



30.5.2018

## NOTICE TO MEMBERS

**Subject:**    **Petition No 0226/2016 by Anneli Fuchs (German) on alleged violation of the right to equal treatment in social security matters**

**Petition No 0409/2016 by N. S. (German) in connection with the discriminatory treatment faced by the wives of civil servants in Germany as regards their medical insurance**

**Petition No 0488/2016 by Angelika Breucker (German) on an alleged violation of the right to equal treatment in social security matters for wives of civil servants in Germany**

**Petition No 0585/2016 filed by G. C. (Germany) on statutory health insurance in Germany**

**Petition No 0586/2016 by F. A. (Germany) on statutory health insurance in Germany**

**Petition No 0613/2016 by E. S. (German) on the alleged violation of the right to equal treatment in social security matters**

**Petition No 1076/2016 by M. M. (German) on the alleged discrimination regarding social insurance schemes in Germany**

**Petition No 1106/2016 by E. R. (German) on the alleged violation of the right to equal treatment in matters of social security**

**Petition No 1415/2016 by P-F.B. (German) on the 9/10 rule pertaining to Germany social security schemes**

**Petition No 1430/2016 by M.H. (German) on the alleged violation of the right to equal treatment in social security matters**

**Petition No 1431/2016 by G.O. (German) on the alleged violation of the right**

**to equal treatment in social security matters**

**Petition No 1507/2016 by B.M. (German) on alleged violation of the right to equal treatment in social security matters in Germany and the 9/10 rule**

**Petition No 1517/2016 by R. S. (German) on alleged violation of the right to equal treatment in social security matters**

**Petition No 1535/2016 by M. B. (German) on alleged breach of the right to equal treatment in social security matters**

**Petition No 0288/2017 by M.P. (German) on the alleged violation of the principle of equal treatment of men and women concerning social security coverage in Germany and the 9/10 rule**

**Petition No 0348/2017 by V. H. (German) on the alleged violation of the right to equal treatment in social security matters (“Law 9/10”)**

**Petition No 0469/2017 by R.N. (German) on the alleged violation of the right to equal treatment in social security matters (9/10 rule)**

**Petition No 0479/2017 by E.H. (German) on the alleged violation of the right to equal treatment in social security matters**

**Petition No 1249/2017 by B.S. (German) on the alleged violation of the right to equal treatment in social security matters**

## **1. Summary of petition 0226/2016**

The petitioner believes that the German state is acting contrary to the right to equal treatment as set out in Directive 79/7/EEC on the gradual implementation of the principle of equal treatment of men and women in social security matters. The petitioner is the spouse of a civil servant. She and her husband are retired. While the petitioner worked she was subject to compulsory insurance. During the time in which she raised her children she was not employed but received a support allowance based on the fact that her husband was a civil servant. When she retired, however, she could not be included in the health system for pensioners (Rentnerkrankenkasse) as the period in which she raised her children did not count towards becoming eligible for this system. The petitioner claims that this condition does not apply to spouses of non-civil servants, which means that the latter can indeed benefit from the Rentnerkrankenkasse. She is now forced to take out expensive, private health insurance which takes up almost half of her pension. The petitioner believes that this amounts to unequal treatment and an incorrect transposition of Directive 79/7/EEC by the German government. According to the petitioner, the state only protects civil servants' households and those with compulsory insurance, while “mixed” households - consisting of a civil servant and a partner working in another sector - are discriminated against and financially disadvantaged. She asks the European Parliament for an inquiry.

### **Summary of petition 0409/2016**

The petitioner is the spouse of a civil servant. She worked for fifteen years and during which she was subject to compulsory insurance. Subsequently, she had a 15-year break, during which she raised her children. At that time she was not employed but received a support allowance based on the fact that her husband was a civil servant. When she will retire, however, she has calculated that she cannot not be included in the health system for pensioners (Rentnerkrankenkasse), as the period in which she raised her children did not count towards becoming eligible for this system, and according to the legislation, the total of the years she will have worked will not count either. The petitioner claims that this condition does not apply to spouses of non-civil servants, which means that the latter can indeed benefit from the Rentnerkrankenkasse. She claims that women married to civil servants are seriously disadvantaged when retiring and are discriminated against when compared to the wives of other persons working in the private sector, especially because the former have to pay much higher social security contributions. She is asking for the intervention of the EP in order to put an end to this unjust treatment.

### **Summary of petition 0488/2016**

The petitioner believes that the Germany acts contrary to the right to equal treatment as set out in Directive 79/7/EEC of 19 December 1978 on the gradual implementation of the principle of equal treatment of men and women in social security matters. The petitioner is a spouse of a civil servant. She and her husband are retired. While the petitioner worked she was subject to compulsory insurance. During the time in which she raised her children she was not employed but received a support allowance based on the fact that her husband was a civil servant. When she retired, however, she could not be included in the health system for pensioners (Rentnerkrankenkasse) as the period in which she raised her children did not count towards becoming eligible for this system. The petitioner claims that this condition does not apply to spouses of non-civil servants, which means that the latter can indeed benefit from the Rentnerkrankenkasse. She is now forced to take out expensive, private health insurance which takes up almost half of her pension. The petitioner believes that this amounts to unequal treatment and an incorrect transposition of Directive 79/7/EEC by the German government. According to the petitioner, the state only protects civil servants' households and those with compulsory insurance, while "mixed" households - consisting of a civil servant and a partner working in another sector - are discriminated against and financially disadvantaged. She claims that she was never informed when she retired about the consequences of belonging to this special regime, especially considering that this legislation has retroactive effect. She asks for the intervention of the European Parliament so that the retired wives of German civil servants can be relieved from this unequal treatment.

### **Summary of petition 0585/2016 and 0586/2016**

The Petitioners criticise the German authorities for the incorrect implementation of some Community legislation, in particular 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, 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 as well as Protocol No 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms.

As a consequence of the alleged situation, the Petitioners submit that they have suffered damages due to the method of calculating insurance premiums and health care.

### **Summary of petition 0613/2016**

The petitioner believes that the German state is acting contrary to the right to equal treatment as set out in Directive 79/7/EEC on the gradual implementation of the principle of equal treatment of men and women in social security matters. While the petitioner worked she was subject to compulsory insurance. Her spouse at the time subscribed to an individual healthcare insurance. While she was raising her children the petitioner was not employed. When she retired, it appeared that she could not be included in the healthcare system for pensioners (Rentnerkrankenkasse) as the period in which she raised her children did not count towards becoming eligible for this system. She is now forced to subscribe to expensive private health insurance. The petitioner believes that this is a situation of unequal treatment and an incorrect transposition of Directive 79/7/EEC by the German government. According to the petitioner, the state is only required to protect civil servants' households and those with compulsory insurance, while 'mixed' households are discriminated against and financially disadvantaged. She asks the European Parliament for an inquiry.

### **Summary of petition 1076/2016**

The petitioner is concerned about the existence of different social insurance schemes in Germany. She states that according to German law, only those persons, who meet the conditions for the right to a pension from the statutory pension insurance scheme and who have applied for this pension if they have been members for at least nine-tenths of the second half of the period from the time of the first-time employment until the application for pension, are subject to statutory insurance. If pensioners do not fulfil the so-called 'nine-tenth' requirement, they need to subscribe to a more costly private insurance scheme. The petitioner could not subscribe to the statutory pension insurance scheme, as she does not fulfil the nine-tenth requirement. She could have done so easily, but was not informed properly of the consequences of early retirement. She now complains that the spouse of a member of the statutory pension scheme can include periods spent caring for children for the purpose of calculating the period of the nine-tenth requirement. Also late repatriates as well as refugees benefit from more advantageous rules. In the petitioner's view, this practices constitute unjustified discrimination. She thus asks the European Parliament to revoke the relevant German law.

### **Summary of petition 1106/2016**

The petitioner believes that the German state is violating the right to equal treatment as set out in Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security. She claims that as a pensioner she is not able to maintain her status as a compulsory member of a statutory health insurance scheme, in accordance with Section 5(1)(11) of the Fifth Volume of the Code of Social Security Law (SGB V), even though she was insured as a compulsory member for most of her working life. She claims that the 9/10 rule is discriminatory because it means that she is unable to qualify as a compulsory member and that, in accordance with Section 240 of the SGB V, all sources of

income are used to calculate her health insurance contributions, not just income from her pension. Furthermore, she has been told that she is not in a position to support herself financially and that her and her husband's finances are therefore considered jointly, with each partner an equal participant. As such, with less income from her pension than her husband, she has to pay contributions based on half the joint income. When she was still in employment, her and her husband's finances were also considered jointly, but then the petitioner paid the contributions from her salary. She asserts that at that time there was gender equality as their insurance contributions were calculated on the basis of their respective salaries. The petitioner claims that the contribution calculation used by health insurance funds is putting additional financial pressure on the partner with the lower income. For these reasons, she states that there has been a violation of Article 4(1) of Council Directive 79/7/EEC on equal treatment of men and women in matters of social security, a violation of Article 14(1) of and Protocol No 12 to the ECHR on the prohibition of discrimination, as well as a violation of the principle of equality under Article 3(1) of the Basic Law of the Federal Republic of Germany.

### **Summary of petition 1415/2016**

The petitioner complains that the 9/10 rule implemented by the German national health insurance (GKV) has imposed a serious financial burden on her. The petitioner states that almost 47% of her pension is spent on health insurance contributions. She claims that the German Parliament has rejected to examine her individual case due to cost reasons. The petitioner also states that at the time of her retirement neither the German health insurance administration nor the pension fund informed her of the automaticity of the scheme which is now applicable to her case nor the financial consequences thereof.

### **Summary of petition 1430/2016**

The petitioner claims that she applied for her pension in early 2016. She states that it is impossible for her to be insured as a pensioner under statutory health insurance. She ceased receiving statutory health insurance when she gave birth to and began raising her children, and left her job to look after her mother. She had to take out private health insurance through her husband, a civil servant. Her husband was privately insured as he had to pay only a 50% contribution while the other 50% was covered by a subsidy. She was not made aware of the alternative involving voluntary statutory health insurance for her husband and the rest of the family. As a result of the decisions she made at the time, the petitioner now falls under the so-called '9/10 rule', which she was also not told about at the time. Men and women may receive unequal treatment as a result of their biological differences (i.e. women have children, men do not), which is the case with the 9/10 rule. Women who have children are disadvantaged in comparison to men.

### **Summary of petition 1431/2016**

The petitioner, wife of a civil servant, claims that after applying for her pension, she was informed of the 9/10 rule and the associated obstacle that pensioners face in accessing statutory health insurance. She was therefore forced to take out voluntary statutory insurance, which presents a significant financial burden. In addition, this situation constitutes discrimination based on the fact that she stopped working from 1971 until 1986 to raise her children. When

she was raising her children, there were no legal provisions for the time spent raising children, no adequate childcare, and few part-time work opportunities. The wives of civil servants have not been taken into consideration in the exemptions to the 9/10 rule for particular groups.

### **Summary of petition 1507/2016**

The petitioner objects to the German social security scheme applicable to the wives of civil servants. She asserts that the scheme violates Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, and provides detailed argumentation to support this point drawing on provisions from the German law as well as her personal situation. She explains that, at the relevant time, following a 38-year long career as a medical nurse, the so-called 9/10 rule was not made clear to her, nor the requirement thereunder that she purchase additional insurance coverage. The petitioner claims that she was only later informed, upon entry into retirement that she was obliged to pay for supplementary insurance, which amounts to EUR 700 euros on a pension of EUR 950. She claims that the system has been designed to benefit insurance providers rather than the insured, and it has a particular negative effect on women who decide to have children.

The petitioner calls for the European Parliament to support her case and objects to continued implementation of the 9/10 rule in Germany. She asks in particular that due consideration be given to the full duration of her participation in the labour market, the independent treatment of spouse salaries in calculating insurance premiums, and that child-rearing should be deemed a beneficial service to society.

### **Summary of petition 1517/2016**

The petitioner believes that the German state is violating the right to equal treatment as set out in Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security. The petitioner is married to a civil servant who is retired. The petitioner herself is still employed until February 2021. She will then be lacking three Contribution Years required to be accepted into the mandatory pension insurance scheme (KVdR); this is because of time taken to raise her three children, during which she did not pursue employment. The petitioner claims that this condition does not apply to spouses of non-civil servants, which means that the latter can indeed benefit from the German sickness insurance scheme for pensioners (Rentnerkrankenkasse). She is now forced to take out expensive private health insurance which takes up almost half of her pension. The petitioner believes that this amounts to unequal treatment and an incorrect implementation of Directive 79/7/EEC by the German government. According to the petitioner, the state only protects civil servants' households' and those with compulsory insurance, while 'mixed' households - consisting of a civil servant and a partner working in another sector - are discriminated against and financially disadvantaged. She asks the European Parliament for an inquiry.

### **Summary of petition 1535/2016**

The petitioner believes that the German State is breaching the right to equal treatment as set out

in Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security.

The petitioner is married to a civil servant and was enrolled in compulsory insurance throughout the qualifying period. However, while she was raising her children, she was not employed and was insured under her husband's private health insurance. Notwithstanding the years of having been privately insured she does not qualify to be accepted by the compulsory pensioners' health insurance scheme (KVdR). She is now forced to take out expensive, private health insurance which takes up almost half of her pension. The petitioner believes that this amounts to unequal treatment and an incorrect transposition of Directive 79/7/EEC by the German government. According to the petitioner, the State only protects civil servants' households and those with compulsory insurance, while 'mixed' households - consisting of a civil servant and a partner working in another sector - are discriminated against and financially disadvantaged. She asks the European Parliament for an inquiry.

### **Summary of petition 0288/2017**

The petitioner objects to the German social security scheme applicable to the wives of civil servants. She asserts that the scheme violates Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, as well as a number of other legal provisions under both EU and German law on equal treatment. The petitioner provides a detailed account of her personal situation and refers to decisions of the German courts affirming the harsh effects of the system on childbearing women.

### **Summary of petition 0348/2017**

The petitioner believes that the German State is violating the right to equal treatment enshrined in Directive 97/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security. The petitioner is the spouse of a civil servant. Both she and her husband are retired. While the petitioner was gainfully employed, she was subject to compulsory insurance payments. During the time in which she raised her children she was not employed but received a support allowance based on the fact that her husband was a civil servant. When she retired, however, she could not be included in the health system for pensioners (Rentnerkrankenkasse) as the period in which she raised her children did not count towards becoming eligible for this system. The petitioner claims that this condition does not apply to spouses of non-civil servants, which means that the latter can indeed benefit from the Rentnerkrankenkasse. She is now forced to take out expensive private health insurance, which takes up almost half of her pension. The petitioner believes that this amounts to unequal treatment and an incorrect transposition of Directive 97/7/EEC by the German government. According to the petitioner, the State only protects civil servants' households and those with compulsory insurance, while 'mixed' households - consisting of a civil servant and a partner working in another sector - are discriminated against and financially disadvantaged. She asks the European Parliament to investigate.

### **Summary of petition 0469/2017**

The petitioner is a pensioner and does not meet the 9/10 rule. If she had known of such a rule at the time of retirement, she would have submitted her application later in order to fulfil the requirements of the 9/10 rule. She is the wife of a civil servant and, out of financial necessity, was covered under her husband's private health insurance while raising her two children. Women whose husbands were covered by compulsory health insurance have the time they spent raising their children counted for the purposes of the 9/10 rule, but not the wives and widows of civil servants. The petitioner sees this as unequal treatment and hopes that the relevant time periods could be re-evaluated.

### **Summary of petition 0479/2017**

The petitioner believes that the German State is breaching the right to equal treatment as set out in Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security. As a result of the so-called "9/10 rule", the petitioner cannot secure compulsorily insured status under the State system, which represents discrimination. The petitioner intends to retire in summer 2017. However, as a pensioner she cannot be compulsorily insured because, during the second half of her working life, at a time when she was caring for a foster child and a son from her husband's first marriage, she took out private insurance. During this period she could not afford voluntarily to take out sickness insurance under the State system. In the petitioner's view, the 9/10 rule is discriminatory because it means that the petitioner cannot secure compulsorily insured status and that her sickness insurance contribution cannot be calculated solely on the basis of her pension, but rather, under paragraph 240 of the Fifth Volume of the Code of Social Security Law, on the basis of her income from all sources. The petitioner wants her sickness insurance contribution to be based solely on her pension.

### **Summary of petition 1249/2017**

The petitioner is turning to the European Parliament on behalf of his retired wife, who is taking out voluntary health insurance because she did not fulfil the '9/10' rule for health insurance. He says that the insurance premiums consume a significant portion of her monthly pension. The petitioner feels that the rule is unfair, and asks for the problem to be addressed.

## **2. Admissibility**

0226/2016 declared admissible on 13 July 2016.  
0409/2016 declared admissible on 31 August 2016.  
0488/2016 declared admissible on 23 September 2016.  
0585/2016 and 0586/2016 declared admissible on 27 October 2016.  
1076/2016 declared admissible on 11 January 2017  
0613/2016 declared admissible on 7 November 2016.  
1106/2016 declared admissible on 20 February 2017.  
1415/2016 1430/2016 and 1431/2016 declared admissible on 12 April 2017  
1507/2016 and 1517/2016 declared admissible on 24 April 2017  
1535/2016 declared admissible on 25 April 2017  
0288/2017 declared admissible on 14 July 2017  
0348/2017 declared admissible on 30 August 2017  
0469/2017 declared admissible on 31 August 2017  
0479/2017 declared admissible on 14 September 2017

1249/2017 declared admissible on 4 April 2018

Information requested from Commission under Rule 216(6).

**3. Commission reply**, received on 28 February 2017

Petitions 0226/2016, 0409/2016, 0488/2016, 0585/2016, 0586/2016, 0613/2016 and 1106/2016

The petitions

The petitioners<sup>1</sup> allege the breach of Directive 79/7/EEC<sup>2</sup>, Directive 76/207/EEC<sup>3</sup> and Protocol No. 12 to the Convention for the protection of human rights and fundamental freedoms<sup>4</sup> and relate to the introduction of stricter rules for access to statutory health care insurance for retired persons in 1989.

All petitioners have been economically active as workers and only ceased economic activities for parts of her their life, for family-related reasons. During their active career, the petitioners have paid obligatory contributions to the statutory health insurance scheme (*Gesetzliche Krankenversicherung - GKV*) in accordance with the rules under the Federal Social Code V<sup>5</sup> and contributed to the statutory old age pension scheme under the Federal Social Code VI<sup>6</sup>. Having sufficiently contributed to the latter, the petitioners receive an old-age pension from this statutory pension scheme.

Their complaint pertains to the fact that women married to men who are not covered by the GKV system, because they were public servants (for which different regimes exist at federal and regional level for pension and health care) are treated less favourably than women with similar career and contribution patterns who are married to men covered by GKV.

This result stems from a different application to these groups of the so-called 9/10 –Rule: The rule makes access to the so-called 'obligatory coverage'<sup>7</sup> of the health insurance for pensioners (*Pflichtversicherung der Rentner*) under the GKV dependent on the fulfilment of a contributory period (*Vorversicherungszeit*) in order to balance income and expenditure of the system. Until 1988, the applicable law provided that a person needed to have been insured under the GKV scheme at least half of the entire duration of his/her employment time (*Halbbelegung*). However, in 1988, the legislator decided, against the background of a severe imbalance of income and expenditure, to only admit persons who have been insured under GKV during 9/10

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<sup>1</sup> Petition 0409/2016 alleges only the breach of Directive 79/7/EEC.

<sup>2</sup> Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment in matters of social security, OJ L 6/24 of 10.1.1979.

<sup>3</sup> 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 L39/40 of 13.2.1976 – repealed by Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation if the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 304/23 of 26.7.2006.

<sup>4</sup> <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/177>

<sup>5</sup> [https://www.gesetze-im-internet.de/bundesrecht/sgb\\_5/gesamt.pdf](https://www.gesetze-im-internet.de/bundesrecht/sgb_5/gesamt.pdf)

<sup>6</sup> [https://www.gesetze-im-internet.de/bundesrecht/sgb\\_6/gesamt.pdf](https://www.gesetze-im-internet.de/bundesrecht/sgb_6/gesamt.pdf)

<sup>7</sup> 'Obligatory' in the meaning that the GKV is obliged to accept coverage of a person.

of the second half of their life time employment duration under the GKV scheme. Persons who temporarily leave the social security scheme of GKV during the second half of their career face difficulties to fulfil the 9/10 access condition. However, periods during which a spouse remains in the system not as an independent member but as a dependent family member of a GKV affiliate, are accounted for.

This means that, for a woman married to a GKV-affiliated employee, a temporary drop-out of the labour market to care for dependent children or elder relatives does not negatively affect her ability to access the obligatory old-age health insurance scheme.

This scenario does not apply to the petitioners who are/have been spouses of public servants which are covered by specific public official insurance schemes for pension and health care (federal for federal servants and regional for servants of the regional entities) outside the scope of the Federal Social Codes. These servants do not contribute to the GKV.

The above scenario does also not apply the petitioner of 613/2016 who is married to an entirely privately insured person, who did also not contribute to GKV. All petitioners have in common that they left, temporarily, during their absence from the labour market, the GKV scheme and opted for coverage by the specific health care schemes of their non-GKV affiliated husbands. For the calculation of the 9/10 rules these periods spent outside the GKV are not countable. In the absence of fulfilment of the 9/10 rule, the petitioners have only access to the voluntary sub-scheme for old age statutory health care under Social Code V.

However, contributions to the voluntary scheme are not calculated on the basis of the women's individual pension income, but the contribution basis reflects their general family income situation and is therefore enhanced by (parts of ) their spouses' income. They are therefore higher than if they were based on the individual pension of the petitioners.

## The Commission's observations

### Directive 79/7/EEC

#### *Material Scope of the Directive:*

The Directive applies to statutory social security schemes covering against sickness (Article 3 (1) (a), first indent) and is therefore applicable to the issue at stake which is the condition of access to statutory sickness insurance for pensioners.

As regards the personal scope, the Directive applies to workers. All five petitioners claim to have been gainfully employed during parts of their life and are therefore entitled to an old age pension.

The issue falls as such under the scope of the Directive.

#### *Discrimination on grounds of sex:*

Article 4 (1) first indent prohibits discrimination on grounds of sex, either directly, or indirectly through reference to marital or family status, inter alia, as concerns the conditions of access to social security schemes.

The German rules described above would constitute discrimination, if they lead to a more unfavourable treatment of a person on grounds of sex. However, the petitioners, who are women, complain that the law treats more favourably another group of women who present similar career patterns. The Directive combats discrimination between persons of different sex, and not women amongst themselves. The petitions thus pertain to equality before the law outside the scope of Directive 79/7/EEC.

### Directive 2006/54/EC

The petitioners refer to Directive 76/207/EEC. This reference is, following the recast of this Directive and its repeal by Article 34 of Directive 2006/54/EC, interpreted as referring to the 2006/54/EC recast Directive. However, this Directive only pertains to the implementation of the principle of equal treatment in relation to occupational social security schemes (Article 1 (c)), the scopes of Directive 2006/54/EC and 79/7/EEC being thus mutually exclusive. For this reason a breach under Directive 2006/54/EC cannot be established because the issue at stake is about conditions of access to the statutory social security scheme. Also this Directive requires the comparator to be a person of another sex than the petitioners.

### Protocol No. 12 to the Convention for the protection of human rights and fundamental freedoms

The petitioners refer to Article 1.1 (apparent error by referring to Article 14 in the petition) of this Protocol. This protocol does as such not form part of the European Union law and can therefore not be the object of a petition under the Treaties. Insofar as this Article is identical with Article 21.1 of the Charter of the Fundamental Rights of the European Union for the prohibition of sex based discrimination, the above reasoning applies, that the sex-based discrimination requires a comparison between different sexes.

## Conclusion:

In the light of the above reflections, the petition is considered unfounded.

### **4. Commission reply**, received on 2 May 2017

Petitions 0226/2016, 0409/2016, 0488/2016, 0585/2016, 0586/2016, 0613/2016 and 1106/2016

The Committee on Petitions recently informed the Commission about a press article from the German Press related to the issue raised in the above petitions.

(<http://www.noz.de/deutschland-welt/gut-zu-wissen/artikel/840803/9-10-regelung-wird-fuer-rentnerinnen-entschaerft>)

After verification of this press information by the Commission services, it appears that the grievance underlying the petition [unequal treatment as regards access to statutory old age health insurance of women married to persons not affiliated to the mandatory statutory health care system (i.e. spouses of civil servants and self-employed), compared to women married to spouses affiliated to the mandatory statutory health care system] has now been addressed by a law adopted by the German Parliament in February 2017 which will shortly enter into force. This law will lead to the inclusion of periods of child care (3 years/child) in the contributory period to close the gaps caused by child care motivated economic inactivity regardless of the insurance situation of the spouse/partner.

<https://www.bundesgesundheitsministerium.de/ministerium/meldungen/2017/februar/hhvg.html>

The relevant excerpt from the new law is as follows:

‘One point of discrimination against spouses and partners raising children when taking into account the contributory period for pensioners’ health insurance (KVdR) will be eliminated. In future, three years for every child will be factored into the contributory period for the KVdR, irrespective of the health insurance of the spouse or partner. This will improve access to the KVdR for spouses and partners who have interrupted their careers in the second half of their working lives to look after children and have not been covered by health insurance during that period. In some cases they do not complete the requisite contributory period for compulsory membership of the KVdR, which is usually more favourable (the ‘9/10 rule’).’

This change does, however, not affect the Commission's earlier position on these petitions (see Commission's reply of 28 February 2017) whereby it had taken the view that EU law on gender discrimination had not been affected by the issue at hand as the inequality issue at stake pertained to a comparison among different groups of women.

### **5. Commission reply**, received on 20 December 2017

Petition 0226/2016, 0409/2016, 0488/2016, 0585/2016, 0586/2016, 0613/2016, 1106/2016, 1415/2016, 1430/2016, 1431/2016, 1507/2016, 1517/2016, 1535/2016, 0288/2017, 0348/2017, 0469/2017 and 0479/2017

### The Commission's observations

The Commission's assessment and conclusions for petitions 0226/2016, 0409/2016, 0488/2016, 0585/2016, 0586/2016, 0613/2016 and 1106/2016 communicated to the Committee on Petitions on 2 May 2017 also apply to all the other petitions listed above, as they all concern the same issue.

As regards the new elements provided by the author of petition 0226/2016 more recently, the Commission would like to make the following observations.

In her letter of 18 April 2017, the petitioner complains that the new legislative rules which allow the recognition of child education periods to be taken into account for fulfilling the contributory period (3 years per child) do not have retroactive effect and do not allow claiming reimbursement of higher contributions paid before the 2017 legislative changes entered into force.

Following the initial assessment of the petition, according to which the Commission did not identify a breach of EU law, the Commission takes note of the new legislative situation addressing the petitioners' original grievance to a certain extent, but which in any event does not affect the original assessment of the Commission.

With her letter dated 25 June 2017, the petitioner intends to clarify/adjust the remit of her original claim. She underlines that she had not meant to base her claim on a comparison between (female) spouses of public servants' access to the obligatory health care scheme for pensioners ("*Pflichtversicherung der Rentner*") with (female) spouses of other workers access (statutory scheme).

However, the Commission recalls that, as stated in detail by the petitioner herself in the original petition, the difference between these groups was that the latter group was allowed to count periods during which they were economically inactive and co-insured without own contributions with their working spouse under a "family co-insurance scheme" in order to have access to the obligatory health care scheme for pensioners, whereas this was not possible for spouses of public servants who had been co-insured for a certain period in the family insurance system of the public servants scheme ("*Beihilfe*") and the complementary private insurance. In her initial petition, the petitioner had communicated that maintaining her own insurance during these periods of inactivity would have been possible but expensive also in the light of the absence of personal income.

Based on this original claim, the Commission had shared its consideration that Directive 79/7/EEC, alike other Directives on sex discrimination, requires the unfavourable treatment to occur in comparison to the other sex. This was however not the case for the initial petition which was clearly geared towards a comparison between spouses of public servants ("*Beamtenehfrauen*")<sup>1</sup>, with another group of women regarding their respective access to the obligatory health insurance scheme for pensioners.

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<sup>1</sup> See last paragraph of the letter dated 05.02.2016: 'By contrast, the spouse of a member of the statutory health insurance scheme is comfortably situated (...)'; see also 2nd paragraph of page 5 of this letter: 'For the spouse of a member of the statutory health insurance scheme, on the other hand, nothing has changed (...). That considerably disadvantages spouses of civil servants. Nor can any particular legal advantages for civil servants' spouses be seen that would warrant differing treatment of the two categories as regards health insurance.'

In her new letter, the petitioner claims that discrimination had rather occurred earlier, insofar as the particular insurance scheme of her public-servant husband (a man) was "forced upon her" as a woman when she decided to become economically inactive to raise children, although she was not a public servant herself at this moment in time. The petitioner further argues that her husband did not have to face the disadvantages of this situation as he continued to enjoy the status as public servant, whereas, as the Commission understands, the petitioner, in her later professional life, returned to the status of an employee falling under the general statutory scheme. However, in the same letter, the petitioner recalls the possibility that voluntary ("*freiwillig*") insurance had as such been available, referring also to spouses of "privately insured, such as public servant spouses", a group to which she belonged.

The Commission takes the view that the new grievance does not fall under the remit of EU *acquis* either. A breach of Directive 79/7/EEC would require that a man, compared to a woman, would not be confronted with the same situation. This is not established by the petitioner. As such, the petitioner used the possibility of being co-insured during her absence from the labour market under the family insurance scheme based on the affiliation of her spouse, who was economically active as a public servant. The same situation would have applied to the female spouse in the inverted situation. The Commission is also unable to see how the use of a contribution-free co-insurance scheme (both in the private and public sector) constitutes in itself a disadvantageous treatment compared to the spouse of the other sex.

Finally, in this letter (last paragraph), the petitioner underlines that the more expensive affiliation to the voluntary pensioners' health care insurance scheme constitutes discrimination, thus requesting that higher contributions paid before the new legislation became applicable in 2017 should be compensated for. The Commission recalls that the contribution under the voluntary system is defined on a basis which takes account of parts of the spouse's income, whereas the non-voluntary pensioners' health care insurance scheme bases the contributions on the individual income of its member. As such, the pensioner who can only accede to the pensioners' health care system on a voluntary basis because he or she failed to fulfil the contributory period necessary for the "obligatory" scheme, can therefore become subject to a higher contribution. This applies to women that are spouses of public servants, as well as to men in the same situation, but also to the respective spouses of persons who have been privately insured as self-employed persons. Even under the probable assumption that women were more frequently affected by gaps in the professional life for periods of child care, the calculation method as such needs to be seen in the overall context of social security systems sustainability. In Germany, statutory insurers provide the possibility to persons that do not fulfil the contributory periods to receive health care coverage, under specific conditions, under the statutory system by means of voluntary affiliation. In the case of the petitioner, prior to such affiliation no contributions were received by the statutory system during the petitioner's absence from the labour market, neither from the petitioner, nor through her spouse as he contributed to another, non-statutory health insurance system (as a public servant). For the voluntary affiliation, statutory insurers therefore rely on a calculation method that allows receiving potentially higher contributions from the individual in accordance with their financial capacity. The Commission recalls that one reason of the 1989 reform had been to address serious imbalances between income and expenditure, as many persons who had not contributed to the statutory scheme for a certain period attempted to reintegrate the statutory scheme at a later age causing an increased health expenditure burden for the insurance schemes. The point of reference under the German legislation to define the personal financial capacity is a provision

that defines, for married persons, the economic obligations towards one another.<sup>1</sup> In order to protect the inactive spouse, her/his duty to earn the family income is assumed, under this rule, to be fulfilled by running the household. The economic capacities of an economically inactive, or of a less earning spouse, are therefore also defined by the share which they are entitled to claim (as a position in law, even if remaining theoretical in daily life) from their spouses' income should this be higher than her own.

As for earlier claims raised by the petitioner, the Commission therefore does not consider that this rule, which established mutual rights and obligations to financial support between spouses, involves discrimination under EU legislative equality rules.

With the latest letter dated 15 July 2017, the petitioner expresses two grievances. First, the issue that a certain statutory insurance company allows also fathers to have the 3 years per child accounted for as contributory period to the statutory health insurance to reach the minimum contributory period of 9/10 of the second half of the professional life, and this regardless of having actually worked or not during that period. This, according to the petitioner, unjustifiably benefits men, whereas the purpose of the law was to strengthen women's access who failed to reach the contributory period for family-related absence from the labour market. Second, she complains that the law in question does not have retroactive effect (similar grievance as in the above-mentioned letter from 18 April 2017).

Both grievances do not change the assessment of the Commission. The mere fact of granting an identical advantage to persons of the other sex does not constitute discrimination - this application of the new rules also benefits, in the same way, women who have continued to work while not being insured under the statutory system for various reasons. The application of the new rules allows persons of both sexes to gain facilitated equal access to the non-obligatory branch of the pensioners' health scheme for which they failed to fulfil the conditions before the legislative change.

On the second grievance, the Commission has no reason to comment as it had not found a breach of EU law under the situation in place before the 2017 legislative changes occurred. The issue of a retroactive application remains a domestic law issue.

### Conclusion

In the light of the above, the Commission concludes that the new elements provided do not affect the original assessment of the petition, which had been to consider the petition unfounded. The Commission also wishes to recall that the German legislator has addressed the situation in the meantime.

## **6. Commission reply to petition 1076/2016, received on 2 May 2017**

The petition relates to the same issue underlying the following petitions: 226/2016, 409/2016,

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<sup>1</sup> Section 1360: Family maintenance obligation:

Spouses are mutually obliged to provide appropriate maintenance for their family through their work and assets. If running the household is entrusted to one spouse, his or her obligation to help maintain the family through work shall normally be discharged by running the household.

488/2016, 585/2016, 613/2016 and 1106/2016, for which a separate reply has been provided.

The petitioner refers to Directive 79/7/EEC<sup>1</sup>, Directive 76/207/EEC<sup>2</sup> and Protocol No. 12 to the Convention for the protection of human rights and fundamental freedoms<sup>3</sup> and to the introduction of stricter rules for access to statutory health care insurance for retired persons in 1989. Background information on the national context of this new legislation is included in the Commission's assessment of the above cited petitions of 2016 (226, 409, 488, 585, 613) and is also valid for the present petition.

However, the personal situation underlying this petition is different from the above-mentioned petitions. This petitioner has not interrupted, temporarily, her affiliation to the statutory health insurance scheme (GKV) for reasons of co-insurance with a spouse during childcare periods. She left the GKV system to contract private health insurance (PKV) on her own for a certain period of time, before rejoining, at the age of 50, the statutory health insurance scheme.

This petitioner is therefore not concerned by the recent legislative change in Germany<sup>4</sup>, on which the Parliament has informed the Commission, and by which education times have now become accountable (3 years per child) to remediate these affiliation gaps.

The petition, in its reasoning, invokes the general equality principle under the German constitution and criticizes the conception of the German national health insurance system as such. The petitioner claims that the spouse of a GKV-insured person is privileged compared to herself. The petitioner also complains that late-resettlement persons [*Spätaussiedler* – a specific scheme of integration of immigrants from German minority population groups in Eastern Europe and Russia] and, as she alleges, refugees do not have to fulfil contributory periods compared to her as a German national and benefit from less costly access to health insurance than herself.

### The Commission's observations

#### (1) Directive 79/7/EEC:

##### *Material Scope of the Directive:*

The Directive applies to statutory social security schemes covering sickness (Article 3 (1) (a), first indent) and is therefore applicable to the issue at stake which is the condition of access to statutory sickness insurance for pensioners.

As regards the personal scope, the Directive applies to workers. The petitioner claims to have been gainfully employed during parts of her life and to be therefore entitled to an old age

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<sup>1</sup> Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment in matters of social security, OJ L 6/24 of 10.1.1979.

<sup>2</sup> 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 L39/40 of 13.2.1976 – repealed by Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 304/23 of 26.7.2006.

<sup>3</sup> <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/177>

<sup>4</sup> <https://www.bundesgesundheitsministerium.de/ministerium/meldungen/2017/februar/hhvg.html>

pension.

The issue therefore falls as such under the scope of the Directive.

*Discrimination on grounds of sex:*

Article 4 (1) first indent of the Directive prohibits discrimination on grounds of sex, either directly, or indirectly through reference to marital or family status, *inter alia*, as concerns the conditions of access to social security schemes.

The German rules described above would constitute a discrimination if they lead to a more unfavourable treatment of a person on grounds of sex. However, the petitioner, a woman, complains, *inter alia*, that the law treats more favourably another group of women (spouses of GKV affiliated persons) as well as refugees and late-resettled persons (*Spätaussiedler*). The Directive combats discrimination between persons of different sex and not women amongst themselves or in comparison to other groups. The petition thus pertains to equality before the law outside the scope of Directive 79/7/EEC.

(2) Directive 2006/54/EC

The petitioner refers to Directive 76/207/EEC. This reference is, following the recast of this Directive and its repeal by Article 34 of Directive 2006/54/EC, to be interpreted as referring to the 2006/54/EC recast Directive. However, this Directive only pertains to the implementation of the principle of equal treatment in relation to occupational social security schemes (Article 1 (c)), the scopes of Directive 2006/54/EC and 79/7/EEC mentioned above being thus mutually exclusive. For this reason, a breach under Directive 2006/54/EC cannot be established because the issue at stake is about conditions of access to the statutory social security scheme. Also this Directive requires the comparator to be a person of another sex than the petitioner.

(3) Protocol No. 12 to the Convention for the protection of human rights and fundamental freedoms

The petitioners refer to Article 1.1 (apparent error by referring to Article 14 in the petition) of this Protocol. This protocol does as such not form part of the European Union law and can therefore not be the object of a petition under the Treaties. Insofar as this Article is identical with Article 21.1 of the Charter of the Fundamental Rights of the European Union for the prohibition of sex based discrimination, the above reasoning applies, that the sex-based discrimination requires a comparison between different sexes. As regards the petitioner's allegations on late-resettled persons (*Spätaussiedler*) and refugees, the petitioner has not provided sufficient detail why any of the other grounds of discrimination mentioned under Article 21.1 would be at stake.

Conclusion

In the light of the above reflections, the petition is considered unfounded.

**7. Commission reply (REV III), received on 30 May 2018**

Petitions 0226/2016, 0409/2016, 0488/2016, 0585/2016, 0586/2016, 0613/2016, 1076/2016, 1106/2016, 1415/2016, 1430/2016, 1431/2016, 1507/2016, 1517/2016, 1535/2016, 0288/2017, 0348/2017, 0469/2017, 0479/2017 and 1249/2017

In her letter received on 25 January 2018, the author of petition 0226/2016 does not submit any new claims. Therefore, this letter does not change the assessment already provided by the Commission with regard to all the above listed petitions. The petitioner just reiterates that she wants the petitioners, including herself, to be treated in the same way as a person insured under a sickness insurance scheme, whether male or female. She considers that the Commission's argument that the law in place only treats certain groups of women differently is not valid. She alleges discrimination on the basis of sex and thus thinks the "anti-discrimination directives" are applicable.

In addition, she maintains that the new law in Germany that guarantees 3 years of pre-insurance time for the *Krankenversicherung der Rentner* (KVdR) per child is not sufficient to eliminate the discrimination, since women in family insurance do not have a time limit. The Commission already dealt with this issue in its communication of 20 December 2017.