

The implementation of Directive 2010/41 on equal treatment of men and women in a self- employed capacity

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Outline

1. Overview of the Directive
2. Who are the self-employed?
3. Equal treatment
4. Social welfare provision
5. Duty holder
6. Remedies



1. Overview of the Directive

Overview of Directive 2010/41

- Application of **equal treatment** (and related) principles concerning the establishment of a business and other form of s/e activity (Arts 4-5)
- Equal treatment re establishment of a company between spouses/life partners and others (Art. 6)
- Where a system of **social protection** exists for s/e, spouses and life partners must be able to benefit (Art. 7).

Overview of the Directive II

- MS must ensure that female s/e workers, spouses and life partners must/may be granted a **sufficient maternity allowance** for at least 14 weeks (Art. 8)
- **Defence of rights** (Art. 9): judicial or other proceedings available to s/e; role of equality bodies (Art. 11)
- Real and effective **remedies** (Art. 10)
- Deadline: 5 Aug 2012

2. Who are the self-employed?

Definitions: Introduction

- Definitions of s/e
 - The elephant test?
 - Italy: “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”
 - No single definition
 - Different terminology



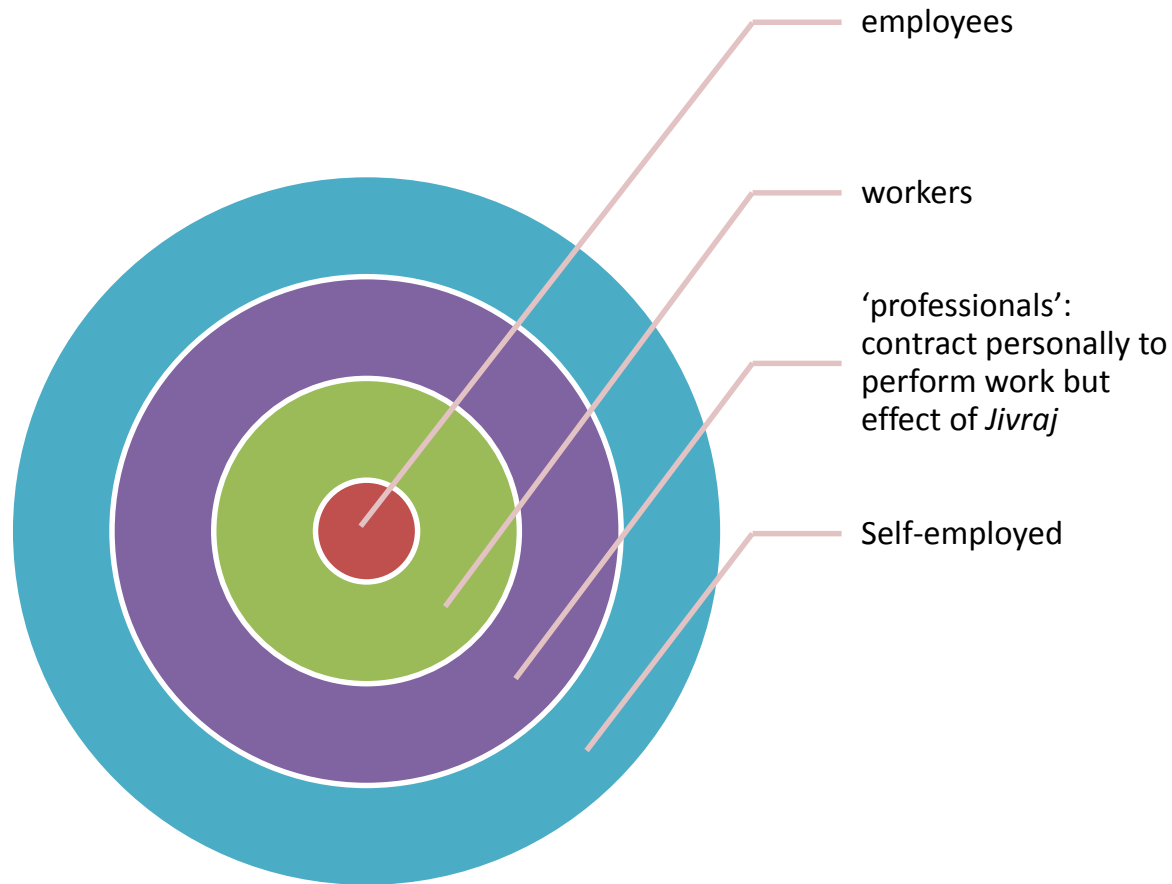
Self-employed definition II

- **States which have a definition of the self-employed**
 - Eg **Malta**: 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”.
- **States with no definition:** eg Denmark
- **States which do not have a definition of the self-employed but define the term negatively by reference to employees:** eg Norway, Portugal

Self-employed definition III

- **States which do not use the term self-employed but use alternative terms**
 - Entrepreneur (Finland), sole proprietor' or 'sole trader' (Estonia), liberal professions (Netherlands)
- **States which adopt a sectoral approach**
 - Bulgaria, Czech Republic
- **States which adopt a three pronged (or more) approach**

Three pronged + approach: the case of the UK



Self-employed definition IV

- Exclusions
 - General: those fall outside the definition
 - Specific: unpaid ‘helping’ spouse is not a worker as long as this help does not go beyond ‘support for family–related reasons’ (**Turkey**)
 - Agriculture
- Majority of states recognise life partners in various forms

3. Equal treatment

Direct and indirect discrimination

- Some MS have correctly transposed Art. 4 eg **Bulgaria** and **Croatia**
- Some MS copied out the wording of the Directive (eg **Austria, Greece**).
- Some MS have made no express implementation because they consider that their existing laws already cover this situation (eg **Denmark, France, Iceland, Italy, Luxembourg, Portugal, Spain, Sweden, the UK**).
- In other countries the implementation is not correct: eg **Lithuania** where legislation does not lay down the principle of equal treatment of self-employed, except in the area of social security schemes.

4. Social welfare provision

Social protection for the individual self-employed person

- Systems vary considerably
 - paid automatically on the basis of residence (e.g. **Norway, Sweden, the UK**)
 - mandatory and contribution-based (e.g. **Belgium, Slovenia, Estonia, Hungary**)
 - voluntary
 - administered by professional or sectoral associations (e.g. **Germany**).
- Most cover old-age and disability pensions and health benefits
- Unemployment protection is provided in **Croatia, Hungary, Macedonia and Sweden**
 - But not in **Cyprus, Ireland, Latvia, Portugal or the UK**
 - Is voluntary in **Denmark, Spain and Romania**
- Cannot be insured against employment injuries or occupational diseases in **Slovakia**
- Some significant differences in provision for employed and self-employed (e.g. **Lithuania**)
 - social insurance contributions related to the minimum statutory salary, irrespective of real income (e.g. **Latvia, Estonia**)
 - workers declare their own income (e.g. **Spain**)

Social protection for spouses

- Covered as:
 - dependent workers or employees of the self-employed (e.g. **Cyprus, Finland, France, Germany, Malta, Slovenia**);
 - assisting, participating, helping or collaborating spouses (e.g. **Belgium, Bulgaria, Czech Republic, Estonia, Germany, Italy, Poland, Portugal**); or
 - members of a partnership (e.g. **Ireland**).
- In **France**, spouses are required to nominate one of these forms of activity.
- Basis of social protection:
 - Voluntary in **Bulgaria; Estonia; Latvia; Lithuania** (but with some residence-based entitlements); **Luxembourg** (voluntary if not in agriculture); **Romania; Slovakia; Slovenia**; and **the UK**.
 - Mandatory in **Austria, Belgium; Croatia; Cyprus** (not life partners); **Czech Republic; Denmark; Finland; France** (not for spouses of liberal professionals or for life partners); **Germany; Iceland; Italy; Lichtenstein; Luxembourg; Macedonia** (not life partners); **the Netherlands; Norway; Poland; Portugal; Spain**; and **Sweden**.
- **Greece and Ireland** have failed to implement Article 7 (though legislation has been introduced in **Ireland**)

Maternity protection



- Duration ranges from 8 weeks (**Belgium**) to 410 days (**Bulgaria**)
- Mix of mandatory and voluntary provision
- Sufficiency under a), b) and c) – many states unclear
- Few States provided temporary replacement services or national social services

5. Duty holder

Who is the duty holder?

- **Who is the duty holder?**
 - Explicitly determined in **Hungary** - person who has the right to give orders to the self-employed person
- **Other possibilities:**
 - the government (via the implementation of social protection programmes: **Croatia, Greece, Latvia, Macedonia, the Netherlands**; or due to a failure to implement the Directive: **Norway**)
 - professional and sectoral associations / statutory professional corporations (**Austria, Cyprus, Greece, Italy, Poland, Slovenia**)
 - local public authorities (**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, Germany, Greece, Ireland, Italy, the Netherlands, Portugal, Spain, cf Sweden**)
 - suppliers of goods and services (**Estonia, Sweden**)
 - no duty holder (**the UK**)

Who is the duty holder?

- Issues regarding the duty holder:
 - Have not experienced problems (e.g. **Czech Republic, Denmark, France, Greece, Liechtenstein, Luxembourg, Sweden, Turkey**)
 - Could raise issues in the future (e.g. **Bulgaria, Italy, Lithuania, Slovenia**)
 - Is a live issue at present (e.g. **Germany, Cyprus**)

6. Remedies

Article 9: access to the courts or administrative procedures

- In most Member States, claimants can have access to courts:
 - specialist labour courts (eg **the UK**)
 - administrative courts (eg **Germany** and **Latvia** for certain types of claim, **Romania**)
 - civil courts (eg **Italy** for certain groups of the self-employed, **Malta, Poland**)
 - criminal courts (eg **France, Ireland**).
- In some Member States claimants can go to a specialist equality body only (eg **Sweden**).
- In others they can go to the courts or the specialist equality body:
 - **Bulgaria**: claimants can take their case to the courts or to the Equality body (the Commission for Protection from Discrimination);
 - **Estonia** self-employed people can make a complaint to the Gender Equality and Equal Treatment Commissioner or to the Chancellor of Justice
 - **Macedonia** claimants can bring a complaint to the Antidiscrimination Commission and a specific antidiscrimination lawsuit in front of the regular courts.
- But: paucity of cases brought

Function of the equality bodies



Extension of remit of equality bodies to self-employed

- (1) the invisibility of the self-employed in the eyes of the agencies
 - Broad remit of equality body (Bulgaria, Denmark, Estonia, Finland, Germany, Iceland, Italy, Latvia, Lithuania, Macedonia, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Turkey) but not extend to self-employed
- (2) lack of resources of the equality bodies (eg Belgium, Luxembourg, and the UK)
- (3) lack of independence of the equality body (eg Romania)

Article 10: compensation or reparation

- compensation
 - available in nearly all systems,
 - often on a tortious basis (eg **Iceland, Poland, the UK**) and/or on a contractual basis (**the Netherlands**)
 - Usually this covers both material and immaterial damage
 - Concerns about:
 - Compensation not applied by the courts eg **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 make high awards for non-material damage.
- Nullity of the acts (eg Italy, Portugal and Spain)

Conclusions

- Confusion about function of the directive
 - Is it really an employment protection issue?
 - Sense that self-employed do not need the protection (and who are they?)
 - Certainly few resources are directed here
- Problem with the equal treatment principle
 - equal with whom?
- Is this really about goods, facilities and services, not employment?