

Der Präsident  
des Bundesrates

An den  
Präsidenten der  
Kommission der Europäischen Union  
Herrn José Manuel Barroso  
1049 BRÜSSEL  
BELGIEN

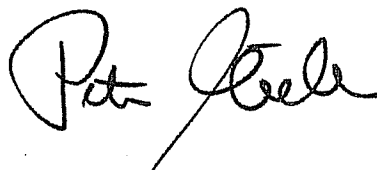
Berlin, 19.12.2008

**Vorschlag für eine Richtlinie des Europäischen Parlaments und des Rates zur Verwirklichung des Grundsatzes der Gleichbehandlung von Männern und Frauen, die eine selbständige Erwerbstätigkeit ausüben, und zur Aufhebung der Richtlinie 86/613/EWG KOM(2008) 636 endg.; Ratsdok. 13981/08**

Sehr geehrter Herr Präsident,

der Bundesrat hat in seiner 853. Sitzung am 19. Dezember 2008 beschlossen, den aus der Anlage ersichtlichen Beschluss der Kommission zu übermitteln. Auf die Ziffer 5 möchte ich besonders hinweisen.

Mit freundlichen Grüßen

A handwritten signature in black ink, appearing to read 'Peter Beuth', written in a cursive style.



19.12.2008

**Resolution**  
of the *Bundesrat*

---

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

**COM(2008) 636 final; Council doc. 13981/08**

At its 853rd meeting on 19 December 2008, acting in accordance with §§ 3 and 5 of the Act on Cooperation between the Federation and the *Länder* in European Union Affairs (*EUZBLG*), the *Bundesrat* adopted the following opinion:

1. The *Bundesrat* welcomes the Commission's aim of applying more effectively the principle of equal treatment between men and women engaged in an activity in a self-employed capacity.

The proposal is likely to strengthen and encourage growth and employment in the EU, particularly in family-run firms, in line with the Lisbon Strategy.

2. The *Bundesrat* welcomes the aim of further reconciling working and family life. The reconciliation of private and professional life is not only an essential prerequisite for the sought-after increase in the birth-rate in Europe; it can also contribute towards genuine equality between men and women, and help to avoid the long-term withdrawal of skilled workers – especially women – from the jobs market. Given that having parents in employment is the best way of protecting against social marginalisation, poverty in general and child poverty in particular, measures reconciling working and family life also help to give families social protection. Finally, a family-friendly personnel policy within firms will give also give them the edge when competing for the most talented

and motivated employees. Parents must, however, remain free to choose how to divide up their working and family life without being discriminated against. The needs and concerns of non-working parents must also be taken into consideration.

3. The number of new businesses being set up by women has been increasing for years, and for this reason the problem of reconciling the running of a business and being a mother will become more serious.

However, the *Bundesrat* would point out that the principle of subsidiarity must be upheld, and that it is a matter for the Member States to adapt their social security systems accordingly.

4. The *Bundesrat* welcomes the Commission's emphasising that the main responsibility for further measures to reconcile working and family life lies with the Member States. Indeed, given that underlying conditions vary between countries, only the Member States can decide where to direct the main focus of further measures and create the material and legal framework for further improvements. In Germany, the federal states (*Länder*) are key players.
5. The *Bundesrat* would point out that the EU does not have any authority in relation to the proposed provisions in the self-employed persons Directive, especially as regards maternity protection. The *Bundesrat* takes the view that Article 141(3) of the EC Treaty cannot be invoked in this connection. Instead, the provisions impinge on the Member States' powers to develop their social security systems independently. Contrary to the Commission's assertion that the planned maternity protection provisions for self-employed persons will promote equal opportunities and equal treatment for men and women, the primary purpose of maternity leave is to protect the health of both mother and child. Equal opportunities and equal treatment may under certain circumstances be a beneficial side-effect, but in no way is this the actual aim of granting maternity leave. Article 141(3) of the EC Treaty, however, does not contain any provisions covering health protection and social welfare of self-employed persons.
6. The Commission should encourage the cross-border exchange of ideas and experiences, and should back efforts at national level to increase the provision

of care and support and do away with gender stereotypes. The *Bundesrat* therefore strongly approves of the Commission's commitment to promoting, at national level, the exchange of experiences in the field of childcare (as reflected, for example, in the platform created by the European Alliance for Families, or the programme for the exchange of best practice in the field of gender equality). The *Bundesrat* also specifically welcomes the possibility, offered by the EU, of being able to promote various measures to reconcile working and family life with financial assistance from the European Social Fund, examples of which include childcare provision within firms and pilot projects to facilitate the return to working life of women who have stopped work for fairly long periods in order to look after their family.

7. The Commission is correct in stating that the responsibility for expanding and developing childcare provision lies with the Member States alone. In particular, the *Bundesrat* supports the idea of a wide range of provisions, tailored to given needs, which will help to reconcile professional and private life.
8. However, the *Bundesrat* would ask that the German Government, in the course of the further negotiations, do what it can to ensure that the specific reference to marital and family status in Article 3(1) be dispensed with. The *Bundesrat* would again stress that reference to family status cannot be equated with indirect discrimination on the grounds of gender (see European Court of Justice judgment of 7 January 2004 in Case C-117/01 *K.B. v. National Health Service Pensions Agency*). Although such a reference is also contained in Article 3(1)(b) of the proposal for a Directive implementing the principle of equal treatment between women and men in the access to and supply of goods and services (*Bundesrat* doc. 887/03), it was quite rightly omitted from the adopted Directive (Article 4(1) of Directive 2004/113/EC) and the German Government's implementing legislation.
9. The *Bundesrat* supports the idea of effective social welfare provision for self-employed persons and assisting spouses. It would stress that, under German insurance law, insurance cover for the self-employed and their spouses depends on the circumstances of each individual case. For example, persons employed by their spouse are not automatically excluded from the obligation to pay social insurance contributions simply because they are using their working capacity within the family rather than making it available on the general labour market.

In addition, there is a possibility (e.g. for persons not subject to compulsory social insurance) to take out voluntary pension insurance.

10. The *Bundesrat* would point out that the way social security systems are designed is a matter for the Member States. In view of this, those Member States which do not up to now have any provision for compulsory social insurance of self-employed persons and assisting spouses should at the most be advised to consider the introduction of compulsory or voluntary insurance in order to ensure social protection for these groups of persons.
11. In cases where adaptations of national law are necessary and the proposals cannot be transposed without costs being incurred, the *Bundesrat* sees a real danger of additional costs for social security systems or public finances in the Member States. It would point out that the provision interferes with the power of the Member States to shape their own social security systems.
12. The *Bundesrat* assumes that, in the field of social security in the agricultural sector in Germany, the proposed Directive's requirements concerning spouses helping out on farms are already being met at present. Reference is made in particular to the Agricultural Social Insurance Reform Act (*Agrarsozialreformgesetz*), which entered into force on 1 January 1995 and introduced separate social security provision for farmers' spouses in the form of an entitlement of their own to disability and old-age pensions. The *Bundesrat* also considers that existing German provisions on sickness insurance, long-term nursing care insurance and accident insurance in the agricultural sector are adequate.
13. The *Bundesrat* would therefore ask that the German Government, in the consultations at EU level, ensure that the system of social security in the agricultural sector, which has been in place for a long time in Germany and has proved fundamentally effective, does not have to be drastically altered because of the changes to EU law. As regards the provision for spouses to merely have the option of joining a social security scheme, it must be left to the Member States to decide whether to also make provision for, or to retain, a system of compulsory social insurance.
14. When a female entrepreneur becomes pregnant, this affects not only her but also the employees and trainees in her firm. In such a scenario, it is at present

hardly possible in Germany to provide a safety-net via social insurance provisions.

Nor is there currently any provision under German law for the employees affected to apply for a short-time working allowance as an interim measure if an entrepreneur is unavailable because of her pregnancy or shortly after having given birth.

An additional problem is the continuation of the training being undertaken by the pregnant entrepreneur's trainees so that they can gain their vocational qualifications within the planned timeframe.

The *Bundesrat* would therefore ask that the German Government, in the course of the further consultations on the proposed Directive, do what it can to ensure that a sound European framework is laid down which will enable the above-mentioned problems to be tackled through solutions at national level which are well-balanced in economic and social terms.

15. Even though, in the context of the ban on discrimination under civil law, no upper limits have so far been put on reparation and compensation, the *Bundesrat* rejects any provision prohibiting upper limits on compensation (Article 9 of the proposed Directive) as excessive interference in the right of states to impose their own sanctions. Experience in the field of employment law shows that the ceiling imposed is very important especially for small and medium-sized businesses, which are often unable to afford their own legal department, in that it keeps the premiums for insurance against liability under the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz, AGG*) at an affordable level.
  
16. It is also still unclear whether Article 9 of the proposed Directive will result in a ban on fault-based compensation claims in all fields, especially that of civil law. In the Commission's letters of formal notice of 23 October 2007 (infringement proceedings 2007/2253 concerning the transposition of Directive 2000/43/EC) and of 31 January 2008 (infringement proceedings 2007/2362 concerning the transposition of Directive 2000/78/EC), it is stated with regard to these respective Directives' Articles 15 and 17, which contain identical provisions, that an infringement of anti-discrimination provisions is not in itself conditional upon fault and that any sanctions cannot therefore be linked to such a requirement. However, it is not clear whether, on the basis of the European

Court of Justice's rulings on this issue, this approach is intended to apply only to the field of employment law or – in view of the transposition of Directive 2000/43/EG – also to the field of civil law.

The *Bundesrat* would therefore ask the German Government to obtain the necessary clarification during the further negotiations.

Indeed, an absolute ban on fault-based compensation claims would, especially as regards civil law, have far-reaching implications which in the *Bundesrat's* view would not be acceptable. In the same way as the civil law in most European countries, German civil law links compensation claims for cause (apart from a few exceptions in relation to strict liability irrespective of fault) to the requirement that the claim be substantiated or, in the field of EU legislation, to the requirement that the liable party must be accountable. Providing for no-fault liability in Article 9 of the proposed Directive, on the other hand, would lead to a kind of strict liability for discrimination irrespective of fault, and the risks involved here would be incalculable. Such a far-reaching sanction is not, however, necessary to ensure effective protection against discrimination.

17. The *Bundesrat* will send this opinion directly to the Commission.