apply since there no formal implementation of Directive 2010/41 has taken place.

7. Article 5 – Positive action

Positive action is not dealt with by Law No. 3/2011, but is allowed by the Portuguese Constitution, especially in favour of women (since under Article 9(h)) of the Constitution the active promotion of gender equality is a fundamental goal of the State), and by Article 27 of the Labour Code.

In practice, several positive action measures have been approved in recent years as regards the participation of women in decision-making, by legally imposing a women's quota in the boards of companies in the public sector and in private companies subjected to public regulation.⁶²² In the expert's view, this kind of positive action is quite effective. As board members are not engaged under an employment contract, they are a specific category of independent workers, which means that this development also affects self-employed persons.

⁶²² Law No. 67/2013, of 28 August 2013, Article 17 No. 8. For more developments on this issue, see M. Palma Ramalho 'Portugal' in: European Network of Legal Experts in the Field of Gender Equality *European Gender Equality Law Review 1/2013* and *European Gender Equality Law Review 2/2013* at pp. 103-104 and 93-95, respectively, European Commission 2013, available at: http://ec.europa.eu/justice/gender-equality/files/law_reviews/egelr_2013-1_final_web_en.pdf and http://ec.europa.eu/justice/gender-equality/files/law_reviews/egelr_2013_2_final_web_en.pdf, accessed 1 November 2014.

8. Article 6 – Establishment of a company

Under Portuguese legislation, life partners are recognized and protected by Law No. 7/2001, of 11 May 2001 (with the changes introduced by Law No. 23/2010, of 30 August 2010) as regards the family home, employment rights attached to the spouse/partner of the worker, tax provisions and social security benefits (Article 3 of Law 7/2001).

Under Company Law and under the Civil Code, the establishment of a company between married couples faces some restrictions.⁶²³ These restrictions are intended to protect the family assets and also the creditors, and regard the type of company and the degree of liability of the married shareholders.

Since these provisions are only applicable to married couples, the establishment of a company is in fact easier for life partners than for married couples. From a different perspective, neither are there any restrictions to the liability of life partners as shareholders of a company to be taken into consideration.

The expert is not aware of any statistics on how many such companies have been established.

9. Article 7 – Social protection

Social protection for self-employed persons is granted by the Social Security Code (CRCSS) but the legal frame is complex.

Most categories of self-employed are covered by the social security scheme of independent workers (Articles 132 and ff. of the CRCSS). Some categories can choose their social security system – this is the case for workers in the cooperative sector since the by-laws of the cooperative can choose to place their workers under the social security provisions applicable to subordinate workers or under the social security provisions applicable to self-employed (Article 135 of the CRCSS). Other categories of independent workers are subjected to the general social security scheme applicable to subordinate workers, with some specificities, as in the case of the members of company boards (Article 61 of the CRCSS), and in the case of 'quasi-subordinate' workers (Article 71 of the CRCSS). Finally, independent workers whose activity is performed for at least 80 % for a sole beneficiary fall under a specific provision (Article 140 of the CRCSS).

The major difference in the social security protection granted under these various schemes regard the amount and the responsibility for the payment of contributions and the social benefits attached to each scheme. In the general social security scheme applicable to subordinate workers both the employer and the employee pay the contributions to the public social security system at different rates, which are much higher for the employer than for the employee (Article 53). As regards independent workers only the worker pays the contribution, at a variable rate determined on the basis of their average income and variable according to the category of the independent worker (Article 168) – for instance, small entrepreneurs contribute at a higher rate than independent workers in agriculture. As regards 'quasi-subordinate' workers, there is a contribution of both contractors but at a lower rate than the rate of the contribution in the general system for subordinate workers and their employers. Finally, the beneficiary of 80 % or more of the activity of an independent worker is also responsible for a small contribution to the social security system, despite the qualification of the worker as an independent worker (Article 168 of the CRCSS).

As to the social security benefits attached to this system, the major difference lies in the fact that, unlike subordinate workers, independent workers are not

⁶²³ Article 8 of the Companies Act (*Código das Sociedades Comerciais*) approved by Decree-Law No. 262/86 of 2 September 2006; and Article 1714 of the Civil Code.

protected against involuntary unemployment. In contrast, social benefits attached to sickness, including professional illnesses, invalidity and old-age pensions, survival pension, and maternity and paternity are granted (Article 141 of the CRCSS). Healthcare is granted to all persons under the National Health Care System. In general, these schemes are mandatory.

Assisting spouses and life partners of independent workers are integrated in the scheme of their partner on a mandatory basis.⁶²⁴

10. Article 8 – Maternity benefits

National legislation grants maternity and paternity benefits to independent workers, not exactly by according the right to maternity or paternity leaves (since they do not have an employer as such) but by granting the right to social security allowances related to maternity, paternity and parental leaves. These issues are dealt with by Law No. 91/2009, of 9 April 2009, in a similar way for subordinate workers and for self-employed persons.

The amount of maternity allowance is calculated on the same basis for subordinate and independent workers, i.e. by taking into account the salary/average income of the worker and corresponding to an average of 100 % of the average income of the worker – in this sense, the amount of the allowance is in accordance with the requirements of Article 8 No. 3 of the Directive. Since the social security scheme of these workers is mandatory, the allowance is also granted on a mandatory basis.

The problem regarding this allowance comes from the fact that Portugal has not formally transposed Directive 2010/41. In fact, Article 40(b) of Law No. 91/2009, grants to self-employed persons the right to maternity, paternity or parental allowances 'during the period in which the worker remains unfit to work' and Article 42 states that the allowance is incompatible with professional activity – in other words, as regards maternity, the minimum period of 14 weeks of time off established by Article 8 No. 1 of the Directive is not formally forbidden but it is also not specifically addressed by national law.

Under these circumstances, but also due to the fact that self-employment is seldom compatible with long absences from work, independent workers tend to take advantage of the time off and of the corresponding allowances for much shorter periods than subordinate workers.

There are no specific provisions concerning assisting spouses or life partners with respect to time off on the grounds of maternity and inherent allowances.

11. Article 9 – Defence of rights

Article 6 of Law No. 3/2011 grants the victims of discriminatory practices in the access to and development of self-employment access to justice for the purpose of damage compensation.

Article 8 of the same Law also grants the same right to organisations acting in defence of non-discrimination in the access to and development of self-employment or subordinate employment, on behalf of the victim and under two conditions: the existence of an explicit representation of the victim of the discrimination (under this piece of legislation, these organisations cannot intervene in their own name as claimants); and the establishment of such a competence in the by-laws of the organizations. The organizations mentioned in this provision include gender equality bodies.

In Portugal, the main (and public) equality body in the area of employment is the Commission for Equality in Labour and Employment (*Comissão para a Igualdade no Trabalho e no Emprego*; CITE) may act as a forum for conciliation since it has the power to adopt non-binding decisions with respect to

⁶²⁴ Article 133 of the CRCSS, No. 1(c) and Article 134 No. 1(a) and (b).

discriminatory practices in employment. Nevertheless, this body has traditionally been much more active in the area of (subordinate) employment than as regards self-employment.

12. Article 10 – Compensation or reparation

Article 6 of Law No. 3/2011 grants the right to damage compensation, for material and immaterial damages caused by discriminatory practices, in the access to and development of self-employment. The provisions applicable to calculate the compensation are set by the Civil Code.⁶²⁵

In the Civil Code, there is no mention of an upper limit of the damage compensation, but specifically as regards immaterial damages, the Code establishes that only 'serious' damages are to be compensated (Article 496 of the CC). The Courts tend to interpret this provision in a strict sense, but since Article 7 of Law No. 3/2011 establishes the reversal of the burden of the proof, when a discriminatory practice is at stake, it will be up to the opposing party to prove that the damage was not serious, so the strictness of the provision of the Civil Code as regards immaterial damages can in fact be limited.

In addition to damage compensation, the Law declares the discriminatory act null and void.⁶²⁶

13. Article 11 – Equality bodies

Despite the absence of a formal transposition of Directive 2010/41 into national legislation, in Portugal the equality body in the area of employment, CITE, is well implemented and has the competence to effectively promote, analyse, monitor and support the equal treatment of self-employed persons by carrying out the activities listed in Article 11 of Directive 2010/41.

The CITE works directly under the Government. However, this fact does not prevent this body from acting as an independent body, because of its tripartite structure and way of functioning. The CITE integrates representatives from the Government, but also from the trade unions and from the employers' associations, and carries out most of its activities (including the approval of public opinions and the leading of cases) based on the agreement of all these parties. This means that it does independent work.

However, as indicated above, in practice the CITE's action is much more focused on the area of employment than on the area of self-employment.

14. Article 12 – Gender mainstreaming

There are some examples of mainstreaming of gender equality principles especially for the public sector, related to the Gender Equality Plans that are approved by the Government every two or three years. However, these Plans apply to the public sector and correspond with a recommendation, the implementation of which is not mandatory, so their level of effectiveness is hard to assess. Self-employed persons can benefit from these Plans if they are engaged in public procurement.

15. Article 13 – Dissemination of information

The expert has no information on this topic.

⁶²⁵ Articles 227, 483 and 798 of the Civil Code, depending on the ground of the claim for damages.

⁶²⁶ Article 6 No. 2 of Law No. 3/2011.

16. Article 14 – Level of protection

The level of protection provided in Portugal is lower than that required by the Directive as regards assisting spouses (Article 2(b) of the Directive), since they are not protected as a separate category for the purposes of access to and development of self-employment, but only for the purposes of social security protection, and also as regards the minimum period of time off on the ground of maternity (Article 8(1) of the Directive), due the lack of clarity of the national provisions regarding the possible duration of such time off.

17. Case law

The expert is not aware of national case law in this area.

18. Issues regarding the ‘duty holder’

In Portuguese legislation, at least for the purposes of discrimination in the access to and development of self-employment, there are no doubts regarding who is the duty holder of the obligations. According to Law No. 3/2011, the duty holder is the counterparty in the service contract that involves self-employment or the beneficiary of such a service. In this respect, the perspective of Law No. 3/2011 on this issue (which, as described above in Section 6 of this report, is more focused on the rights of the independent worker vis-à-vis the counterparties of his/her work and the duties of the counterparty vis-à-vis the independent contractor) makes things easier.

In contrast, as regards the creation of a business and also as regards maternity rights, the recognition of a duty holder is much more complicated, since these situations are outside the scope of Law No. 3/2011.

19. National statistics

National statistics as regards self-employment are difficult to find and unreliable, since self-employment is a concept covering very different situations that are not easy to identify under the general terms of ‘employment’ or ‘unemployment’ used by official statistics.

The expert therefore has no valid information on this topic.

20. Any other issues?

There are no other issues to be mentioned.

ROMANIA – *Iustina Ionescu*

1. Context

There is no specific research available on self-employed persons in Romania. Therefore, no assessment can be made of the problems that self-employed persons (in particular women) are confronted with.

Data show that men are predominant among self-employed workers, while women are predominant among spouses of self-employed workers. Not until April 2013 did the Government extend the Gender Equality Law to also cover self-employed workers and their spouses. Moreover, only in January 2014 the law actually introduced the concept of spouses of self-employed workers and extended the possibility of taking out insurances for social protection to registered spouses.

2. Transposition of the Directive

The Gender Equality Law has transposed Directive 2010/41 in Romania.⁶²⁷ The law was amended for this purpose by Government Emergency Ordinance No. 83/2012,⁶²⁸ approved with amendments by Law No.115/2013.⁶²⁹ In particular, the above-mentioned amendment expanded the scope of the Gender Equality Law to establishment, equipment or extension of a business or the launching or extension of any other form of self-employed activity, to also cover self-employed workers and their spouses who work with them but are not paid.

In addition, Law 4/2014 transposed Article 2 of Directive 2010/41 by establishing rights for the spouse of the self-employed person who works with that person without being employed.⁶³⁰

Romania did not extend the time for implementation of Directive 2010/41, as provided for in Article 16(2).

3. Article 1 – Subject matter

The transposition of Directives 2006/54⁶³¹ and 2010/41 was effected in one single law, the Gender Equality Law. Therefore, all definitions and provisions applicable to the area covered by Directive 2006/54 apply to the area covered by Directive 2010/41. In fact, the only amendments to the Gender Equality Law introduced to transpose Directive 2010/41 were to expand the scope of this law. The other definitions and provisions have remained unchanged.

4. Article 2 – Scope

There is no definition of ‘self-employed worker’ in the Gender Equality Law or in other pieces of legislation in Romania. Article 7(2) of the Gender Equality Law simply lists self-employed workers among the subjects covered by the law, without giving other details.

However, ‘self-employed work’ is defined only in the Tax Code (*Codul Fiscal*) as any activity that is not a dependent activity (employment relationship) and is carried out regularly by a person.⁶³² The Code enumerates categories of income that are subject to tax as income from self-employed work: commercial activities, including providing services and practising a profession, freelance activities (such as medical professions, lawyers, notaries, financial auditors, tax consultants,

⁶²⁷ Law 202/2002 on equal opportunities and equal treatment between women and men (*Legea 202/2002 privind egalitatea de șanse și tratament între femei și bărbați*), republished in Official Journal No. 326 of 5 June 2013, transposing Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC OJ L 180 of 15 July 2010, pp. 1-6.

⁶²⁸ Government Emergency Ordinance 83/2012 for the amendment of Law 202/2002 on equal opportunities and equal treatment between women and men (*Ordonanța de Urgență nr. 83 din 4 decembrie 2012 pentru modificarea și completarea Legii nr. 202/2002 privind egalitatea de șanse și de tratament între femei și bărbați*), published in Official Journal No. 839 of 13 December 2012.

⁶²⁹ Law 113/2013 on the approval of the Government Emergency Ordinance 83/2012 for the amendment of the Law 202/2002 on equal opportunities and equal treatment between women and men (*Lege nr. 113 din 24 aprilie 2013 privind aprobarea Ordonanței de urgență a Guvernului nr. 83/2012 pentru modificarea și completarea Legii nr. 202/2002 privind egalitatea de șanse și de tratament între femei și bărbați*), published in Official Journal No. 240 of 25 April 2013.

⁶³⁰ Law 4/2014 on the amendment of the Government Emergency Ordinance 44/2008 on the carrying out of economic activities by authorised individuals, individual firms and family businesses (*Legea 4/2014 de completare a Ordonanței de Urgență 44/2008 privind desfășurarea activităților economice de către persoanele fizice autorizate, întreprinderile individuale și întreprinderile familiale*).

⁶³¹ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) OJ L 204 of 26 July 2006, pp. 23-36.

⁶³² Law 571/2003 regarding Tax Code (*Legea 571/2003 privind Codul fiscal*), amended, Article 7, published in Official Journal No. 927 of 23 December 2003.

expert accountants, authorised accountants, brokers, architects, and other professions regulated by law carried out independently), and intellectual activities that generate intellectual property.⁶³³ The norms for the application of the Tax Code define 'self-employed work' as an activity that is carried out regularly, on an independent basis, and is for profit.⁶³⁴ According to the norms, the criteria that define self-employed work are: the freedom to choose the activity that is carried out and to establish the work programme and the workplace; the risk implied for the freelancer; the activity is carried out for several clients; and the activity can be carried out not only directly by the self-employed worker, but also by the employees hired by him according to the law.⁶³⁵ Given this broad definition of self-employed work, we believe there is no risk for some people like 'small entrepreneurs' or 'business persons' not to be covered.

Agricultural workers are treated separately by the Tax Code:⁶³⁶ agricultural work, including forestry and fishing, is not included in the category of self-employed work. Nevertheless, the rights and benefits in the field of pregnancy and maternity apply similarly as they do to the rest of the self-employed workers (see Section 10 below).

National legislation in Romania does not recognise life partners. The provisions transposing Directive 2010/41 are limited to spouses of self-employed workers.⁶³⁷

5. Article 3 – Definitions

All four definitions in this Article have been correctly transposed into national law. The Gender Equality Law draws a distinction between 'direct' and 'indirect' discrimination by including separate definitions for each of these two notions⁶³⁸ and enumerating them in the list of forms of discrimination on the ground of sex forbidden by law.⁶³⁹ The Gender Equality Law draws a distinction between 'harassment' and 'sexual harassment' by including separate definitions for each of these two notions⁶⁴⁰ and enumerating them in the list of forms of discrimination on the ground of sex forbidden by law.⁶⁴¹ We are not aware of any difficulties caused by this legal distinction.

6. Article 4 – Principle of equal treatment

Article 4(1) has been transposed by Article 2(1) of the Gender Equality Law, amended by Government Emergency Ordinance 83/2012. The previous version of Article 2(1) did not have any explicit reference to self-employed activity. However, the newly introduced text follows the wording from repealed Directive 86/613/EEC: '[t]he measures to promote equal opportunities and equal treatment between women and men and for the elimination of all forms of discrimination on the ground of sex apply ... with respect to the establishment, equipment or

⁶³³ Law 571/2003 regarding Tax Code (*Legea 571/2003 privind Codul fiscal*), amended, Article 46, published in Official Journal No. 927 of 23 December 2003.

⁶³⁴ Government Decision 44/2004 regarding the Norms for the application of Law 571/2003 regarding the Tax Code (*Normelor metodologice de aplicare a Legii nr. 571/2003 privind Codul fiscal, aprobate prin Hotărârea Guvernului nr. 44/2004*), published in Official Journal No.112 of 6 February 2004.

⁶³⁵ Government Decision 44/2004 regarding the Norms for the application of the Law 571/2003 regarding the Tax Code (*Normelor metodologice de aplicare a Legii nr. 571/2003 privind Codul fiscal, aprobate prin Hotărârea Guvernului nr. 44/2004*), published in Official Journal No.112 of 6 February 2004.

⁶³⁶ Law 571/2003 regarding the Tax Code (*Legea 571/2003 privind Codul fiscal*), amended, Chapter 7, published in Official Journal No. 927 of 23 December 2003.

⁶³⁷ Law 202/2002, Article 7(2).

⁶³⁸ Law 202/2002, Article 4(a) and (b).

⁶³⁹ Law 202/2002, Article 4(g).

⁶⁴⁰ Law 202/2002, Article 4(c) and (d).

⁶⁴¹ Law 202/2002, Article 4(g).

extension of business or the launching or extension of any other form of self-employed activity.⁶⁴²

We are not aware of any way in which this implementation has added to the protection for self-employed persons in the access to self-employment, as set out in Article 14(1)(a) of Directive 2006/54.

7. Article 5 – Positive action

We are not aware of any positive action taken by the State to ensure full equality in practice between men and women in working life.

8. Article 6 – Establishment of a company

There has been no explicit transposition of Article 5 of repealed Directive 86/613/EEC. The legal provisions regarding the establishment of a company did not have discriminatory provisions against spouses or family members.⁶⁴³

We are not aware of any problems in practice for spouses or life partners in establishing a company. There are no statistics publicly available on how many such companies have been established between spouses, only on the number of family businesses (which may involve other members of the family). According to the available statistics, the number of family businesses has dropped drastically since 2004 (164 236) up to 2012 (16 979).⁶⁴⁴

Romania does not recognise life partners. The Civil Code that entered into force on 1 October 2011 stipulates that family is based only on a marriage concluded between a man and a woman.⁶⁴⁵ Other forms of cohabitation are forbidden or not recognised according to Article 277 of the Civil Code: same-sex marriage is forbidden and, same-sex marriage and any form of civil partnership lawfully concluded abroad are not recognised in Romania.⁶⁴⁶

9. Article 7 – Social protection

There is a system for social protection for self-employed workers. By registering as an authorised individual (PFA), individual enterprise or family business, as an authorised professional (e.g. lawyer, accountant) or by declaring the income in another category of self-employed person (e.g. writer, inventor), the self-employed person is automatically registered as tax payer and contributor to social insurance and health insurance public funds. The contributions are calculated on the basis of the amount of income earned per year. The self-employed workers who pay their contributions will benefit of social protection covering public pensions and healthcare. Self-employed workers may also conclude an insurance contract to cover unemployment.⁶⁴⁷

There is only one general system of social protection: the public social protection system. Lawyers have their private system of social protection

⁶⁴² Law 202/2002, Article 2(1).a

⁶⁴³ Government Emergency Ordinance 44/2008 on the carrying out of economic activities by authorised individuals, individual enterprises and family businesses (*Ordonanța de Urgență 44/2008 privind desfășurarea activităților economice de către persoanele fizice autorizate, întreprinderile individuale și întreprinderile familiale*), published in Official Journal No. 328 of 25 April 2008. Law 31/1990 on companies (*Legea 31/1990 privind societățile comerciale*), published in Official Journal No. 1.066 of 17 November 2004.

⁶⁴⁴ Institutul National de Statistică, TEMPO-Online Database, available at <https://statistici.insse.ro/shop/>, accessed 21 July 2014.

⁶⁴⁵ Law 287/2009 on the Civil Code (*Legea 287/2009 privind Codul Civil*), Article 258, republished in Official Journal No. 505 of 15 July 2011.

⁶⁴⁶ Law 287/2009 on the Civil Code (*Legea 287/2009 privind Codul Civil*), Article 277, republished in Official Journal No. 505 of 15 July 2011.

⁶⁴⁷ Law 76/2002 on the insurance system for unemployment and stimulating employment (*Legea 76/2002 privind sistemul asigurărilor pentru șomaj și stimularea ocupării forței de muncă*), Articles 20 and 22, published in Official Journal No. 103 of 6 February 2002.

covering pensions and maternity benefits. The public social protection system and the lawyers' private social protection system are mandatory. Self-employed persons who prefer to contract private pensions or private health insurance can only choose to do so as additional insurance and the relevant contributions cannot be deducted from their income.

In January 2014, an amendment to the law regulating the economic activities of authorised individuals, individual firms and family businesses established that the spouse of the self-employed person who works with that person without being employed has the right to conclude insurance contracts for public pension, public healthcare and unemployment support, similar to every tax payer that earns an income.⁶⁴⁸ This insurance system is voluntary for spouses. Nevertheless, self-employed persons are obliged to register a spouse who works with him/her without being employed.⁶⁴⁹

The public pension scheme and the public health insurance scheme are mandatory for self-employed persons, but not for their spouses.

10. Article 8 – Maternity benefits

Self-employed workers and their spouses that are registered as spouses that work with them without being employed are eligible for maternity benefits similar to any other employee if they have paid a contribution covering at least one month to the public health insurance fund in the previous twelve months.⁶⁵⁰ The total duration of maternity leave is 126 days, of which 42 days after giving birth are mandatory for the woman.⁶⁵¹ The criterion used for the maternity allowance is the one from Article 8(3)(a) of Directive 2010/41. The allowance is 85 % calculated on the basis of the average income of that person in the last six months. This average income is capped at 12 minimum salaries per month established at the national level. The minimum salary per month as of 1 September 2014 was EUR 209 (RON 900).⁶⁵²

There is no consolidated system of services supplying temporary replacements or existing national social services available as an alternative or part of the allowance, in accordance with Article 8(4) of Directive 2010/41. In 2012, the total number of children reported to attend nurseries was 18 388 compared to a total of 1 036 065 children in the 0-4 age group living in Romania on 1 January 2012.⁶⁵³

⁶⁴⁸ Law 4/2014 on the amendment of Government Emergency Ordinance 44/2008 on the carrying out of economic activities by authorised individuals, individual firms and family businesses (*Legea 4/2014 de completare a Ordonanței de Urgență 44/2008 privind desfășurarea activităților economice de către persoanele fizice autorizate, întreprinderile individuale și întreprinderile familiale*), Article 1.3.

⁶⁴⁹ Law 4/2014 on the amendment of Government Emergency Ordinance 44/2008 on the carrying out of economic activities by authorised individuals, individual firms and family businesses (*Legea 4/2014 de completare a Ordonanței de Urgență 44/2008 privind desfășurarea activităților economice de către persoanele fizice autorizate, întreprinderile individuale și întreprinderile familiale*), Article 1.2.

⁶⁵⁰ Emergency Ordinance No. 158/2005 on health insurance leaves and allowances (*Ordonanța de Urgență nr. 158 din 17 noiembrie 2005 privind concediile și indemnizațiile de asigurări sociale de sănătate*), Articles 2.(1) and 7, published in Official Journal No. 1.074 of 29 November 2005.

⁶⁵¹ Emergency Ordinance No. 158/2005 on health insurance leaves and allowances (*Ordonanța de Urgență nr. 158 din 17 noiembrie 2005 privind concediile și indemnizațiile de asigurări sociale de sănătate*), Article 24, published in Official Journal No. 1.074 of 29 November 2005.

⁶⁵² Emergency Ordinance No. 158/2005 on health insurance leaves and allowances (*Ordonanța de Urgență nr. 158 din 17 noiembrie 2005 privind concediile și indemnizațiile de asigurări sociale de sănătate*), Articles 10 and 25, published in Official Journal No. 1.074 of 29 November 2005.

⁶⁵³ Institutul National de Statistică, TEMPO-Online Database, available at <https://statistici.insse.ro/shop/>, accessed 21 July 2014.

11. Article 9 – Defence of rights

The self-employed and their spouses may submit an administrative complaint for discrimination on the ground of sex to the national equality body⁶⁵⁴ or a civil action for damages to a civil court.⁶⁵⁵ The administrative sanctions vary from EUR 680 (RON 3 000) to EUR 22 720 (RON 100 000). In practice, administrative fines awarded by the *Consiliul Național pentru Combaterea Discriminării* (National Council for Combating Discrimination (CNCD)) are closer to the minimum range.

Administrative complaints and court actions against sex discrimination are tax exempted. Recently, an amendment to the Gender Equality Law has limited the possibility of alleged victims to be represented or assisted by trade unions or non-governmental organisations to administrative procedures only, and not court proceedings, which is in breach of Article 9(2) of Directive 2010/41.⁶⁵⁶ Moreover, trade unions and NGOs may act only in support of a victim, but not in their own name as claimant. This situation is limited to cases of discrimination on the ground of sex that are regulated by a special law (Gender Equality Law); the Anti-Discrimination Law prescribes that all groups exposed to discrimination may benefit from NGO support in both administrative procedures and court proceedings and NGOs may act in their own name in cases of discrimination affecting a group of persons or a community.⁶⁵⁷

Romanian legislation does not allow equality bodies to act in representation. The National Council for Combating Discrimination that deals with cases of discrimination on all grounds, including sex, has the mandate to initiate mediation and functions as a quasi-judicial body with the power to adopt binding decisions. The Department for Equal Opportunities between Women and Men, which is a department within the Ministry of Labour, Family, Social Protection and the Elderly, does not have the power to represent victims in cases of discrimination on the ground of sex or handle complaints of discrimination on the ground of sex. They can only forward the complaint to the National Council for Combating Discrimination or other competent authorities.⁶⁵⁸

12. Article 10 – Compensation or reparation

Every person that alleges having been discriminated against on the ground of sex may initiate an action for material and/or moral (immaterial) damages in a civil court.⁶⁵⁹ There are no prior upper limits established by law. However, there are no official guidelines for calculating moral damages. In practice, civil-law compensations for moral damages, when awarded by courts for violations of the principle of equality, are very low in the Romanian justice system, rendering the mechanism ineffective.

13. Article 11 – Equality bodies

Neither the National Council for Combating Discrimination nor the Department for Equal Opportunities between Women and Men could provide information about any cases of discrimination on the ground of sex against a self-employed person or his/her spouse, or any studies, analyses, statistics, policies or measures in the field of equal treatment of self-employed persons.⁶⁶⁰

⁶⁵⁴ Gender Equality Law, Article 31. Government Ordinance 137/2000 regarding preventing and sanctioning all forms of discrimination (*Ordonanta Guvernului nr. 137/2000 privind prevenirea si sanctionarea tuturor formelor de discriminare*), Article 20(1), republished in Official Journal No. 166 of 7 March 2014 (hereafter 'Anti-Discrimination Law').

⁶⁵⁵ Gender Equality Law, Article 31. Anti-Discrimination Law, Article 27(1).

⁶⁵⁶ Gender Equality Law, Article 35(2).

⁶⁵⁷ Anti-Discrimination Law, Article 28.

⁶⁵⁸ Gender Equality Law, Article 23(2).

⁶⁵⁹ Gender Equality Law, Article 31.

⁶⁶⁰ E-mail reply of CNCD of 24 June 2014. E-mail reply of DEOWM of 23 June 2014.

The National Council for Combating Discrimination is an independent body according to the law, but the appointment process of the members of the Steering Committee of the CNCD is strongly political and not all members have the required expertise required by law. The Department for Equal Opportunities between Women and Men is not independent, since it is a department within the Ministry of Labour, Family, Social Protection and the Elderly.

14. Article 12 – Gender mainstreaming

Neither the National Council for Combating Discrimination nor the Department for Equal Opportunities between Women and Men could provide information about any examples of policies or measures of gender mainstreaming in the last four years.⁶⁶¹

15. Article 13 – Dissemination of information

The National Council for Combating Discrimination has not carried out any activities of dissemination of information as required by Article 13 of Directive 2010/41.⁶⁶² The Department for Equal Opportunities between Women and Men reported disseminating information about the amendments of the Gender Equality Law after this having been republished in the Official Journal in June 2013. The dissemination of information targeted the general public by publishing the new text on the Ministry of Labour’s website and by reaching out to the equal opportunities commissions at the local level and NGOs through direct communication, seminars and meetings.⁶⁶³ The fact that the National Council for Combating Discrimination reports not having handled any cases of discrimination on the ground of sex involving a self-employed person or his/her spouse may indicate that the information did not effectively reach the persons concerned.⁶⁶⁴

16. Article 14 – Level of protection

Maternity leave is longer (126 days) than the minimum provided in Article 8 of the Directive.⁶⁶⁵

17. Case law

The National Council for Combating Discrimination reports not having handled any cases of discrimination on the ground of sex involving a self-employed person or his/her spouse.⁶⁶⁶

18. Issues regarding the ‘duty holder’

Domestic legislation does not clarify who the duty holder is in cases of discrimination on the ground of sex against self-employed persons or their spouses; this will be identified on a case-by-case basis.

⁶⁶¹ E-mail reply of CNCD of 24 June 2014. E-mail reply of DEOWM of 23 June 2014.

⁶⁶² E-mail reply of CNCD of 24 June 2014.

⁶⁶³ E-mail reply of DEOWM of 23 June 2014.

⁶⁶⁴ E-mail reply of CNCD of 24 June 2014.

⁶⁶⁵ Emergency Ordinance No.96/2003 of 14 October 2003 regarding the protection of maternity at the workplace (*Ordonanța de Urgență nr.96/2003 din 14 octombrie 2003 privind protecția maternității la locurile de muncă*) Article 2.(g), published in Official Journal No.750 of 27 October 2003.

⁶⁶⁶ E-mail reply of CNCD of 24 June 2014.

19. National statistics

According to the study *Employment and Social Developments in Europe in 2013*, in 2012, the total percentage of self-employed persons in Romania from total employment was 32.5, with women representing 32.4 and men representing 32.6.⁶⁶⁷ This figure remained relatively constant in the last eight years, oscillating between 30.5 and 34.2.⁶⁶⁸ The same report indicates that in 2012 the number of female employees was approximately one million lower than that of men (4 108 000 compared to 5 090 000). Therefore, the number of self-employed women is also significantly lower than that of men.

The gender disparities are obvious in the statistics reported by the National Institute of Statistics for the year 2013: a total number of 1 728 359 self-employed workers, out of which 1 226 038 are men and only 502 321 are women, of a total of 9 247 397 working persons (5 127 697 men and 4 119 701 women).⁶⁶⁹ At the same time, the total number of self-employed workers appears to be significantly smaller than the one reported in the study mentioned in the paragraph above. In addition, out of the total number of 1 132 416 unpaid workers helping a self-employed member of their family, 779 595 are women and 352 822 are men.⁶⁷⁰

The definition of a 'self-employed person' used to compile national statistics in Romania refers to the persons who work in their own firm or individual business, without hiring any employee, or being helped by unpaid family members (such as vendors, tutors, babysitters, hauliers, individual taxi drivers, etc.), freelancers (such as music artists, lawyers), day workers, commercial workers who have rented a business and do not have employees, and agricultural labourers who work individually or in association.⁶⁷¹ By 'unpaid worker helping a self-employed member of their family', national statistics refer to persons who work in the family business run by a family member for which they do not receive any payment in cash or in kind. Agricultural activities taking place in the rural household are an example of such a family business.⁶⁷²

Romanian legislation includes no definition of 'self-employed worker' used for other legal purposes, only a definition of 'self-employed work' (see Section 5 above). There is a difference between the two definitions in the sense that self-employed workers who hire employees are not covered by the national statistics, whereas they are covered by the definition of the Tax Code.

20. Any other issues?

There are no other issues to report.

⁶⁶⁷ Eurostat, *Employment and Social Developments in Europe in 2013*, available at: <http://ec.europa.eu/social/main.jsp?langId=en&catId=113&newsId=2023&furtherNews=yes>, p. 452, accessed 21 July 2014.

⁶⁶⁸ Eurostat, *Employment and Social Developments in Europe in 2013*, available at: <http://ec.europa.eu/social/main.jsp?langId=en&catId=113&newsId=2023&furtherNews=yes>, p. 452, accessed 21 July 2014.

⁶⁶⁹ Institutul National de Statistică, TEMPO-Online Database, available at <https://statistici.insse.ro/shop/>, accessed 21 July 2014.

⁶⁷⁰ Institutul National de Statistică, TEMPO-Online Database, available at <https://statistici.insse.ro/shop/>, accessed 21 July 2014.

⁶⁷¹ Institutul National de Statistică, TEMPO-Online Database, available at <https://statistici.insse.ro/shop/>, accessed 21 July 2014.

⁶⁷² Institutul National de Statistică, TEMPO-Online Database, available at <https://statistici.insse.ro/shop/>, accessed 21 July 2014.

SLOVAKIA – Zuzana Magurová

1. Context

The concept of absolute employment under which all persons were obliged to work was applied in Slovakia during the totalitarian regime. This was the reason why the regulation of self-employment and the tradition of creating small family business only started after the economic and social transition following 1989.

A special Act regulating only the issues of self-employed persons does not exist in Slovakia. The term ‘self-employed person’ has been regulated by several Acts which however stipulated different definitions of the term. The definition of this term was unified in 2011.⁶⁷³

2. Transposition of the Directive

According to Tables of Concordance⁶⁷⁴ the Directive has been implemented by several special laws: Act No. 461/2003 Coll. On Social Insurance, as amended; Act No. 311/2001 Coll. Labour Code, as amended; Act No. 5/2004 Coll. on Employment Services, as amended; Act No. 365/2004 Coll. the Anti-Discrimination Act, as amended; Act No. 571/2009 Coll. on Parental Contribution; and Act No. 43/2004 Coll. on Old-Age Pension Savings, as amended.

Slovakia did not extend the time for implementation, as provided in Article 16(2).

3. Article 1 – Subject matter

There have been no problems in Slovakia with overlap of the coverage of this Directive with Directives 2006/54,⁶⁷⁵ 79/7⁶⁷⁶ and 2004/113.⁶⁷⁷

4. Article 2 – Scope

The definition of self-employed person in national law meets the requirement of Article 2(a), which refers to performance of work by a person on his/her own account.

The basic definition of self-employed person (so-called SZČO) is contained in the Act on Social Insurance. With effect from 1 July 2014, an SZČO is defined as a natural person who has reached the age of 18, and who derives income from a business or other self-employed occupation in the calendar year that is decisive for the payment or duration of mandatory sickness insurance and mandatory old-age insurance of an SZČO. For the status of an SZČO it is therefore relevant whether a person earns a taxable income, rather than whether such person is registered with the tax office (as it was before).

According to the Act on Employment Services, self-employed activity also means:

⁶⁷³ By amendments to Act No. 461/2003 Coll. on Social Insurance (*Zákon o sociálnom poistení*), Act No. 5/2004 Coll. on Employment Services (*Zákon o službách zamestnanosti*), Act No. 43/2004 Coll. Act on Old-Age Pension Savings (*Zákon o dôchodkovom sporení*) and to Act No. 571/2009 Coll. on Parental Contribution (*Zákon o rodičovskom príspevku*).

⁶⁷⁴ These tables show the articles of Acts transposing individual articles of the Directive.

⁶⁷⁵ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) OJ L 204 of 26 July 2006, pp. 23-36.

⁶⁷⁶ Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security OJ L 6 of 10 January 1979, pp. 24-25.

⁶⁷⁷ Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services OJ L 373 of 21 December 2004, pp. 37-43.

- (i) trade operated independently, systematically, in his/her own name, on his/her own responsibility, for profit-making purposes and under conditions laid down by the Small Businesses Act;
- (ii) activity performed under special regulations – so-called freelance occupations, e.g. activities of lawyers or notaries public; and
- (iii) activity of a natural person, who carries out fee-charged mediation of employment, who executes the activities of an agency for temporary employment and who executes the activities of an agency for supported employment according to the Act on Employment Services.

Also, a natural person who produces agricultural products and is registered can be defined as a self-employed person. The agricultural sector is not treated differently and all self-employed persons are considered to be part of the same category.

No surveys have been conducted on the issue of helping spouse or life partner of self-employed persons, there are no reports or plans on gender equality and the labour market that deal with this issue, and there are no sufficient data available.

The national law does not contain specific regulations concerning a spouse or life partner of a self-employed person. The definition of 'co-operating person' (contributing partner)⁶⁷⁸ as a spouse who participates in the activities of a self-employed person was included in the previous Act on Social Insurance, which was abolished by the current Act on Social Insurance in 2003. This new Act lacks any regulation concerning contributing partners. Only what could be considered as an assisting spouse can be found in Article 11(1) of the Small Businesses Act, which states that the deputy responsible for performing the trading activities of the trader must be in an employment relationship, unless this responsible person is the trader's spouse. However, this type of engagement in trader's activities is not explicitly called a cooperative partnership, and the statutory social insurance does not recognise such concept either.

According to current legislation there is practically no legal definition of a helping spouse and no legal/social protection for such persons, and issues relating to their social protection are not resolved in a satisfactory manner, so the Slovak legislation transposing the Directive does not meet the prescribed criteria.

5. Article 3 – Definitions

The Anti-Discrimination Act⁶⁷⁹ as a general Act on equal treatment in public and private relationships and protection against discrimination regulates direct discrimination, indirect discrimination, harassment and sexual harassment.

The definition of direct discrimination is almost identical to the definition taken from the Directive. Direct discrimination is defined not only as an action but also an omission that causes one person to be treated less favourably than another is or has been treated in a comparable situation. The definition of indirect discrimination is almost identical to the definition contained in the Directive.

The definition of harassment is not fully compatible with the Directive, but in some aspects goes beyond the requirements of the Directive and may guarantee a higher level of protection against harassment than the Directive. In addition to covering the intention or consequence of a violation of an individual's dignity, it permits an actual or potential intervention in a person's freedom. As the Anti-Discrimination Act does not define this freedom in detail, it can be widely interpreted as personal freedom, freedom of religious belief, conviction, speech and movement. Unlike the Directive, the definition of harassment in the Anti-

⁶⁷⁸ This had significant impact in terms of voluntary social insurance which a co-operating member could opt for if his or her self-employed partner is insured.

⁶⁷⁹ Act No. 365/2004 Coll. on Equal Treatment in Certain Areas and on Protection against Discrimination and on amendment of certain Acts (Antidiscrimination Act), as amended.

Discrimination Act does not contain any direct reference to the ground on which the harassment is prohibited. However, from the logical and systematic interpretation it is clear that the prohibition of harassment is relevant only on the grounds as defined in the recital of the Anti-Discrimination Act. The definition of sexual harassment (provided in the Anti-Discrimination Act of 1 April 2008) is not fully compatible with the definitions contained in the directives. It does not include an explicit reference to unwanted conduct. From the interpretation of the definition it is also clear that potential violation of an individual's dignity should be assessed individually and independently from whether an intimidating, hostile, degrading, humiliating or offensive environment has been created. The definition of sexual harassment requires a cumulative fulfilment of the condition of actual or potential violation of an individual's dignity and the creation of an intimidating, hostile, degrading, humiliating or offensive environment without indicating the difference between these two requirements. This means that the definition is restrictive compared to the definition contained in the Directive.

6. Article 4 – Principle of equal treatment

In all of the abovementioned Acts that contain a definition of a self-employed person, the principle of equal treatment is established, in accordance with the concept of equal treatment as expressed in the Anti-Discrimination Act. In conformity with the principle of equal treatment, any discrimination is prohibited also on the grounds of marital and family status.

7. Article 5 – Positive action

From 1 April 2008, repeated attempts have been made to introduce positive action (literally 'temporary balancing measure', as translated from Slovak) into the Anti-Discrimination Act. During the adoption process, Parliament refused to include temporary balancing measures on the grounds of sex and ethnic or racial origin. Instead it replaced these grounds by 'social and economic disadvantage'. The amendment to the Anti-Discrimination Act adopted in 2013 extended the grounds on which certain persons may be discriminated: not only on the ground of age and disability, but also on the ground of their racial or ethnic origin, membership of an ethnic minority, gender and sex.

In its annual report,⁶⁸⁰ the Centre for Human Rights (Centre), which is the national equality body, criticises the fact that in 2013 temporary balancing measures were hardly implemented in practice by state authorities, but especially by private persons. The report does not contain information about any temporary balancing measure taken on the ground of sex. It proves that the effectiveness of the law is almost zero.

8. Article 6 – Establishment of a company

There are no limitations contained in the Commercial Code that would prevent or restrict setting up a commercial company between spouses or life partners. Statistics on companies founded by spouses or life partners are not publicly available.

9. Article 7 – Social protection

The system of social protection comprises social insurance and a pension savings system, state social support for families, social assistance and health insurance.

⁶⁸⁰ *Report on the observance of human rights including the observance of the principle of equal treatment in the Slovak Republic* available at <http://www.snslp.sk>, accessed 21 July 2014 (only in Slovak).

Social insurance consists of a mandatory public insurance component (based on mandatory contributions and defined benefits) governed by the Act on Social Insurance,⁶⁸¹ a mandatory or voluntary savings component governed by the Act on Old-Age Pension Savings,⁶⁸² and a voluntary private savings component, which is a supplementary component governed by the Act on Additional Pension Savings. Health insurance is not included in the scope of social insurance. Having health insurance is mandatory for all self-employed persons.

Mandatory insured for sickness and pension insurance is self-employed person, whose income from business and other gainful occupation, in the previous year was more than 12 times the tax base (more than 12 times of 50 % of the average yearly wage for a full-time job). This means that since 1 July 2014, and continuing from that date for a further 12 months, it refers to those self-employed persons whose gross taxable incomes in 2013 amounted to more than EUR 4 830.

The social protection of self-employed persons differs slightly from the social protection of employees. Legislation does not differentiate between social security for the self-employed with and without employees. A difference exists in the insurance of employment injuries, occupational diseases and sickness insurance. The self-employed are not, and cannot be, insured against employment injuries, nor occupational diseases, because these kinds of insurance only apply to employees, whose contributions are fully covered by the employer. In the case of sickness insurance, eligibility for sickness benefits for the self-employed worker is conditional upon the payment of insurance contributions over the previous 270 days in the two years before the onset of the incapacity. Employees do not have such a pre-condition.

The spouses or life partners of self-employed persons, not being their employees or partners in the business, are not protected under the social security scheme for self-employed persons. They are, however, allowed to join the social security scheme voluntarily. The precondition is that the person is voluntarily insured for sickness and pensions at the same time.

As regards the decrease in the labour force employed in industrial production by sex: 40 000 women and 57 000 men lost their jobs during the period from 2008 to 2010, i. e. during the crisis.

More men than women registered their unemployment. In 2008 and 2009, the number of unemployed men increased by 27 % (as compared to a 13.5 % increase of the number of unemployed women). The lower representation of women among the unemployed may be caused by their exclusion from the unemployment protection system due to interrupted career paths and the compulsory number of days present in the social insurance scheme, or the related use of maternity and parental leave. It would also partially explain the lower number of women receiving unemployment benefits. The amount of benefits derived from previous wages is much lower for women.

⁶⁸¹ According to the Act on Social Insurance, the scope of social insurance covers five independent sub-schemes: sickness insurance (which is designed to protect people from remaining without any income or at a considerably lower income during times of sickness, pregnancy or maternity); pension insurance (old-age insurance – designated to secure income for old-age pensioners and in case of death, and disability insurance – designated to secure income for people who cannot find employment because of their disability), injury insurance (which covers risk of health damage or death caused by a work-related accident or a work-related disease), guarantee insurance (which covers the risk of insolvency (bankruptcy) of the employer in order to pay the wages to the employees and the compulsory contributions of the employer for the contributory pensions fund) and unemployment insurance (designed to secure an income for eligible workers who become unemployed).

⁶⁸² Act No. 43/2004 Coll. Act on Old-age Pension Savings, as amended.

10. Article 8 – Maternity benefits

Self-employed mothers are not entitled to maternity leave or parental leave, unlike employed mothers. Maternity or parental leave is an excused absence from work provided by the employer to the employee, as results from the Labour Code. As a self-employed person does not have an employer, she has nobody to give her time off work. Women who are self-employed or voluntary contributors cannot claim equalisation benefits since redeployment to another job is meaningless outside the context of corporate labour law.

However, they are entitled to maternity allowance, which are benefits of the sickness insurance provided for the reason of pregnancy or childcare. The entitlement to maternity allowance applies not only to female employees, but to each insured person, i. e. also to self-employed women who:

- (i) satisfy the criteria for eligibility for maternity allowance;
- (ii) satisfy the criteria for payment of maternity allowance; and
- (iii) exercise their right to maternity allowance by submitting the request to the respective branch of the Social Insurance Agency.

The criteria for eligibility for maternity allowance are that: 1. the self-employed person has the mandatory sickness insurance; and 2. has no debts in respect of insurance contributions. A person who is pregnant or takes care of a child must have sickness insurance at the time that the reason for provision of maternity allowance arises, and this insurance must have existed at least 270 days in the last two years before the birth of the child.

For self-employed persons, another criterion applied to the assessment of their eligibility for maternity allowance is the absence of debts in respect of social insurance contributions for the period of the last 5 years. Arrears not exceeding the amount of EUR 5 are tolerated.

Maternity allowance is paid for seven days a week and is generally 65 % of the daily assessment basis (with a monthly ceiling corresponding to 1.5 times the national average wage). The maternity allowance meets the requirement of sufficiency in Article 8(3) subparagraph (a).

A mother who does not pay sickness insurance contributions, mandatorily or voluntarily, or whose debt in respect of social insurance contributions for the last 5 years exceeded the amount of EUR 5 is not entitled to maternity benefits. In this case she can apply for parental benefits – state social benefits paid by the Office of Labour, Social Affairs and Family. The State pays the eligible person contributions that are to ensure the proper care of a child until the age of three (or six for a child with a long-term unfavourable health condition). Since January 2014 the amount of monthly benefits has been EUR 203.20; a parent of twins will receive EUR 254 per month and a parent of triplets EUR 304.80 per month.

Self-employed persons are not subject to any other limitations of business/amount of income during the period of entitlement to maternity allowance. They can receive the allowance and carry out their business activity at the same time without being forced to suspend their trading licence. Moreover, a self-employed person who is mandatorily insured against the contingency of sickness is not obliged to pay sickness insurance contributions during the time she receives maternity allowance.

Similarly, a person mandatorily registered in the old-age pension scheme is not obliged to pay old-age pension contributions. The State pays contributions to the pension insurance scheme and the reserve solidarity fund on behalf of this person until the last day of the period during which she receives maternity allowance.

Temporary replacement or services are not available.

11. Article 9 – Defence of rights

Disputes concerning violations of the principle of equal treatment, including gender discrimination, are covered particularly by the Anti-Discrimination Act⁶⁸³ (as a special regulation), and by the Civil Procedure Code (as a general regulation on civil proceedings).⁶⁸⁴ Victims of discrimination have the right to sue the perpetrator (legal entity or natural person, private or public body) and request them to refrain from such conduct and, where possible, rectify the illegal situation or provide adequate satisfaction.

Victims of discrimination may be supported and also represented in court by the Slovak National Centre for Human Rights (the Centre), which is the equality body, or by an organisation which has protection against discrimination as its aim.⁶⁸⁵ The Centre and NGOs cannot provide adequate and efficient representation of the victims however, because they can represent them only before regular courts (in first and second instance), but not before the Supreme Court or the Constitutional Court.

In cases of discrimination which affect a larger or non-specified number of people or otherwise threaten the public interest, such an organisation, or the Centre, can initiate a case in its own name. The Centre can also be involved in the process of mediation and has the power to adopt non-binding opinions.

Self-employed persons with and without employees are organised in the Slovak Craft Industry Federation (*Slovenský živnostenský zväz, SZZ*). They are not organised in any trade union organisation. Membership of SZZ is voluntary. SZZ is involved in the national tripartite social dialogue and the usual topic concerning self-employed workers is the setting of the national minimum wage level, which is a calculation base for the contributions of self-employed persons to mandatory social insurance funds.

12. Article 10 – Compensation or reparation

According to the Anti-Discrimination Act anyone who considers themselves a victim of discrimination has the right to take the perpetrator (natural person or legal entity, public or private body) to court and request them to refrain from such conduct and, where possible, rectify the illegal situation or provide adequate satisfaction. If the satisfaction is insufficient, generally if the violation of the principle of equal treatment has considerably impaired the dignity, social status or social achievement of the victim, they may also claim financial compensation for non-pecuniary damage. The amount of this financial compensation is determined by the court, which must take into account the seriousness of the non-pecuniary damage and all underlying circumstances. Material damages resulting from such treatment may also be claimed. In practice, compensation that would be perceived by victims as satisfactory and that would dissuade actual or potential discriminators from further discrimination is not guaranteed. Another obstacle is judicial fees. The claimant is supposed to pay 3 % of any sum claimed as non-pecuniary compensation (at all stages of the proceedings). This means that the higher the amount that is claimed as non-pecuniary damages, the higher the judicial fee.

⁶⁸³ Act No. 365/2004 Coll. on Equal Treatment in Certain Areas and on Protection Against Discrimination and on amendment of certain Acts (Antidiscrimination Act), as amended.

⁶⁸⁴ Act No. 99/1963 Coll. on the Code of Civil Procedure.

⁶⁸⁵ There are only few NGOs in Slovakia which provide legal assistance to victims of discrimination. One of them is the Centre for Civil and Human Rights (Poradňa) which deals mainly with cases of discrimination against Roma. Another is Citizen, Democracy and Accountability (OaDZ), which focuses on gender-related discrimination.

13. Article 11 – Equality bodies

The Slovak National Centre for Human Rights (Centre) as an independent legal entity is a specialised national institution that promotes the observance of the principle of equal treatment and develops its activities in combating discrimination. It was established in 1994 and its tasks were extended in accordance with the Anti-Discrimination Act in 2004, when it started to fulfil the functions of an equality body. The functioning of the Centre in the last three years was criticised not only by human rights NGOs but also by the Government Council for Human Rights, National Minorities and Gender Equality.⁶⁸⁶

The Centre is currently unable to fully ensure the real and effective fulfilment of functions in the areas of support and assurance of equal treatment and protection of human rights. It does not have a special division on gender equality with sufficient funding and gender equality experts.

The Centre publishes an annual report on the observance of human rights including the observance of the principle of equal treatment (the Report).⁶⁸⁷ No section of this Report presently deals with the issue of self-employed women, spouses or life partners of self-employed persons. So the Centre does not effectively promote, analyse, monitor and support the equal treatment of self-employed persons by carrying out the activities listed in Article 11 Paragraph (2)(a)-(d) of the Directive.

14. Article 12 – Gender mainstreaming

Statistics and some studies⁶⁸⁸ have shown that fewer women are employed and conduct a business in the long term. This is caused among others things by the failure to apply the gender mainstreaming obligations. There are no examples of good practices of the implementation of gender mainstreaming in practice as regards self-employed women.

15. Article 13 – Dissemination of information

Only a few studies, mostly by non-governmental organisations, have analysed the position of women on the labour market in recent years. And few of them have dealt with the issue of self-employment of women. There is no available information about measures adopted by the Government or Ministry of Labour to bring the Directive to the public's attention.

16. Article 14 – Level of protection

The level of protection provided in Slovakia is not greater than that required by the Directive.

⁶⁸⁶ In June 2011 the Analytical Report on the Activities of the Centre noted, among other deficiencies, that the Centre did not have sufficient capacity in the area of equal treatment and only very few cases of discrimination had been brought to the courts by the Centre, none of which had been successfully resolved. The suggestion was to transform the Centre into an Equality Body and transfer its competences in the area of human rights to the Public Defender of Rights (the Ombudsman). Due to the fall of the former Government, the transformation of the Centre was postponed. See: <http://www.rokovania.sk/File.aspx/ViewDocumentHtml/Mater-Dokum-133077?prefixFile=m>, accessed 21 July 2014.

⁶⁸⁷ The Centre publishes an annual report on the observance of human rights in Slovakia and also a report on the observance of the rights of the child; www.snsip.sk, accessed 18 September 2013.

⁶⁸⁸ See: Institute for Labour and Family Research, *Vybrané aspekty podnikania žien: Základné štatistické trendy podnikania žien (The selected aspects of women's entrepreneurship: The basic statistical trends women's entrepreneurship)*. Available at http://www.sspr.gov.sk/IVPR/images/IVPR/vyskum/2009/Barosova/Vybrane_aspekty.pdf, accessed 31 October 2014, and *Výsledky štatistického monitoringu podnikania mužov a žien (The findings of the statistical monitoring concerning of the women's and men's entrepreneurship)*, available at <http://www.sspr.gov.sk/IVPR/images/pdf/bulletin-4-2010.pdf>, accessed 31 October 2014.

17. Case law

No judgments concerning the violation of the principle of equal treatment in self-employment are available.

18. Issues regarding the ‘duty holder’

As self-employed persons enter into commercial relations they are not protected by the provisions of the Labour Code. They may use the provisions of the Commercial Code,⁶⁸⁹ the Small Businesses Act,⁶⁹⁰ and the general Anti-Discrimination Act. But in practice, when the duty holder is the user of their services the protection of self-employed persons against discrimination on the ground of sex is very problematic. This is despite the obligation to respect the principle of equality imposed on ‘everybody’ by the Anti-Discrimination Act.⁶⁹¹ It is also possible for the duty holder to be the Trades Licensing Office.

19. National statistics

The basic source of gender statistics in Slovakia is the Statistical Office of the Slovak Republic,⁶⁹² which has published a section devoted to gender equality on its website since 2010 and every year issues a publication entitled *Gender Equality*.⁶⁹³ The term ‘self-employment’ in the Labour Force Survey (LFS) terminology covers a wide range of self-employed persons such as entrepreneurs, traders, free-lancers, self-employed farmers, and so on.⁶⁹⁴

According to the study conducted by the Institute for Labour and Family Research from the year 2012, the number of self-employed persons in Slovakia has gradually increased from 10.9 % (221 879 persons) in 2004 to 15.2 % (339 426 persons) at the end of 2011, which represents an increase of 53 % during the period under review.

Based on the labour force survey, self-employed persons are persons working in their own business (traders with employees), on their own account (traders without employees) and helping (unpaid) members of trader households who do not receive any wage or remuneration for their work.

20. Any other issues?

According to the authors of a 2012 study,⁶⁹⁵ data in the category of traders without employees prove that work performed under trade licence in some cases

⁶⁸⁹ Act No. 513/1991 Coll. Commercial Code.

⁶⁹⁰ Act No. 455/1991 Coll. on Licensed Trades (Small Business Act) states in Section 5 that the rights provided for under this Act are guaranteed equally to all persons in conformity with the principle of equal treatment in employment and similar legal relationships. In conformity with the principle of equal treatment, any discrimination is prohibited also on the grounds of marital and family status.

⁶⁹¹ According to the Anti-Discrimination Act (Section 3/1) the statutory obligation to observe the principle of equal treatment in the field of employment and similar legal relations, social security, and healthcare, the provision of goods and services and education applies to ‘everybody’.

⁶⁹² The Statistical Office is purely specialised in the provision of data, because it is not allocated funds and experts required for the implementation of in-depth scientific analyses.

⁶⁹³ See <http://portal.statistics.sk/showdoc.do?docid=59033>.

⁶⁹⁴ The source of information about the labour market, including the employment of women, is the results of the Labour Force Sample Survey (LFS), which has been conducted by the Statistical Office since the beginning of 1993, and from 2003 the survey has been fully harmonised under the regulations and guidelines of the EU.

⁶⁹⁵ P. Bellan & A. Oľšovská *Flexibilné formy zamestnania v rámci EÚ – možnosti a riziká ich uplatnenia v Slovenskej republike (The flexible forms of employment in the EU – possibilities and risks of their implementation in Slovakia)* Inštitút pre výskum práce a rodiny, Bratislava, IVPR, 2012 at p. 56. Available at http://www.sspr.gov.sk/IVPR/images/IVPR/vyskum/2012/Bellan/2157_olsovska_bellan.pdf, accessed 31 October 2014.

'masks' the employment relationship and *de facto* has the character of paid employment, usually called 'forced trade'.

Based on data from the labour force survey, the number of traders without employees whose work, according to their subjective evaluation, meets the characteristics of paid employment, has continuously increased from 58 816 to 81 030 persons from the beginning of 2010 to the end of 2011, which represents an increase of 38 % in the period under review. As for the structure of the category of self-employed persons (with special stress on the category of traders without employees) as compared to that of employees, the data from the labour force survey show that a majority of these self-employed persons are men, especially in the construction industry and in positions of qualified workers and craftsmen.

SLOVENIA – Tanja Koderman Sever

1. Context

In Slovenia self-employment is important in the labour market. In the years since independence the number of independent entrepreneurs (SP)⁶⁹⁶ has increased. According to the first labour force data in 1993, the rate of self-employment was 12 % of all persons in employment. After an initial increase, the share of self-employed slightly decreased until 2009. The rate of self-employed persons went back up in the following two years. In 2011, 12.2 % of those in employment in Slovenia were self-employed. The growing number of self-employed persons increased due to the measures of the Employment Service of Slovenia to promote self-employment and due to the new recruitment methods by employers who prefer to hire independent entrepreneurs rather than entering into employment relationships with workers. The latter recruitment method enables employers to quickly terminate the cooperation with the self-employed persons without any obligations regarding breaks, leaves, vocational training, etc. The share of self-employed persons in 2013 was 12.2 %.⁶⁹⁷

2. Transposition of the Directive

Directive 2010/41⁶⁹⁸ has been transposed by the Act Implementing the Principle of Equal Treatment (hereafter the AIPET),⁶⁹⁹ the Companies Act (hereafter the CA),⁷⁰⁰ the Institutes Act (hereafter the IA),⁷⁰¹ the Pension and Invalidity Insurance Act (hereafter the PIIA),⁷⁰² the Healthcare and Health Insurance Act (hereafter the HCHIA),⁷⁰³ the Prevention of Undeclared Work and Employment Act (hereafter the PUWEA),⁷⁰⁴ Parental Care and Family Benefits Act (hereafter the PCFBA),⁷⁰⁵ Labour and Social Courts Act (hereafter the LSCA),⁷⁰⁶ and the

⁶⁹⁶ The abbreviation SP refers to a sole proprietor.

⁶⁹⁷ Statistics available at: http://www.stat.si/novica_prikazi.aspx?id=4375, accessed 27 October 2014.

⁶⁹⁸ Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC OJ L 180 of 15 July 2010, pp. 1-6.

⁶⁹⁹ Act Implementing the Principle of Equal Treatment, Official Gazette of the Republic of Slovenia, No. 61/2007.

⁷⁰⁰ Companies Act, Official Gazette of the Republic of Slovenia, No. 65/2009.

⁷⁰¹ Institutes Act, Official Gazette of the Republic of Slovenia, Nos 12/1991, 17/91, 5/92, 13/93, 66/93, 45/94, 8/96, 31/00 and 36/00.

⁷⁰² Pension and Invalidity Insurance Act, Official Gazette of the Republic of Slovenia, Nos 96/2012 and 39/2013.

⁷⁰³ Healthcare and Health Insurance Act, Official Gazette of the Republic of Slovenia, Nos [72/06](#), [114/06](#), [91/07](#), [76/08](#), [62/10](#), [87/11](#), [40/12](#), [21/13](#), [91/13](#), [99/13](#), [99/13](#) and [111/13](#).

⁷⁰⁴ Prevention of Undeclared Work and Employment Act, Official Gazette of the Republic of Slovenia Nos [36/2000](#), [118/2006](#), [12/2007](#), [29/2010](#), [57/2012](#) and [32/2014](#).

⁷⁰⁵ Parental Care and Family Benefits Act, Official Gazette of the Republic of Slovenia, No. 26/2014.

Administrative Dispute Act (hereafter the ADA).⁷⁰⁷ Self-employed persons are directly protected by Article 2 of the AIPET as regards access to self-employment. In addition, there are general provisions in the AIPET prohibiting discrimination in any area of social life, provisions on ensuring legal protection in cases of violations of the ban on discrimination and compensation for loss or damages suffered. The CA and the IA are neutral as regards gender and therefore provide equal opportunities for women and men in relation to the establishment, equipment or extension of a business or the launching or extension of any other form of self-employed activity. In the social security area, self-employed persons are covered by mandatory social security schemes (the health insurance scheme, the pension and invalidity insurance scheme, the parental protection insurance scheme and the employment insurance scheme). The PUWEA prohibits undeclared employment.

Slovenia extended on 17 June 2012 the time for implementation, as provided for in Article 16(2) of Directive 2010/41, until 5 August 2014.

3. Article 1 – Subject matter

There have been no problems with overlap of the coverage of Directive 2010/41 with Directives 2006/54,⁷⁰⁸ 79/7,⁷⁰⁹ and 2004/113.⁷¹⁰

4. Article 2 – Scope

Article 2(a) has been transposed by including definitions of 'self-employed workers' in various laws. Each law defines a notion for its own purpose. Definitions are similar, but not uniform. According to the PIIA 'self-employed workers' are those persons who independently pursue a gainful or any other permitted activity.⁷¹¹ Furthermore the HSWA⁷¹² defines 'self-employed workers' as persons performing a gainful or other activity as their only or main occupation and who do not employ other workers or involve other persons in the work process; and persons insured as farmers in accordance with the pension and disability insurance regulations who do not employ workers or involve other persons in the work process other than family members on farms in accordance with regulations governing agriculture.

All self-employed workers are considered to be part of the same category and are covered.

The agricultural sector is treated differently. According to Article 17 of the PIIA, farmers shall be insured under compulsory insurance, provided that upon entry of application for insurance they are in a good state of health which allows them to pursue the agricultural activity, are not attending regular schooling, are not entitled to an old-age pension, widow's or widower's pension or invalidity pension and have a minimum income from a farm holding per each insured member of such holding equal to the amount of 60 % of the average monthly salary in the Republic of Slovenia. Furthermore, Article 6 of the PCFBA provides for mandatory parental care insurance for persons engaged in an independent

⁷⁰⁶ Labour and Social Courts Act, Official Gazette of the Republic of Slovenia, No. 2/04.

⁷⁰⁷ Administrative Dispute Act, Official Gazette of the Republic of Slovenia, Nos [105/06](#), [107/09](#), [62/10](#), [98/11](#) and [109/12](#).

⁷⁰⁸ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) OJ L 204 of 26 July 2006, pp. 23-36.

⁷⁰⁹ Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security OJ L 6 of 10 January 1979, pp. 24-25.

⁷¹⁰ Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services OJ L 373 of 21 December 2004, pp. 37-43.

⁷¹¹ Article 15 of the PIIA.

⁷¹² Article 55 of the HSWA.

agricultural activity in the Republic of Slovenia as their sole or principal occupation and are already included in the mandatory pension and disability insurance scheme. And according to Article 15 of the HCHIA, farmers and members of their households who are engaged in an independent agricultural activity in the Republic of Slovenia as their sole or principal occupation are insured under compulsory health insurance.

Regarding help provided by spouses or life partners of self-employed workers the PUWEA is relevant. According to the PUWEA, help provided by spouses or life partners is recognised as undeclared work, with the exception of short-term work. Short-term work includes unpaid work in a micro-company, a private institute, or with an entrepreneur with a maximum of 10 employees if carried out by a spouse or a life partner of the entrepreneur, provided that the work does not exceed 40 hours per month. If the work of a spouse or a life partner exceeds this upper limit and their partner or spouse fails to conclude an employment contract or a civil-law contract with them and also fails to register them for a health, pension and disability insurance, a fine shall be imposed on the relevant legal entity or entrepreneur for a minor offence by the labour inspectorate.

Slovene legislation is gender neutral and does not distinguish between various forms of partnerships. According to Article 12 of the Law on Marriage and Family Relations, a long-term life partnership of a man and a woman who have not concluded a marriage, shall have the same legal consequences for them as if they had concluded marriage.⁷¹³ Life partners in a same-sex civil partnership are covered if they have registered as each other's civil partners before the competent authority.

5. Article 3 – Definitions

All four definitions from Article 3 of Directive 2010/41 have been correctly transposed into Slovene national law. There is a distinction between direct and indirect discrimination. According to the ERA and the AIPET direct discrimination occurs when a person has been, is or could be treated less favourably than another person in an equal or comparable situation on the ground of his/her personal circumstances. Indirect discrimination occurs when an apparently neutral provision, criterion or practice in equal or comparable situations and under similar conditions put, puts or might put a person with certain personal circumstances in a less favourable position compared to other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

A distinction between harassment and sexual harassment has been drawn in the ERA and the Regulation on Measures to Protect the Dignity of Employees in Public Administration (hereinafter the RMPDEPA),⁷¹⁴ and has not caused any difficulties. According to Article 7 of the ERA and Article 2 of the RMPDEPA, sexual harassment is any form of undesired verbal, non-verbal or physical action or behaviour of a sexual nature with the effect or purpose of adversely affecting the dignity of a person, especially where this involves the creation of an intimidating, hostile, degrading, humiliating or offensive environment. And harassment is defined as any unwanted conduct associated with any personal circumstance with the purpose or effect of violating the dignity of a person or of creating an intimidating, hostile, degrading, humiliating or offensive environment.

6. Article 4 – Principle of equal treatment

Article 3 of Directive 2010/41 has been correctly transposed. According to the AIPET, equal treatment shall be ensured irrespective of sex, nationality, racial or

⁷¹³ Law on Marriage and Family Relations, Official Gazette of the Republic of Slovenia, No. 69/2004.

⁷¹⁴ Regulation on Measures to Protect the Dignity of Employees in Public Administration, Official Gazette of the Republic of Slovenia No. 36/2009.

ethnic origin, religious or other belief, disability, age, sexual orientation or other personal circumstance in relation to self-employment.⁷¹⁵ According to the AIPET equal treatment means the absence of direct or indirect discrimination and harassment.

Implementation has not been modified as compared to Article 4 of the repealed Directive 86/613/EEC. Neither has this implementation added to the protection for self-employed persons in access to self-employment, as set out in Article 14(1)(a) of Directive 2006/54.

7. Article 5 – Positive action

Slovenia has not taken advantage of the possibility to take positive action.

8. Article 6 – Establishment of a company

Conditions for the establishment of a company between spouses are not more restrictive than the conditions for the formation of a company between unmarried persons. There have been no problems in practice for spouses or life partners in establishing a company. In addition, there are no statistics on how many such companies have been established.

Regarding Article 6 of Directive 86/613/EEC,⁷¹⁶ which extends coverage to life partners, amendments to the PIIA are relevant: Article 25 of the PIIA provides for voluntary membership in the mandatory pension and invalidity insurance for persons with permanent residence in the Republic of Slovenia who have reached the age of 15 and are not already included in the mandatory pension and invalidity insurance.

9. Article 7 – Social protection

Slovenia extended the time for implementation of Article 7 until 5 August 2014. However, Slovenia does not have a special system for social protection for self-employed workers. There is only one system of social protection. Self-employed persons are covered by the mandatory social security schemes (the health insurance scheme, the pension and invalidity insurance scheme, the parental protection insurance scheme and the employment insurance scheme). Self-employed persons are granted the rights under these compulsory insurances on the basis of payment of contributions.

Spouses and life partners can be covered by mandatory social security schemes if they are employed by their spouses or partners and if they pay contributions for mandatory insurances. If this is not the case and if they are not already included in the mandatory pension and invalidity insurance scheme and health insurance scheme, they can only voluntarily join the mandatory pension and invalidity insurance scheme and health insurance scheme.

10. Article 8 – Maternity benefits

According to the PPFBA, pregnancy and maternity rights apply equally to all insured persons, regardless of the form of employment.⁷¹⁷ In order to have these rights the relevant persons need to take out insurance before the day of commencement of the individual type of parental leave. If they are no longer

⁷¹⁵ Articles 2, 4 and 5 of the AIPET.

⁷¹⁶ 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 of 19 December 1986, pp. 56-58.

⁷¹⁷ Article 8 of the PCFBA.

insured but were previously insured for at least twelve months in the past three years prior to exercising the right to parental benefits, they are entitled to parental benefits as well.⁷¹⁸ Their spouses or life partners can benefit from these rights only if they are employed by their spouses or partners and if they pay contributions for mandatory insurance for parental protection.

However, they can benefit from family benefits. The relevant family benefits are parental allowance, which is a financial aid to parents who are not entitled to parental benefits after the birth of a child. The right to parental allowance is granted to a mother for 77 days after the birth of a child if the mother and her child have permanent residence in the Republic of Slovenia and currently live in Slovenia. After 77 days the parental allowance is granted *mutatis mutandis* and on the same conditions, to one of the parents, according to their written agreement. The right to parental allowance shall last for 365 days after the birth of the child. This allowance meets the requirement of sufficiency in Article 8(3) of Directive 2010/41 according to subparagraph (c) if it is granted to a spouse or a life partner of a self-employed person after 77 days of receiving a parental allowance. Unfortunately this is not the case if a self-employed person decides to take parental leave to take care of the child and starts receiving parental benefits after 77 days. In the latter case the requirement of sufficiency is not met.

Female self-employed workers, and female spouses or life partners have no access to any other existing services supplying temporary replacements or to any other existing national services.

11. Article 9 – Defence of rights

Article 9 of Directive 2010/41 has been implemented by Article 22 of the AIPET, Articles 5 and 7 of the LSCA and Articles 1, 2, and 4 of the ADA.

According to the AIPET all persons who consider themselves wronged by the failure to apply to them the principle of equal treatment can pursue their claims by judicial proceedings before the competent civil court according to the general rules of civil law. In addition to civil courts there are specialised labour tribunals and the Administrative Court. Labour tribunals have jurisdiction to decide in individual disputes (concerning the conclusion, existence, duration and cessation of employment relations; concerning rights, obligations and responsibilities arising from the employment relationship between employees and employers or their legal successors etc.) and social tribunals which have jurisdiction in social disputes (concerning rights to and deriving from pension and disability insurance; concerning payment of contributions for compulsory pension and disability insurance; concerning voluntary inclusion in compulsory pension and disability insurance and payment of contributions for this insurance, concerning rights to and deriving from compulsory health insurance and payment of contributions for this insurance; concerning rights to and deriving from compulsory unemployment insurance and payment of contributions for this insurance; concerning rights to and deriving from insurance for parental protection and payment of contributions for this insurance; concerning social security benefits; concerning compensation for damages caused by an official state body or holder of public authority to an insured person or claimant to social security, or damages an insured person has caused to an institution in connection with insurance relations, or in connection with exercising rights under social security etc.). The Administrative Court has jurisdiction to decide in administrative disputes in accordance with the methods and procedures set out in the ADA. Among other things, this Court rules on the legality of final administrative acts that interfere with the legal position of the claimant and adjudicates on the legality of individual acts and actions that interfere with the human rights and fundamental freedoms of an individual, unless a different form of due process has been guaranteed.

⁷¹⁸ Article 41 of the PCFBA.

Access to the courts is only ensured for alleged victims of discrimination. Interest groups, other legal entities and the equality body are excluded. They may assist the claimant in the proceedings.

The Slovene equality body is the Advocate for the Principle of Equality (hereafter the Advocate) who hears cases of alleged discrimination and works within the Service for Equal Opportunities in the Ministry of Labour, Family and Social Affairs. The opinion of the Advocate contains a recommendation to the offender on ways to eliminate the violation, its causes and consequences. Through such informal intervention, the Advocate tries to eliminate the violation and provides help to improve future practice. If an issue cannot be resolved in this way, the Advocate may ask inspection authorities to prosecute the minor offences and to impose fines. He or she issues non-binding opinions.

12. Article 10 – Compensation or reparation

Remedies and sanctions in Slovenia are effective, proportionate and dissuasive. Sanctions depend on why the case has been taken to court. A person who has suffered loss or harm may claim damages for material loss and damages for immaterial loss arising from unlawful acts, actions or omissions pursuant to the general rules of civil law. Damages are not limited as to their amount. In the determination of the compensation for non-pecuniary damage, it must be taken into account that the compensation should be effective and proportional to the damage suffered by the person.

As regards the burden of proof, the AIPET states that if a person in a dispute alleges facts from which it may be presumed that there has been discrimination, it is up to the respondent to prove that there has been no breach of the principle of equal treatment.⁷¹⁹

13. Article 11 – Equality bodies

The Slovene equality body, the Advocate of the Principle of Equality, used to work as a specialised body for prevention and elimination of discrimination within the Office for Equal Opportunities, which was abolished in April 2012. The Advocate is now part of the Ministry of Labour, Family and Social Affairs as one of the employees and is therefore not independent. The Advocate covers all grounds of discrimination. Regarding the extent of his work and taking into consideration the available time and the lack of independence, it is impossible for him to effectively promote, analyse, monitor and support the equal treatment of self-employed persons.

14. Article 12 – Gender mainstreaming

At government level, Slovenia started the activities for gender mainstreaming in 1997 by launching a pilot project, which involved several ministries. In this project, public servants received training on gender equality policy and training aimed at achieving greater comprehension and recognizing the necessity to integrate the principle of gender equality into all policies. Subsequently, similar training was organised also for officials. Slovenia committed itself to gender mainstreaming by adopting the Equal Opportunities for Women and Men Act.⁷²⁰ In 2005 the Resolution on the National Programme for Equal Opportunities for Women and Men (hereinafter the National Programme) was adopted for the 2005 to 2013. The National Programme was a strategic document which defined objectives and measures as well as key policy makers for the promotion of gender equality in different areas of life of women and men. Gender mainstreaming

⁷¹⁹ Article 22 of the AIPET.

⁷²⁰ Equal Opportunities for Women and Men Act, Official Gazette of the Republic of Slovenia, Nos [59/02](#) and [61/07](#).

implies a horizontal approach, taking into account differences in conditions, situations and needs of women and men in all social areas. Consequently, the ministries and government offices and the local self-governing communities design policies and measures that are intended to achieve equal opportunities for women and men. The appointment of coordinators for equal opportunities operating at all ministries and at several local self-governing communities means that the basic condition has been met for mainstreaming gender into all policies and at all levels. However, for the comprehensive and systematic implementation of gender mainstreaming, it is essential to ensure that all actors in the process of designing, planning, implementing, monitoring and supervising policies and programmes are appropriately qualified. Therefore, development of and access to tools and methods are to be ensured, as is true for the qualified skills necessary for their efficient implementation at all levels of policy making and in all areas relevant when it comes to promoting gender equality.

15. Article 13 – Dissemination of information

Nothing significant has been done in order to disseminate information regarding provisions adopted pursuant to Directive 2010/41.

16. Article 14 – Level of protection

The level of protection of the principle of equal treatment between men and women in Slovenia is compliant with Directive 2010/41.

17. Case law

There has not been any relevant case law regarding equal treatment between men and women engaged in an activity in a self- employed capacity.

18. Issues regarding the ‘duty holder’

There are no issues regarding who the duty holder should be. There are some professional chambers and councils for some self-employed professionals, but they do not address this issue since there are no specific provisions on this issue in Slovene legislation. Consequently, this might make the implementation and application of Directive 2010/41 difficult.

19. National statistics

According to the most recent available statistics of the Statistical Office of the Republic of Slovenia, the share of self-employed persons decreased by 2.9 % in 2013 in comparison with the previous year, probably due to the economic crisis, and it now amounts to 12.2 %.⁷²¹ Since 1993, when data collection started, the share of self-employed has slightly increased or decreased, but has remained at around 12 %. 69.4 % of self-employed persons are men and 30.6 % are women.⁷²²

In statistical reports self-employed persons are natural persons performing economic or gainful activity (independent entrepreneurs), own account workers, performing their activity as the only or principal occupation (e.g. lawyers, cultural workers, independent researchers, priests, foster parents, etc.), top-level sportsmen, top-level chess players and farmers.

⁷²¹ Data of the Statistical Office of the Republic of Slovenia, available at: http://www.stat.si/letopis/2013/12_13/12-02-13.html, accessed 21 July 2014.

⁷²² Data of the Statistical Office of the Republic of Slovenia, available at: <http://www.stat.si/doc/statinf/07-si-009-1301.pdf>, accessed 21 July 2014.

According to the above-mentioned statistics the share of unpaid family workers amounts to 3.9 % of persons in employment. The rate of unpaid family workers increased in 2013 to 16.5 %. 64 % of them are women and 36 % are men.

20. Any other issues?

There are no other relevant issues.

SPAIN – María Amparo Ballester Pastor

1. Context

The number of self-employed women in Spain on 31 December 2013 was 652 220, representing 33.9 % of the total self-employed population. The proportion was similar in previous years.⁷²³

Women are under-represented in all categories of self-employment except for family aid. Only 20 % of the self-employed workers in the industry and construction sector were women. Only 25 % of the total number of self-employed who hired workers were women.⁷²⁴ These data confirm that there is segregation in the activities developed by self-employed women and men in Spain. This situation could probably have an effect on salaries since the industry and construction sectors usually pay better salaries than the family aid sector. These data also suggest that the dimension of the companies created by self-employed women is probably smaller than that of the companies created by men, since not many of the self-employed women hire employees.

The proportion of self-employed women in relation to the female workers' population has decreased progressively. In 1993 the percentage of self-employed women in relation to the total of female workers was 23 %. In 2011 it was 9.8 %.⁷²⁵ In 2012, however, the percentage was 10.2 %.⁷²⁶ This could be the consequence of the increase of the unemployment rate due to the economic crisis.

2. Transposition of the Directive

The legislation that regulates the situation of self-employed workers in Spain is the Self-Employed Worker Statute (*Estatuto del Trabajador Autónomo*; SEWS).⁷²⁷ The SEWS preamble makes express reference to Directive 86/613,⁷²⁸ which allows one to presume that this Directive was taken into account in its elaboration. In fact, the non-discrimination obligation on the ground of sex is expressly contained in Articles 4 and 6 of the SEWS.

⁷²³ Data from the Spanish Ministry of Employment and Social Security, available at: http://www.empleo.gob.es/es/sec_trabajo/autonomos/economia-soc/autonomos/estadistica/2013/4trim/Publicacion_RESUMEN_DE_RESULTADOS.pdf, accessed 2 July 2014.

⁷²⁴ Data from the report *Mujeres empresarias en la economía española*, produced by the Spanish Chamber of Commerce in 2007, available at: <http://www.abayanalistas.net/archivos/Mujeres%20Empresarias.pdf>, accessed 3 July 2014.

⁷²⁵ Data from the report *Mujeres empresarias en la economía española*, produced by the Spanish Chamber of Commerce in 2007, available at: <http://www.abayanalistas.net/archivos/Mujeres%20Empresarias.pdf>, accessed 3 July 2014.

⁷²⁶ According to data provided by the European Commission in the report *Employment and Social Developments in Europe 2013*, available at: <http://ec.europa.eu/social/main.jsp?langId=en&catId=113&newsId=2023&furtherNews=yes>, accessed 2 July 2014.

⁷²⁷ Law 20/2007, of 11 July 2007, available at: http://noticias.juridicas.com/base_datos/Laboral/I20-2007.t2.html#a4, accessed 3 July 2014.

⁷²⁸ 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 of 19 December 1986, pp. 56-58.

Article 6 of the SEWS establishes that the provisions of Law 3/2007 for effective equality between men and women (*Ley para la igualdad efectiva entre hombres y mujeres*) shall apply to the right to equality and non-discrimination on the grounds of sex in relation to self-employed workers.⁷²⁹ In fact Article 1 of Law 3/2007 establishes that its objective is to guarantee the right to equal treatment and equal opportunities between women and men whatever their circumstance or condition, in any of the fields of life, which clearly includes self-employed persons as well.

It has to be noted that there is no legislation in Spain that expressly refers to itself as the transposition of Directives 86/613 and 2010/41.⁷³⁰ Spain has not extended the time for implementation, as provided for in Article 16(2), either.

3. Article 1 – Subject matter

There have not been any problems in Spain with overlap of the coverage of Directive 2010/41 with Directives 2006/54,⁷³¹ 79/7,⁷³² and 2004/113.⁷³³

4. Article 2 – Scope

Article 1 of the SEWS defines a self-employed worker as ‘an individual who habitually, personally and directly engages, on his or her own account and outside another person’s organisation or sphere of management, in a business or professional activity for a profit, irrespective of whether or not he or she has any employees’. This definition is the same for any legal purpose.

There are two kinds of self-employed workers in Spain: the ordinary ones (who are called *Autónomos*), and the economically dependent self-employed workers (who are called *Trabajadores Autónomos Económicamente Dependientes* or *TRADE*). According to Article 11 of the SEWS, TRADE are those self-employed workers that obtain from one of their clients at least 75 % of their income. The SEWS recognises the TRADE some rights granted to ordinary workers but they do not have the whole protection provided by labour law to employees. Thus, for example, the contract with a TRADE cannot be terminated by the client without good reason, since if this happened, the TRADE would have the right to a generic compensation of damages. However, the TRADE would not have the right to receive the compensation established in labour law for employees. The concept of TRADE has raised much criticism in Spain, since someone with such a high level of economic dependence from only one client should not be considered as a self-employed person but as an ordinary worker.

The group of agricultural self-employed workers has certain peculiarities in social security protection, but they do not seem to have any direct or indirect discriminatory effect.

The SEWS also applies to family members of the self-employed worker who habitually, personally and directly work with the self-employed person, but are not registered as employees. Such family members would include the spouse and

⁷²⁹ Law 3/2007 of 22 March 2007, available at: http://noticias.juridicas.com/base_datos/Admin/lo3-2007.tp.html#a1, accessed 3 July 2014.

⁷³⁰ Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC OJ L 180 of 15 July 2010, pp. 1-6.

⁷³¹ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) OJ L 204 of 26 July 2006, pp. 23-36.

⁷³² Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security OJ L 6 of 10 January 1979, pp. 24-25.

⁷³³ Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services OJ L 373 of 21 December 2004, pp. 37-43.

relatives in the descending or ascending line, provided they live with the self-employed person. The SEWS makes no reference to unmarried couples, although this kind of partnership has legal standing in other laws, such as recognition of the entitlement to receive a survivor's pension (Article 174 of the General Law of Social Security).⁷³⁴

5. Article 3 – Definitions

The Spanish concepts of direct and indirect discrimination on grounds of sex can be found in Article 6 of Law 3/2007. The Spanish concepts of gender-related harassment and sexual harassment are contained in Article 7 of Law 3/2007. All of them essentially reproduce the same concepts as contained in Directive 2006/54 and in Directive 2010/41. The distinction between 'harassment' and 'sexual harassment' has not caused any difficulties.

6. Article 4 – Principle of equal treatment

It could be considered that Article 4(1) has been correctly transposed in Spain. Article 4(3)(a) of the SEWS establishes the self-employed worker's general right to equality before the law and to non-discrimination on the grounds of sex. More specifically, Article 6 of SEWS establishes the following: 'The public authorities and those who hire the professional activity of self-employed workers are subject to the prohibition of discrimination, both direct and indirect, of those workers, for the reasons outlined in Article 4(3)(a) of this Law. The prohibition of discrimination will affect free economic initiative and recruitment, as well as the conditions for the exercise of professional activities'.

This implementation has not been modified as compared to Article 4 of the repealed Directive 86/613.

7. Article 5 – Positive action

There are several benefits that could be considered positive action since they intend to promote women's self-employment. One of them is the Programme of corporate support for women, funded by the European Social Fund and the Ministry of Equality. It is a programme aimed at women who want to run a business, or who, having already started activities, are looking for support for its implementation and/or consolidation. Most of the services offered by the programme are primarily dedicated to give free advice to self-employed women.⁷³⁵ Some regions have also established benefits for the promotion of female self-employment, including subsidies and access to credits.⁷³⁶

Another positive action measure for self-employed women in Spain is the establishment of discounts for their social security contribution. Before 2012 there was a discount for self-employed mothers returning to work after maternity leave or parental leave based on which she could qualify for a 100 % discount for her monthly contribution to social security during 12 months after return. Although this discount has disappeared there are still two other ones applicable to self-employed women: a) Self-employed workers who during the period of maternity leave, adoption, foster care, parenting, risk during pregnancy or risk during breastfeeding have been replaced in their activity by an unemployed worker are entitled to a discount of 100 % in their monthly contribution to social security. The self-employed worker has the right to a 100 % discount for the social security contribution of the replacement as well. Both discounts are applied only if

⁷³⁴ Royal Legislative Decree 1/1994, of 20 June 1994, available at:

http://noticias.juridicas.com/base_datos/Admin/rdleg1-1994.html, accessed 5 July 2014.

⁷³⁵ See: www.e-empresarias.net, accessed 25 September 2014.

⁷³⁶ For instance, in Andalucía, see: <http://www.juntadeandalucia.es/institutodelamujer/index.php/empleo-y-empresas/actuaciones-dirigidas-a-emprendedoras-y-empresarias>, accessed 5 July 2014.

the self-employed person is replaced, since one of the objectives of this measure is to generate employment, so it has a very limited application; and b) In 2012 a new 50 % discount for self-employed persons' contribution was introduced. It applies to the family members of the self-employed worker who habitually, personally and directly work with the self-employed person if they live with him/her. The discount applies during the first 18 months after the start of the activity of the family member. The purpose of this measure is to encourage the contribution of those family members of the self-employed person, primarily spouses and children, who are currently not registered despite working in the family business due to the economic difficulties that the crisis has caused in many small businesses. However, this benefit has not served to significantly increase the number of collaborating relatives that are registered. This is probably because the benefit has a very limited duration (18 months).

8. Article 6 – Establishment of a company

In Spain the conditions for the establishment of a company between spouses, or between life partners are not more restrictive than the conditions for the establishment of a company between other persons, so Article 5 of the repealed Directive 86/613 did not need to be transposed. For the same reason, Article 6 of Directive 2010/41 did not need transposition either, not even with relation to the inclusion of life partners. There are no reported problems in practice for spouses or life partners in establishing a company. There are no reliable statistics on how many of these family companies have been established, given that there must be a significant number of them in which the spouse is not registered as a self-employed worker in order to diminish the cost of the family social security contribution.

9. Article 7 – Social protection

Self-employed workers are included in the Spanish system of social security. The way in which the contributions are made is quite peculiar since self-employed workers are free to declare the income which will be relevant in determining their monthly contribution. This declared income will determine the amount of future benefits (including pensions). It is quite usual that self-employed declare the minimum wage, so their monthly contribution will be lower, although this means that their future benefits will be lower as well. 85.7 % of the self-employed choose to declare the minimum wage but the majority of the self-employed who choose to declare a higher income are men (75 %).⁷³⁷ The self-employed have the following social security benefits: healthcare (including medical and pharmaceutical coverage), sick leave (which guarantees between 60 and 75 % of the declared previous income), maternity leave, paternity leave and leave due to risk during pregnancy and/or breastfeeding (which guarantees 100 % of the previous declared income), pension due to permanent disability (which guarantees a percentage of the previously declared average income depending on the degree of disability), retirement pension (which guarantees a percentage of the previously declared average income depending on the amount of years of contribution to the system of social security), widow's or widower's pension (which guarantees to the widow or widower – including life partners – of a deceased self-employed a percentage of his/her previously declared average income) and unemployment insurance (only if the self-employed chose to include this voluntary benefit and made the relevant contributions).

There is only one system of social protection for self-employed persons, although some slight peculiarities have been established for agricultural workers

⁷³⁷ Data from the Spanish Ministry of Employment and Social Security, available at: http://www.empleo.gob.es/es/sec_trabajo/autonomos/economia-soc/autonomos/estadistica/2013/4trim/Publicacion_RESUMEN_DE_RESULTADOS.pdf, accessed 4 July 2014.

and for maritime workers. These peculiarities are basically related to organisational and bureaucratic matters.

It is mandatory for spouses and life partners who work in the family business to be included in the social security system as self-employed person and to contribute to it. Only occasional work by spouses or life partners is excluded from the system of social security. In order to encourage the contribution by family members which are currently not registered despite working in the family business, a temporary discount for their social security contribution has been established.

10. Article 8 – Maternity benefits

The maternity benefit for self-employed women is recognised in Spain in the same way as it is recognised for employees (100 % of the previous declared income during 16 weeks). The coverage and contribution are compulsory for self-employed women, but only the first 6 weeks after the birth have to be taken by the mother. The allowance can be considered sufficient, since it would be at least of the same amount that she would receive in the event of a break in her activities on grounds connected with her state of health. However, given that self-employed women usually declare a lower than real income, the maternity allowance hardly serves to replace the loss of the previous income. In fact, self-employed women tend to go back to work immediately after the compulsory six weeks after birth, discarding the rest of the maternity leave. There are no services supplying temporary replacements or other kinds of social services, other than the discounts for the social security contribution if the self-employed woman hires someone to replace her during her maternity leave. Spain has not used the option, as provided for in the last sentence of Article 8(4), to provide for access to those services to be an alternative or part of the allowance.

11. Article 9 – Defence of rights

Article 6 of the SEWS could be considered as the transposition of Article 9 of Directive 2010/41. It establishes the following: 'Any self-employed worker, the associations that represent him/her or the Unions that consider that their fundamental rights have been damaged or that a discriminatory treatment has taken place may seek the protection of the Courts through a brief and preferential judicial procedure'. This brief and preferential judicial procedure is the special one referred in Article 53(2) of the Spanish Constitution for the defence of fundamental rights. Article 6 of the SEWS provides a general and unspecified capability of certain subjects to engage in judicial proceedings regarding gender discrimination: Not only the self-employed victim of gender discrimination may engage in judicial proceedings but Associations and Unions could do so as well. It could be stated that the associations referred to in Article 6 of the SEWS are not only the self-employed associations but the professional chambers as well, since their function is to defend the professional interests of their associates. Associations and Unions may act in support of the victim with his/her approval but it is not sufficiently clear whether they can act in their own name as claimants on behalf of a victim of discrimination, since the defence of diffuse interests are attributed to other entities.

Article 11 of the Law of Civil Procedure (*Ley de Enjuiciamiento Civil*) establishes a quite peculiar capability for certain entities to engage in judicial proceedings in their own name as claimants, when they intend to act in defence of diffuse interests.⁷³⁸ Article 11 of the Law of Civil Procedure states the following: 'When the affected are a plurality of unspecified persons or when they are difficult

⁷³⁸ Law 1/2000 of 7 January 2000, available at: http://noticias.juridicas.com/base_datos/Privado/l1-2000.html, accessed 4 July 2014.

to determine, the legal standing to sue in the defence of these diffuse interests will belong to the public agencies with expertise in this area, to the most representative trade unions and to the national associations whose primary purpose is the equality between women and men, without prejudice, if those affected were certain of their own right to start a judicial procedure'. In this way, Article 11 of the Law of Civil Procedure identifies certain situations in which the concrete victim is difficult to establish (diffuse interest) and it attributes to certain entities (Women's Institute, most representative Unions and National Women's associations) the capability to engage in judicial proceedings in this respect.

Equality bodies (the Women's Institute and other regional public entities) are not mentioned expressly in Article 6 of the SEWS but they have capability to act in judicial proceedings in support of any victim of gender discrimination. They can act in defence of diffuse interests related to gender discrimination as well. Their intervention is not compulsory and they do not have any capability to adopt decisions.

12. Article 10 – Compensation or reparation

In relation to compensation or reparation, Article 6 of the SEWS transposes Article 10 of Directive 2010/4. It establishes the nullity of the discriminatory act and the right to an appropriate compensation for damages. Article 6 of the SEWS stipulates the following: 'Once the Court has declared the existence of the discrimination, it will declare the act null and void, will order the immediate cessation of the conduct and, where appropriate, will order the refitting of the situation at the time previous to occur, as well as the repair of the consequences of the act. The contractual clauses that violate the right to non-discrimination or any fundamental right will be null and void. The Court will integrate the contract in accordance with the provisions of Article 1258 of the Civil Code and it will determine the appropriate compensation for damages'. Article 10 of Law 3/2007 has a similar wording and specifically states that 'the compensation for damages will be real, effective and proportionate to the injury suffered'. Therefore, the compensation for damages in the case of discrimination of the self-employed includes all types of damage (including immaterial damages) and no upper limit is established.

13. Article 11 – Equality bodies

The Spanish Women's Institute has among its functions the promotion, analysis, monitoring and support of the principle of equal treatment between men and women in any aspect of life so it includes the female self-employed as well.⁷³⁹ There is no reason to believe that the Spanish Women's Institute is not properly fulfilling its function in relation to the female self-employed, but it has to be pointed out that it is not independent of the Government, given that its governing bodies are appointed by the Government and are hierarchically dependent.

14. Article 12 – Gender mainstreaming

Examples of the implementation of Article 12 of Directive 2010/41 in Spain are not known.

⁷³⁹ See: <http://www.inmujer.gob.es/elinstituto/conocenos/home.htm>, accessed 5 July 2014.

15. Article 13 – Dissemination of information

Public entities with competence in the protection against discrimination on grounds of gender (the Women's Institute and other similar regional bodies) often disseminate information about programmes for the promotion of female self-employment that includes information about the prohibition of discrimination. The programme of corporate support for women referred to above is an example.

16. Article 14 – Level of protection

The level of protection provided in Spain is not greater than that required by Directive 2010/41.

17. Case law

The only relevant judgment, although now quite old, is the judgment of the Supreme Court of 8 February 2001.⁷⁴⁰ The El Palmar Fishing Community (all of them self-employed) had its own customary laws governing fishing rights in Albufera, a lagoon in Valencia, and only admitted as members the male descendants of fishing captains already members of the Community. The Supreme Court ruled that the exclusion of women constituted sexual discrimination. The judgment had a great impact, and attracted a lot of attention from the media. It has contributed to the elimination of differences between men and women in the access to all kinds of professions.

18. Issues regarding the 'duty holder'

Article 6 of SEWS establishes that the duty holders are the public authorities and those who hire the professional activity of self-employed workers, since they are the ones bound by the principle of non-discrimination. However, not only these subjects are bound by the principle of non-discrimination, since Law 3/2007 applies to any aspect of social life and relates to all kinds of subjects and entities, including professional chambers, educative institutions, mass media, etcetera. As a consequence, all of these entities are duty holders as well in relation to discrimination of self-employed persons on the ground of gender.

19. National statistics

Data on self-employment have been referred to above (see 1. Context above). The definition of self-employed person used in National Statistics is the same as the one used for other legal purposes.

20. Any other issues?

There are no other issues to be mentioned.

SWEDEN – Ann Numhauser-Henning

1. Context

In Sweden self-employed persons and 'helpers' (assisting spouses/partners) are reported as part of general labour-market statistics.⁷⁴¹ Among the economically active group aged 15-74 in the Swedish labour market in 2011 there were

⁷⁴⁰ Judgment no. 93/2001.

⁷⁴¹ The following statistics are taken from *Swedish Statistical Yearbook 2013*, SCB, Stockholm 2014.

4 156 000 employed persons and 485 500 self-employed persons (including helpers); of the self-employed 354 100 were men and 131 400 women. The self-employed therefore amounted to 10.5 % of the economically active, women being 27 %. Most self-employed persons worked in the agricultural sector, followed by construction and wholesale and retail trade. Self-employed women mainly work in services. The group of self-employed persons is made up of individual entrepreneurs (*enskild näringsidkare/firma*) and those in a trading partnership (*handelsbolag*). Immigrants are slightly overrepresented among the self-employed.

Whereas women therefore represent only about a fourth of the self-employed, they account for one third of newly initiated individual businesses. Still, the uneven share of self-employed women is a concern of the Government and since 2007 there have been special programmes to promote women entrepreneurs for 2007-2010 and 2011-2014.

2. Transposition of the Directive

The Swedish implementation has taken a complex form – often by regulation already in place – as reported by the Government in accordance with Article 16(3) of the Directive in Promemoria dated 24 April 2012 of the Labour-Market Department. The main instruments mentioned in the Promemoria are the (2008:567) Discrimination Act, the (2010:110) Social Security Code, the (1980:1102) Act on Trading Partnerships and the (2005:551) Joint-Stock Company Act. The implementation by the 2008 Discrimination Act is rather subtle. The Act is a Single Non-Discrimination Act covering seven grounds of discrimination – among them sex – and ten areas of society. It is truly horizontal in character – definitions are found in Chapter 1 whereas the bans ‘tacitly’ covering all grounds as well as types of discrimination are found in Chapter 2. The Swedish labour market has a binary system where personalised work is concerned – either you are an employee or a self-employed person. The concept of employee is broad in range and covers all dependent work/workers. (Where the concept of employee is concerned, Swedish labour law does not contain any statutory definition – instead, the concept has been developed through a combination of judicial interpretation and indications by the legislator in preparatory works. The courts apply a multi-factor test in a ‘holistic’ and also rather flexible manner.) However, if not covered by the ban on discrimination in working life (of employed persons) the protection of the self-employed proper is ‘divided’ between the bans on discrimination in labour-market policy activities (Chapter 2 Section 9), when starting or running a business and professional recognition (Chapter 2 Section 10), membership of certain organisations (Chapter 2 Section 11), providing goods and services (Chapter 2 Section 12), health (Chapter 2 Section 13) and in social security matters (Chapter 2 Section 14). This is done in a far from transparent way and without ever mentioning the concept of self-employed person. According to the main Swedish commentary on the Discrimination Act⁷⁴² there is reason to doubt that this implementation of EU law is satisfying. As the expert understands, however, this remark would rather refer to the implementation of the Recast Directive than to that of Directive 2010/41.

Sweden did not make use of the possibilities offered by Article 16(2) of the Directive.

3. Article 1 – Subject matter

As described in Section 2 above there is a binary division in the Swedish labour market between employees and self-employed persons, the former group being

⁷⁴² Fransson and Stuber *Diskrimineringslagen, En Kommentar*, Norstedts, Stockholm 2010 p. 298.

very broad in character. There is no risk of people ‘falling in between’.⁷⁴³ The protection against discrimination of the self-employed proper is rather more diffuse, however, as it is covered by a number of discrimination bans in the 2008 Discrimination Act without a clear reference to the self-employed.

4. Article 2 – Scope

Swedish law does not provide a specific definition of a self-employed person – as indicated above in Section 1 they may be individual entrepreneurs or partners in a trading partnership or even owners of a small joint-stock company. The type of self-employed person is important mainly for taxation purposes but also concerning social security – and in contrast with employees (the binary division). There are not necessarily any formalities regarding individual entrepreneurs – anyone having a revenue as a result of an economic activity while not being employed is treated as a self-employed person. For taxations purposes there is a definition of individual entrepreneur (*enskild näringsidkare*) implying ‘economic activities carried out in a professional and independent way’ (*Förvärvsverksamhet som bedrivs yrkesmässigt och självständigt*) (Chapter 13 Section 1 paragraph 1 of the Income Taxation Act (1999:1229)). This is interpreted as requiring activities of some importance carried out on a continuous basis and in relation to several customers/clients. There are no categories of self-employed persons, and the concept is used broadly.

Life partners or co-habitees, *sambor*, are recognised by Swedish law in much the same way as marital spouses and without any formalities. This also goes for same-sex partners. Swedish social security, e.g. the parental leave benefit scheme (but also the pension scheme), is individually based and there is often a guarantee level applying to anybody legally resident regardless of family status.

Summing up, in the Swedish system people are either self-employed or employees (compare above), and this also goes for spouses and cohabitees, i.e. helping spouses are – if not a business partner proper or running a business of their own – considered an employee in the business. (There is therefore no exception or special treatment of family members in this regard. Taxation in Sweden is individual and any person has his/her individual rights to social security, etc.)

5. Article 3 – Definitions

All four definitions in Article 5 have been correctly transposed into Swedish national law through the 2008 Discrimination Act (Chapter 1 Section 4). The definitions are therefore in line with those of the Directive – and this goes for the distinction between direct and indirect discrimination too. The same goes for ‘harassment’ and ‘sexual harassment’, respectively. These latter concepts have not, to the expert’s knowledge, caused any difficulties.

6. Article 4 – Principle of equal treatment

Article 4(1) has, in the expert’s opinion, been correctly transposed by Chapter 2 Section 9 (labour-market policy activities and employment services), 10 (starting or running a business and professional recognition) and 12 (the provision of goods and services) of the Discrimination Act. The same goes for Article 4(2) and (3). No modifications were made as a result of the new Directive. (The 2008 Discrimination Act is a ‘single non-discrimination’ Act which entered into force only in 2009, is truly ‘horizontal’ in character and has therefore implemented EU equality law in its entirety, see above under 2.)

⁷⁴³ Compare Countouris and Freeland ‘Work’, ‘Self-Employment’ and Other Personal Work Relations: Who Should be Protected against Sex Discrimination in Europe’.

7. Article 5 – Positive action

The 2008 Discrimination Act provides for positive action in that it 'does not prevent measures that contribute to efforts to promote equality between women and men' in regard to labour-market policy activities and employment services (Chapter 2 Section 9 Paragraph 2(1)). Nor does it 'prevent measures concerning support that contributes to efforts to promote equality between women and men' in regard to starting or running a business (Chapter 2 Section 10 Paragraph 3). The expert has no specific information, however, about such measures having been put into practice. Special labour-market projects to promote the under-represented sex in certain areas are known to exist, however, and so are special projects on financing for women setting up a business as part of promoting women entrepreneurs (compare the government programmes 'Promoting Women Entrepreneurs'). The expert would imagine that such special initiatives are positive to increase self-employment among women!

8. Article 6 – Establishment of a company

A self-employed person is either an individual carrying out independent activities or a partner to a trading partnership (*handelsbolag*) or even the owner of a small joint-stock company. The setting up of a business as a trading partnership or a joint-stock company is regulated in the (1980:1102) Act on Trading Partnership and Chapter 2 of the (2005:551) Joint-Stock Company Act, respectively. These rules do not contain any restrictions whatsoever with regard to family status. The Directive has therefore not been regarded to require specific implementation in this regard. In 2011 there were 19 698 new individual entrepreneurs, 43 959 new joint-stock companies and 4 650 new trading partnerships.⁷⁴⁴

9. Article 7 – Social protection

First, there is a general ban on (sex) discrimination concerning social security matters including unemployment insurance in 2008 Discrimination Act Chapter 2 Section 14, and another one concerning health and medical services (Chapter 2 Section 13). These bans also (tacitly) cover the self-employed.

The Swedish social security system as such is mainly regulated by the (2010:110) Social Security Code. It is mandatory and individual in character. Basically, there are residence-based and income-based benefits. The residence-based benefits apply to all residents whether self-employed or not and concern among others child benefits, child support, parental leave benefits at guarantee level, invalidity benefits at guarantee level, guarantee pensions and support for the elderly. Income-based benefits include among others pregnancy benefits, parental leave benefits, sickness benefits in cash, invalidity benefits, and pensions. All these schemes provide protection for the self-employed.

It is therefore mandatory for the self-employed to be part of the sickness benefits in cash system. During the initial 24 months of running a business there is 'a guaranteed sickness benefit' amounting to what an employed person would earn for equal work – afterwards it is based on the actual income as a self-employed person. The general rule is that the first 7 days of every sickness period you pay yourself (for employees there are 'sickness wages' paid by the employer during the first two weeks of sickness). Here, there is an element of choice to the scheme however – the self-employed can choose to have a longer initial period without pay (14, 30, 60 or 70 days) resulting in somewhat lower contributions. (There is special protection for those often sick reducing the days without pay in certain ways.)

⁷⁴⁴ Table 6.16 of the *Swedish Statistical Yearbook 2013*, SCB, Stockholm 2014.

Unemployment benefits are regulated in a special Act: the Unemployment Insurance Act (1997:238). This, too, provides protection for the self-employed. The insurance is divided into one, mandatory, basic insurance at guarantee level and another, voluntary, income-replacement insurance requiring membership. The latter is therefore voluntary for both employees and self-employed persons. This Act includes a definition of a self-employed person parallel to that in the Income Taxation Act. During the first 24 months of running a business it is possible to keep the level of unemployment benefits from an earlier employment. Thereafter benefits are based on the income taxed in the previous business year. To receive unemployment benefits it is not necessary (any longer) to actually close down the business (or sell it) – it is enough that it is ‘dormant’ in that no activities are carried out.

As regards sickness benefits in kind – i.e. healthcare – Sweden has a universal system that applies to all residents regardless of economic activity.

Where spouses/life partners are concerned they are, of course, individually covered by all residence-based schemes (including benefits at guarantee level). Income-based schemes require a formal revenue/income. There are no schemes which are mandatory for the self-employed worker but voluntary for his/her spouse or life partner, or vice versa.

10. Article 8 – Maternity benefits

In Sweden there is a comprehensive parental leave benefits scheme in place, regulated in the (2010:110) Social Security Code. This scheme provides benefits at basic/guarantee and income-replacement level, in all covering 480 days. All residents are entitled to basic/guarantee benefits. Income-replacement benefits equal sickness benefits in cash (Article 8.3(a)) and requires a formal revenue/income in relation to the taxation system. The system as such is mandatory. Like all social security (but unemployment benefits at income-replacement level) parental leave benefits are paid for in the process of taxation – by employer contributions on a pay-roll basis for employees and by self-contributions (*egenavgifter*) concerning the self-employed.

Since 1998 replacement services in the agricultural sector is a business activity in the market like any other and there are no public systems, subsidies, and so on. No special system has been set-up.

11. Article 9 – Defence of rights

Chapter 6 of the 2008 Discrimination Act applies, as do the rules on the Equality Ombudsman in its Chapter 4. The individual as well as the Equality Ombudsman (or where working life issues are concerned possibly a trade union) may bring an action to the relevant Court. So can a non-profit organisation ‘whose statutes state that it is to look after the interests of its members’. They can then bring an action as a party on behalf of an individual who consents to this. The Equality Ombudsman and trade unions often enough submit claims, whereas claims on behalf of organisations are less frequent (although known to exist). Basically no claims have been raised concerning the self-employed, however. Still the expert did find one case concerning a self-employed disabled woman having been denied insurance for self-employed persons among the applications to the Equality Ombudsman (ANM 2009/1382). The case was settled out of court and the woman was paid damages of approximately EUR 7 770 (SEK 70 000).

The Equality Ombudsman is by no means a mandatory system where complaints are concerned and the Ombudsman has no power to adopt binding decisions. The Ombudsman does adopt (non-binding) opinions occasionally, however, and has monitoring powers where the 2008 Discrimination Act is concerned – i.e. the Ombudsman can approach employers, service providers, etc., and require information regarding their practices. In case employers etc. do

not fulfil their obligations concerning active measures according to Chapter 3 of the Discrimination Act they may be ordered to fulfil them subject to a financial penalty. Such orders are issued by the special Board against Discrimination of application from the Equality Ombudsman.

12. Article 10 – Compensation or reparation

Article 10 on compensation or reparation has been implemented through the rules in Chapter 5 of the 2008 Discrimination Act. According to these rules a 'discrimination compensation' is to be paid 'for the offence resulting from the infringement' and 'particular attention shall be given to the purpose of discouraging such infringements of the Act', i.e. punitive/immaterial damages – aiming at amounts of damages rather above the general level of damages in Sweden. There is no upper limit.

13. Article 11 – Equality bodies

There is therefore an Equality Ombudsman empowered to monitor the 2008 Discrimination Act in all areas, also empowered to bring the claims of individuals to court. Its competences are regulated in Chapter 4 of the Act and in the additional Act concerning the Equality Ombudsman (2008:568). It is the expert's opinion that these regulations fully implement Article 11 of the Directive and the activities listed in Paragraph (2)(a)-(d).

14. Article 12 – Gender mainstreaming

Where Governmental Inquiries leading to legislation are concerned there is a general requirement to take into consideration the effects of any proposal to the equality between women and men and in society. It is naturally difficult to say anything more specific about this obligation but the expert considers it to be positive.

15. Article 13 – Dissemination of information

The Equality Ombudsman also provides information about the protection of the self-employed on their website. There is also a special government project 'Promoting Women Entrepreneurs' carried out by the Economic Growth Authority (*Tillväxtverket*). To some extent these efforts should have been effective in reaching the persons concerned.

16. Article 14 – Level of protection

It is the expert's opinion that the protection offered to the self-employed in Sweden generally meets the level of protection provided for by the Directive. The shortcomings that may concern the actual 'access to self-employment' (compare Article 14(1) of the Recast Directive) due to respect for the Free Contract Principle and the somewhat diffuse design of protection in other respects (compare Section 2 above) are countered by the broad concept of employee in Sweden and the universal character of the social security and health systems, normally also covering the self-employed and also offering benefits at guarantee level.

17. Case law

To the knowledge of the expert, there is no case law relevant to self-employed persons.

18. Issues regarding the ‘duty holder’

The expert does not believe that the uncertainties regarding the duty holder are of any greater concern in relation to this Directive. It is however one of the reasons why the protection provided to the self-employed by the 2008 Discrimination Act is so scattered. Chapter 2 Sections 9 and 10 refer to public authority duty holders in relation to labour-market policies and financial support for setting up or running a business, whereas private duty holders are mainly covered by the ban on provision of goods and services in Chapter 2 Section 12. As indicated above, the ‘real problem’ rather is the impossibility under the Swedish system to provide protection against discrimination for independent ‘work’ providers in relation to clients/customers due to the respect for the Freedom of Contract Principle. There is no such thing, as a general rule, as forced contracts! The Swedish ban in Chapter 2 Section 10 covers the conditions for having access to self-employment as such rather than covering the actual choice of an entrepreneur, compare the UK case *Jivraj v Hashwani*.⁷⁴⁵ When dealing with a self-employed person there is no discriminatory ban applicable as regards the choice of, as it is, a business partner. Nor does legislation cover the termination of contractual relationships with a self-employed person. These realities are, however, counteracted by the very broad concept of employee that applies and that makes the group of more ‘dependent’ self-employed persons small to non-existent. The generally broad scope of the social security and health systems is also of importance here.

19. National statistics

In Sweden, self-employed persons and ‘helpers’ are reported as part of general labour-market statistics.⁷⁴⁶ Among the economically active group aged 15-74 in the Swedish labour market in 2011 there were 4 156 000 employed persons and 485 500 self-employed persons (including helpers) – of the self-employed 354 100 were men and 131 400 women. The self-employed therefore amounted to 10.5 % of the economically active, women being 27 %. Most self-employed persons worked in the agricultural sector, followed by construction and wholesale and retail trade. Self-employed women mainly work in services. The group of self-employed persons in relation to these statistics is made up by individual entrepreneurs (*enskild näringsidkare/firma*) and those in a trading partnership (*handelsbolag*). Immigrants are slightly overrepresented among the self-employed. Whereas women represent only about one quarter of the self-employed they account for one third of newly initiated individual businesses.

In addition, there are also statistics regarding different legal forms of enterprises.⁷⁴⁷ These are more detailed and do not concern the ‘self-employed’ but the different legal sub-forms. The numbers do not equal those of the labour-market statistics since they also include ‘dormant’ enterprises.

20. Any other issues?

There are no other issues to be mentioned.

⁷⁴⁵ *Jivraj v Hashwani* [2011] UKSC 40, [2011] 1 W.L.R. 1872.

⁷⁴⁶ The following statistics are taken from *Swedish Statistical Yearbook 2013*, SCB, Stockholm 2014.

⁷⁴⁷ See *Swedish Statistical Yearbook 2013*, SCB, Stockholm 2014, table 6.10.

TURKEY – Nurhan Süral

1. Context

According to the Social Security Institution, there were 1 915 053 self-employed persons in non-agriculture and 929 946 in agriculture in February 2014.⁷⁴⁸ In the same period, there were 13 134 982 workers and 2 836 699 civil servants.

According to the TUIK (the Turkish Statistical Institute) Household Labour Force Survey,⁷⁴⁹ Turkey's 2013 labour force participation rate increased by 0.8 percentage points compared to the previous year. While male labour force participation showed an increase of 0.5 points, amounting to 71.5 %, female labour participation was 30.8 % with an increase by 1.3 percentage points compared to the previous year. Agricultural employment was 5 315 000 and non-agricultural employment was 20 000 268 persons. Of those who were employed 20.8 % was employed in agriculture, 21 % was employed in industry, 7.1 % was employed in construction and 51.2 % was employed in services. The number of unemployed persons aged 15 years old and over was 2 747 000.

Comparing the results for the year 2013 with those for 2004 shows that the population that has joined the workforce in the past ten years has found jobs predominantly as 'employed person' and that the number of people working as employers and tradesmen has not changed much in these ten years. While the number of those who have entered the labour force and found a job was 19 600 000 in 2004, this figure went up to 25 500 000 in 2013. In other words, there has been an increase of almost 6 million in employment in ten years. Those who could not find jobs were recorded as 'officially unemployed' and in ten years their numbers rose from 2 400 000 to 2 700 000 million. The unemployment rate stayed at an average of around 10 % from 2004 to 2013. TUIK data reveals that in the past ten years there has not been a significant change in employers and the self-employed and that mostly in the agricultural sector, the number of family workers is decreasing. In other words, the number of those who work for themselves and the number of employers has not changed much in the past ten years. The number of employers increased from 1 million to only 1 182 000 in ten years. As a ratio, however, the share of employers went back to 4.6 % from 5 %. The number of those who are self-employed in agriculture and in non-agriculture, together with those who make their family members work for them without pay, has consistently remained under 8 million in the last ten years; and as a ratio their share, which was 40 % in 2004, went down to 31 % in 2013. In other words, while the tendency of those who joined the labour force after 2004 to set up their own business and to work in their family managements rapidly declined, being a wage earner emerged as the principal tendency.

Small producers, who are the dominant component in the agriculture segment that has a 1/4th share in total employment, lost ground with the fall in agriculture. Agricultural employment, the number of which, together with 'unpaid family workers,' reached 5 200 000 in 2004 and went back to 4 400 000 in the period between 2006 and 2008, then recovered to become 5 400 000 in the 2011-2013 period. However, the shares of small farmers and their family workers in total employment went back from nearly 27 % in 2004 to 21 % in 2013. In other words, economic growth did not cause an increase in agriculture and in the number of small farmers. In terms of ratio, it created an outcome that decreased the share of agriculture. The decrease in subsidised purchases in agriculture and animal husbandry, the negative course of domestic trade rates against

⁷⁴⁸ http://www.sgk.gov.tr/wps/wcm/connect/a6e3cf0d-2a9d-4017-89dc-9927e409d73a/2014_02_temel_gostergeler.pdf?MOD=AJPERES, accessed 8 July 2014.

⁷⁴⁹ <http://www.turkstat.gov.tr/PreHaberBultenleri.do?id=16008>, No. 16008, 16 June 2014; Wage earning on the rise as entrepreneurship is declining, 31 March 2014, <http://www.hurriyetdailynews.com/wage-earning-on-the-rise-as-entrepreneurship-declining.aspx?pageID=238&nID=64300&NewsCatID=345>, accessed 6 July 2014.

agriculture, with the young population's preference of cities, and the increased migration from rural to urban areas have caused stagnation and regress in agricultural production and employment.⁷⁵⁰ The weakness of agriculture in creating employment was followed by the decline in small entrepreneurship in urban areas. TUIK data reveals that the number of the self-employed in non-agriculture and their family members has not increased much in the past ten years. The number of small urban producers and their family workers maintained its course at around 2 700 000 in ten years without increasing. The share of urban tradesmen families lost four points in the past ten years to go down to 10 %. In cities, with the rise of supermarkets and retail stores, and import of cheap products, a significant decline has been observed, particularly in the number of tradesmen engaged in retail trade.

According to TUIK's Women in Statistics 2012,⁷⁵¹ around one-third of working females was employed as unpaid family worker in 2012. While the ratio of females is 54.3 % for regular employees and casual employees, it is 10.8 % for own-account workers. The ratio of males is 66.5 % for regular employees and casual employees, and 22.3 % for own-account workers.

2. Transposition of the Directive

There is no discernible impact of the Directive, which is most probably due to the fact that social security laws are gender neutral. No legal problems are encountered by women. Also, in practice, it is a lot easier for women to get bank loans without interests or small interests as a result of plans, programmes, and projects carried out by the Small and Medium Enterprises Organisation (KOSGEB)⁷⁵² to increase the number of self-employed women.

3. Article 1 – Subject matter

There have been no problems with overlap of this Directive with Directives 2006/54,⁷⁵³ 79/7/EEC,⁷⁵⁴ or 2004/113.⁷⁵⁵

4. Article 2 – Scope

The term 'self-employed' is used in Turkey but not the term 'self-employed worker'. A self-employed person may be a shoe repairer, a carpenter, a farmer, an architect, a lawyer, a notary public, or a doctor. Those who run small businesses are covered by the Law on Tradesmen and Small Artisans' Professional Organisations.⁷⁵⁶ Those with larger businesses (merchants) and legal entities (business companies) are covered by the Commercial Law,⁷⁵⁷ but this does not result in a difference in treatment. All self-employed persons including those self-employed in agriculture are covered by the Social Insurances and General Health

⁷⁵⁰ State Planning Organization of Turkey and the World Bank, Female Labour Force Participation in Turkey: Trends, Determinants and Policy Framework, Report no. 48508-TR, 23 November 2009, pp. ix, 2-5, 12-15, 21.

⁷⁵¹ TUIK, Women in Statistics 2012, Ankara, March 2013, <http://kasaum.ankara.edu.tr/files/2013/02/%C4%B0statistiklerle-kad%C4%B1n-2012.pdf>, accessed 12 July 2014.

⁷⁵² www.kosgeb.gov.tr.

⁷⁵³ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) OJ L 204 of 26 July 2006, pp. 23-36.

⁷⁵⁴ Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security OJ L 6 of 10 January 1979, pp. 24-25.

⁷⁵⁵ Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services OJ L 373 of 21 December 2004, pp. 37-43.

⁷⁵⁶ *Esnaf ve Sanatkarlar Meslek Kuruluşları Kanunu*, Law no. 5362, Official Gazette 21 June 2005, No. 25852.

⁷⁵⁷ *Türk Ticaret Kanunu*, Law no. 6102, Official Gazette 14 February 2011, No. 27846.

Law (Law no. 5510).⁷⁵⁸ The term ‘self-employed person’ is not defined but the conclusion drawn from Article 4 of Law no. 5510 specifying the coverage of the self-employed, is that they are mainly those who are not employed under labour contracts but pursue gainful activities on their own account. Partners in a business, village heads and heads of smallest districts in towns (*muhtar*), and the voluntarily insured (those who are 18 years old and over, and not covered by a state security scheme may be voluntarily insured by paying contributions in order to benefit from social security rights before joining the workforce in any way), jockeys and their trainers constitute the somewhat ‘grey zone’ between employment, self-employment and unemployment. These people, however, are grouped together with the ‘real’ self-employed with the idea of enjoying the same social security rights and benefits.

An unpaid ‘helping’ spouse is not a worker as long as this help does not go beyond ‘support for family-related reasons’. If this help is beyond mere support, then there is no legal hindrance for being employed under a labour contract. There are no comprehensive statistics on self-employed women and men, making it impossible to say how these facts impact on the situation of self-employed women who help/support their husbands.

The Social Insurances and General Health Law recognises officially married spouses but not partners. Like any other unregistered worker (undeclared work; worker not registered with the Social Security Institution), a partner may apply to the court claiming that his/her work has remained undeclared.

5. Article 3 – Definitions

Law no. 6518⁷⁵⁹ amending the Law on the Disabled⁷⁶⁰ defines ‘direct and indirect discrimination’ with regard to the disabled (Article 63 amending Article 3 of the Law on the Disabled) in conformity with the definitions given in the Directive. The concepts of direct and indirect discrimination, and that of sexual harassment are used in labour and criminal laws but have not been defined therein.

No distinction has been made between ‘harassment’ and ‘sexual harassment’ but this has not caused any difficulties so far. The new Penal Code regulates four types of crimes under the title ‘Crimes against sexual inviolability’: Sexual assault, sexual exploitation of children, sexual intercourse with an under-aged person, and sexual harassment.⁷⁶¹ Sexual harassment has not been defined in the relevant Article (Article 105) but in the reasons appended to it. According to this definition, sexual harassment occurs when acts of a sexual nature sexually disturb the victim, thereby violating moral decency but not the physical inviolability of the victim. In other words, this behaviour may be verbal (remarks about one’s figure/looks, crude sexual jokes, verbal sexual advances/offers, unwanted messages or emails) or non-verbal (staring, whistling, indecent exposure) but not physical. Acts involving physical contact, such as patting, kissing, fondling, hugging, grabbing, and rape constitute sexual assault. There was an application to the Constitutional Court claiming that Article 105/1 of the Penal Code on sexual harassment was unconstitutional based on the fact that sexual harassment had not been defined and therefore remained an ambiguous concept, and that this contradicted the constitutional principle of legal specification of crimes and penalties. The Constitutional Court rejected the claim stating that on the basis of other crimes specified under the title ‘Crimes against sexual inviolability’ and the reasons appended to Article 105, sexual harassment has to be understood as any disturbing behaviour with a sexual aim/overtone that

⁷⁵⁸ *Sosyal Sigortalar ve Genel Sağlık Sigortası Kanunu*, Law no. 5510, Official Gazette 16 June 2006, no. 26200.

⁷⁵⁹ Official Gazette 19 February 2014, no. 28918.

⁷⁶⁰ Law no. 5378, Official Gazette 7 July 2005, no. 25868.

⁷⁶¹ *Türk Ceza Kanunu*, Law no. 5237, Official Gazette 12 October 2004, no. 25611.

does not amount to sexual assault or sexual exploitation.⁷⁶² In sexual harassment, the perpetrator and the victim may be of different sexes or the same sex, single or married. Previously, moral harassment ('mobbing') was not an asserted claim in labour relations but in recent years it has become a growing workplace violence complaint although it has not been specified as a crime in the Penal Code. The Prime Ministry issued a circular⁷⁶³ on the combat of mobbing in public bodies and institutions and private workplaces. The circular defined mobbing as deliberate and systematic behaviour by which an employee is humiliated, degraded, socially excluded, intimidated, has his or her personality and dignity violated and is subjected to (hostile) ill treatment. Under Article 417 entitled 'Protection of the worker's personality' of the new Obligations Code⁷⁶⁴ that became effective on 1 July 2012, employers are to take the necessary measures to prevent sexual harassment in the workplace and to prevent further damage to those who have already been victims of sexual harassment. The employer has to 'provide an environment compatible with morals' in his workplace.

6. Article 4 – Principle of equal treatment

The principle of equal treatment already existed in Turkish law.

7. Article 5 – Positive action

Incentives to encourage employers to hire female entrants into the labour force were introduced in 2008 and expanded in 2011. Vocational training through ISKUR and support for young female entrepreneurs through KOSGEB (the Small and Medium Enterprises Organisation) have been significantly expanded. Prime Ministry Circular no. 2004/7 of 2004 on Observance of the Principle of Equality in Staff Recruitment and the Prime Ministry Circular of 2010 on Increasing Female Employment and Ensuring Equal Opportunities⁷⁶⁵ are critical indicators of the political commitment to achieve gender equality in the labour market. KOSGEB has various entrepreneur support and training programmes⁷⁶⁶ prioritizing the support of women entrepreneurs. Applied Entrepreneurship Trainings can be organized by KOSGEB or other foundations or institutes (universities, ISKUR (Employment Office), professional organizations, municipalities etc.). Trainings are organised for general and specific (youngsters, women, disadvantaged groups) target groups at no charge for the participants.

There are many national and international plans, programmes, and projects underway. For example, on 20 July 2011, KAGIDER (Women Entrepreneurs of Turkey) and the World Bank launched Turkey's first Gender Certification Programme, also known as the Equal Opportunities Model, for private sector companies. The main objective was to support private sector firms that succeed in promoting gender equality as a business practice. On 22 October 2013, the Ministry of Family and Social Policy, the Swedish International Development Agency (SIDA) and the World Bank partnered up in a multi-year effort to develop improved access to affordable and high-quality childcare as part of balancing family and work life, promote more flexible working arrangements for men and women in the context of the New National Employment Strategy, expand female entrepreneurship, raise awareness throughout society and support women's cooperatives.

⁷⁶² Constitutional Court 25 February 2010, Case no. 2008/55 (Official Gazette 22 June 2010, no. 27619).

⁷⁶³ Official Gazette 19 March 2011, no. 27879.

⁷⁶⁴ Official Gazette 4 February 2011, no. 27836.

⁷⁶⁵ EGELR, No. 2/2010, pp. 112-113.

⁷⁶⁶ www.kosgeb.gov.tr, accessed 10 December 2014.

8. Article 6 – Establishment of a company

There are no particular rules for companies established by spouses or partners. They are treated as shareholders and subjected to general legal rules on companies. Nevertheless, the shareholders may draw up their own internal regulations as far as these rules do not violate the absolutely imperative legal provisions.

Article 7 – Social protection

The Social Insurances and General Health Law covers the self-employed and the employed in an equal manner. This is on a mandatory basis. Apart from this mandatory state social security coverage, all employed, self-employed and unemployed persons may benefit from private insurances on a voluntary basis. Any person (i.e. including spouses and life partners) may apply to a private insurance company and make payments for specified periods for various reasons including entitlement to retirement pensions.

Article 8 – Maternity benefits

Apart from the recognition of life partners, Law no. 5510 (Social Insurances and General Health Law) conforms to Article 8 of the Directive. The self-employed and the employed are treated equally as regards maternity benefits. Article 15 of the Social Insurances and General Health Law applies to self-employed women, women workers and uninsured wives of male workers without making any differentiation. Like women workers and uninsured wives of male workers, the self-employed women will receive full maternity benefits. In relation to pregnancy and giving birth, there are benefits in kind and benefits in cash. Maternity medical benefits cover medical examinations, medication, in-vitro fertilisation, and hospitalisation designed to cover care for the insured woman or the uninsured wife of the male worker. Maternity allowance is a short-term incapacity benefit designed to compensate for a worker's loss of earnings due to pregnancy and giving birth. (Law no. 5510, Articles 16-18). The amount of maternity allowance is equal to sickness pay, i.e. two thirds of a worker's regular daily wage throughout the maternity leave. Maternity leave lasts 16 weeks, and 18 weeks in the case of multiple pregnancies. State social security coverage is compulsory for employed and self-employed persons. Contributions are made for specified periods for entitlement to maternity benefits, including temporary replacements (temps).

A number of recent developments indicate how women workers and self-employed women are treated the same. Article 68/5 of Law no. 5510 concerns in vitro fertilisation. The Social Security Institution previously paid for two trials, and the woman worker, woman civil servant, or self-employed woman would contribute consecutively 30 % and 25 % of the total amount. Law no. 6552⁷⁶⁷ increases the number of trials to three, and the woman is only required to contribute 20 % towards the total amount for the third trial. Article 41/1a of Law no. 5510 concerns early retirement possibilities for working women. If the worker pays contributions (premiums) for the statutory maternity leave period, this period counts as pensionable service. In addition, if a worker resigns due to pregnancy or delivery, if she chooses she may pay contributions for at most the two-year period during which she remains unemployed. This period starts with birth and the worker could benefit from this provision for two separate births. Law no. 6552 increased the number of births to three, meaning that a worker fully benefiting from this provision will retire six years earlier.

⁷⁶⁷ *İş Kanununda ve Kanun Hükmünde Kararnamelerde Değişiklik Yapılması ile Bazı Alacakların Yeniden Yapılandırılmasına Dair Kanun*, Official Gazette 11 September 2014, no. 29116bis.

11. Article 9 – Defence of rights

The laws are in conformity with the first paragraph of Article 9. As regards the second paragraph, only the trade unions have the right to act in support of a worker upon such a request by the victim. Other legal entities do not have such a right.

In Turkey there is no gender equality body but efforts are being made to establish one. There is the Ombudsman Institution⁷⁶⁸ linked to the parliamentary speaker's office. The Institution has a Chief Ombudsperson and five Ombudspersons, one of whom is tasked with complaint applications regarding women's and children's rights. For complaints regarding human rights, fundamental rights and freedoms, women's rights, children's rights, and general issues of interest to the general public, 'violation of interests' shall not be sought.

12. Article 10 – Compensation or reparation

Under Article 5 of the Labour Law,⁷⁶⁹ if the worker proves prima facie that there may be discrimination, it is up to the employer to prove the opposite. If discrimination is proved, the court will determine a remedy even if there has been no consequent loss or suffering. A female worker who considers herself to have been treated in a discriminatory fashion on the basis of her sex during the course of her employment or dismissal may pursue her claims and demand pay amounting to four months' basic wages. This is the so-called 'discrimination pay.' The introduction of a ceiling to the amount of discrimination pay contradicts the EU acquis. Compensation is available not only for material and immaterial damages but also for the existence of discrimination without any proven damage. The calculation is left entirely to the discretion of the judge; the judge is to decide the amount according to the specifics of the case.

13. Article 11 – Equality bodies

There is no equality body but there is an ombudsman. So far, there have not been any applications by a self-employed person on the basis of equal treatment.

14. Article 12 – Gender mainstreaming

There are no examples of implementation in practice.

15. Article 13 – Dissemination of information

There is no dissemination of information on this particular Directive, but there is wide dissemination of information as regards social security rights of Turkish citizens.

16. Article 14 – Level of protection

There is equal treatment between the self-employed and the employed. In cases of pregnancy and giving birth, there are benefits in kind and benefits in cash. Maternity medical benefits cover medical examinations, medication, in-vitro fertilisation, and hospitalisation. A self-employed woman shall be entitled to temporary incapacity benefits during pregnancy. During a period of unpaid maternity leave, neither the worker nor the employer will be expected to

⁷⁶⁸ The Law on the Ombudsman Institution, Law no. 6328, Official Gazette 29.06.2012, no. 28338 (in English on the official website); Regulation on Procedures and Principles Concerning the Implementation of Law on the Ombudsman Institution, Official Gazette 28 March 2013, No. 28601. Official website of the Institution: <http://www.kamudeneticiligi.gov.tr>.

⁷⁶⁹ *İş Kanunu*, Law no. 4857, Official Gazette 10 June 2003, no. 25134.

contribute. The worker may, if she chooses, pay contributions for the statutory (compulsory) maternity leave but the employer will not have a duty to contribute. If the worker pays contributions for the statutory maternity leave period, this period counts as pensionable service. Also, where a self-employed person stops her work due to pregnancy or having given birth, she may, if she chooses, pay contributions for at most the two-year period during which she remains non-working. This period starts at the birth and the worker may benefit from this provision for two separate births (Law no. 5510, Article 41). If a self-employed woman is the mother of a disabled child in need of constant care, she will be entitled to early retirement: 90 extra pensionable days will be added to each year of service (Law no. 5510, Article 28). The conditions for entitlement to early retirement are the same for employed and self-employed persons.

17. Case law

No case law has been found on the issue.

18. Issues regarding the 'duty holder'

There are no problems related to the concept of 'duty holder'.

19. National statistics

Please see '1. Context' for the available figures.

20. Any other issues

As revealed in a 2010 study,⁷⁷⁰ in the context of the economic crisis of 2008-2009, self-employment in Turkey was considered not as an important driver of entrepreneurship but rather as a coping mechanism for the lack of primary segment jobs. It remained a key part of employment but it was the unattractive part of it. Self-employment did not only exhibit resilience through the crisis but also flourished, especially for women. Self-employment became a coping mechanism to address the income loss of the household. As the male main breadwinner of the household lost some of his income or his job, women stepped into self-employment in the informal market, in order to make ends meet (added worker effect).

UNITED KINGDOM – Aileen McColgan

1. Context

Self-employment in the UK has significantly increased in recent years, standing at 4.6 million (almost one in six workers) in the first quarter of 2014. This represents a rise of over 700 000 or 19 % since the recession of 2008-09.⁷⁷¹ In 2013 men accounted for 70 % of self-employed workers, whose average age was 47, but only 51 % of employees, whose average age was 40.⁷⁷² In 2013 the four most common occupations for self-employed people were taxi or cab drivers,

⁷⁷⁰ H. Ercan Turkey, European Employment Observatory Review: Self-employment, 2010 pp. 2 and 7, available at: <http://www.eu-employment-observatory.net/resources/reviews/Turkey-SERvw2010.pdf>, accessed 24 September 2014.

⁷⁷¹ Office for National Statistics *Self-employed up 367,000 in four years, Mostly since 2011* 6 February 2013 http://www.ons.gov.uk/ons/dcp171776_298533.pdf, accessed 7 August 2014, ONS *Labour Force Survey* May 2014 release (<http://www.ons.gov.uk/rel/lms/labour-market-statistics/may-2014/index.html>), accessed 7 August 2014), EMP09.

⁷⁷² *Self-employed up 367,000 in four years, Mostly since 2011*.

'other' construction trades, carpenters and joiners and farmers.⁷⁷³ The Trades Union Congress suggested in 2014 that, while just over half of the 1 million jobs created since 2008 were among the self-employed, the income of those in self-employment had dropped by 20 % since 2006 (compared to a 6 % drop for employees).⁷⁷⁴ Less than 10 % of the self-employed businesses which have come into existence since 2000 generate sufficient funds (GBP 79 000, or around EUR 100 000) to require VAT registration. The Resolution Foundation's *Just the job – or a working compromise?*, published in May 2014, reported that while 73 % 'of people who became self-employed since the recession did so wholly or partly due to their personal preference for this way of working, and not solely due to a lack of better work alternatives', this marked a decrease from the 90 % of self-employed people who fitted this category in 2008. The drop in self-employed earnings 'has been seen across genders and industries but is particularly notable among people of prime earning age (35 to 50 years old) whose earnings are 26 per cent lower. As a result, the typical self-employed person now earns 40 per cent less than the typical employed person'. The Resolution Foundation's report referred to 'a worrying picture of the security and vulnerability of self-employed people on both a short and long term horizon. Only 30 per cent of self-employed people are contributing to a pension, compared to 51 per cent of employees [and] ... a minority of self-employed people are experiencing difficulties getting mortgages, tenancies and accessing personal credit and loans, specifically due to being self-employed'.

2. Transposition of the Directive

In the view of the UK Government, no new measures were required to implement the provisions of the Directive, save in the case of Article 8. The UK extended the time for implementation, as provided for in Article 16(2), and the Social Security (Maternity Allowance) (Participating Wife or Civil Partner of Self-employed Earner) Regulations 2014 and the materially identical Social Security (Maternity Allowance) (Participating Wife or Civil Partner of Self-employed Earner) Regulations (Northern Ireland) 2014 came into effect on 1 April 2014. The Regulations make provision for the payment of a maternity allowance in line with the minimum requirements imposed by the Directive to the partners of self-employed workers who participate in their partners' self-employed business but who do not receive payment in respect of such participation. Whereas assisting spouses/partners who were paid for their efforts would have been entitled to maternity allowance prior to the implementation of the Regulations, those who were not paid for their assistance were not.

3. Article 1 – Subject matter

There have not been any difficulties in the UK as regards overlap of the coverage of Directive 2010/41 with that of Directives 2006/54,⁷⁷⁵ 79/7,⁷⁷⁶ and 2004/113.⁷⁷⁷

⁷⁷³ *Self-employed up 367,000 in four years, Mostly since 2011.*

⁷⁷⁴ *The Guardian Economics Blog* 2 February 2014, 'Untold story of the downturn: the shift from paid jobs to self-employment', <http://www.theguardian.com/business/economics-blog/2014/feb/02/living-standards-of-british-workers-analysis>, accessed 8 August 2014. The 20 % figure is taken from the Resolution Foundation's *Just the job – or a working compromise?* (May 2014, http://www.resolutionfoundation.org/media/media/downloads/Just_the_job_-_or_a_working_compromise_1.pdf), accessed 8 August 2014.

⁷⁷⁵ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) OJ L 204 of 26 July 2006, pp. 23-36.

⁷⁷⁶ Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security OJ L 6 of 10 January 1979, pp. 24-25.

4. Article 2 – Scope

The Explanatory Memorandum to the Northern Ireland Regulations states that no transposition of Article 2 was necessary: ‘the terms used in the article are those generally understood in UK legislation’.⁷⁷⁸ The Office for National Statistics, which is responsible for monitoring levels of employment and self-employment, does not adopt any definition but merely asks respondents to classify themselves. But the meaning of ‘self-employment’ in the UK is uncertain, workers falling into this category being the group of workers who do not qualify as ‘employees’ working under a ‘contract of employment’. The question whether or not a particular individual works under a contract of employment (which does not have to be written) is a question for the courts, and questions such as whether or not the individual pays tax as an employee are not determinative. As to whether an individual is protected from discrimination by the Equality Act 2010 (which prohibits discrimination on grounds of sex, pregnancy and maternity as well as on other grounds) those ‘self-employed’ men and women who provide work under contracts ‘*personally to execute any work or labour*’ will be protected (emphasis added) but the decision of the Supreme Court in *Jivraj v Hashwani*⁷⁷⁹ would appear to deny the protection of the Act to anyone who would not be regarded as a (subordinated) ‘worker’ for the purposes of EU law, unless (as in the case of contract workers, police officers, partners in firms, barristers and advocates) such persons are expressly covered by the legislation. There is, accordingly, a risk that ‘small entrepreneurs’ or ‘business persons’ will not be covered; if, for example, a woman contractor finds that her services are dispensed with when she becomes pregnant she will be unable to bring her claim within any provision of the Equality Act 2010 if her contractual engagement does not impose on her a duty to provide her services *personally* (as distinct from a duty to ensure that the relevant service is provided).

The agricultural sector is treated the same as other sectors by the implementing Regulations (as by the Equality Act 2010) and, as their title suggests, the Regulations cover life partners only where they are married or civilly partnered (the latter in the case of same-sex couples).

5. Article 3 – Definitions

The definitions of direct and indirect discrimination, harassment and sexual harassment in the Directive are consistent with those in the Equality Act 2010 (for Great Britain) and the Sex Discrimination (Northern Ireland) Order 1976 as amended. National law defines direct discrimination as less favourable treatment *because of sex* (Section 13 Equality Act 2010 and Article 3 of the Sex Discrimination (Northern Ireland) Order 1976), indirect discrimination being defined by Section 19 and Article 4 respectively as the unjustified application of a disparately impacting provision, criterion or practice. The distinction between ‘harassment’ and ‘sexual harassment’ has been drawn in Great Britain and Northern Ireland (Section 26 and Article 6A respectively), the difference being between unwanted conduct *related to sex*, on the one hand, and unwanted conduct *of a sexual nature* on the other (in both cases having the purpose or effect of harming a person’s dignity *or* creating an intimidating, hostile, degrading, humiliating or offensive environment for her. It has not caused any difficulties in practice.

⁷⁷⁷ Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services OJ L 373 of 21 December 2004, pp. 37-43.

⁷⁷⁸ http://www.legislation.gov.uk/nisr/2014/102/pdfs/nisrem_20140102_en.pdf, accessed 10 August 2014.

⁷⁷⁹ [2012] 1 All ER 629.

6. Article 4 – Principle of equal treatment

The implementation of Article 4 of Directive 2010/41 has not been modified since that of Article 4 of Directive 86/613/EEC, the UK governments taking the view in each case that no implementing measures were required.

The Equality Act 2010 and the Sex Discrimination (Northern Ireland) Order 1976 prohibit sex discrimination in access to employment, vocational training and promotion and in working conditions; also in access to and the provision of goods, facilities and services; in the disposal and management of premises; in education; in the exercise of public functions and by associations such as private clubs. The combined material scope of the prohibitions on sex discrimination is likely to capture most sex discrimination against the self-employed but it is possible that lacunae exist in view of the non-application of the employment-related provisions to self-employed workers *not* working under a contract 'personally to execute any work or labour'. It is possible, for example, that a 'freelance' taxi driver will not be regarded as a relevant worker for the purposes of the employment-related provisions of the Equality Act 2010. If that taxi driver wished to complain of his or her 'termination' by a taxi firm s/he would have to argue that the taxi firm had refused to provide a 'service' or 'facilities' to the taxi driver, or that it amounted to an association from which s/he had been excluded. Such an argument might work in the particular case but it will turn on the facts of the individual case and it may be that some self-employed workers will fall through a gap, which would indicate inadequate transposition.

7. Article 5 – Positive action

No measures have been taken with respect to positive action in the transposition of the Directive. The Equality Act 2010 already makes relatively generous provision in relation to positive action, though it *permits* rather than *requires* such except (in the form of the Public Sector Equality Duty) in the public sector. The scope for positive action in Northern Ireland is more limited (Article 5 of the Sex Discrimination (Northern Ireland) Order 1976) and the PSED also differs.

8. Article 6 – Establishment of a company

The Explanatory Memorandum to the Northern Ireland Regulations states that '[t]here is no condition which makes establishment of a company between spouses/civil partners more restrictive than between other persons'. This has been the case since prior to the enactment of Directive 86/613/EEC⁷⁸⁰ and so no implementing measures were taken in respect of Article 5 of that Directive. There have not, as far as the expert is aware, been documented examples of problems in practice for spouses or civil partners establishing companies and the expert is not aware of any statistics on the number of such companies.

9. Article 7 – Social protection

There is not a specific system of social protection applicable in the UK to self-employed workers. Entitlement to social protection depends, in the case of some benefits, on mandatory contributions made through National Insurance (paid by employees and the self-employed); other benefits are paid irrespective of contributions in which case the self-employed, together with employed persons and the economically inactive, are entitled by reason of need or other eligibility criteria.

⁷⁸⁰ 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 of 19 December 1986, pp. 56-58.

Dealing first with contributory benefits, self-employed workers make National Insurance contributions if they earn in excess of EUR 7 361/ GBP 5 885 per year. If they make sufficient contributions they will be eligible for the basic (but not additional) state pension; contribution-based Employment and Support Allowance (payable to those unable to work by reason of disability); maternity and bereavement allowances. Except in the case of share fishermen and volunteer development workers employed abroad they will not be entitled to contribution-based Job Seeker's Allowance.

State benefits which are payable irrespective of contributions include Child Benefit, 'income-based' (means tested) Jobseeker's Allowance, 'income-based' Employment and Support Allowance, Working Tax Credit and Child Tax Credit, Attendance Allowance and Disability Living Allowance, Carer's Allowance, Severe Disablement Allowance, Industrial Injuries Disablement Benefit, War Widow's or Widower's Pension, Pension Credit and Universal Credit. The self-employed are entitled to means-tested state benefits and are also eligible for treatment under the National Health Service which is dependent on residence rather than contribution.

Except in relation to maternity allowance for spouses/civil partners of the self-employed, no amendments have been made to the system in the transposition of Directive 2010/41. The Explanatory Memorandum to the NI Regulations states that '[s]pouses and life partners referred to in Article 2(b) can access non-contributory means-tested social protection in their own right, on the same basis as other persons who do not pay contributions, depending on their circumstances and in accordance with UK law'.

There are no schemes in the UK which require participation in the form of payment or otherwise by the spouse or life partner of the self-employed, whereas the payment of National Insurance contributions is compulsory for the self-employed.

10. Article 8 – Maternity benefits

The British and NI Regulations both provide for payment of a Maternity Allowance based on the National Insurance contributions of women's spouses or partners, where the woman is not otherwise eligible for maternity allowance or statutory maternity pay, and where she has participated in the self-employed activities engaged in by her spouse or partner 'performing the same tasks or ancillary tasks, without being employed by S or being in partnership with S'. Maternity Allowance in such cases is a flat rate of EUR 33.71/ GBP 27 for 14 weeks. This contrasts with the level of Maternity Allowance for those women who qualify in their own right, who are entitled to the lower of EUR 172.84/ GBP 138.18 a week or 90 % of their average weekly earnings for 39 weeks. The Explanatory Memorandum to the NI Regulations is silent as to whether Article 8(3)(a), (b) or (c) is relied upon but the EUR 33.71 level of payment is the same as that at which Maternity Allowance will be paid to a woman who relies on her own contributions, holds a small earnings exception for at least 13 weeks in the relevant period and has no other earnings. It must be questionable whether this can be said to amount to 'a sufficient maternity allowance enabling interruptions in their occupational activity owing to pregnancy or motherhood for at least 14 weeks' as required in Article 8(1). The Maternity Allowance is mandatory in the sense that the woman is *entitled* to it as a matter of law, though she is not obliged to apply for it. It is paid by the State rather than by the woman's partner and is parasitic on his or her contributions.

The Explanatory Memorandum is silent as to how it is said that the NI (or materially identical GB) Regulations implement Article 8(4). It is to be presumed that the expectation is that self-employed spouses and partners, like everyone else, may avail themselves (if they can afford so to do) of temporary/ agency workers if necessary. Such would not be alternative to or part of the allowance.

11. Article 9 – Defence of rights

Article 9 has not been implemented as such. The Equality Act 2010 and, in NI, the Sex Discrimination (Northern Ireland) Order 1976 provide for a fairly comprehensive system of enforcement of the prohibitions on gender discrimination through the employment tribunals (or, where discrimination in access to goods, services or facilities or by associations is complained of, the county courts). The effectiveness of the enforcement mechanisms is in doubt by reason (1) of the costs regime applicable in the courts which imposes risks of catastrophic liability in the event of an unsuccessful claim and (2) the fees introduced in employment tribunal cases in summer 2013 as a result of which there has been an 80 % drop in tribunal applications generally and in sex discrimination claims in particular.⁷⁸¹ Those fees are in the region of EUR 1500/£1200.

No representation rights are accorded to 'associations, organisations and other legal entities' though such may support and fund litigation by victims of discrimination. The equality bodies (the Equality and Human Rights Commission and the Equality Commission for Northern Ireland) may investigate, issue non-discrimination notices and support legal action by individuals but have no powers to engage in mandatory conciliation or to adopt 'decisions'. Non-discrimination notices may be enforced by the courts but not by the equality bodies.

12. Article 10 – Compensation or reparation

Article 10 has not been implemented as such but the Equality Act and Sex Discrimination Order provide for uncapped compensation for all losses flowing from discrimination in contravention of those provisions, including damages in respect of injury to feelings. Calculation of the latter is in line with case law on the basis of three bands dependent on the severity of the discrimination. The lower '*Vento*' band is currently EUR 750-EUR 7 500/GPB 600-GPB 6 000; the medium band EUR 7 501-EUR 22 500/GPB 6 00-GPB 18 000 and the top band EUR 22 501-EUR 37 525/GPB 18 00-GPB 30 000. As above, the difficulty for potential claimants lies in the threat of costs liability in the case of the courts and in the very significant fees for employment tribunals.

13. Article 11 – Equality bodies

The Equality and Human Rights Commission (EHRC) has statutory duties, so far as relevant, to encourage good practice in relation to equality and diversity, to promote equality of opportunity, to work towards eliminating unlawful discrimination and harassment, to monitor the effectiveness of law on equality and progress on equal opportunities and to publish reports on progress towards identified outcomes. The Equality Commission for Northern Ireland (ECNI) has statutory duties to work towards the elimination of discrimination, to promote equality of opportunity and affirmative/positive action, to encourage good practice, to oversee the implementation and effectiveness of the PSED and to keep the relevant legislation under review. Neither has any specific duties relating to the equal treatment of self-employed persons and the EHRC, in particular, is experiencing real difficulties in carrying out its duties as a result of swingeing reductions in its funding (reduced by about 2/3 in the five years to 2015). The expert is not aware of any specific work carried out by either commission on the equal treatment of self-employed persons. The independence of the equality bodies cannot be regarded as fully assured in view of the fact that both are

⁷⁸¹ TUC *At what price Justice?* May 2014, http://www.tuc.org.uk/sites/default/files/TUC_Report_At_what_price_justice.pdf, accessed 10 August 2014.

dependent on the designated Secretary of State (a member of the executive) for funding.

14. Article 12 – Gender mainstreaming

The Public Sector Equality Duty imposed by Section 149 of the Equality Act 2010 is intended to mainstream gender and other protected characteristics into all public sector decision making. The expert is unaware of any examples where this has had measurable effects in relation to self-employment. The Explanatory Memorandum to the NI Regulations makes reference to a 2011 public consultation by the UK Government, *Strengthening Women's Voices in Government*,⁷⁸² which 'identified the issues which women and their organisations wanted to priorities [sic] such as promoting work-life balance and tackling violence against women and girls' and stated that 'the findings from the consultation are informing the design of a new programme of direct engagement with women's organisations to ensure women's voices are heard within government'.

15. Article 13 – Dissemination of information

The government websites which provide information on entitlement to Maternity Allowance make reference to the new entitlement to Maternity Allowance provided by reason of the Directive's transposition and such would also be referred to in any printed materials detailing entitlement to the allowance. The author is not aware of any significant publicity campaign having been run on this issue.

16. Article 14 – Level of protection

In the view of the expert, the level of protection is not higher than that required by the Directive.

17. Case law

There has been no relevant case law.

18. Issues regarding the 'duty holder'

There is no difficulty as regards the 'duty holder' in the one area in which transposing measures have been adopted in relation to Directive 2010/41 as set out above, the State is responsible for payment of Maternity Allowance to the spouses/civil partners of self-employed workers to those who are eligible for it by reason of their partners' NI contributions and their own pattern of assistance and lack of entitlement to Maternity Allowance of Statutory Maternity Pay by reason of their own NI contributions. There is (as noted above) the possibility at least of lacunae in the protection of self-employed workers from discrimination. In the expert's view, however, this is the result of the non-existence of *any* duty holder in domestic law such cases, as distinct from uncertainty as to the identity of a duty holder. Further, it is by no means clear that the relative difficulty women appear to face in establishing themselves as entrepreneurs is best tackled by the imposition of non-discrimination duties.

⁷⁸² Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/85576/strengthening-womens-voices.pdf, accessed 13 October 2014.

19. National statistics

As above, almost one in six of the workforce is currently self-employed. This proportion has increased very significantly since 2008. As above, the statistical authority does not define self-employment and asks respondents to its surveys to self-classify.

20. Any other issues?

There are no other issues to be mentioned.

Annex 1

Questionnaire

Directive 2010/41 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity

Questionnaire

European Network of Legal Experts in the Field of Gender Equality

Catherine Barnard (main author) and Alysia Blackham

I. Introduction

The theme of this report is the issue of equal treatment of men and women engaged in an activity in a self-employed capacity. The purpose of this report is to provide information on and present an analysis of the implementation of Directive 2010/41¹ (which repealed Directive 86/613) as well as possible weaknesses/lacunae in the existing *acquis*. In 2012 the Gender Network produced the report *The Personal Scope of the EU Gender Equality Directives* in which the authors Mark Freedland and Nicola Countouris also paid attention to self-employment.²

II. Questionnaire

1. Context

Please explain concisely the context of self-employment in your country, providing for example data on specific problems that self-employed persons (in particular women) are confronted with and/or the results of specific research.³

2. Transposition of the Directive

- What legislation transposes this Directive in your country?
- Did your country extend the time for implementation, as provided for in Article 16(2)?

3. Article 1 – Subject matter

Have there been any problems in your country with overlap of the coverage of this Directive with Directives 2006/54, 79/7 and 2004/113?⁴

¹ Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC, OJ L 180, 15.7.2010, pp. 1-6.

² This report is available at: http://ec.europa.eu/justice/gender-equality/files/your_rights/personal_scope_eu_sex_equality_directive_final_en.pdf. See also their article in the *European Gender Equality Law Review* 2/2013, available at: http://ec.europa.eu/justice/gender-equality/document/index_en.htm#h2-9, accessed 5 June 2014.

³ Data of Eurostat on (female and male) self-employment as a percentage of total employment can be found in the statistical annex of: Employment and Social Developments in Europe in 2013, available at: <http://ec.europa.eu/social/main.jsp?langId=en&catId=113&newsId=2023&furtherNews=yes>, accessed 12 May 2014.

4. Article 2 – Scope

- Article 2(a) does not define what is meant by ‘self-employed workers’ but provides that they are those persons who are pursuing a gainful activity for their own account, under the conditions laid down by national law. This approach follows that of the preceding Directive 86/613. How has Article 2(a) been transposed in your country? What conditions have been laid down by your national law? Has your national law defined self-employed or self-employment? If so, is this definition the same for any or all other legal purposes?
- Are all self-employed workers considered to be part of the same category? For example, is there a risk in your country that, for example, people like ‘small entrepreneurs’ or ‘business persons’ will not be covered?⁵
- Is the agricultural sector treated differently?⁶
- Does your national legislation recognise life partners?
- If so, please concisely describe the scope and the requirements in relation to such recognition. How does the legislation transposing this Directive ensure that both spouses and life partners are covered?

5. Article 3 – Definitions

- Have all four definitions in this Article been correctly transposed into your national law?
- Does the national law in your country draw a distinction between direct and indirect discrimination? If so, how?
- Has the distinction between ‘harassment’ and ‘sexual harassment’ been drawn in your country? Has it caused any difficulties?

6. Article 4 – Principle of equal treatment

- Has Article 4(1) been correctly transposed?
- How, if at all, has the implementation been modified as compared to Article 4 of the repealed Directive 86/613/EEC?
- How, if at all, has this implementation added to the protection for self-employed persons in access to self-employment, as set out in Article 14(1)(a) of Directive 2006/54?⁷

7. Article 5 – Positive action

Has your State taken advantage of the power to take positive action? If so, what positive action has your country taken? What is your view of its effectiveness?

8. Article 6 – Establishment of a company

- How was this requirement first implemented in your country when transposing Article 5 of the repealed Directive 86/613/EEC? If your country recognises life partners, has your national legislation been amended to reflect the fact that Article 6 of this Directive extends coverage to life partners? Have there been any problems in practice for spouses or life partners in establishing a company?

⁴ With reference to pp. 9-11 of the *Report on the Personal Scope of the EU Sex Equality Directives* and the summary article in *European Gender Equality Law Review* No. 2/2013.

⁵ With reference to p. 19 of the *European Gender Equality Law Review* No. 2/2013.

⁶ With reference to p. 21 of the *Report on Fighting Discrimination on the Grounds of Pregnancy, Maternity and Parenthood*.

⁷ With reference to Paragraph 4.b on p. 10 of the *Report on the Personal Scope of the EU Sex Equality Directives*.

- Are there any statistics on how many such companies have been established?

9. Article 7 – Social protection

- Does your country have a system for social protection for self-employed workers? If so please concisely describe what it covers. For example does it cover pensions, health, etc.?
- Is there only one system of social protection, or is there a choice between several systems? Out of those systems, which are mandatory and which are voluntary? How do these systems work in practice (e.g. payment of contributions, etc.)?
- If a system is in place, how has this new requirement to ensure that spouses and life partners can benefit from social protection in accordance with national law been implemented? Has your country made such systems mandatory or voluntary for spouses and life partners?
- Are there any schemes in your country which are mandatory for the self-employed worker but voluntary for his/her spouse or life partner, or vice versa?

10. Article 8 – Maternity benefits

- How has this new requirement been implemented in your country? Does the maternity allowance meet the requirement of sufficiency in Article 8(3) and, if so, which criterion has been used, i.e. subparagraph (a), (b) or (c)?
- With reference to Article 8(2), is the maternity allowance granted on a mandatory or voluntary basis? Is there a choice of systems? How does it work in practice (e.g. payment of contributions, etc.)?
- In relation to Article 8(4) were there existing services supplying temporary replacements or existing national social services? If so have these been extended to female self-employed workers and female spouses and life partners? Has your country used the option, as provided for in the last sentence of Article 8(4), to provide for access to those services to be alternative or part of the allowance? If so, how does this work in practice?⁸

11. Article 9 – Defence of rights

- How has Article 9 been implemented in your national law?
- Has Article 9(2) been used to extend representation rights to 'associations, organisations and other legal entities'? Can they act only in support of a victim or also (in their own name as claimant) on behalf of a victim? Have these representation rights also been granted to the equality bodies listed in Article 11? If so, to what extent are these powers being used?
- To what extent is the equality body (or are the equality bodies) in your country involved either as a (mandatory) forum for conciliation or as a (quasi-) judicial body with the power to adopt (binding or non-binding) decisions?

12. Article 10 – Compensation or reparation

- Has Article 10 on compensation or reparation been properly implemented, including the absence of a prior upper limit?
- Which system of compensation or reparation has been chosen?

⁸ With reference to pp. 21 and 22 of the *Report on Fighting Discrimination on the Grounds of Pregnancy, Maternity and Parenthood*.

- Is compensation also available for immaterial damages and if so how is that compensation calculated?

13. Article 11 – Equality bodies

- In particular has Article 11 (equality bodies) been fully implemented? If so, does the equality body in your country effectively promote, analyse, monitor and support the equal treatment of self-employed persons by carrying out the activities listed in paragraph (2)(a)-(d)?
- In your view, does the equality body or bodies in your country carry out the tasks in Article 11(3)(a)-(d) independently, as required by the Article?

14. Article 12 – Gender mainstreaming

Are there any examples in your country of the implementation of this Article in practice? How successful, or otherwise, has this been?

15. Article 13 – Dissemination of information

Has your country disseminated the information as required by this Article? If so, how, and do you think it was effective in reaching the persons concerned?

16. Article 14 – Level of protection

Is the level of protection provided in your country greater than that required by the Directive? If so, briefly describe regarding which aspects the protection is greater.

17. Case law

Has there been any national case law on this Directive or its predecessor, Directive 86/613/EEC and/or its implementation? If so please provide the reference and a brief description.

18. Issues regarding the ‘duty holder’

The article in the European Gender Equality Law Review on ‘Work, self-employment, and other personal work relations: who should be protected against sex discrimination in Europe’⁹ notes that ‘the question of who ought to be seen as the duty holder vis-à-vis self-employed professionals in respect of the various distinct “equality duties”, national approaches appear to vary considerably and are often characterised by a high degree of uncertainty.’ The Report on ‘Fighting discrimination on grounds of pregnancy, maternity and parenthood’ also notes that ‘there is no employer to enforce the obligations against because by definition the workers are self-employed’.¹⁰ Do issues over who the duty holder should be in your country make implementation and application of the Directive difficult? Do such issues result in gaps in your domestic legislation?

19. National statistics

- If such statistics are available in your country, what percentage of the workforce in your country is self-employed? Is this figure increasing, decreasing or does it remain constant?¹¹

⁹ *European Gender Equality Law Review* No. 2/2013, pp. 15-20 – see in particular p. 18.

¹⁰ *Fighting discrimination on grounds of pregnancy, maternity and parenthood*, p. 21.

¹¹ With reference to p. 27 of the *2013 Report on Gender Equality in 33 countries*. See also Question 1 and the reference in the footnote.

- What definition of 'self-employed' is used to compile these national statistics? Is this definition the same as the definition of 'self-employed' used for other legal purposes (if any)?

20. Any other issues?

Is there any other issue you would like to draw attention to?

21. Relevant literature

Please include relevant literature on equal treatment in self-employment in the European Union or in your country.

Annex II

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