Inequality in Equality

Lacunae in the European equal Treatment Protection of self-employed Women

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Introduction

Since its beginnings, the European Economic Community has provided rules outlawing discrimination on grounds of sex and nationality. Non-discrimination on grounds of nationality and sex was first and foremost a tool in the achievement of the single economic market. Since those days, both nationality and sex equality are concepts that have gradually acquired a social and moral undercurrent.

The original objective of the introduction of article 119 EC (now 141 EC), the first article on sex equality, was to prevent distortion of competition. From here, sex equality has developed from having subsequently both an economic and social aim and predominantly a social aim to finally, the status of a fundamental right.[1] Morally, sex equality upholds human dignity by enabling the individual to participate fully and exploit their talents to the utmost.

The field of equality is a dynamic one. The introduction of article13 EC has substantially extended the area by providing the basis for legislation promoting equality in areas other than nationality and sex, including race, disability, religion, sexual orientation and age. Except for the steady expansion of grounds, an inclination prevails to extend the principle of equality into areas outside the traditional labour market. Whereas before the promotion of sex equality was mainly aimed at the labour market, the recently introduced directives on race and other grounds tend (also) to cover goods and services and social security. Equal treatment is a concept that has gradually become a general fundamental principle of the European Union.

The promotion of sex equality in the framework of the European Union has the advantage of streamlining the equality legislation in the Member States and can raise the level of protection by providing by minimum standards. However, as equality of the sexes requires alterations in people's attitudes and possible cultural identities, the law alone might have limited effect. However, the presence of European equality legislation provides a standard of behaviour and expectations.[2]

The developments illustrate the importance of the principle of equality in the European Union. However, a recent discussion and case law in the Netherlands on the provision of pregnancy-related insurances for the self-employed have exposed a possible gap in the expanding equality legislation mentioned above.[3] The issue prompts a further investigation into the protection of the self-employed in the sex equality legislation.

Sex equality concerning the self-employed is a seemingly underexposed subject. Since the beginning of the sex equality legislation, the focus has been on the protection of the employed and most directives have been devised with a view to their needs.

The following research will scrutinize the current and recently adopted directives[4] regarding sex equality that are completely or partly applicable to the self-employed. The research question is whether this framework of directives provides adequate protection with a view to sex equality concerning the self-employed. In order to calibrate the phrase 'adequate protection', the protection of the self-employed is predominantly set off against the protection of the employed.

The first chapter contains a closer look at the meaning of the concept of 'self-employed'. The exact content of the definition is crucial to the subject, as the categorization of individuals into self-employed and employed determines which directives are applicable

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[1] Prechal, S. "Equality of Treatment, Non-discrimination and social Policy: Achievements in Three Themes." Common Market Law Review. 2004.Vol. 41. Issue 2. p. 548.
[2] Ellis, E. *EU Anti-Discrimination Law*. Oxford: Oxford University Press, 2003. p.1.
[3] The issue will be discussed in chapter 3.II.C.3
[4] Here: directives that have entered into force, of which the implementation dates have not yet elapsed.

and what level of protection they provide. The research explicitly does not include the assisting spouses. Albeit the importance of their (lack of) status and the ensuing disadvantages thereof, they form a distinct category to the self-employed. Obstacles experienced by this category take place in the phase before reaching the actual status of self-employed.

In the second chapter, the initial focus will be on the substance of the current system of equal treatment legislation in general and will touch upon some legal issues relevant to the self-employed and the employed. The second part comprises an elaborate examination of the directives relevant to the self-employed, focussing on their goals, scope, possible exceptions and the occurrence of positive action provisions. [5]

The third chapter will first outline the current situation of female participation in the area of self-employment. Secondly, it will identify and examine the current barriers that self-employed women encounter at the start or during their activities. The research is not all-comprehensive and certain problems, such as education and information, receive less attention than others do. The choice was made to highlight problems specifically related to funding, in the form of start-up finance, pregnancy and maternity benefits and social security. These problems are related to the above-mentioned Dutch case law regarding pregnancy insurances, which also revolves around finances. The selection of these specific problems is not meant to suggest that education and information are less important than funding. Indeed, these factors can be crucial for the achievement of equality. However, funding is the basis for the start and survival of any self-employed activity. The subsequent part of the chapter will relate the examination of the directives in chapter 2 to the barriers found in chapter 3. The objective is to describe the correlation between the existing problems and the current protection. The main question is whether the directives have addressed or will address the problems encountered and to which extent.

Chapter four functions as a conclusion. The first part encompasses a general survey of the established gaps. Based on the lacunas, the second part comprises suggestions for the revision of the European equality protection of the self-employed.

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[5] The relevant directives are:
86/613/EEC, 2002/73/EC, 2004/113/EC, 79/9/EEC and 86/378/EEC
-Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood OJ L 359, 19.12.1986, p. 56–58.
-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, 5.10.2002, p. 15–20.
-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, 21.12.2004, p. 37–43.
-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, 10.1.1979, p. 24–25
-Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes as amended by Directive 96/97/EC OJ L 46, 17.2.1997, p. 20–24.

Chapter 1. The Concept of Self-employed

The issue whether a person can be qualified as a worker or a self-employed person can be of relevance in several areas including, amongst others, equal treatment between men and women. Throughout this research, it will become clear that the level and extent of the European protection regarding equal treatment of men and women differs substantially between workers and the self-employed.[6] Due to these important differences, the determination of the concepts of worker and self-employed is essential. Clearly, a well-defined concept of worker and the self-employed contributes to a proper application and implementation of European legislation.

I. European Definition of Worker and Self-employed Person

First and foremost, the European definition of the concept of worker and self-employed person should be examined. In the *Hoekstra (née Unger)* case, the Court indicated that the determination whether a person holds the status of a worker is to be decided by applying a Community definition instead of solely national criteria.[7] The EU Court will have the authority to define the meaning and scope of the concepts, so that the effect of Community legislation cannot be unilaterally restricted by a Member State.[8] According to this line of reasoning, it seems self-explanatory that the concept of a worker and a self-employed person for the purposes of European legislation will need to be the Community definition. In the case *Jany and others*, the Court emphasized this and stated that a Member State cannot justify categorizing persons into the category of the employed/worker solely based on the presumption that a certain activity is generally exercised in the form of a disguised employment relationship.[9] The statement seems to suggest that every case should be assessed individually, using the Community definitions of the concepts.

In order to determine what the common European definition of self-employed is, it is helpful, besides examining case law relating to the actual field of equal treatment, to look at case law relating to the free movement of workers laid down in article 39 EC and the freedom of establishment of article 43 EC.[10] In these areas, there have been several cases explaining the concept of worker and its supposed counterpart, the concept of the self-employed person. The EU Court indicated in the cases *Nolte* and *Megner and Scheffel* that the definition of worker as defined for the purposes of articles 48 EC (now 39 EC), 119 EC and Directive

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[6] See chapter 2, in which the substance of the directives concerning equality between men and women is discussed.

[7] Case C-75/63 *Hoekstra (née Unger) v Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten* (1964) ECR 177. In: White, R.C.A. *Workers, Establishment, and Services in the European Union* .Oxford: Oxford University Press, 2004, p.33.

[8] Craig, P. and Gráinne de Búrca. *EU Law: Text, Cases and Materials*. Oxford: Oxford University Press, 2003, p.706.

[9] Case C-268/99 *Jany and others* (2001) ECR I-8615, paras. 67-68.

[10] Article 39 EC stipulates that the free movement of workers within the Community shall be secured, whereas article 43 EC states that freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48 EC, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the chapter relating to capital.

79/7/EEC all define the concept of a worker in the light of the principle of equal treatment.[11] In these two cases, the EU Court provided a link between the concept of worker for the purposes of article 39 EC and beyond and the concept of worker for the purposes of the principle of equal treatment.

The Community concept of worker, according to the case *Lawrie-Blum*, should be defined in accordance with objective criteria, which distinguish the employment relationship, by reference to the rights and duties of the persons concerned. The essential feature of an employment relationship, however, 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.[12] The term direction implies work performed under another person's control and supervision. The characteristics of a self-employed person, on the other hand, can be explained by reference to the *Jany and Others* case, in which the Court provided some criteria for self-employment.[13] The case did not directly concern article 43 EC, but instead related to the Association Agreements between the Member States and Poland and the Czech Republic, which contained similar provisions with regard to freedom of establishment. The Court indicated that self-employment signifies that an economic activity is carried out if the following conditions are met:
-outside any relationship of subordination concerning the choice of that activity, working conditions and conditions of remuneration;
- under that person's own responsibility; and
- in return for remuneration paid to that person directly and in full.[14]
Within this definition of self-employed, the actual form of the self-employed capacity seems irrelevant; the criteria are material. Considering the negative wording of the first condition, self-employment seems to be a residual category. The self-employed person can be a legal or natural person, it can concern a small or large entrepreneurial activity or a liberal profession, as long as it meets the above-mentioned criteria.

Parallel to the concept of worker in the area of the free movement of workers and freedom of establishment, in the case *Allonby* the Court put forward a concept of worker specifically formulated for the purposes of article 141(1) EC.[15] The Court had earlier stated in the case *Martinez Sala* that there was no single Community definition of worker and that its definition can vary according to the area under consideration.[16] However, the definition of worker for the purposes of article 141(1) EC is an exact copy of the one in the *Lawrie-Blum* case. Again, the Court stressed that the concept of worker should not be interpreted restrictively and that the classification as a worker is not dependent on the nature of the legal relationship between the parties and that a formal classification of a person under national law as self-employed cannot prevent the person from being classified as a worker within the

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[11] Case C-317/93 *Nolte v Landesversicherungsanstalt Hannover* (1995) EC I-04625, paras. 19-21.
Case C-444/93 *Megner and Hildegard Scheffel v Innungskrankenkasse Vorderpfalz, now Innungskrankenkasse Rheinhessen-Pfalz* (1995) EC I-4741, paras. 18-20.
The argument that the determination of the definition of worker in the area of social security is within the competence of the Member States is rejected in both cases. The Court emphasized that the European Community definition is also relevant in social security law.
[12] Case C-66/85 *Lawrie-Blum v. Land Baden-Württemberg* (1986) ECR 2121, para.17. in:
Craig, op cit, n.8, p.709.
N.B. Article 39 mentions 'workers' and not employees. It can be assumed that the concepts within the framework of article 39 EC are interchangeable. The Dutch translation of worker is 'werknemer', and the German translation is 'arbeitnehmer'. Both notions seem to be closer to employee, which suggest the difference is irrelevant.
[13] Op cit, n.9.
[14] Ibid, para. 70.
[15] Case C-265/01 *Allonby v Accrington and Rossendale College* (2004), paras. 67-68.
[16] Case C-85/96 *Martinez Sala* (1998) ECR I-2691.

meaning of article 141(1) EC.[17] The Court also added another interesting point: even though it was clear that the drafters did not mean to include independent providers of services who are not in a relationship of subordination within the scope of 141(1) EC, the fact that a provider of services is under no obligation to accept an assignment is irrelevant. After the acceptance of an assignment, a situation of subordination can occur due to a limitation in the freedom of the service providers and can subsequently be classified as an employer-worker relationship.

II. The Concept of Self-employed in the Member States

The dichotomy worker/self-employed is a concept of old, used by all Member States to divide the labour market into categories. The two categories have long been legally differentiated with regard to tax regimes and social protection such as unemployment benefits and insurances. In general, labour law covers subordinate employment, while civil and commercial law governs self-employment. Labour law is directed at the protection of the weaker party, the worker, and restricts the usual freedom of contract, while a self-employed person is deemed to be on an equal footing with a contractual partner.[18] A worker, or a person in dependent employment, will generally enjoy a more protective social regime, including provisions with regard to health and safety, working time and benefits. The essence of self-employment being responsibility and individuality, a self-employed person will enjoy greater freedom in arranging his or her individual protection, according to choice or responsibility. The advantage is that a self-employed person is able to reduce overheads and thus effectively compete on the market; the disadvantage is that a self-employed person will run a greater risk of finding him- or herself in dire straits in case of a eventuality.

The definition of worker across the Member States is mainly characterized by the emphasis on legal subordination. In some instances, a legal definition is lacking, and the definition has taken shape through case law or a code of practice.[19] The element of subordination dovetails closely with the Court's case law on the subject, albeit the actual interpretation of the concept can vary from the wide notion of control over a person's work to more extensive criteria determining subordination such as the use of an employer's equipment, place of work, set working hours and financial risk.[20] The emphasis of the assessment of a subordinate relationship can vary from ownership and dependence to permanent or fixed contracts.[21] The definition of self-employed is, again, often negatively formulated if formulated at all, and functions as a catchall. A problem with the employed/self-employed distinction of the Member States and the EU Court is that it does not allow for intermediate forms of work. A person is classified into a single category and will be treated accordingly. Some Member States, however, do utilize certain categories that resemble intermediate categories or maintain an assumption of employment in certain cases.[22] In

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[17] *Allonby*, op cit, n.15, para. 70.
[18] Perulli, A. *Economically dependent / quasi-subordinate (parasubordinate) employment: legal, social and economic aspects* . Report, 2003.
http://ec.europa.eu/employment_social/labour_law/docs/parasubordination_report_en.pdf , p. 6-7.
[19] *EIRO comparative study on 'Economically dependent workers'.* EIRO, 2000.
< http://ec.europa.eu/employment_social/labour_law/docs/eirostudy_en.pdf> p. 3-4.
See for example 7:348 BW, in which an authorative relationship is the key element.
See for code of practice Ireland, p. 21-22.
[20] Ibid, p.4-5. See, for example, specification of Germany and Luxembourg.
[21] Ibid. See specification Spain and Sweden.
[22] *See Perulli report*, op cit, n.18, p.18. In France, some contracts are presumed to imply an employment relationship.

general, the categorization into self-employed or employed is not dependent on the wishes of the parties, but entails a fact-based assessment. It means that despite a certain legal classification given to a relationship, the circumstances of the actual situation will prevail in the assessment by the Courts.[23] This approach also intends to prevent the occurrence of bogus self-employment. Due to the inferior protection of the self-employed regarding social benefits, the potential employer can gain subsequent financial advantages by presenting a work relationship as a self-employed/client relationship, even though it bears the characteristics of an employer/employee relationship. The above-mentioned material approach can pierce through such constructions and oblige the employer to contribute to social security for the person concerned.[24] A further complication of the employed/self-employed distinction is the fact that different definitions are sometimes used for different areas; in France, the definition of employee for social security provisions diverges from the definition of worker in labour law.[25]

III. Changing Patterns

The labour market has undergone some profound changes in recent years, which have undermined the traditional distinction between the employment and self-employment distinction based on legal subordination.[26] The changes occurring are related to the different forms of atypical work emerging, such as fixed-term contracts and the outsourcing of work to freelancers.[27] The trend is that the number of traditional full-time employees is decreasing in favour of flexible forms of work, such as temporary, part-time or self-employed work.[28] The structures are changing as to the control of the employer and is shifting from a hierarchical organisation to a more horizontal relationship with a diffuse control distribution, shared control in case of temporary work and a increased content and quality of work. [29] The result is that a formerly typical employer/employee relationship more often resembles a self-employed/client relationship. Likewise, in the area of self-employment, relationships that resemble an employer/employee relationship are increasingly common. Such atypical forms of work are creating a "grey area" in between traditional employment and self-employment, which contains types of work that display characteristics of both employment and self-employment.[30] This type of situation is therefore not the same as pseudo- or bogus employment; even in the view of the material approach to employment and self-employment it is difficult to classify these relationships into one category. The occurrence of a grey area is especially conspicuous regarding former employees who have become self-employed, and do not have dependent employees themselves. It mainly concerns the field of micro-enterprises,

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[23] Ibid, p.31. This principle is known as the primacy of fact principle. It resembles the approach of the EU Court regarding material criteria.
[24] *EIRO study*, op cit, n.19.
[25] Ibid, p.4.
See also Berg, van den L. "Het begrip werknemer in de werknemersverzekeringen". Sociaal Maandblad Arbeid. No.6, June 2004, p.301. In the Netherlands, the concept of employee has different meanings with regard to income tax or social security.
[26] *Perulli-report,* op cit, n.18, p.29.
[27] Examples of atypical contracts include, for example, temporary contracts for advisors.
[28] *Labour market trends, Labour Market Trends and Globalization's Impact on Them.* International Labour Organisation. Actrav: bureau for workers' activities. 2000. Flexible forms of work in developed countries. http://www.itcilo.it/english/actrav/telearn/global/ilo/seura/mains.htm.
[29] *Perulli report,* op cit, n.18, p.29.
[30] Ibid, p.15.

in other words own-account workers.[31] According to the binary system of employment and self-employment, the group will be considered self-employed. However, using another criterion, it could be considered a sub-group of the self-employed using the concept of the 'economically dependent worker' (or EDP).

According to the *EIRO study*, the concept of the 'economically dependent worker' can roughly be defined as; 'a worker who is formally self-employed, but is economically dependent on a single employer for their income'.[32] The concept is not entirely new; in fact, some Member States have already used the concept in case law and legislation, albeit in slightly divergent forms, while many others are discussing it.[33] It is also a topic of discussion in the European Union.[34] According to the more elaborate description of the EDP category in the *Perulli Report*, the main criteria for such an economically dependent worker are the absence of subordination and a situation of economic dependence indicated by work that is performed personally, a continuity and coordination of work and an income partly or wholly received from one principal.[35] The emphasis of the assessment thus shifts from subordination to economic dependence. The issue is whether this category of quasi- or parasubordinated work in an intermediate position due to economic dependence should be wholly or partly included in the extensive labour law protection, which also includes provisions on equal treatment that have a personal scope limited to employees. A new concept of the category could either mark such persons as employees for the purposes of various kinds of protection, or a change of legislation could introduce a new category of economically dependent workers, which would also fall (partly) within the scope of the current social protection.

The above discussion on the new category of the EDP could be quite relevant to self-employed women. Again, the level of protection concerning equal treatment of men and women differs between workers and the self-employed. The emergence of a third in-between category that will wholly or partly be included in the more elaborate protection of workers could influence the position of self-employed women in a positive way, as more women who qualify for this category will enjoy the higher level of protection provided for workers in the equality between men and women directives.[36]

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[31] Ibid, p.35.
[32] Op cit, n.19, p.1.
[33] Ibid, p.78-80. Italy, Germany and the UK.
See also discussion Van den Berg on zzp-ers (self- employed without employees): op cit, n.25.
Van den Berg suggests a subcategorization according to the criterion of economic dependence.
[34] The Commission issued a consultation document on the subject in 2000. The onset was given by the conclusions of the March 2000 Lisbon European Council. See EIRO-online: http://www.eiro.eurofound.eu.int/about/2000/07/inbrief/eu0007259n.html.
[35] *Perulli Report,* op cit, n.18, p.100.
[36] The specific relevance of the 'third' category for women and equal treatment will be discussed further in chapter 3.

Chapter 2. The European Legislation

Part 1. Equal Treatment in general

I. The General Framework

The provisions concerning equal treatment can be subdivided into primary and secondary sources. The main primary source- article 119 EC- was the starting point, as it was the first provision to mention equal treatment between men and women in the form of equal pay for equal work. The article was originally devised to combat distortion of competition; the comparative differences between wages for women and men in the various Member States could seriously jeopardize the common market. However, the Court indicated in the *Defrenne II* case that the article has a two-fold aim. Besides protecting the member states that have already implemented the principle of equal pay from economic disadvantages, it also serves the aim of ensuring social progress by improving working conditions and the standard of living of workers.[37] The article functioned as the basis for all subsequent developments.[38] With the adoption of the Amsterdam Treaty, article 119 EC was renumbered as 141 EC and some important amendments were made. The amended article provides the Community with a legal basis for measures to be taken within the framework of equal treatment in employment and occupation and provides a paragraph enabling positive action.[39] Additionally, the aim of promoting equality between men and women was included in the list of main tasks of the European Community in article 2 EC. The treaty also introduced the already existing concept of gender mainstreaming in the EC Treaty. Article 3(2) EC indicates that the Community will strive to eliminate inequalities, and to promote equality between men and women in all their activities. The concept is defined as the systematic consideration of the differences between the conditions, situations and needs of women and men in all Community policies, at the point of planning, implementing and evaluation.[40] Such an approach suggests that there is an obligation of the Community to anticipate possible disadvantages for the under-represented sex in advance and actively prevent and solve factual inequalities flowing from Community actions or legislation.

II. Expanding legislative Powers

Before the adoption of the Treaty of Amsterdam, the institutions involved in the process of creating secondary legislation in the field of equal treatment had to rely on the residual provisions of articles 94 EC and 308 EC, as there was no specific provision on which to base legislation.[41] The Treaty amended Article 141 (3) EC in such a way that it now confers secondary legislative power and thus can be used to adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or

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[37] Case 43/75 *Defrenne v Sabena (II)* (1976) ECR 455, paras. 9-12.
[38] Op cit, n.2, p.12.
[39] Treaty of Amsterdam. OJ C 340, 10 November 1997.
[40] Bell, M. *Anti-Discrimination Law and the European Union*. Oxford Studies in European Law. Oxford: Oxford University Press, 2002, p. 47.
[41] Formerly articles 100 and 250 EC. In: op cit, n.2, p.14.

work of equal value. Moreover, a fourth paragraph was added that enables the Member States to maintain and adopt specific measures with a view to ensuring full equality between men and women in practice. These measures can entail the provision of specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers. Article 137 EC provides the Community with the power to adopt minimum harmonization directives in various spheres of social policy, including equality between men and women.[42] Besides the fact that both these provisions simplify the legislation process by their use of the co-decision procedure of article 251 EC, they also provide legislation with a more substantial legitimacy. In line with article 2 and 3 EC it seems to suggest that the field of gender equality is now recognized as a mature and important issue.

As to the applicability of the amended articles, 141 EC is applicable in the area of gender equality regarding employment and occupation. Referring back to chapter 1, the concept of employment clearly relates to employees only. The concept of occupation can possibly also encompass the self-employed.[43] The former article 119 EC had a personal scope limited to employees. Article 137 EC seems less apt for adapting measures in the field of equal treatment of the self-employed, as it differs from article 141 EC in two important areas. Firstly, the scope of the article seems more limited. The paragraph relevant to equal treatment between men and women, article 137 (1)(i) EC, refers to equal treatment of men and women regarding equal opportunity in the labour market and equal treatment at work.[44] The phrase 'labour market' seems to refer to persons who are covered by labour law, thus excluding the self-employed from its scope. Additionally, article 137 EC does not provide a paragraph that specifically allows for positive action, as does article 141(4) EC.

The Treaty of Amsterdam also introduced the general article 13 EC that confers legislative powers to combat discrimination based on sex as well as other grounds, which encompass racial or ethnic origin, religion or belief, disability, age or sexual orientation. In the field of gender equality, this general article can only be used in case the specific provisions for gender equality do not apply. Unlike article 141 EC and 137 EC, article 13 EC conspicuously omits any reference to employment, occupation and labour market and can therefore seemingly be utilized in situations outside the labour market.[45] The scope of article 13 EC is thus broader than the scope of article 137 and 141 EC, and can be used for equal treatment legislation concerning, for example, goods and services. In contrast to article 141 EC, measures based on article 13 EC will have to be adopted unanimously.

III. Form of Community Legislation

All of the Community legislation concerning equal treatment on any grounds has been in the form of either soft law, such as opinions and recommendations, or directives.[46]

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[42] See article 137 paras 1(i) and 2 (b) EC.

[43] See Directive 2002/73/EC. The directive expands the applicability of directive 76/207/EEC to the self-employed and is based on article 141EC, suggesting the term occupation includes the self-employed.

[44] See article 137 paras 1(i) and 2 (b) EC.

[45] See article 13 EC.

[46] Examples of soft law:
Commission Recommendation of 27 November 1991 on the protection of the dignity of women and men at work, including the code of practice to combat sexual harassment (92/131/EEC),
Council Recommendation of 13 December 1984 on the promotion of positive action for women (84/635/EEC).
In: Bell, op cit, n.40, p.4.

According to the articles 141 EC and 13 EC mentioned before, the Community is able to take all measures or action necessary to achieve its goals. According to article 249 EC, these measures theoretically include regulations. The choice for soft law and directives instead seems to be motivated out of both necessity and conscious choice. The characteristics of directives and soft law in contrast to regulations are the comparative freedom they offer to the Member States. Regulations are binding in their entirety and directly applicable in all Member States and will immediately become part of the domestic law of the Member States without the need for any implementing measures.[47] Unlike regulations, directives are in principle addressed to a state and are binding as to the results to be achieved, but shall leave to the national authorities the choice of form and methods. Soft law is in principle not binding and leaves complete freedom to the Member State to either take measures or disregard it all together.[48] Directives are often used to achieve harmonization in fields that either vary greatly among the Member States or are especially sensitive or complex.[49] The field of equal treatment can be categorized as such, as it touches upon, amongst others, the complex area of labour law and affiliated areas. Most of these areas require quite some adaptation before the Member states could fulfil their obligations, as the systems of labour law differ substantially between states.[50] Additionally, as equal treatment is at least partly a social goal and therefore a more sensitive subject than a purely economic one, directives might arouse less resistance as they create more space for the individual Member States to maintain their own systems while incorporating the rules of the directives.

From the point of view of the individual, the use of directives does carry certain disadvantages. A directive needs to be implemented into national law and the Member States are awarded a certain period to achieve this. During this occasionally long-term period, an individual will not be able to reap the benefits from the legislation. According to article 249 EC, the provisions of a regulation will be directly applicable. In order for these provisions to have direct effect, they will have to satisfy the criteria as spelled out in, amongst others, the *Van Gend en Loos* case and subsequent cases.[51] The case itself revolved around the possible direct effect of a treaty provision, but the criteria have also been used to determine the direct effect of both regulation and directive provisions. The Court argued that in order to have direct effect, a provision needs to be self-executing, which entails that the provision should be clear, unconditional, containing no reservation on the part of the Member State, and is not dependent on any national implementing measure. [52] In later cases, these criteria have been somewhat softened. An example of such a case is the *Defrenne II* case mentioned before. The Court stated that article 119 EC (now 141 EC) EC could have direct effect in both vertical and horizontal relations, although the provision itself did not so much impose a precise obligation on the Member States, but instead was the expression of a principle. The fact that the provision was addressed to the Member States does not necessarily mean that there is an element of discretion conferred on the states and subsequently does not preclude direct

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[47] See Craig, op cit, n.8, p.190.
[48] However, according to the case 322/88 *Grimaldi v Fonds des Maladies Professionelles* (1989) ECR 4407 national courts must take soft law into consideration in order to decide disputes submitted to them, in particular where they clarify the interpretation of national provisions adopted in order to implement them or where they are designed to supplement binding Community provisions. Moreover, soft law carries with it moral authority, which makes it difficult for the Member States to diverge therefrom.
[49] See Craig, op cit, n.8, p.202.
[50] See website of Federation of European Employers, especially the country employment law guides, which provide an overview of the basic labour law provisions of the EU Member States. http://www.fedee.com/IntroLaw.html.
[51] Case 26/62 *Van Gend en Loos v Nederlandse Tariefcommissie* (1963) ECR 1.
[52] Craig, op cit, n.8, p.185.

effect.[53] However, as the provisions of a directive are by nature addressed to the Member States, they are at least less likely to have vertical direct effect. Moreover, in case of a directive, the individual will not be able to appeal to the direct effect of any directive provision until the implementation period has elapsed. After this period, a directive can have similar effects to regulations.[54] In contrast to regulations, the Court excluded horizontal applications of directive provisions in the *Marshall* case.[55]

IV. Formal and material Approach to Discrimination

The formal approach to discrimination, or formal equality, is the traditional view of the concept of discrimination, and signifies that different rules are applied to comparable situations or similar rules are applied to different situations. Thus, there is no discrimination if comparable situations are treated similarly and dissimilar situations dissimilarly, to the extent of the difference.[56] In other words, the formal conception of equality is a negative concept of discrimination: 'a prohibition of '.[57]

The material or substantive approach entails that equal or unequal treatment itself is less important, as an overall assessment is made of the actual effect of a certain rule. The primary task is to create real social, economic and cultural equality and in order for this aim to be achieved, it is necessary to evaluate the results of a certain treatment. The approach means that the principle of equal treatment will lead from a duty to defer from discrimination, which is a rather passive stance, to the active duty to differentiate.[58] The different approaches can have very different results. The formal/material equality distinction can be seen as a scale, in which at one end there is an absolute formal approach, at the other an absolute material approach and in between a grey area of mixed approaches. It has to be noted that formal or material equality are relative concepts; one will classify an approach as formal or material depending on the starting position on the scale. If this position is located on the edge of the formal side, anything that is slightly more material will be deemed to be a material approach and the other way around.[59]

It is difficult to say which of these approaches the EU Court prefers, as case law has shown that the approach can differ from case to case. The exact direction of the EU Court as regards formal or material equality is subject to discussion. Burri, for example, asserts that an inclination towards the formal approach can be detected.[60] Prechal, on the other hand, is somewhat more optimistic on the topic. Albeit agreeing that the EU Court is sending mixed messages, Prechal finds that certain developments indicate that the material approach to equality is on the increase. Examples of such evidence can be found in the above-mentioned adaptation of article 2 and 3 EC, and the introduction of indirect discrimination in the equality directives, which is a (mild) form of material equality.[61] An example of the material approach

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[53] *Defrenne II*, op cit, n.37, paras. 28-40.
[54] Case 41/74 *Van Duyn v Home Office* (1974) ECR 1337. In: Craig, op cit, n.8, p.206.
[55] Case 152/84 *Marshall v Southampton and South-West Hampshire Area Health Authority* (1986) ECR 723. In: Craig, op cit, n.8, p.208.
[56] Burri, S.D. *Gelijke Behandeling m/v*. Europees Sociaal Recht. The hague: Sdu Uitgevers, 2004, p.39.
[57] Prechal, op cit, n.1, p. 537.
[58] Burri, op cit, n.56, p.40.
[59] See Prechal, op cit, n.1, p.537. In France, which traditionally uses a very formal concept of equality, the concept of indirect discrimination is considered to be far-reaching material equality.
[60] Burri, op cit, n,56, p.40.
[61] Prechal, op cit, n.1, p.537-538.

can be found in the *Brown* case.[62] The Court has ruled that the principle of equal treatment entails that Directive 76/207/EEC cannot be interpreted restrictively; the provisions of the directive are deemed to aim at material equality.[63] In case of self-employed women, the material approach will lead from a theoretical equality to a practical assessment whether women, even if formally not discriminated against, have the same opportunities as their male counterparts of starting and/or maintaining a self-employed activity.

The idea of material equality is closely linked to positive action. In fact, an absolute material approach would mean that there would be no need for separate provisions enabling positive action. Complete material equality implies that any measures to differentiate in case of a lack of real social, cultural or economic equality are obligatory. Thus, the introduction of positive measures in some cases could be an obligation in order not to infringe on the principle of equal treatment, and not a possibility. Considering the above-mentioned uncertainty about the exact interpretation of equality by the EU Court, ranging from rather formal to modestly material and in all cases rather casuistic, the assumption that the EU Court will make a definitive shift to complete material equality in the near future seems far-fetched. Thus, for now, provisions on positive action are necessary and prevalent in most (new) directives.[64]

V. The Substance of Community Legislation

A. Equal Pay and Social Security Directives

The first directive created in the framework of equal treatment was the equal pay Directive 75/117/ EEC.[65] Directive 75/117/EEC has had a limited impact in the field of equal treatment. The directives on equal treatment that are mentioned below have partly replaced it, and it was also established that the directive did not extend or add to the principle of equal pay as laid down in article 141 EC. Shortly after, Directive 79/9/EEC concerning the gradual implementation of equal treatment in the field of statutory social security was adopted, followed by Directive 86/378/EC/EEC concerning occupational social schemes.[66] The personal scope of the first Directive 75/117/EEC is limited to employees, while the personal scope of the social security directives is wider and covers both employees and the self-employed.[67]

The *Barber* case was important for the expansion of the concept of pay of article 141(1) EC.[68] The Court indicated that certain (outsourced) pension schemes should be regarded as pay and therefore fall under the scope of article 119 EC (now 141 EC). Therefore, it was essential to determine whether an occupational scheme was covered by article 141 EC

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[62] Case C-394/96 *Brown v Rentokil Ltd* (1998) ECR I-4185. The Court stated that a rule equally applicable to both pregnant women and men similarly applied to different situations was discriminatory. This is clearly a case of a duty to differentiate in case of pregnant women.
[63] Burri, op cit, n.56, p.41. Case C-136/95 *CNAVTS v Thibault* (1998) ECR I-2011.
[64] A further discussion on the relevance of material equality and positive action will follow in chapter 3.
[65] Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women. OJ L 45, 19.2.1975, p. 19–20.
[66] See op cit, n.5.
[67] The personal scopes of Directive 79/7/EEC and Directive 86/378/EEC are expansive. According to article 2, respectively article 3 the directives are applicable to the working population, including the self-employed and employees which are incapacitated by illness, maternity, accidents or involuntary unemployment, and persons seeking employment, and to retired and disabled workers.
[68] Case C-262/88 *Barber v Guardian Royal Exchange Assurance Group* (1990) ECR I-1889.

or a social security directive, as the latter offers several exemptions and a more gradual approach in the field of equal treatment, while article 141 EC is characterized by the absence of exemptions.[69] After much discussion, Directive 86/378/EEC was amended by Directive 96/97/EC and incorporated the relevant case law.[70] The changes made were aimed at employees; article 9 of Directive 86/378/EEC was deleted and substituted by a version that no longer allows for the postponement of the implementation of the principle of equal treatment by extensive exceptions. These exceptions, relating to subjects like the determination of pensionable age and surviving relatives' pensions, are still applicable to the self-employed.

B. Equal Treatment at the Workplace

The first equal treatment directive was adopted in 1976.[71] The directive was intended to cover all areas other than equal pay such as access to employment, vocational training, promotion and working conditions.[72] The directive was amended in 2002 by Directive 2002/73/EC, an important change being the inclusion of equal pay within the sphere of equal treatment, another the apparent inclusion of the self-employed within the scope of the directive.[73] The inclusion of equal pay is apparently not meant to detract from the current case law on equal pay. The directive not only functioned to modernize and streamline the gender equality directives, it was also used to attune the concepts of discrimination and the possible exemptions in all the directives concerning equal treatment as a whole.[74]

Three other directives that are directly or indirectly connected with the category of the self-employed are of importance in the area of equal treatment and need to be mentioned, if only to compare the situation of workers and the self-employed. The first concerns Directive 92/85/EEC 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, or Pregnancy Directive.[75] This directive was adopted on the basis of the former article 118A EEC, now renumbered as 137 EC, and is therefore only applicable to employees. The second is the Directive 86/613/EEC on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood.[76]

Very recently, Recast Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation was adopted.[77] The directive is meant to provide a single coherent text concerning

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[69] Burri, op cit, n.56, p.60.
[70] Council Directive 96/97/EC of 20 December 1996 amending Directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes
[71] 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. OJ L 39, 14.2.1976, p. 40.
[72] Ibid, preamble.
[73] Directive 2002/73/EC, see article 3.
[74] Ellis, op cit, n.2, p.216.
[75] 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, 28.11.1992, p.1.
[76] See op cit, n.5.
[77] Directive 2006/54/EC of the European Parliament and 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 204/23 26.7.2006, p.23-36.

equal treatment in the workplace, and to that end amalgamates Directives 75/117/EEC on equal pay, 76/207/EEC on equal treatment and its amendment Directive 2002/73//EC, 86/378/EEC on occupational security schemes and its amendment Directive 96/97/EC and Directive 97/80/EC on the burden of proof in cases of discrimination based on sex.[78] The merging of these directives into a single instrument could provide greater legal certainty and clarity in the field of equal treatment including equal pay. The directive is subdivided into chapters relating to equal pay, equal treatment and occupational security schemes and the actual substantive provisions are in all areas for the greater part similar to those of the existing directives. The definitions of discrimination are updated according to case law; the concept of discrimination now for all areas includes any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EEC.[79] Although the directive has already entered into force, the implementation date is set on the 15th of August 2008, with a possible reprieve of a year.[80] From that date on, all the directives that the directive aims to replace will be repealed.[81]

C. Directives based on Article 13 EC

Since its existence, three directives have been adopted based on article 13 EC. The first was the Race Directive 2000/43/EC, which aims to combat discrimination on the grounds of race or ethnic origin[82]. The Race Directive has a wide material scope, as it not only covers the traditional areas of employment and education, but has additionally broadened the field to cover social advantages, social security, health and education and goods and services.[83] Moreover, the personal scope of the directive is not limited and can encompass all persons, employed, self-employed or unemployed or in any capacity relating to one of the areas within the material scope.[84] The second is Framework Directive 2000/78/EC that strives to create a general framework for equal treatment in employment and occupation.[85] According to article 1, the directive aims to combat discrimination on the grounds of religion or belief, age, disability or sexual orientation. The directive is substantively more limited than the Race Directive and has a substantive scope similar to that of Amendment Directive 2002/73/EC.[86] Again, the personal scope is in principle not limited to any category.[87] In line with Race Directive 2000/43/EC, recently a proposal has been adopted implementing the principle of equal treatment between women and men in the access to and supply of goods and services, resulting in Directive 2004/113/EC.[88] According to article 17, the Member States will not have to implement the provisions until the end of 2007. The directive could be of relevance to self-employed women with regard to financial services and insurances.[89]

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[78] Ibid, preamble point 1.
[79] Ibid, article 2(2)(c).
[80] Ibid, article 33.
[81] Ibid, article 34.
[82] 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, 19.7.2000, p. 22–26.
[83] Ibid, article 3.
[84] Ibid, article 3(1).
[85] Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. OJ L 303, 2.12.2000, p.16-22.
[86] Ibid, article 3.
[87] The exact phrase is 'all persons' according to article 3
[88] See op cit, n.5.
[89] The subject will be discussed further in chapters 2 and 3.

Part 2. The Self-employed

I. General

After this general overview, it is clear that the above-mentioned directives differ substantially as to both their personal and material scope. The following chapter will elaborate upon the applicability of the relevant equal treatment directives on the self-employed. The focus will be on the directives most relevant to the self-employed namely the previously mentioned Directive 2002/73/EC, Directive 86/613/EEC, Directive 2004/113/EC and the social security Directives 79/9/EEC and 86/378/EEC.

II. Directive 86/613/EEC

A. The Goals

Directive 86/613/EEC was adopted to ensure the application of the principle of equal treatment in the areas specific to the position of the self-employed. In the Explanatory Memorandum to the original proposal, the Commission acknowledges that, although the existing guidelines are applicable to a certain extent, they partly fail to consider particular issues concerning the self-employed.[90] Based on the earlier Community Action Programme 1982-1985 [91], the Commission names a list of pressing issues that the directive aims to resolve or ameliorate. The first problem concerns the lack of occupational status of spouses who participate in family businesses, especially in the agricultural sector. Their ambiguity of their status, being neither an employee nor a legal partner, makes it difficult to determine their claims to any kind of social security or income. According to the European Parliament, the directive should lead to an acknowledgement of the individual rights of the participating spouses instead of derived rights. The individual right to an income, an individual fiscal position and individual rights in matters of social security can secure more independence , both financially and professionally, for these spouses.[92] As mentioned before, this particular issue falls outside the scope of the subject of equal treatment of self-employed women. It is noteworthy though, that the enumeration of the goals start out with the subject and that it is a relatively much discussed issue in the preparatory documents leading towards the adoption of Directive 86/613/EEC. It could even be argued that the issue was so important, that it could have worked to the detriment of the other subjects that needed to be addressed. Furthermore, the programme indicated that it was necessary to promote the access of self-employed women to occupational training and education. A third problem concerns the fact that there is a lack of female members of the representative organs of the professions concerned, even in cases where they have a legally established right to participate. The next problem mentioned is the issue concerning childbirth and maternity. Both women who are indirectly involved in the management operations of a family business and women who run their own independent activities in general are not in the position to abandon their work during the period surrounding confinement, due to the lack of available funds to set off the loss of income ensuing from their absence. Another problem is the access of women to financial means such

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[90] Proposal for a Council Directive of the principle of equal treatment for men and women in self-employed occupations, including agriculture, and on protection during pregnancy and maternity. COM (84) 57 final, p.1. OJ C 113, 27.4.1984, p.4.
[91] Community Action Programme 1982-1985 COM (81) 758 final, action 5.
[92] Resolution of the European Parliament. OJ C172 2.7.1984, p. 81.

as loans. This problem is not mentioned in the Explanatory Memorandum, nor in the preamble to both the first and the final version of the proposal; in fact it is not mentioned until the comments on the articles with regard to article 4.[93] After this enumeration, the Commission sets the tone that permeates throughout the directive. It states that the directive is an attempt to obviate the problems by means of formulating a series of goals for the Member States to strive for, while leaving them the freedom to choose the appropriate means. The Commission states that the diversity of the legal systems and the provisions on the different areas have to be taken into account.[94] The most conspicuous words of the phrasing are 'strive for'. They suggest that the directive is not so much putting an obligation on the Member States to attain these goals, but instead functions as an incentive or a reminder to try to attain them. In other words, the Commission seems to imply that the directive conveys an obligation for the Member States to perform to the best of their abilities, instead of an obligation to produce a certain result. The reason for this careful and rather noncommittal approach seems to be the realisation that the differences between the legislation and practices concerning the self-employed diverge considerably amongst the Member states and these differences are likely to influence the materialization of the previously mentioned goals.[95] Article 1 of the proposal states the goals of the directive. Apart from the obvious goals of attaining equal treatment of the self-employed in paragraph 1, paragraph 2 specifically mentions the additional objective of the protection of maternity in the professions concerned. In the final text of Directive 86/613/EEC, the paragraph has disappeared.[96]

B. Personal and material Scope

According to article 2(a) of Directive 86/613/EEC, the directive is applicable to self-employed workers, that is to say 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. The wording 'under the conditions laid down by national law' seems to imply that the Member States have some discretion as to the interpretation of the concept of self-employed.[97] The phrase was absent in the earlier Commission proposal.[98] In line with the earlier mentioned issue of the ambiguous status of the spouse in activities, article 2(b) states that the directive covers spouses, not being employees or partners, where they habitually, under the conditions laid down by national law, participate in the activities of the self-employed worker and perform the same tasks or ancillary tasks. The Commission proposal spoke first of a considerable degree of participation, and subsequently of a significant degree of participation following the amendment of the European Parliament.[99] Evidently, the term significant was deemed to be too restrictive. It is clear that is easier to fall under the scope of this directive if all that has to be proven is that a spouse habitually participates in any form or manner, while the term significant can cause a large group of women to fall outside the scope of the directive, and can cause much uncertainty about the exact interpretation of the term.

The material scope of the directive stands out for its vagueness. Article 1 states that it is applicable as regards aspects not covered by Directives 76/207/EEC and 79/7/EEC.[100] The sentence seems to suggest that concerning aspects covered by Directive 76/207/EEC, the

[93] COM (84) 57 final, p.4.
[94] COM (84) 57 final, Ex. Mem, p.2.
[95] COM (84) 57 final, Ex. Mem, p.3.
[96] Compare article 1 of COM (84) 57 final, p.3 to article 1 of Directive 86/613/EEC.
[97] See chapter 1 on the self-employed. Since the adoption of Directive 86/613/EEC, case law has shown that it is not up to the Member States to define the concept differently for the purposes of EU law.
[98] COM (84) 57 final, p.3.
[99] OJ C172 23.5.1984. p.78, article 2.
[100] As amended by Directive 2002/73/EC.

latter has precedence over Directive 86/613/EEC. The specific subjects that Directive 86/613/EEC aims to cover can be found in articles 4 to 8. Article 4 states that the Member states shall ensure the elimination of all provisions that are contrary to the principle of equal treatment, especially in respect of establishment, equipment or extension of a business or the launching or extension of any other form of self-employed activity including financial services and thus concerns access to self-employed work. The Explanatory Memorandum indicates that the article is specifically meant to ensure access to financial means and resources, aiming at granting self-employed women access to, for example, bank credit and subsidies.[101] The original proposal contained the obligation to eliminate both provisions and practices contrary to the principle of equal treatment.[102] The removal of the word practices in the definitive directive diminishes the strength of the article. Article 4 seems to entail the conveyance of an obligation to the member states to eliminate the provisions contrary to equal treatment in the public sphere, such as the matrimonial property regime and possibly the legislation concerning the banking sector. However, the elimination of discriminatory practices suggests an approach that goes beyond the elimination of provisions and could entail that the Member State is obliged to monitor if both the public and the private sectors that provide financial services to starting or expanding entrepreneurs do not behave themselves in a discriminatory manner. The approach seems to carry an obligation to introduce measures in case of discriminatory practices and seems to strive for a slightly more material equality instead of a merely formal one. However, both articles try to ensure equal treatment by the elimination of discrimination and evidently do not prescribe that equal treatment should be actualized by positive action. In light of the discussion in chapter 2.Part 1.IV, it is highly unlikely that even the more far-reaching text of the proposed version of article 4 actually aimed at complete material equality. In this respect, it is important to mention that the Directive does not contain a provision on positive action, in contrast to the later instruments Directive 2004/113/EC and amendment Directive 2002/73/EC.[103] In its advice, the Economic and Social Committee indicated that a successful realization of equal treatment had proven to be implausible if it is not accompanied by a proper system of sanctions. In cases of apparent discrimination concerning the granting of credit, the Committee therefore suggested to prevail upon the Member States to attach sanctions to infringements in order to effectuate equality in practice.[104] Despite the advice, neither article 4 nor the other articles in Directive 86/613/EEC mention the subject of sanctions.

Article 5 to 7 address problems regarding the status of assisting spouses, amongst others the formation of a company and the issue of access to contributory schemes and are not relevant to the situation of actual self-employed women.

The only other substantive provision that is important to self-employed women is Article 8. This article concerning pregnancy and motherhood is very similar in its wording to article 7. The article provides that the Member States shall undertake to examine whether, and under what conditions, female self-employed workers and the wives of self-employed workers may, during interruptions in their occupational activity owing to pregnancy or motherhood, have access to services supplying temporary replacements or existing national social services, or be entitled to cash benefits under a social security system or under any other public social protection system. Again, the article is an order to examine and seemingly fails to impose any obligation on the Member State to address a possible identified insufficiency. Similar to article 7, article 8 was far more obliging in the original proposal. At that stage, the article obliged the Member States to take all necessary measures to ensure that

[101] COM (84) 57 final, Ex. Mem, p.4.
[102] COM (84) 57 final, p.4.
[103] See article 6 of Directive 2004/113/EC and Directive 2002/73/EC, article 1(2)(8).
[104] Opinion of the Economic and Social Committee OJ C 343/1 24.12.1984, p.3.

all women who are either self-employed or are wives of self-employed persons could appeal to replacement services or compensation in the framework of either a social security system, contributory or otherwise, or any other system of public social protection.[105] Although this earlier article did not indicate what minimum levels of compensation were acceptable, nor did it indicate the conditions under which such a service or compensation should be offered, it did at the least oblige the Member States to act should such a service or compensation be non-existent. The result seems to be that the only obligation Member States have is to determine inadequacies and maintain the status quo or take action at their own discretion. The outcome is a far cry from the proposal, the ESC advice and the Parliamentary Resolution on the matter. The European Parliament's wish was that self-employed women and wives of self-employed men would be entitled to the same rights concerning pregnancy and motherhood as those common to female employees.[106] The ESC stressed the absolute necessity of replacement services, more so than monetary compensation for lost income, as women in these positions experience severe problems with the perforce interruption of work a pregnancy brings about.[107]

III. Directive 2002/73/EC

Directive 2002/73/EC, amending Directive 76/207/EEC, is based upon article 141(3) EC. The original Directive 76/207/EEC was applicable in matters of access of employment, vocational training and working conditions and, albeit limited, social security.[108] The directive was predominantly aimed at men and women in employment, similar to Directive 75/117/EEC. As mentioned above, Directive 86/613/EEC refers to Directive 76/207/EEC in article 1 and claims that it covers all aspects in so far as they are not covered by Directives 76/207/EEC and 79/7/EEC. The specific reference is rather puzzling, as it seems that Directive 76/207/EEC, before its amendment, was extremely limited in its coverage of the self-employed, if at all. The phrase 'access to employment' implies that it is applicable in relations between an employee and an employer. The term working conditions is equally inappropriate in case of a self-employed person, as working conditions are a typical aspect of an employee.[109] However, the original directive might have covered some instances. Article 3(1) stated that there could be no discrimination whatsoever on grounds of sex, including the selection criteria, for access to all jobs or posts, whatever the sector or branch or activity, and to all levels of the occupational hierarchy. Article 3(2)(a) and (b) added that any laws, regulations and administrative provisions contrary to the principle of equal treatment shall be abolished and that the Member states should take all the measures necessary to ensure that any provisions contrary to the principle of equal treatment, which are included in collective agreements, individual contracts of employment, internal rules of undertakings or in rules governing the independent occupations and professions shall be, or may be declared, null and void or may be amended. The directive might have been applicable to a person applying for posts in a partnership in any of the regulated professions such as medicine and subsequently,

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[105] COM (84) 57 final, p.5.
[106] OJ C172 2.7.1984, p.82.
[107] OJ C 343/1 24.12.1984, p.1.
[108] 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. OJ L 39, 14.2.1976, p.40.
[109] Ibid, article 1(1).

rules infringing on the principle of equal treatment should be eliminated. Similarly, article 4 did not exclude the applicability of the directive in the field of self-employment concerning vocational training. Furthermore, article 5 concerning working conditions, especially paragraph 2 (b) seemed to indicate that, again, any rules governing the independent occupations and professions shall be null or should be amended in case of infringement.[110]

In the original proposal for Directive 2002/73/EC, the modifications were relatively minor and article 3, regarding the scope of the Directive, remained nearly the same.[111] Throughout the decision-making process, some important improvements were made and Amendment Directive 2002/73/EC seems to have broadened, or at least clarified, the scope of Directive 76/207/EEC. Article 3 was thoroughly revised and articles 4 and 5 were deleted.[112] An important change for the self-employed was the explicit inclusion of their category in article 3(1)(b), added by means of a Parliamentary Amendment to bring it into line with the Framework Directive 2000/78/EC.[113] The inclusion indicates that the principle of equal treatment in Directive 76/207/EEC now unequivocally applies to access to self-employment. Still, the new article raises the question how access to self-employment should be interpreted. In the framework of access to employment, the Court has generally given a wide meaning to the concept.[114] Similar to the earlier Directive 76/207/EEC, it is unclear if the self-employed are included amongst the persons protected by article 3(1)(b). However, as vocational training is not reserved for employment alone, it would be plausible that the liberal professions and other self-employed activities fall within its scope. In contrast to the previous Directive 76/207/EEC, the new article 3 clearly states that there shall be no direct or indirect indiscrimination in both the public and the private sectors, including public bodies.

Regarding pregnancy and motherhood, the amendment directive explicitly refers to the existing instruments and case law.[115] Article 2 of Directive 76/207/EEC was amended and some subparagraphs were added to paragraph 3. The original text merely stated that the directive should be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity. The new subparagraphs incorporate recent case law on maternity leave and dismissal and refer to the Pregnancy Directive 92/85/EEC.[116]

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[110] It is, however, a rather limited possibility. A body or organisation adopting or applying rules governing the liberal professions could, for example, maintain a rule that disables part-timers from reaching a certain level. Theoretically, this could involve a person in a self-employed capacity.

[111] COM (2000) 334 final, 16. OJ C 337E , 28.11.2000, p.204–206. In the proposal, article 1(4) states that a paragraph (d) is added to article 3(2) of Directive 76/20/EEC. The paragraph prescribes the nullity of provisions contrary to the principle of equal treatment concerning membership of and involvement in an organisation of workers and employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations.

[112] Directive 2002/73/EC, article 1(3): article 3 shall be replaced by the following:
1. Application of the principle of equal treatment means that there shall be no direct or indirect discrimination on the 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 Directive 75/117/EEC;
(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.

[113] Directive 2002/73/EC, article 1(3). Directive 2000/78/EC, however, differs in one aspect. Article 3(1) clearly specifies that the personal scope of the article covers all persons.

[114] Ellis, op cit, n.2, p.220. The problem will be further elaborated upon in chapter 3.II.

[115] Directive 2002/73/EC, preamble point 12.

[116] Directive 2002/73/EC, art. 1(2)(8).

The case law involved concerns employees and equal pay and working conditions, and the Pregnancy Directive itself is only applicable to employees. The subparagraphs are remarkably silent on the protection of motherhood regarding the self-employed, as Directive 86/613/EEC, especially article 8, fails to be mentioned. The focus on pregnancy and maternity concerning employees suggests that the paragraph as a whole was written exclusively for the benefit of the protection of employees, in connection with article 3(1)(b); the principle of equal treatment regarding employment and working conditions, including dismissals, as well as pay as provided for in Directive 75/117/EEC.

IV. Directive 2004/13/EC

A. General

The idea of applying the principle of equal treatment in areas outside of employment and professional life had been introduced earlier through the adoption of Directive 2000/43/EC, the Race Directive.[117] In its Framework Strategy on Gender Equality for 2001-2005, the Commission presented the proposal for a directive based on article 13 EC regarding equal treatment of men and women in matters other than employment and occupation as an action point.[118] The Commission materialized its intention in the form of Directive 2004/113/EC, which implements the principle of equal treatment between men and women in the access to and supply of goods and services.[119] In its Explanatory Memorandum regarding the original proposal, the Commission elaborated upon the motivation for the proposal.[120] Firstly, the Commission points out that the legislation at European level prohibiting sex discrimination in the labour market is comprehensive and well established and goes on to say that as the principle of equality is consolidated in the Constitutions of all Member States, it cannot be justified that this principle is limited to the world of work.[121] Discriminatory behaviour based on sex in the access to and supply of goods can, according to the Commission, act as a barrier to social and economic integration. These barriers occur especially in the access to finance, although they are certainly not limited to that area, and can be detrimental to the possibilities for small companies and individuals to gain access to loans and therefore the possibilities to provide for themselves and for their dependents.[122] The Commission admits that it is not common for providers of goods and services to maintain rules or practices that are overtly discriminatory. The principle of equal treatment will predominantly be infringed by discriminatory behaviour.

There is, however, one exception to this rule; in the field of insurances, services are generally offered on different terms and conditions to women and men.[123] The use of actuarial factors such as life expectancy and patterns of behaviour to evaluate the risks and determine differential premiums, benefits and annuities for men and women is widespread.[124] The

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[117] Directive 2000/43/EC.
[118] Commission Communication of 7 June 2000: "Towards a Community framework strategy on gender equality (2001-2005)" COM (2000) 335 final –nyr.
[119] Op cit, n.5.
[120] Directive proposal COM (2003) 657 final.
[121] Ibid, Ex.Mem, p.3-4.
[122] Other financial services in which evidence points to (indirect) discriminatory behaviour are: the refusal to provide pregnant women with mortgages, the refusal to offer loans to people working part-time, the requirement for a woman to have a guarantor for a loan , sexual harassment by landlords and so on. See Commission Staff Working Paper, Extended Impact Assessment SEC (2003) 1213, p.5.
[123] Op cit, n.120, Ex.Mem, p.6.
[124] The areas of insurance concern all the main insurance fields , such as motor, health and life insurances, as well as pension annuities, while in other insurances such as civil liability, gender is generally not taken into account. See Commission Staff Working Paper, op cit, n.122, p.5.

Commission asserts that this behaviour is discriminatory and should be brought into line with the rules concerning the field of statutory insurance.[125] The insurance companies stated that the two situations cannot be compared, as the insurance companies, in contrast to the State, have little control over the balance of men and women in insurance schemes. By applying the principle of equal treatment of men and women in private insurances, the market could be artificially distorted and some products would no longer be economically viable.[126] The Commission did not agree and suggested that other actuarial factors than sex can be used to calculate risks instead.[127] However, some compromise was made regarding the time-limit for equal treatment concerning insurances.[128] Conspicuously enough, the Council declares in the preamble to the directive that the principle of equal treatment does not require that facilities should always be provided to men and women on a shared basis, as long as they are not provided more favourably to members of one sex.[129] The statement suggests that if a supplier cannot or will not offer their services or goods on the same conditions or terms to both sexes, they are better off and at liberty not to provide their services or goods at all.[130]

As to discrimination, the directive uses the same terminology as Amendment Directive 2002/73/EC, Directive 2000/43/EC and 2000/78/EC. The definitions of direct and indirect discrimination are similar, which means that less favourable treatment of women for reasons of pregnancy and maternity is considered direct discrimination.[131] Article 6 allows for positive action and stipulates that the principle of equal treatment shall not prevent any member state from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to sex.

B. Personal and material Scope

Directive 2004/113/EC applies to all recipients of goods or services, which are available to the public, irrespective of the person concerned. In other words, the directive has the widest personal scope imaginable, as it theoretically does not exclude anyone; it can apply to employees, self-employed and unemployed and the non-working population. According to article 3, the obligation to apply the principle of equal treatment is addressed to all providers of goods and services, as regards both the public and private sectors, including public bodies. The material scope of the directive is where the boundaries are set. First of all, the directive shall not apply to goods and services within the area of private and family life. This exclusion

[125] See Directive 79/9/EC and pension schemes, op cit, n.120, Ex.Mem, p.7.
[126] Ibid.
[127] A problem with this line of reasoning, however, might be that other factors could be discriminatory in their turn. For example, the use of the actuarial factor of age brackets to differentiate in the premiums for motor insurances could well lead to the violation of the principle of equal treatment on grounds of age. Instead of ensuring the principle of equal treatment, in some cases the directive could have the effect of shifting the problem to the area that has the weakest equality protection.
[128] Directive 2004/113/EC, article 5.
[129] Directive 2004/113/EC, preamble point 17.
[130] Clearly, this will not be the case in instances of privatized obligatory insurances, such as the Dutch health insurance contracts. If individuals are obliged to have health insurance, insurance companies are not able to offer services to one sex only if these are not based on actual physical differences such as, for instance, pregnancy care. See also the preamble.
[131] Directive 2004/113/EC, article 4(1). See also Directive 2002/73/EC, article 1(2)(7). The directives also include discrimination through harassment or sexual harassment and also the instruction to directly or indirectly discriminate in their definition of discrimination.

serves to protect other fundamental rights and freedoms such as the right to a private and family life and the freedom of religion.[132]

The phrase 'goods and services available to the public' might need some further explanation. In the Explanatory Memorandum, the Commission explains that the concept of goods and services has the same meaning as it does in Directive 2000/43/EC and should be restricted to those that are normally provided for remuneration. The concept of goods and services available to the public should therefore include: access to premises into which the public are permitted to enter; all types of housing, including rented accommodation and accommodation in hotels; services such as banking, insurance and other financial services; transport and the services of any profession or trade.[133] Originally, the definitions of goods and services were developed in the framework of the free movement of goods of article 28/29 EC and the freedom of services of article 49 EC. The concept of goods entails all goods in existence, as long as these goods have economic value. In principle, it includes foodstuffs, clothing, cultural goods, electricity and natural gas. Economic value does not need to be positive value.[134] Services, on the other hand, represent the non-tangible counterpart of goods. The EC treaty provides a definition of the concept as article 50 EC stipulates that services are: 'Services shall be considered to be "services" within the meaning of this Treaty where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons. "Services" shall in particular include: activities of an industrial or commercial character, activities of craftsmen and activities of the professions'. According to this definition, services form a residual category. The key element in both the definitions of goods and services is that there needs to be an economic element in the form of remuneration or value. Especially in the area of services, it could raise the question whether, for example, an interest free loan by a non-profit organisation will fall within the definition of services.[135]

The difference between the definition of services for the purposes of the freedom of services and the one in Directives 2000/43/EC and 2004/113/EC is that in the latter directive the phrase 'available to the public' is added.[136] It could be questionable when a service is available to the public or should be considered as purely private. Clearly, all state services and services offered to the general public will fall within its scope. On the other hand, the directive will not be applicable to services that are offered to a closed and fixed group of private persons. Determining the boundaries between available to the public, on the one hand, and closed and fixed service, on the other, might prove to be a challenge.[137] The addition could mean that, for example, specialized insurance services that are offered to a select group of self-employed professionals might fall outside the scope of the directive. As will be explained in chapter 2.Part 2.V.B, Directive 86/378/EEC excludes individual contracts of the self-employed from its scope. The issue arises whether these contracts will fall within the scope of Directive 2004/113/EC, if the phrase 'available to the public' is interpreted narrowly.

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[132] Directive 2004/113/EC, preamble point 3. The examples given in the Explanatory Memorandum are, amongst others, the renting of a holiday home to a family member or the letting of a room in a private house, op cit, n.120, Ex. Mem, p.13.

[133] Ibid.

[134] *Guide to the concept and practical application of articles 28-30 EC.* Agnete Philipson. DG Internal Market. http://ec.europa.eu/enterprise/regulation/goods/docs/art2830/guideart2830_en.pdf.

[135] In the case of equal treatment regarding finances, this could prove to be rather important. A private non-profit organization that provides such loans to, for example, starting entrepreneurs, could well fall outside the scope of this directive.

[136] Directive 2004/113/EC, article 3(1).

[137] Report "Combating discrimination in Goods and Services" Project: Towards the uniform and dynamic implementation of EU anti-discrimination legislation: the role of specialised bodies. 2004, p.6. http://ec.europa.eu/employment_social/fundamental_rights/pdf/pubst/mpg_uk04_en.pdf

To avoid any inappropriate interpretations of the prohibition of discrimination, it is emphasized in the preamble to the directive that direct discrimination can only occur when a person is treated less favourably, on grounds of sex, than another person in a comparable situation. The key word is 'comparable situation'; differential treatment based on physical differences in, for example, health care services, cannot be considered as comparable situations and will not constitute discrimination.[138] The question is why such emphasis is placed on the phrase 'comparable situation'. In the recent Directives 2000/43/EC, 2002/73/EC and 2000/78/EC, the definitions of discrimination are identical. They concur with Directive 2004/113/EC, in stating that discrimination occurs where one person is treated less favourably, on grounds of sex, than another is, has been or would be treated in a comparable situation. Directive 86/378/EEC and other older directives have definitions that do not contain any reference to 'comparable situation'. The inclusion could provide a possible early let-out in case of possible discrimination. An emphasis on the exact comparability of a situation could well lead to the up-front exclusion of certain situations from the directive(s) without ever coming to the stage of justification.

There are some disadvantages to the emphasis on comparability. Firstly, it provides the Court(s) with too much freedom in assessing forbidden classifications. Classifications, such as race or sex, are laid down by equality law and should not be reassessed by the Court(s) in every case as to their comparability. Secondly, the comparability test does not add to the transparency and objectivity of a case as the reasoning is at times very difficult to follow and could well be a reflection of the judge's opinion.[139] Moreover, the inclusion seems obsolete in the light of the *Dekker* case, in which the Court put forward that there is no need for a comparable situation in case of pregnancy, as a comparable situation could never be found for men. Taking it a step further, it could be argued that there is no comparable situation in more cases than just the period of pregnancy as men and women can have very different (starting) positions in other matters, even in the case of the absence of discrimination. By placing such emphasis on the comparability of situations, the definition seems to imply that, in spite of *Dekker*, the formal approach to discrimination is preferred, or at least is (ab)used to construe an escape route.[140]

Paragraph 2 of article 3 states that the directive shall not prejudice the individual's freedom to choose a contractual partner as long as an individual's choice of contractual partner is not based on that person's sex. The provision is obviously meant to protect the important civil law principle of freedom of contract. However, the addition of the paragraph is rather useless in the case of direct discrimination, and potentially detrimental in the case of indirect discrimination. Except for the situation that direct discrimination is set in a rule, it is highly doubtful that any supplier of goods and services will openly admit that the choice of a contractual partner is based on their sex. As the Commission pointed out, discrimination is often more a matter of practice than of written rules. A supplier could easily deny an accusation of discrimination based on sex, by asserting that other factors played a role in their choice of contractual partner.[141] This will be the case in instances of covert or structural discrimination, which is often difficult to trace.[142] More surprisingly, the paragraph seems to have the potential of undermining the concept of indirect discrimination. The essence of indirect discrimination is that there is no discrimination on grounds of sex, but that instead

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[138] Directive 2004/113/EC, preamble point 12.
[139] Prechal, op cit, n.1, p.543-544.
[140] Case C-177/88 *Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus* (1990) I-3941.
[141] However, it is not inconceivable that one could prove such an inclination by establishing a pattern in the choices of contractual partners. If any party categorically or for a large percentage rejects the members of one sex as possible contractual partners, it could certainly establish the presumption of discrimination.
[142] Op cit, n.137, p.6.

some other condition or criterion is used that has the effect of discrimination of sex. Therefore, by definition, indirect discrimination is not based on a person's sex. Unless the phrase 'based on that person's sex' is multi-interpretable, the paragraph in question ignores indirect discrimination and could rule out certain contracts that contain indirectly discriminatory conditions. The proper phrasing of the article should possibly have been 'is not based on that person's sex or based on any other condition having such effect'.

Paragraph 3 of article 3 excludes the content of media and advertising, as well as education. The reasoning for this is that subjecting media contents to the principle of equal treatment could lead to the infringements of other fundamental rights, such as freedom of speech. Education is said to be sufficiently covered by other directives.[143] Paragraph 4 states that the directive shall not apply to matters of employment and education. Additionally, the directive shall not apply to matters of self-employment, insofar as these matters are covered by other Community legislative acts. The paragraph indicates that the directive functions as a residual category to issues concerning the self-employed.

Article 5 concerns the important issue of insurance. As mentioned before, the general rule is that Member States must uphold the principle of equal treatment. However, in order not to upset the balance in the market and create a disproportional flux to certain insurance companies, the date for realizing the goal has been postponed. Member States are obliged to ensure that in all contracts concluded after 21 December 2007 at the latest, the use of sex as a factor in the calculation of premiums and benefits for the purposes of insurance and related financial services shall not result in differences in individual premiums and benefits. Paragraph 2 makes an exemption, enabling the Member States to allow proportionate differences in these premiums and benefits where the use of sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data. The precondition is that these data are compiled, published, updated and reviewed after 5 years. In reality, the article does not contain a ban on the use of sex as a determining factor, but rather an obligation for the Member States to monitor the appropriateness and accurateness of data underlying the assessment. The system suggests a proactive and preventive approach.

An important addition to the article is paragraph 3, which states that in no event may costs related to pregnancy and maternity result in differences in individual premiums and benefits. This category of costs is not covered by the exemption of paragraph 2, although Member States may defer the implementation measures for this paragraph to 21 December 2009. The preamble is very clear about the purpose of this paragraph: less favourable treatment of women for reasons of pregnancy and maternity should be considered a form of direct discrimination based on sex and therefore prohibited in insurance and related financial services. Costs related to the risks of pregnancy and maternity therefore should not be attributed to members of one sex only. [144] Referring back to the previously mentioned emphasis on 'comparable situation', the comment is notable. Evidently, the comparable situation criterion could not and should not be applied to men and pregnant women, an argumentation which is in line with the *Dekker* case.[145] Although pregnancy and maternity are important subjects that touch the lives of the majority of women, it is difficult to see why the comparable situation criterion apparently does not apply in pregnancy and maternity cases while it does apply in other situations relating to womanhood as a whole. The result is that costs relating to pregnancy and maternity cannot be attributed to the members of one sex only, while other possible costs relating to womanhood can be attributed to women only. Clearly, any costs relating to insurances and related financial services such as disability insurances can influence the equality of women. In the case of self-employed women, these costs, if higher,

[143] Op cit, n.120, Ex.Mem, p.5.
[144] Directive 2004/113/EC, preamble point 20.
[145] Op cit, n.140.

could be an additional burden to both the starting up and the maintaining of a business or occupation. Besides pregnancy and maternity, it is not unlikely that certain conditions occur exclusively or more often within one sex than they do in the other.[146] Following the logic of the *Dekker* case, any different treatment on grounds of a condition or situation that is inextricably bound to a certain sex, could possibly lead to direct discrimination. The question arises if these conditions do not legitimate a similar approach and should be excluded from comparison and subsequently be non-attributable to one sex only. Moreover, it should be mentioned that the span of protection relating to costs of pregnancy and maternity will probably be limited to the actual pregnancy and the ensuing period of confinement and pregnancy leave, in line with, for example, the case *Brown*.[147] Thus, costs relating to maternity after this period will not fall within the scope of paragraph 3. These costs, varying from illnesses relating to the pregnancy after the previously mentioned period and costs ensuing from child-care, such as loss of income, could therefore be attributed to women only.

C. A different Character

The area of goods and services is by nature different to the field of employment and occupation and collective social securities. The market is very diverse and typically has a large number of participants on both the supply and demand side. The implementation of the principle of equal treatment in the area of goods and services will therefore inevitably be a complex matter. The field of employment and occupation and social security has traditionally been an area in which the state heavily intervened by the creation of legislation in the framework of the protection of the employee and is characterized by its rule density and strict (semi-)governmental control. In such an area, especially as the government is an important employer, equality is relatively easy to achieve. The legislator seems to have realised that it was necessary to make some slight adaptations to the implementation of the principle of equal treatment concerning goods and services as regards men and women. The Equal Treatment Directive, the Race Directive, the Framework Directive and nearly all other directives are ordered along a system in which direct discrimination can only be exempted by the exceptions expressly mentioned in the three directives, a rule established by the Court in the *Johnston* case.[148] Indirect discrimination however, can be justified by satisfying the criteria set out in the *Bilka* judgment. Indirect discrimination can be excusable by objectively justified factors that are unrelated to any discrimination. This assessment is left to the national courts.[149] If the party that displays indirect discriminatory behaviour is an undertaking, it can justify the discriminatory measure or behaviour by proving that the measures correspond to a real need of the undertaking, are appropriate with a view to achieving the objectives pursued and are

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[146] For example, gender-specific illnesses.

[147] Op cit, n.63.

[148] Case C-222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* (1986) ECR 1651 In: op cit, n.2, p. 271.

Permissible exceptions, amongst others, are:

- The Member States may provide that difference in treatment based on a characteristic related to, for example, sex might not constitute discrimination if that characteristic constitutes a genuine and determining occupational requirement, provided the object is legitimate and the requirement is proportionate. (see Race Directive 2000/43/EC)
- Provisions that protect women, especially regarding pregnancy and maternity. (see Equal Treatment Amendment Directive 2002/73/EC)
- Positive action. (see Framework Directive 200/78/EC)

[149] Case C-381/99 *Brunnhofer v Bank der österreichischen Postsparkasse AG* (2001) ECR I-4961. In: Ellis, op cit, n.2, p. 109.

necessary to that end.[150] Thus, in principle, unlimited arrays of justifications are available to the defendant. In practice, the possible list is somewhat shorter, as the Court has put up some boundaries.[151] The more recent directives have included the conditions of the *Bilka* judgment in similar wording as a means to objectively justify indirect discrimination.

However, there are some exceptions to this rule. Directive 1999/70/EC on fixed-term contracts allows for objective justification of both direct and indirect discrimination in clause 4.[152] Framework Directive 2000/78/EC makes two exceptions for direct and indirect discrimination, and again both kinds of discrimination can be objectively justified by the *Bilka* test. The two exceptions can be found in articles 5 and 6 regarding discrimination on grounds of disability and age.[153] Article 6, regarding age, is an exact copy of the *Bilka* formula and includes a non-exhaustive list of possible justifications. Article 5 is somewhat different from all other non-discrimination principles. The terms direct or indirect discrimination are not mentioned. Instead, a positive obligation is mentioned which is limited by proportionality. The article allows for adjustments not to be made if they require a disproportionate effort on the part of the employer. Thus, in effect, an employer can withhold access to a disabled person due to his or her disability; in practice, it amounts to justification of direct discrimination.

Directive 2004/113/EC is notable for also allowing the possible application of the *Bilka* test to both direct and indirect discrimination in article 4.[154] The relevant paragraphs of article 4 are:

> 1. For the purposes of this Directive, the principle of equal treatment between men and women shall mean that
> (a) there shall be no direct discrimination based on sex, including less favourable treatment of women for reasons of pregnancy and maternity;
> (b) there shall be no indirect discrimination based on sex.
> 5. This Directive shall not preclude differences in treatment, if the provision of the goods and services exclusively or primarily to members of one sex is justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

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[150] Case C-170/84 *Bilka-Kaufhaus GmbH v Weber Von Hartz* (1986) ECR 1607. If the party forms part of the official authorities, Case C-171/88 *Rinner-Kühn v FWW Spezial-Gebäudereinigung GmbH & Co. KG* (1989) IRLR 493 is relevant. The legitimate objective will then have to be a necessary social policy.

[151] See e.g. Case C-226/98 *Jørgensen v Foreningen af Speciallæger and Sygesikringens Forhandlingsudvalg*. (2000) ECR I-2447. Budgetary considerations cannot, within the context of social protection measures adopted by the Member States, in themselves justify discrimination between workers on grounds of sex.

[152] Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP. OJ L 175, 10.7.1999, p. 43–48.

[153] See Framework Directive 2002/78/EC.

Article 5:

Reasonable accommodation for disabled persons

In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.

article 6:

Justification of differences of treatment on grounds of age

1. Notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

[154] The possible problems and consequences of the provision will also be addressed in chapter 3.

Paragraph 5 seems to suggest that differences in treatment, whether they be the result of direct or indirect discrimination, can be justified by a test similar to the one normally used for indirect discrimination.

The idea of objective justification of direct discrimination is not entirely new. Before the actualization in the previously mentioned directives and Directive 2004/113/EC, the idea had, amongst others, been mentioned in the cases *Dekker* and *Birds Eye Walls*.[155] In *Dekker*, the Court made very clear that the justification of direct discrimination on grounds other than those provided for in the relevant Directive 76/207/EEC is not permissible. This approach has as a result that national measures and/or exemptions other than the measures implementing the exemptions of the Directive cannot be relied upon to justify direct discrimination.[156] In the case *Birds Eye Walls*, the Commission stated that the aim of achieving overall substantive equality between the sexes should be a possible justification, but the Court did not accept this.[157] The reasons why the justification of direct discrimination is precarious are manifold. Direct discrimination carries the risk of resulting in less protection and greater legal uncertainty.[158] However strict the test for objective justification may be, it is certain that more justifications than the statutory ones are available.[159] Moreover, the possible defence of the respondent is unclear and cannot be anticipated before it is made. Additionally, as the national courts are also the ones to apply the test, it can result in too much discretion on their part.[160] It should be noted that the equality principle is, according to articles 2 and 3 EC, a main task and an important issue, if not a fundamental principle. The question is whether meddling with the exceptions will erode the equal treatment principle.

However, some arguments in favour of the justification of direct discrimination can be discerned. In line with the *Birds Eye Walls* case, the absence of such a justification means that possible measures taken in favour of substantive equality will not be allowed within the framework of justification.[161] The issue is closely related with the subject of the possibility of taking positive action, which is normally allowed by a different paragraph or article. The 'justification of direct discrimination approach' could provide another possibility of taking such measures within the concept of discrimination, besides the actual positive action provisions, thus promoting substantive equality. Secondly, it is not inconceivable that the possibility of objective justification will prevent the occasionally flawed constructions used by the national courts and the EC Court to avoid classifying a measure or behaviour as discrimination.[162] The prospect of a defence besides the statutory exemptions could prompt the Courts more readily to deem a situation as discrimination and reserve the actual reasons or

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[155] Case C-132/92, *Birds Eye Walls v Roberts* (1994) IRLR 29.

[156] Op cit, n.140, paras. 19-26.
AG Van Gerven advocates in his Opinion concerning this case that such justification should be possible in exceptional cases. Such cases concern situations in which it is difficult to distinguish between direct and indirect discrimination, op cit, n.2, p.111.

[157] Op cit, n.155, para.15. In: Bowers J. and E. Moran. "Justification in Direct Sex Discrimination Law: Breaking the Taboo". Industrial Law Journal, vol. 31, no. 4. December 2002. Industrial Law Society, p.309.

[158] Gill, T. and K. Monaghan. "Justification in Direct Sex Discrimination Law: Taboo Upheld". Industrial Law Journal, vol. 32, no. 2. June 2003. Industrial Law Society, p.121.

[159] Op cit, n. 157, p.315. Bowers and Moran suggest a model for the justification test that will provide the claimant with the necessary legal certainty and will ensure that the test will be uniformly and strictly applied.

[160] Ibid, p.319.

[161] Op cit, n.157.

[162] See for example Dutch case concerning *Movir*: 3rd May 2006.LJN AW7505. The argumentation used is weak and seems to be used to avoid the label discrimination at all costs by using the 'comparable situation escape'. See discussion on "comparable situation" in chapter 2.Part 2. IV.B. See also Case C-342/93 *Gillespie and others v Northern Health and Social Services Boards, Department of Health and Social Services, Eastern Health and Social Services Board and Southern Health and Social Services Board* (1996) EC I-0475.

motivations for finding it acceptable or not in the justification assessment.[163] Eventually, it might lead to a greater readiness on the side of the EU Court to adopt a complete material approach to equality, as the acceptance of this relatively far-reaching approach is softened by the escape of objective justification of direct discrimination. This mode of operation could contribute to clarity and the transparency in their reasoning.

The apparent incorporation of this approach into Directive 2004/113/EC is therefore conspicuous and could carry with it a diminished protection. The fact that it is included suggest that, similar to direct discrimination on grounds of age and part- or fixed-time work, there is more room for manoeuvre in the field of goods and services. Referring back to the earlier mentioned complexity of the goods and services market, it is likely that the provision was included to anticipate unforeseen or undesired side effects of the directive. However, as will be discussed later, in some instances the self-employed have to rely on the directive in areas related to their work if other directives are not applicable. For them, the inclusion of the justification paragraph could have serious consequences.

V. Social Security

A. Statutory social Security

As was mentioned before, two specific directives were adopted concerning equal treatment in social security matters, Directives 79/7/EEC and 86/378/EEC.[164] Both directives have limited coverage concerning the self-employed.

Directive 79/7/EEC applies to existing social security systems, but does not require the Member States to introduce a certain social security system, if such a system fails to exist for the self-employed. Naturally, a set of certain minimum standards a system needs to adhere to is also absent. The directive is meant to level the treatment of men and women, and does not aim to provide for a uniform system. Article 7 provides the Member States with the opportunity to exclude some areas from the scope of the directive. The Member States have the obligation to examine periodically whether maintaining these exclusions can be justified.[165].

Directive 79/7/EEC states in article 2 that the directive is applicable to the self-employed.[166] The material scope is specified in article 3, and states that all statutory benefits regarding illness, disability, old age, work-related accidents and unemployment are covered. Notably, situations relating to pregnancy and motherhood are not mentioned in the list. There is some logic to that, as it is a fact that such benefits could not and are not available to men and women. However, the absence of the situation of motherhood and pregnancy suggests that this is a problem relating to women only. To employees, the lacuna is less relevant, as in their case Directive 92/85/EEC will fill the void by establishing minimum standards for these benefits.[167] To self-employed women, the void could be relevant. As was mentioned before, in light of case law and recent directives it is clear that different treatment on grounds of pregnancy amounts to direct discrimination.[168] With a view to uniformity, this should also apply to Directive 79/7/EEC and should be read into the definition of discrimination in the directive. Thus, a Member State cannot discriminate on grounds of pregnancy in case of, for

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[163] Op cit, n.157, p.320.
[164] See chapter 2. Part 2.V.A
[165] See Directive 79/7/EEC, article 7, para.1(c). and para.2.
[166] See op cit, n.67 for the exact personal scope.
[167] See Directive 92/85/EEC, article 1.
[168] E.g. Case *Dekker*, op cit, n.140.

example, entitlements to disability benefits. It seems that a pregnancy-related sickness can be covered by the disability or sickness situation. However, as was mentioned before, the actual pregnancy cannot be equated with disability or sickness itself.[169] Thus, although the Member State cannot exclude pregnant women from a system of disability or sickness benefits, the pregnancy itself will not qualify as such.

B. Occupational Security Schemes

Directive 86/378/EEC has a personal scope similar to Directive 79/7/EEC and thus includes the self-employed. Directive 86/378/EC, as amended by Directive 96/97/EC, is applicable to occupational social security schemes, meaning schemes not governed by Directive 79/7/EEC of which the purpose is to 'provide workers, whether employees or self-employed, in an undertaking or group of undertakings, area of economic activity or occupational sector or group of such sectors with benefits intended to supplement the benefits provided by statutory social security schemes or to replace them, whether membership of such schemes is compulsory or optional'.[170] According to article 4, these occupational schemes can relate to benefits regarding the same circumstances as Directive 79/7/EEC. Concerning the self-employed, article 2, paragraph 2 stipulates that the directive is not applicable to:
(a) individual contracts for self-employed workers;
(b) schemes for self-employed workers having only one member;
(d) optional provisions of occupational schemes offered to participants individually to guarantee them:
- either additional benefits, or
- a choice of date on which the normal benefits for self-employed workers will start, or a choice between several benefits.

The list of possible exclusions suggest that even though the self-employed are in principle included within the scope of the directive, the actual value of the directive will be limited by the extensive exemptions it makes. The directive is aimed at collective occupational security schemes, devised by undertakings or certain trade or business sectors applying to a group of persons. Therefore, any arrangement that is individual or voluntary is excluded from its scope. If a security scheme for the self-employed qualifies as a collective scheme and is not voluntary, it will fall under the scope of the directive. In that case, the scheme cannot contain any provisions that infringe the principle of equal treatment. Such schemes can especially occur in the regulated professions.[171] Both directives emphasize that

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[169] Case *Dekker*, ibid. Case *Brown*, op cit, n.62.
[170] Directive 86/378/EC, article 2(1), Consolidated version.
[171] See article 6 of Directive 96/97/EC. The paragraphs and subparagraphs relevant to the self-employed:
1. Provisions contrary to the principle of equal treatment shall include those based on sex, either directly or indirectly, in particular by reference to marital or family status, for:
(a) determining the persons who may participate in an occupational scheme;
(b) fixing the compulsory or optional nature of participation in an occupational scheme;
(c) laying down different rules as regards the age of entry into the scheme or the minimum period of employment or membership of the scheme required to obtain the benefits thereof;
(d) laying down different rules, except as provided for in points (h) and (i), for the reimbursement of contributions when a worker leaves a scheme without having fulfilled the conditions guaranteeing a deferred right to long-term benefits;
(e) setting different conditions for the granting of benefits or restricting such benefits to workers of one or other of the sexes;
(f) fixing different retirement ages;
(h) setting different levels of benefit, except in so far as may be necessary to take account of actuarial calculation factors which differ according to sex in the case of defined-contribution schemes.

they shall not prejudice the provisions relating to the protection of women by reason of maternity.[172]

In the case of funded defined-benefit schemes, certain elements (examples of which are annexed) may be unequal where the inequality of the amounts results from the effects of the use of actuarial factors differing according to sex at the time when the scheme's funding is implemented;

[172] See article 4(2) Directive 79/7/EEC and article 5(2) Directive 86/378/EC.

Chapter 3. Self-employed Women

Women in self-employment face specific barriers. Some of these problems have already been furtively touched upon in chapter 2; amongst others, access, bank loans and insurances were mentioned. This chapter serves to explore further the position of women in self-employment, the most important problems and the (lack of) solutions offered by the applicable directives. Some of the barriers are gender-specific, others, such as disability insurances, can be a problem for both sexes.

I. Female Participation in self-employed Activities

Women are substantially less involved than men are in self-employed activities. The average estimate is that women account for 25 % of the self-employed, consequently leaving men an ample 75 %. The number varies across sectors and countries, and these differences can be quite substantial.[173] The number seems to be rising, which can be inferred from the fact that the percentage of women starting a business in relation to men is around 30%.[174] Apart from the low participation rate of women, it also seems that their enterprise survival rate is somewhat negative compared to that of men.[175] These numbers can be distorted by the fact that there is a category of assisting spouses of which the size is hard to determine, and officially do not count as self-employed. Women who are self-employed tend to be concentrated in feminine sectors such as retail and personal services such as childcare.[176] Additionally, female self-employed activities mostly involve small to medium-sized enterprises and tend to have no or a small number of employees. [177] To conclude, women are on average less represented, earn less and engage in smaller-scale activities.[178] Referring back to chapter 1, there could be a sizeable part of the female self-employed that falls within the category of economically dependent workers (EDP).[179] Although data is still scarce, it seems

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[173] See *Fourth Annual Report on Reports of The European Observatory for SMEs.* (abstract). http://ec.europa.eu/enterprise/entrepreneurship/craft/craft-women/craft-obswomen.htm
The differences vary from 5% to 52%, but in general, it can be said that women are the least represented in industry, the most in services and variably in agriculture.

[174] *Young Entrepreneurs, Women Entrepreneurs, Co-Entrepreneurs and Ethnic Minority Entrepreneurs in the European Union and Central and Eastern Europe* (Study). Final report to European Commission/ DG Enterprise. CEEDR, Middlesex University Business School. July 2000. Chapter 3: Women Entrepreneurs, p.45-73.
http://ec.europa.eu/enterprise/entrepreneurship/craft/craft-studies/documents/womenentrepreneurs.pdf
and *Fourth Annual report*, op cit, n.173.

[175] Op cit, n.173, table 3.

[176] *Women and work: Report on existing research in the European Union.* September 1997.Employment and Social affairs. For: DG Employment, Industrial Relations and Social Affairs. Luxembourg: Office for Official Publications of the European Communities, 1999, p.28. Self-employed activities that have a relatively high percentage of women include the liberal professions, such as the legal profession. While the liberal professions are characterized by middle or higher incomes, most of the other feminized sectors are low-income sectors.

[177] Ibid, p.29.

[178] Clearly, this is also the case in the category of employees, as the participation rate, pay, and position of women are not equal to those of men. However, these differences are smaller. See e.g. *EU Labour Force Survey Principal results 2005* Focus on Statistics/population and social conditions. 13/2006. (Jouhette and Romans). http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-NK-06-013/EN/KS-NK-06-013-EN.PDF#search=%22labour%20participation%20women%20EU%22. See also Eurostat: http://epp.eurostat.ec.europa.eu/portal/page?_pageid=0,1136184,0_45572592&_dad=portal&_schema=PORTAL

[179] See chapter 1.III. for definition and discussion.

that women in self-employment relatively often have no employees, which could be an indication of economic dependence.[180] Additionally, there has been some research done into the subject. Although by no means conclusive, the data available seem to hint at a certain overrepresentation of women in the category of the EDP. In the *Perulli Report*, an Italian study on the subject is presented. The study suggests that women are proportionally overrepresented in the figures on economically dependent workers in comparison to their overall representation in the self-employed category.[181] Moreover, in the *EIRO Report* a similar tendency concerning the possible overrepresentation of women in the category of the EDP occurs. Although the data are by no means complete, the estimates given of the percentage of women in the EDP category in Austria, Denmark an Italy seem to be higher than their overall representation in self-employment.[182] The data mentioned here are recent.[183]

Due to the above-mentioned overall weak position of self-employed women and their apparent overrepresentation in the more vulnerable in-between category of the economically dependent worker, their protection in European equality legislation is of the utmost importance and crucial to the promotion of self-employment among women.

II. Specific Barriers faced by self-employed Women

The main problems encountered by female self-employed persons are access to self-employment, the availability of financial facilities, pregnancy and maternity, including the combination of work and family responsibilities, and social security.[184] The barriers will be scrutinized separately, but it is important to note that the barriers sometimes overlap, as does the protection contained in the directives. This subject is especially important in the area of access to self-employment, as it has the potential of including nearly all problems inventoried.

A. Access to Self-employment

The term access to self-employment is an ambiguous one. As mentioned before, the term is explicitly used in article 3(1)(a) of Directive 2002/73/EC. The term expressly includes any selection criteria and recruitment criteria, e.g. the entrance criteria for the regulated professions. The question arises whether the term access should be interpreted broadly and should include other issues than pure access conditions.

The interpretation of access to self-employment is relevant, as it will determine which directive will address a certain barrier. Throughout the examination of chapter 2, it has become clear that the levels of protection of the self-employed in Directive 2002/73/EC, 86/613/EEC and 2004/113/EC vary. The most conspicuous difference between Directive 2002/73/EC and Directive 86/613/EEC is the presence of a provision on positive action in

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[180] Having no employees is one of the indicators of being an economically dependent worker. See chapter 1.III: 'work that is performed personally': meaning work performed personally, instead of by an employee. See *Perulli Report*, op cit, n.18.

[181] *Perulli Report*, op cit, n.18, p. 94-95. See for Italian study p. 53-55: general data Italy. (percentage 2000 of overall self-employment: 26.2%).

[182] *EIRO study*, op cit, n.19, p.22-23. Compare to data in *Perulli Report*, op cit, n.15, p.34-76: statistical data Denmark, Austria, Italy.

[183] *Missoc*: 2006. *Eiro*: 2000, *Perulli*: 2003.

[184] *Equal Treatment of the Self-employed and the Position of Assisting Spouses: an Inventory of some Problems*. Special report 1994 of the Network of Experts on the Implementation of the Equality Directives. (Sacha Prechal, Linda Senden) DG Employment, Industrial Relations and Social Affairs. June 1995. V/6457/95EN. Taxation will not be examined.

Directive 2002/73/EC, and the absence thereof in Directive 86/613/EEC. Naturally, it will be important to determine whether a certain measure, behaviour or practice will fall under the scope of Directive 2002/73/EC or 86/613/EEC or both, as apparently positive action, such as special funding for women, is only an option if it falls under the scope of Directive 2002/73/EC.

Another reason why the interpretation of access is relevant is the difference between Directive 2002/73/EC and Directive 2004/113/EC. As mentioned before, the latter is relevant in private insurances, as they will not be covered by Directive 86/378/EEC. The difference especially lies in the possibility of objective justification of direct discrimination available in article 4 of Directive 2004/113/EC as discussed in chapter 2.Part 2.IV.C. In the paragraph, the development was deemed to be rather undesirable, as it carries risks for the protection and legal certainty in the area of goods and services.

The interpretation of 'access' is a complex issue. In order to grasp its meaning, it is necessary to look at its origin. The concept of 'access' has been developed in the area of the four freedoms. Case law concerning articles 39, 43 and 49 EC has shed some light on the concept of what kind of measures can impede access to the (employment) market. In the framework of article 39 EC, it has become clear that a range of measures can qualify as measures that can impede access to employment. In *Bosman*, a transfer system was deemed to be in breach of article 39 EC and in the case *Terhoeve* the Court stated that provisions which could preclude or deter a national of a Member State from leaving his country of origin in order to exercise his free-movement rights constituted an obstacle to that freedom even if they applied without regard to the nationality of the workers concerned. Consequently, a provision of national law requiring a worker to pay greater contributions in case of residence in another Member State than those payable if he/she continued to reside in the same Member State throughout the year was deemed to be incompatible with article 39 EC.[185] If we disregard the phrase 'applied without regard to nationality' for a moment, which is a second issue[186], these judgments alone indicate the potentially wide scope of the concept 'access to the employment market'; it can include a range of measures, including those on social security. The Court followed this approach in a case concerning access to employment in the framework of Directive 76/207/EEC (before amendment). In *Meyers*, the Court indicated that access to employment not only included the conditions obtaining before an employment relationship comes into being, but also the factors that influence a person's decision whether to accept or decline a job offer. A family credit rewarded in case of the acceptance of low-paid work can encourage a worker to accept a job, and thus falls within the concept of access.[187]

The wide concept of 'access to employment' could and should be applied in the determination of the concept of 'access to self-employment'. Instead of 'factors that influence a person's decision to accept a job', the criteria could be 'factors that influence a person's decision to enter self-employment'. Of all the barriers named above, in theory most can qualify as such factors. Such an approach would enlarge the scope of Directive 2002/73/EC to

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[185] Case C-415/93 *Union Royale Belge des Sociétés de Football Association and others v Bosman* (1995) ECR I-4921, paras. 98-103 & Case C-18/95 *Terhoeve v Inspecteur van de Belastingdienst Particulieren/Ondernemingen Buitenland* (1999) ECR I-345, para.39. In: Craig, op cit, n.8, p.718.

[186] The phrase refers to the obstacle theory, in which also non-discriminatory measures can be deemed incompatible with the articles of the four freedoms. In that whole area, the accent is shifting from an emphasis on (indirectly) discriminatory measures to obstacles in general. In fact, it is a very interesting subject in light of the equal treatment directives as a whole, as the effect would be that non-discriminatory measures would fall within the scope of the directives. Compare also the approach on mutual recognition; the concept entails a positive obligation to recognize qualifications, even if those are not completely equal. See White, op cit, n.7, p.191-208.

[187] Case C-116/94 *Meyers v Adjudication Officer Case* (1995) ECR I-213. In: Craig, op cit, n.8, p.220. However, see Case C-63&64/91 *Jackson and Cresswell v Chief Adjudication Officer Cases* (1992) ECR I-4737. The link must be clear. A general scheme providing for people of insufficient means will not qualify as such.

an extent that nearly all barriers to female self-employment could fall within it. Most countries do not have discriminatory barriers regarding the narrow concept concerning access, which include the actual statutory limitations on who can set up a business and who is allowed to enter a regulated profession.[188] In case of a wide interpretation, it could be argued that difficult acquisition of finance, the absence or lack of quality of pregnancy or maternity provisions, services, or social security as a whole, including the private sector, are factors that influence the decision of a woman to enter self-employment and can qualify as access. If such a wide definition is applied, the other directives will be nearly obsolete with regard to the self-employed, with the advantage that the self-employed will enjoy the more elaborate protection provided for by Directive 2002/73/EC. However, there is no conclusive evidence that access will be interpreted as such in the area of the self-employed.[189]

B. Start-up Finance

1. The current Situation

Finance is a barrier especially encountered by women who are starting up a business. In order to start a business in any form, some capital is usually required and women experience great difficulties in acquiring loans from banks and public subsidies. For that reason, most women rely on private or family capital.[190] A consequence might be that these amounts could be significantly lower than the amounts potentially acquired elsewhere, resulting in smaller enterprises and modest goals. The reasons why capital is more difficult to acquire for women are manifold, but difficult to pinpoint. Firstly, public institutions, banks and other financial providers can directly discriminate against women by external or internal rules that exclude women from qualifying for loans, but this will usually not be the case.

A more severe problem is that financial providers will sometimes make requirements that could possibly have an indirect discriminatory effect, by demanding a certain amount of experience or an uninterrupted employment history.[191] As, on average, women have less experience and they may have interrupted work for reasons of pregnancy or childcare at some point in their career, it is very likely that such requirements will affect relatively more women than men.

Even in the absence of overt or rule-based direct discriminatory behaviour or indirect discrimination in the form of conditions or requirements, the question arises whether women operate on an equal basis with regard to finance. Usually women have less access to information, less knowledge of financial matters and request loans that are less profitable, and thus less desirable, as far as the banks are concerned. Moreover, they have less access to the informal networks typical of the financial sector, which are often the most efficient and successful ways to acquire loans.[192] These kinds of barriers are not laid down in rules, but occur in the form of behavioural patterns of the banks and institutions and the women

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[188] Report from the Commission on the Implementation of Council Directive of 11 December 1986 on the application of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed activity, and on the protection of self-employed women during pregnancy and motherhood (86/613/EEC). COM(94) 163 final.

[189] As will be discussed later in chapter 3, the abolition of the WAZ (Invalidity Insurance (Self-employed Persons) Act) in the Netherlands shows that there is no agreement on the subject.

[190] *Young Entrepreneurs*, op cit, n.174, p.45.

[191] *Women and Work*, op cit, n.176, p.34.

[192] *Young Entrepreneurs,* op cit, n.174, p.54.

themselves and it will be a challenge to eliminate these patterns, which are often based on lingering stereotypical images about women and entrepreneurship.[193]

Apart from the starting of a business, female entrepreneurs experience the same difficulties, albeit to a lesser extent, when trying to expand a business.[194]

2. The Directives and their Effects

The relevant articles of the current directives that are important for the issue at hand are first of all article 4 of Directive 86/613/EEC and possibly article 3(1)(a) in article 1(3) of Directive 2002/73/EC. As was mentioned above, article 4 of Directive 86/613/EEC was especially drafted for this purpose, and specifically includes access to financial facilities, which can include loans and subsidies from both private and public institutions. It was also mentioned in chapter 2.Part 2.II.B that the original version of the article in the earlier proposal included the elimination of discriminatory practices. The current article 4 merely contains a reference to the elimination of provisions. Noting the above paragraph and its description of the problems women run into regarding loans, the elimination of (legal) provisions alone will not be enough to tackle the problem of discriminatory practices and/or behaviour, as behaviour and practices are not necessarily based on provisions. In fact, according to the Implementation Report on Directive 86/613/EEC, article 4 already was, or had been implemented in all Member States. In fact, very few countries had to change their legislation to do so, as equality before the law already existed.[195] Additionally, the Commission pointed out in the conclusions of the Implementation Report that it was difficult to determine whether national legislation complied with Community law on all subjects, as the directive covers so many different rules.[196] The Commission also admitted that it was not possible to examine if the Member States had taken all necessary measures to eliminate indirect discrimination.[197] The above suggests that the introduction of Directive 86/613/EEC has very little practical effect on the elimination of problems regarding start-up finance.

The word ‘access’ in article 4 is interesting with regard to the above discussed subject of the scope of the term access. In case of financial facilities and other access-related barriers, there could be an overlap of the application of both Directive 86/613/EEC and Directive 2002/73/EC as apparently both could apply to access to financial facilities. The importance of the applicability of Directive 2002/73/EC is the occurrence of a separate provision that enables positive action in the area.[198] It should also be added that, besides the difference in the occurrence of a provision on positive action between the two directives, the Court in the case *Thibault* stated that Directive 76/207/EEC (and thus now Directive 76/207/EEC amended by Directive 2002/73/EC) aimed to achieve a material equality.[199] Additionally, the actual phrasing of the prohibition on discrimination in Directive 2002/73/EC seems wider than the phrasing of article 4 of Directive 86/613/EC. While the latter speaks of an elimination of provisions contrary to the principle of equal treatment, the former prohibits direct and indirect discrimination in relation to conditions for access to (self-)employment. Referring back to the discussion of material and formal equality in chapter 2.Part 1.IV, the phrasing lends itself more easily to a more material interpretation of equality, as it includes a reference to indirect

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[193] Ibid, p.55. Such widespread patterns can be considered structural or institutional discrimination.
[194] Ibid, p.55.
[195] Implementation Report, op cit, n.188, p.6.
Note that the earlier version of article 4 suggested a more active approach on the side of the Member States to eliminate discriminatory practices.
[196] Implementation Report, op cit, n.188, p.42.
[197] Ibid.
[198] See chapter 2.Part 2.II.A.
[199] *Thibault*, op cit, n.63.

discrimination and, in principle, does not specify or limit the actions that can or should be taken in order to achieve the absence of discrimination

Whether Directive 2002/73/EC is applicable is questionable, as the wordings of article 4 of Directive 86/613/EEC and article 1(3) of Directive 2002/73/EC are quite different. Article 4 of Directive 86/613/EEC is specifically written for these kinds of situations; the starting up and expanding of businesses and the financing thereof. If the word access in article 1(3) of Directive 2002/73/EC is construed narrowly, the result could be that the specific access to financial activities is solely covered by Directive 86/613/EEC, with the effect that positive action will not be allowed.[200] A wide definition of the term with regard to Directive 2002/73/EC would mean that the latter, being the newer directive, would replace article 4 of Directive 86/613/EEC. Due to the importance of positive action in the field of start-up finance, the following paragraph will elaborate on the subject in detail.

3. Positive Action

The absence or presence of the possibility of positive action is especially important regarding the subject of start-up finance. It was explained in Chapter 3.I and 3.II.A that women are proportionally less represented in self-employed activities, and if they are, their businesses are often smaller and they apply for smaller loans. It was also explained that start-up finance is, according to recent reports, considered to be a major problem for female entrepreneurs.[201] It has also become clear that the above-mentioned problems concerning start-up finance are less a matter of discriminatory provisions than they are of (indirectly) discriminatory behaviour. Due to the many problems resulting from this behaviour, which is difficult to eliminate, the possibility of positive action in the field of start-up finance is crucial. As will be discussed below, it might not be a coincidence that there have been and are many initiatives by Member States and organisations that in reality amount to positive action regarding start-up finance.

There is no uniform definition of positive action as such in Community law. However, in a guide issued by the Commission on the very subject, the Commission did attempt to provide one.[202] The guide says that positive action aims to 'complement legislation on equal treatment and includes any measure contributing to the elimination of inequalities in practice. The setting up of a positive action programme allows an organisation to identify and eliminate any discrimination in its employment policies and practices, and to put right the effects of past discrimination. Thus a positive action programme is a 'type of management approach which an employer can adopt with a view to achieving a more balanced representation of men and women throughout the organisation's workforce and thus a better use of available skills and talents.'[203] In general, positive action thus allows for measures that actively address the considerable arrears of (potential) self-employed women.

Despite this general definition, it should be noted that 'positive action' is a relative concept. It will rely on the narrow or broad interpretation of the term positive action, so as to determine what kind of measures will fall within or outside its scope.[204] A narrow view could entail that the only measures allowed in the framework of positive action are mild forms of encouragements such as e.g. a campaign to motivate women to apply for a job or a loan. A broad interpretation of the term positive action could mean that far-reaching measures in order

[200] See for text of articles chapter 2.
[201] See chapter 3.I/3.II.
[202] Ellis, op cit, n.2, p.300.
[203] Ibid.
[204] Ibid, p.297.

to make up for arrears are allowed, including positive discrimination. Positive discrimination entails that men can be discriminated against if this should be necessary to achieve equal representation.

There have been some initiatives as to positive action in the area of financial facilities for the self-employed, both of the Member States and/or semi-public and private organisations or institutions. The Implementation Report names one Member State, Italy, in which an Act was devised to allow state-funded preferential access to bank credits through a National Fund, the Ministry of Industry and banks. The scheme was criticized for its lack of clarity in its application and its violation of the principle of free competition.[205] It has to be noted that this scheme was devised under the apparent regime of Directive 86/613/EEC, which does not allow for positive measures. Since the Implementation Report, other Member States have introduced measures and institutions that are specifically aimed at aiding women in the starting up of a business, by providing information, support, training and, albeit less often, funding.[206] At the time of the Implementation Report and currently, Member States sustain programmes addressed to the promotion of self-employment for men and women, either especially for the unemployed, or agricultural activities or for small businesses in general.[207] The latter schemes cannot be perceived as being positive action with regard to women, as they apply to the (aspiring) self-employed regardless of sex. However, they can indirectly advantage women as they tend to focus on small businesses and start-up finance for the unemployed and women are proportionately overrepresented in these groups.[208]

There are specific problems in the area of positive action regarding the self-employed. The first problem concerns the issue whether positive action is allowed in case of the self-employed. In the above paragraph, the absence of a positive action provision in Directive 86/613/EC was emphasized. In case of a broad interpretation of 'access', Directive 2002/73/EC could be applicable, which means that positive action is therefore in principle legitimate. However, due to the wording of the positive action provision of Directive 2002/73/EC, the issue arises whether positive action with regard to the self-employed is allowed. Firstly, the exact wording of article 2(8) of Directive 2002/73/EC is the following: 'Member States may adopt or maintain measures within the meaning of article 141(4) EC of the treaty with a view to ensuring full equality between men and women'. In chapter 2.II, the scope of article 141(3) EC was briefly discussed and in this discussion the word 'occupation' was key. If occupation, as suggested, encompasses self-employed activity, article 2(8) will allow for positive action in the realm of the self-employed. If it does not, the article seems to be irrelevant to self-employed women, as it specifically refers to article 141(4) EC, and will only be applicable to employed women. Referring back to the discussion of formal and material equality in chapter 2.Part 1.IV, it could be argued that there is no need for a separate provision on positive action if the concept of equality is interpreted very broadly, to such an extent that it could encompass positive action if this should be necessary to achieve equality. The general non-discrimination prohibitions of Directive 86/613/EEC and Directive 2002/73/EC could be reinterpreted in such a way that it is obligatory to provide for positive action if necessary. In that case, it could be argued that there is no need for new provisions. However, as was mentioned in the same discussion, there is no indication the EU Court is

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[205] Special report, op cit, n.184, p.20.
[206] See for an overview: *Good Practices in the Promotion of Female Entrepreneurship. Examples from Europe and other OECD Countries.* Austrian Institute for Small Business Research (IfGH) Vienna, December 2002. Icw: DG Enterprise. http://ec.europa.eu/enterprise/entrepreneurship/craft/craft-women/documents/study-female-entrepreneurship-en.pdf. Member states that provide special services to women in this area, including funding, are e.g. France, Germany and Greece. The services are provided by ministries, banks, and private and public organizations.
[207] Ibid, p.20-23.
[208] Ibid, p.23.

planning to adopt such a radical material approach to equality. Additionally, the question arises whether it is desirable or advisable to provide the courts and the EU Courts with so much discretion in this matter, which could work to the detriment of transparency and clarity.

A second problem with the positive measures in the area of the self-employed is the extent to which positive action is allowed and thus the interpretation of the term. Assuming that article 2(8) is applicable to the self-employed, boundaries set up by the Court present a possible obstacle to the positive measures above. According to the *Good Practices Report*, many of these practices are aimed at women and at women alone. The approach of the Court throughout several positive action cases in the area of employment can provide a guide to which measures and practices are allowed in the framework of positive action and article 141(4) EC. The first case that needs to be mentioned is *Johnston*, in which the Court stated that the exceptions in article 2 of Directive 76/207/EEC (now amended by Directive 2002/73/EC) should be interpreted narrowly.[209] Furthermore, the cases *Kalanke*, *Marshall* and *Badeck* confirmed this rather strict interpretation of the positive action exception.[210] All of these cases concern situations regarding access to employment; they revolved around positive action with regard to engagement policies. In *Kalanke*, the Court stipulated that 'national rules which guarantee women absolute and unconditional priority for appointment or promotion go beyond promoting equal opportunities and overstep the limits of the exception.'.[211] Consequently, an absolute quota was considered to fall outside the scope of the exception, as it does not strive for equal opportunities, but for equal representation.[212] The case *Marshall* specified when such a quota would be allowed: in case the national rule contains a so-called 'saving clause', a quota could fall within the scope of the positive action exception. The saving clause entails that in case a male and female candidate are equally as qualified, an objective assessment of criteria specific to the candidates should be made, which should override the priority given to female candidates where one or more of these criteria tilts the balance in favour of the male candidate. However, the criteria used should not discriminate against the female candidates.[213] The case *Badeck* confirmed this line of reasoning. In *Lommers*, the Court used this argumentation to allow national measures granting women priority in the assignation of childcare facilities, as long as men are not automatically excluded in emergency cases.[214]

To conclude, the Court seems to apply an approach that positive action can entail (mild) positive discrimination subject to the condition that these measures do not give automatic priority to women and contain a saving clause. Moreover, the candidates should be equally qualified. The interpretation of positive action and its subsequent limits presumably should be applied to the measures regarding services for (potential) self-employed women mentioned above, including the funding of loans. Consequently, any programme or organisation, private or public, will probably not be able to offer their services exclusively to women without considering the applications by men. For example, if a woman applies for funding in the form of a loan, the granter will be obligated to consider a male applicant and, in line with the case law, should assess whether the male and female applicants have equal qualifications. If they do, the granter will subsequently have to assess if there are any

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[209] *Johnston*, op cit, n.148. In: Burri, op cit, n.56, p.127.
[210] Case C-450/93 *Kalanke v Freie Hansestadt Bremen* (1995) ECR I-3051. Case *Marshall*, op cit, n.51. Case C-158/97 *Badeck and Others, interveners: Hessische Ministerpräsident and Landesanwalt beim Staatsgerichtshof des Landes Hessen* (1999) ECR I-1875. In: ibid, p.127.
[211] Ellis, op cit, n.2, p.305.
[212] Ibid.
[213] Ibid, p.307.
Note also Case C-407/98 *Abrahamsson and Leif Anderson v Elisabet Fogelqvist.* (2000) ECR I-5539 : no priority to women if the candidates are not equally qualified.
[214]Case C-476/99 *Lommers v Minister van Landbouw* (2000) ECR I-2891.

objective criteria in favour of the male applicant, before giving priority to the woman. In short, if any of the previously mentioned programmes or organisations offer funding exclusively to women without any possible access for men, it seems likely that such measures will fall outside the scope of positive action as defined by the Court.

However, this is not a specific problem of self-employed women alone. The limitations of positive action were developed in the field of the employed and affect employed women. Conspicuously enough, Directive 2004/113/EC, with all its previously mentioned disadvantages, might offer a solution to the self-employed in this area. As was discussed before, Directive 2004/113/EC seemingly contains a system in which direct discrimination can be objectively justified. Article 4(5) states that the directive does not preclude differences in treatment if the provision of goods and services exclusively or primarily to members of one sex is justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.[215] In this case, the funding of women will be the service exclusively offered to one sex, and a difference in treatment, such as priority and different requirements as to qualifications and conditions, could possibly be justified and thus allow for positive action beyond the scope of positive action as defined for the purposes of the exception. However, it might be unlikely that the Court will contradict its own reasoning on positive action in the interpretation of another article.

It should also be noted that the discussion above is relevant to the further problems discussed below. Positive action regarding pregnancy and maternity and social security could also aid the opportunities for women in the field of self-employment. As women are under-represented in the group of self-employed persons, positive action beyond the start-up finance could also contribute to an increase in the number of self-employed women.

C. Pregnancy and Maternity

1. The current Situation

Another issue that is perceived as a problem by self-employed women is the availability of (financial) facilities regarding maternity. These problems concern primarily the actual period of pregnancy, but also the subsequent period in the form of the availability of childcare facilities. Concerning the issue of pregnancy leave, a distinction can be made between the provision of replacement services and financial assistance. The first problem is the arrangement of financial assistance for the self-employed during pregnancy leave and it varies amongst the Member States. Most states have obligatory public social insurance with regard to pregnancy.[216] The fact that such a system exists though, is no guarantee that the system will be comprehensive or affordable. Other states do not have a public security system regarding the subject, which means that self-employed women need to rely on private insurances.[217] The second part of the equation, which is particularly important in the agricultural sector, involves the availability of replacement services. The situation regarding these services is again very divergent across the Member States.[218] In practice, the absence of

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[215] See chapter 2. Part 2.IV.C

[216] Eleveld, A. "Een zwangerschaps- en bevallingsuitkering voor zelfstandigen en meewerkende echtgenoten in Europees perspectief". Sociaal Maandblad Arbeid. n.6, June 2006, p.264.
For more country information see: *Bulletin Legal Issues in Gender Equality*. Employment and Social Affairs. 2005, nr 2. http://ec.europa.eu/employment_social/gender_equality/docs/2005/bulletin05_2_en.pdf.

[217] See *Social protection in the Member States of the European Union,of the European Economic Area and in Switzerland*. Organisation of social protection: Charts and descriptions. Missoc, 2006. DG for Employment, Social Affairs and Equal Opportunities. http://ec.europa.eu/employment_social/missoc/2006/organisation_en.pdf

[218] Ibid.

sufficient funds or replacement services can deter women from either starting a self-employed activity or continuing one. Women in a self-employed activity thus have an additional disadvantage in relation to men flowing from the fact that, unlike disability, there is a good chance that they will have to deal with absence due to pregnancy or maternity at some point in their life. In the framework of this research, the emphasis is laid on the availability of public or private insurances.

2. The Directives and their Effects

The relevant directives concerning pregnancy and maternity are Directives 86/613/EEC, 2002/73/EC and 2004/113/EC. As was mentioned before, Directive 2002/73/EC will only be relevant if the definition of access is interpreted widely and the presence or lack of facilities concerning pregnancy and maternity are deemed to fall within its scope. Yet, even in the case where Directive 2002/73/EC will be applicable, article 2(7) seems to suggest that the provision concerning pregnancy and maternity is not applicable to the self-employed, as Directive 92/85/EEC itself is not applicable to the self-employed. Consequently, it could be argued that any case law concerning the minimum requirements of maternity allowances in the framework of Directive 92/85/EEC will also be irrelevant. Thus, in contrast to the area of the employed, there is seemingly no obligation to introduce a, albeit minimal, system of public insurance regarding the self-employed.[219]

If Directive 2002/73/EC is not applicable, it is necessary to examine Directives 86/613/EEC and 2004/113/EC. Firstly, article 4 of Directive 86/613/EEC should be examined. The aim of article 4, as has been mentioned in chapter 2, was intended to be the elimination of discrimination of especially conditions regarding the establishment and expansion of self-employed activities, specifically financial services. It is questionable if the provision thus includes facilities regarding pregnancy and maternity, especially as the directive includes a specific provision on the matter. As was explained in chapter 2, Directive 86/613/EEC provides for a non-committal provision on the matter, in which the Member States are merely obliged to examine the pregnancy and maternity facilities. The provision emphatically does not obligate the Member States to act or address the matter. If a Member State finds a lack of protection in the facilities, public or private, there is apparently no need to address the matter and ensure that there are facilities available. Again, in contrast to Directive 92/85/EEC, there are no minimum requirements as to these facilities in the area of the self-employed. [220]

Directive 2004/113/EC can be applicable with regard to public and private services concerning pregnancy and maternity. However, article 3(4) emphasizes that the Directive will not be applicable in matters concerning the self-employed, insofar as these matters are covered by other Community legislation. If one regards article 8 of Directive 86/613/EEC as covering both public and private insurances, Directive 2004/113/EC will not be applicable. As was discussed in chapter 2, the latter directive does address the matter of insurances in article 5 and states that costs related to pregnancy and maternity shall not result in differences in individual premiums and benefits.

Overall, none of the directives mentioned seem to provide adequate protection with regard to pregnancy and maternity insurances. In comparison to the protection of the employed, the protection is fundamentally insufficient. The next paragraph will provide an example of its (probable) inadequacies.

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[219] Eleveld, op cit, n.216, p.261.
[220] Ibid, p.262.

3. A Test Case

Momentarily a case is pending before the District Court of The Hague, concerning the repeal of the Dutch Invalidity Insurance (Self-employed Persons) Act (WAZ). The case illustrates the problems that surround the pregnancy and maternity insurances. The WAZ concerned an obligatory public insurance for disability and pregnancy and maternity. As a result of the repeal of this public insurance, self-employed women will have to rely on private insurances concerning pregnancy and maternity. Besides the fact that these insurances are expensive, disabling female self-employed with low or middle incomes from joining, they often contain strict conditions, such as a two-year waiting period before allowances are paid out.

In the summons, the plaintiffs argue the Dutch state had infringed the European equality laws by repealing the WAZ. In contrast to the defendant, they are convinced the Dutch state should have maintained the system. Their arguments put forward are various. On the whole, they assume that Directive 2002/73 /EC covers such public insurance, which is, as discussed, questionable. They do admit that Directive 86/613/EEC, in the light of European policy, contains only an obligation to examine. Directive 2004/113/EC is not mentioned.[221] However, the focus of the arguments used mostly revolve around the fact that the Dutch state at one point decided that a public insurance was necessary in order to comply with European legislation and changed its policy a few years later. The argument that the Dutch state has in fact lowered the standard and displays behaviour that attests to inconsistency and infringes on the non-regressal provision of 2002/73/EC, could well be their best argument.[222] If the case would concern a situation in which a public insurance regarding pregnancy and maternity had never been introduced, it is not likely a Court will arrive at the conclusion that a state has encroached on the European equality legislation by not introducing a public insurance system on the matter, for all the reasons listed in chapter 3.II and before. The only way a court could come to the conclusion that the introduction of a public insurance system on the matter is obligatory, would be a combination of a broad interpretation of the term ‘access’ in order to ensure the applicability of Directive 2002/73/EC and a very material interpretation of the concept of equality. As was discussed in chapter 2.Part 1.IV, such an interpretation could lead to the inclusion of positive measures within the concept of equality and such measures then become obligatory. However, it was also mentioned that the likelihood of such an interpretation was minimal and the desirability of such discretion for the court(s) questionable.[223]

To conclude, although the case is important as it might shed some light on the extent of the obligations of the Member States regarding public systems concerning maternity allowances, the outcome of the case might not be conclusive with regard to the obligations of states that have never introduced such a public system.

4. Conditions of Insurance

Apart from the issue whether a pregnancy or maternity allowance is existent, there is also the issue whether such a system is affordable and refrains from negative clauses with regard to self-employed women. If a maternity or pregnancy insurance exists, it will only be

[221] Dagvaarding (summons) of WAZ-case. March 2006. A.o. FNV and Proefprocessenfonds Clara Wichmann v Staat der Nederlanden, points 18-25.
[222] Ibid, points 25-29.
[223] See also Chapter 3.II.B.3

useful to self-employed women if it is adequate. If not, such insurances could result in a mere formality.

As pregnancy and maternity insurances are apparently not covered by Directive 86/378/EC, public nor private, and Directive 86/613/EEC merely contains an obligation to examine, the two directives most relevant in this area are Directives 2002/73/EC and 2004/113/EC. Both Directives state that differential treatment on grounds of pregnancy and maternity amounts to direct discrimination.[224] It is not inconceivable that high(er) premiums and negative conditions regarding pregnancy or maternity insurances could be directly discriminatory.

However, both directives also contain the phrase 'comparable situations' in their definitions of direct discrimination.[225] As was discussed in chapter 2.Part 2.IV.B, the phrase could provide an early let-out. This construction can be illustrated by a judgment recently delivered by the District Court of Utrecht.[226] The case concerned a private pregnancy and maternity insurance, which entailed the condition, amongst others, that an insurant had to have been insured for at least two years to be eligible for remittance. The Court applied an argumentation that illustrates the risk of the 'comparable situation' phrase. The claimant asserted that such a negative condition amounted to direct discrimination, as the condition was not set in the framework of the disability insurance. The Court however, asserted that disability insurance and pregnancy insurance are two different situations, and can thus be treated differently.[227] In this line of reasoning, negative conditions for pregnancy and maternity insurances are allowed, as the behaviour will not amount to direct discrimination at all. Whether the judgment will be overruled, remains to be seen. The Court rejected any reference to the case law concerning maternity and pregnancy in the framework of Directive 2002/73/EC (76/207/EEC) and Directive 92/85/EEC and stated that it was irrelevant to the area of the self-employed. As an effect, it took no notice of the, amongst others, *Dekker* and *Brown* cases, in which the EU Court asserted that a situation of pregnancy is a unique situation that cannot be compared to disability, but also cannot be treated more negatively than disability.[228] The approach of the Court is extremely formal, but one can say that the 'comparable situation' phrases in both directives suggest and legitimize a similar approach.[229] The result is thus that if disability and pregnancy and maternity insurances are offered as separate services, they could be excluded from the equal treatment protection and be subject to higher premiums and negative conditions, while both insurances concern an excusable absence from a self-employed activity.

Directive 2004/113/EC has another disadvantage. Article 5, stating that costs relating to pregnancy and maternity shall not result in differences in individual premiums and benefits, raises the question if the sentence includes differences in conditions. If it does not, the result could be that insurance companies will be able to impose negative conditions. Moreover, assuming a negative condition or higher premium of a pregnancy and maternity insurance will be considered direct discrimination, the previously mentioned objective justification of direct discrimination specific to Directive 2004/113/EC creates the possibility for insurance

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[224] See chapter 2.Part 2. III & IV.
[225] See discussion on 'comparable situation' in chapter 2.Part 2.V.B.
[226] *Movir* LJN AW7505, 3 May 2006.
[227] Ibid.
[228] *Dekker*, op cit, n.140 and *Brown*, op cit, n.63.
[229] It should be noted though that the application of the case law might not have aided the claimant to any great extent. In Case C-411/96 Boyle v EOC (1998) ECR I-6401, the Court allowed a negative condition. Although the Court stated that the amount of the maternity benefit could be no less than the disability benefit, it did allow a condition that the woman receiving the extra benefit should pay back the amount in case she did not go back to work immediately after her maternity leave.

companies to argue the necessity and proportionality of the differences in treatment by referring to an unlimited array of reasons.

D. Social Security

1. The current Situation

It is to be noted that self-employed women, besides maternity issues, experience the lack of social security in general as a barrier, which includes social security with regard to sickness, disability, accidents at work/occupational diseases, old age, survivors, family and unemployment. Some Member States have introduced systems that include self-employed men and women in a universal, public and obligatory social security system, others have separate (partially obligatory) systems for employees and the self-employed, while some states have left the self-employed mostly outside of the public social security systems, forcing them to rely at least partly on private insurances.[230] Elaborating on the differences between the countries and the differences within the countries themselves in detail is impossible within the scope of this research. The systems diverge substantially and there is very little uniformity concerning social security. In general, it can be concluded that the protection in measures regarding long-term benefits such as old age and invalidity is of a higher level than the protection in short-term benefits such as sickness and work-related accidents.[231]

It could be argued that a lack of social protection is not a specific female problem, as it potentially affects all self-employed and can therefore not be considered as an issue that belongs to the area of equal treatment of men and women, but instead to the general topic of social security in Europe. However, two problems can be identified with regard to this line of reasoning. Firstly, the current directives, as will be discussed below, allow some room for differential treatment of men and women in the area of social security. Secondly, in the areas in which no differential treatment is allowed, it is possible that a lack of social security protection will affect women more severely than men. As was mentioned before, women in general engage in smaller self-employed activities, which subsequently lead to smaller turnovers and smaller reserves. Additionally, women's activities have a lower survival rate. Moreover, it was mentioned that women seem to be overrepresented in the category of the economically dependent workers of chapter 1, and are subsequently more dependent on a principal. Consequently, women seem to be in a more vulnerable position with regard to social security. Apart from the fact that they might have to rely on social security more often if a business fails, they might also find it more difficult to pay the premiums and be more dependent on the benefits as less bridging finance is available to them.

2. The Directives and their Effects

Referring back to chapter 2.Part 2.V., in which the social security Directives 79/9/EEC and 86/378/EEC were discussed, it has become clear that self-employed women can take limited advantage of these directives. Although Directive 79/9/EEC covers the self-employed and equal treatment of men and women is obligatory concerning existing statutory social security provisions, it was clear that the directive carries no obligation to introduce social

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[230] See *Social protection in the Member States*/Missoc op cit, n.207 and *Social Protection of self-employed Workers and Helper-Spouses. Final Report* (de Reus, Coenen, Elzinga) DG for Employment, Industrial Relations and Social Affairs. 1989, p.50.
[231] Ibid, p.51-52.

security systems if none exist. Thus, the previously mentioned problem of the vulnerable position of women and their possible greater dependency on social security is not diminished by the directive or, at least, does not have to be.

Directive 86/378/EEC on occupational schemes was also found to be applicable to the self-employed, albeit to a rather limited extent as individual contracts for self-employed workers, schemes with only one member and optional provisions are excluded from its scope. In case of individual insurance contracts, self-employed women will have to rely on either Directive 2002/73/EC or Directive 2004/113/EC. Directive 86/613/EEC contains a provision on the social security position of assisting spouses, but is remarkably silent on the position of actual self-employed women.[232] Again, if such contracts are deemed to fall within the concept of access, the contracts might be within the scope of Directive 2002/73/EC. However, it has already been established that this is by no means certain.

Directive 2004/113/EC contains a separate provision on insurances and related financial services in article 5, and in principle the use of sex as a factor in the calculation of premiums and benefits is forbidden. A possible lacuna might be that paragraph 1 fails to mention the word 'conditions', which could suggest that negative conditions based on sex will be excluded from its scope. Clearly, any differential conditions could jeopardize the availability and attainability of these insurances for self-employed women. [233] Additionally, its protection is substantially diminished by the inclusion of paragraph 2, which allows for proportionate differences in premiums and benefits.[234] Although the paragraph requires the permission of the Member States for these differences, and carries with it an obligation to justify and review the data on which the permission is funded, the exception could lead to different premiums for self-employed men and women with regard to, for example, insurances for sickness, disability and unemployment. With a view to the already vulnerable position of women in the field of self-employment, the paragraph could be less than helpful in strengthening their position. Additionally, once again the possibility of objective justification of direct discrimination of Directive 2004/113/EC should be mentioned. Again, the negative consequence could be that insurance companies have more room for manoeuvre in the justification of differential treatment of men and women, which could lead to an increase in accepted negative conditions for women.[235]

[232] See Directive 86/613/EEC, article 6&7.
[233] See chapter 2.Part 2. II.B
[234] See Directive 2004/113/EC, article 5.
[235] That being said, however, article 5 and the objection justification paragraph could be used to offer insurances to women on slightly better terms with regard to premiums, benefits and conditions as long as men are not excluded entirely from the possibility of receiving these advantages.

Chapter 4. Gaps and suggestions

I. Lacunae

Throughout the preceding chapters 2 and 3, it has become clear that self-employed women enjoy less protection with regard to equal treatment between men and women than the employed, in both quantity and quality. Consequently, the problems experienced by self-employed women have remained substantial.

Directive 86/613/EEC, specifically introduced for the self-employed and assisting spouses, in reality contains very few provisions for the actual self-employed and focuses for a major part on the assisting spouses. Although the position of the assisting spouses is a problem that needs to be addressed, the attempt to address the problems of the self-employed and the assisting spouses in a single directive has apparently led to a directive that pays little attention to the self-employed. The two provisions that are applicable to the self-employed, article 4 and 8, seem quite insufficient to solve the problems of self-employed women. Although article 4 is applicable and forbids indirect and direct discrimination, its scope is rather unclear and it is not accompanied by a provision on positive action. The actual article has done very little to address the real problems of women in the starting up or expansion of self-employed activities. Article 8 is extremely non-committal and merely obligates the Member States to research the availability of replacement services and social security to self-employed women for the purposes of motherhood and pregnancy.

Directive 2002/73/EC is an improvement on Directive 76/207/EEC, as it is partly applicable to the self-employed with regard to access to self-employment. However, the extent of the applicability is not clear, as it depends on the interpretation of the term access. The wide interpretation leads to the conclusion that the Directive could also be applicable to the issues regarding motherhood and maternity, finance and social security. Thus, the self-employed could enjoy the advantage of Directive 2002/73/EC; a provision on positive action is available, creating the possibility to take positive measures in areas in which self-employed women experience problems. It has to be noted though, that positive action is limited in its extent and is on no account obligatory. Consequently, positive measures in the field of, for example, start-up finance will be allowed under strict conditions. The applicability is questionable however, as there are no conclusive clues that stretching the term access to cover all issues of self-employed women is accepted. Moreover, the text of Directive 2002/73/EC regarding motherhood and pregnancy seems to suggest that it will not play a role in the protection of those issues with regard to the self-employed, due to the inapplicability of Directive 92/85/EEC: the Pregnancy Directive. The exclusion of the self-employed from the latter seems to indicate that there are no minimum requirements as to the availability or quality of maternity and pregnancy benefits for this group.

The social security Directives 79/9/EEC and 86/378/EEC have proven to be limited in their effects with regard to self-employed women. Both directives are not applicable regarding pregnancy and maternity and they do not oblige the Member States or other suppliers to introduce any social security system or scheme that does not exist. Moreover, Directive 86/378/EEC excludes private contracts from its scope. Self-employed women that rely on private insurances with regard to social security will not benefit from its protection.

Directive 2004/113/EC could have a residual function. This new directive could provide a safety net for the problems regarding financial services and areas of social security, such as pregnancy and maternity, which are not covered by the above directives. However, as was mentioned in chapter 3.II.C, if one assumes that Directive 86/613/EEC covers the subjects of financing and pregnancy and maternity, Directive 2004/113/EC will subsequently

not be applicable in these areas. Apart from this apparent gap, Directive 2004/113/EC seems to contain many possible limitations in its material scope. Firstly, the concept of 'goods and services available to the public' is multi-interpretable and if the concept is interpreted narrowly, some important services for the self-employed could be excluded. Clearly, any Court could decide to interpret the concept more broadly, but the fact that it is not clear could create uncertainty and could lead to a lack of uniformity. A second issue that threatens to diminish the effectiveness of the directive for the self-employed is the appearance of the word 'comparable' in its definition of discrimination, similar to Directive 2002/73/EC, which suggests a rather formal approach to the interpretation of discrimination. A third problem is the possible exemption of insurance services from equal treatment, which can include the social security insurances of self-employed women. Additionally, the directive contains an objective justification provision for both indirect and direct discrimination, which suggest that in the area of goods and services there is more room for manoeuvre in the exemption of measures and behaviour, and could well lead to diminished protection in this area. The overall effect of the directive could be that differential treatment with regard to premiums and benefits, as well as conditions in the area of the important areas of insurances and financing will either relatively often fall outside the scope of the directive and/or can be relatively easily justified or exempted.

II. Suggestions for Improvements

The question arises what alterations can be made to the current regime of equal treatment in the area of the self-employed to address the gaps established in the previous paragraph. But before answering this question, it should be mentioned that the solution to the lacunae is also a matter of political will. There is no doubt that the subject of the protection of the self-employed is a complex one. Moreover, from the preparatory documents one gathers that there are some reservations as to the protection of the self-employed, possibly fed by the conviction that the self-employed require and deserve less protection than the employed.

However, considering the changing patterns in the labour market established in chapter 1, leading to the blurring of the boundaries between the self-employed and the employed that relatively affects more women than men, it could be said that a less extensive protection of the self-employed in the area of equal treatment seems outdated. Moreover, it is not helpful in achieving the aim of promoting work participation in general and specifically self-employment amongst women.[236]

Clearly, the first option to consider is a redefinition of the term 'self-employed'. If a new definition is employed that focuses on the presence or absence of economic dependence, the result could be that categories now considered self-employed will instead be considered employed and thus fall under the more elaborate regime of protection of the employed. However, although the option might be an answer for women that fall within the category of economically dependent workers, it will not address the issues of other self-employed women falling outside the category. As these women, especially the lower and middle-income groups, are presumably also struggling with issues of e.g. finance and pregnancy, this suggestion alone would result in a partial improvement.

In addition to this suggestion, a more overall approach concerning the protection of the self-employed seems required; an approach based on the premise that the self-employed deserve protection on the same level as the employed, albeit not similar. Even though the

[236] Which is a goal of the European Community. See, amongst others, the March 2000 Lisbon European Council.

starting point of self-employment might be personal responsibility, the effect of a lack of protection, for example in the area of pregnancy and maternity, is that self-employed women, besides the usual responsibilities, carry the additional burden of the costs and disadvantages of pregnancy and maternity. In the area of start-up finance, self-employed women who have difficulties acquiring loans are burdened with an additional problem on top of the steep hurdle of starting up a business in general. With regard to social security, self-employed women run the risk of facing differential treatment concerning conditions and premiums or benefits in insurances and other financial services that are already considered expensive and scarcely available.

This approach could lead in different directions. A suggestion could be to include the self-employed in general in the regime of the employed in a directive that would cover both groups. The self-employed though, as was mentioned before, are a group with specific characteristics and specific problems and issues, and the inclusion of the self-employed in such a directive might therefore not be the most obvious approach as it would be necessary to differentiate between the two categories anyway. Moreover, the approach will have the effect of making Recast Directive 2006/54/EC obsolete before it will be implemented, as this directive is obviously not meant to replace or repeal Directive 86/613/EEC.

With a view to clarity and in order to pay specific attention to the problems regarding the self-employed, it might be a more effective suggestion to completely revise Directive 86/613/EEC and create a new directive solely for the purposes of the self-employed. Instead of including the assisting spouses in the same directive as the self-employed, it might be more useful to introduce a separate directive for the group of assisting spouses, as they experience different problems than the self-employed. The separation of the two groups might lead to more specific and effective directives for both groups and offer them the specific attention that they deserve.

The new directive on the self-employed could include a definition of the self-employed for the purposes of the directive, and could thus eliminate some uncertainty with regard to its applicability. Furthermore, this directive should be utilized to substantially improve the protection of the self-employed in all the areas that are considered a problem; access, finances, maternity and social security. If the protection of the self-employed is roughly on a par with the employed, the definition itself might become less important. In order to achieve clarity and transparency, it might be desirable to include equal treatment of goods and services in the directive, especially in the area of goods and services related to work and occupation, including private insurances regarding pregnancy, maternity and other legitimate reasons for absence from work or occupation. Such work- or occupation related goods and services are essential for the improvement of the position of self-employed women. In the Race Directive 2000/43/EC, goods and services, amongst others, are also included in the equal treatment protection and it is difficult to see why this could not be an option for the self-employed.[237]

A complete outline of the contents of the directive would need further study. However, it is possible to make suggestions based on the previously mentioned gaps. A first step could be to leave out the phrase ‘comparable situation’ in its definition, in contrast to Directives 2004/113/EC and 2002/73/EC, in order to prevent a rather formal approach to the concept of discrimination and the possible exclusion of many situations from the directive. [238] As to the further scope of the Directive: it should encompass, besides goods and services, access to self-employment including the starting up of a business, access to finances (thus complementing Directive 2002/73/EC and Directive 2006/54) and provisions regarding pregnancy, maternity and social security (thus replacing Directives 79/7/EEC, 86/368/EEC and Directive

[237] See Directive 2000/43/EC, article 3.
[238] Clearly, this is also advisable in the area of the employed and others. See chapter 2.Part 2.V.B.

2006/54/EC as far as the self-employed are concerned). Consequently, it will repeal Directive 86/613/EEC.

The directive, in line with nearly all other directives, should have a provision that enables positive action in all areas. Although, as was mentioned in chapter 3, positive action is a term that is fairly limited in its extent, the provision at least provides some clarity that positive action is also an option in the area of the self-employed, especially in the areas currently (exclusively or not) covered by Directive 86/613/EEC. One could even take it a step further, and suggest an additional provision similar to 'the reasonable accommodation' provision of Framework Directive 2000/78/EC.[239] A similar provision in the area of the self-employed could lead to the result that a private or public body and/or supplier should make reasonable adjustments as to, for example, the conditions on which a loan is granted for the underrepresented group, in this case self-employed women. This scenario has the advantage that (positive) measures should be taken in order not to infringe on the provision, while the occurrence of a provision on positive action by no means obligates the Member States or other parties to introduce positive action. Clearly, it could also be an option to formulate the article on positive action in such a manner that positive action will be obligatory in the case of (substantial) underrepresentation.[240]

Concerning the important subject of pregnancy and maternity, the potential new provision should place a clear obligation on the Member States, not unlike article 11 of Directive 92/85/EEC.[241] The provision should contain an unambiguous duty to ensure that facilities, whether replacement services or public or private insurances, are affordable and in practice enable self-employed women to start or continue a self-employed activity. Consequently, negative conditions and premiums that impede self-employed women from relying on these benefits or services will have to be changed or deleted. In order to suggest a minimum level, the standard of disability insurances should be utilised, including the absence of negative conditions. This provision should leave it to the discretion of the Member States whether they choose to introduce a (obligatory) public insurance or not, as long as the facilities meet the minimum demands. The approach seems the only way of assuring that the costs of pregnancy and maternity will not be shifted on to self-employed women.

As regards social security, it might be an improvement to have all the directives concerning social security amalgamated into one directive. Although the lack of social security with regard to the self-employed is not an issue exclusive to self-employed women, it was noted that, as an underrepresented group, it does form a hurdle to self-employment. The specific obligation to introduce certain public social security systems would go rather far in the light of subsidiarity. A system of minimal requirements, similar to the pregnancy and maternity facilities of the employed might also be an option with the potential effect of lowering the threshold for women to participate in self-employed facilities. In any case, an improved directive should at least ensure that the existing conditions or premiums and benefits cannot be more negative for women than men. At the moment, because of the exemptions of Directive 86/378/EC, private contracts are excluded from its scope, and will (probably) fall under the scope of Directive 2004/113/EC. It has become clear that Directive 2004/113/EC contains some gaps as to its scope and due to the presence of the objective justification provision. If it is assumed that, at a minimum, work-related goods and services

[239] Directive 2002/78/EC, article 5.

[240] This idea is not new, in fact it was previously proposed that positive action should be obligatory: Professor Vogel-Polsky presented a report in which she recommended the introduction of a directive containing obligatory positive action programmes for EU institutions and national public bodies (CREW Reports (1983) vol.3, n.3, p.4). However, the idea was rejected. In: Ellis, op cit, n.1, p.299. Obviously, this issue is also relevant to the employed, and other subjects such as race discrimination. It might be impossible to achieve, but then, nothing ventured, nothing gained.

[241] Directive 92/85/EEC.

will fall under the scope of the potential new directive on the self-employed, its material scope would profit from being more extensive than the scope of Directive 2004/113/EC. Thus, restrictions such as applicability only to 'services available to the public' should be avoided. It could also be argued that the new directive will not merely address the Member States, but, in line with Directive 2002/73/EC, contains an open-ended address that could in principle address an unlimited array of parties, including the Member States, private persons etc.

Moreover, the directive should contain a stricter regime regarding exemptions than Directive 2004/113/EC. Regarding insurances, there should be no general possibility of exempting differential treatment based on sex in the all-important area of work-related insurances. Additionally, it is questionable whether the objective justification of direct discrimination should be introduced in such a directive. Although this approach does have its advantages, the disadvantages seem to outweigh them. The signal that emanates from such a provision might not be conducive to the improvement of the protection of the self-employed.

The above suggestions are only meant as an onset and will need further study and elaboration. Leaving practical issues aside for now, it has become clear throughout this research that the current European protection regarding equal treatment of self-employed women requires alteration. In comparison to employed women, the protection of self-employed women is fragmented, unclear and, at times, utterly inadequate. It is hard to imagine that the current protection could ever contribute to a higher and more successful participation of women in self-employment. Besides this rather pragmatic motivation, it should be remembered that sex equality is considered a fundamental right and the current second-rate protection of self-employed women fails to honour that right.

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