



EUROPEAN COMMISSION

Brussels, 14 MAI 2009
C/2009/3935

Dear Mr President,

Thank you for transmitting the German Bundesrat's contribution to the document COM(2008)636 concerning the 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.

In line with the Commission's decision to encourage National Parliaments to react to its proposals in order to improve the process of policy formulation, we welcome this opportunity to respond to your comments. I enclose the Commission's response and I hope you will find this a valuable contribution to your own deliberations.

I look forward to developing our policy dialogue further in the future.

Yours sincerely

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Vice-President of the European Commission

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EUROPEAN COMMISSION

Brussels, May 2009

COMMENTS OF THE EUROPEAN COMMISSION ON AN OPINION FROM THE GERMAN BUNDESRAT

COM(2008)636 – 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

The Commission takes note that the Bundesrat welcomes the Commission's aim of applying the principle of equal treatment between men and women engaged in an activity in a self-employed capacity more effectively and of improving reconciliation of work and family life and that it is aware that, as the number of new businesses created by women increases, the problem of reconciling the running of a business and family life will become more acute.

The Commission notes, nevertheless, that the Bundesrat has some concerns on the proposal, which can be summarised as follows:

- (1) The EU has no competence to deal with maternity protection of self-employed persons.
- (2) The EU should encourage the cross-border exchange of ideas and experience on childcare, which is a matter of national competence.
- (3) The reference to family status should be deleted.
- (4) The proposal interferes with the power of Member States to shape their own social security systems.
- (5) As regards assisting spouses, it must be left to the Member State to decide whether to make provision for, or retain a system of compulsory social insurance.
- (6) When a female entrepreneur gets pregnant, this affects employees and trainees in her firm. It is therefore necessary to put in place a European framework for the development of well-balanced national solutions, in economic and social terms.
- (7) The Bundesrat rejects provisions prohibiting upper limits on compensation.

COMMISSION'S REPLY

1. On the competence concerning maternity leave for self-employed workers

The Commission considers that two questions need to be raised in this context: a) is Article 141 EC an appropriate legal base to cover self-employed workers? b) is maternity leave a matter of gender equality?

It is commonly accepted that, before amendments were introduced by the Treaty of Amsterdam, Article 141 EC was restricted to employees (dependent workers). However, the Treaty of Amsterdam introduced a new paragraph 3 in Article 141 EC making this provision applicable to "equal opportunities and equal treatment of men and women in matters of employment and occupation". Article 141 EC covers therefore now not only matters of employment but more generally matters of occupation. This new wording of Article 141 EC covers self-employed workers, as was recognised by the Council. On two previous occasions, the Council accepted that Article 141 EC was an adequate legal base to cover self-employed workers: see Directives 2002/73/EC and 2006/54/EC.

Even though it can be concluded that Article 141 EC is a sufficient legal base to implement the principle of equal treatment between women and men for self-employed persons, it is necessary to assess whether maternity leave is a matter of gender equality or only a health and safety issue.

As far as employees are concerned, Directive 92/85/EC is based on former Article 118a (now Article 137 EC) which, at the time, allowed for the adoption of Directives in field of health and safety of workers. This Directive, as mentioned in the title, is an individual Directive within the meaning of the Framework Directive on Health and Safety.

There is therefore no doubt that the protection of women, who have recently given birth or are breastfeeding, is mainly seen from a health and safety perspective at EU level. Nevertheless, the protection of women who have recently given birth or are breastfeeding is also a matter of equal treatment. This has been recognised by the Court of Justice for employees and there is no reason why the reasoning would not apply to self-employed workers. The possibility to reconcile work and family life, by giving entitlement to a period of maternity leave, aims to ensure equal opportunities between men and women. It will also have a positive impact on the participation of women in self-employed activities.

2. The EU should encourage the cross-border exchange of ideas and experiences on childcare, which is a matter of national competence.

The proposal was adopted in the context of a package on "reconciliation" including a report on the "Barcelona" targets on child care. The 2002 Barcelona European Council urged the Member States to remove disincentives to female participation in the labour force by aiming to provide childcare by 2010 for at least 90% of children between three years old and school age and at least 33% of children under three. These targets have become an integral part of the European Employment Strategy and Lisbon Agenda.

In the report, the Commission points out that:

- most Member States are not on course to meet the targets, especially for children under three;
- where facilities exist, often they are costly or the opening hours are not compatible with full-time work or jobs with atypical hours;
- the quality of the facilities (qualifications of the staff and the staff/child ratio, for example) could deter parents from using them.

The Commission also announced that it will:

- monitor the follow-up to Member States' policies in this field under the Strategy for Growth and Jobs, support it with comparable, up-to-date statistics and, if necessary, propose Recommendations to those countries where implementation is weak;
- analyse the development of childcare services and their specific contribution to gender equality, in particular in the annual report on equality between women and men to each spring European Council;
- promote exchanges of good practice in this area and stimulate research on jobs in the childcare sector;
- promote the development of affordable quality childcare services, including by making full use of the potential of the EU Cohesion Policy, in collaboration with all stakeholders (Member States and social partners).

The present proposal does not directly deal with the issue of child care.

3. The reference to family status should be suppressed

Article 3(1) of the proposal lays down that "the principle of equal treatment means that there shall be no discrimination whatsoever on grounds of sex, either directly or indirectly, by reference in particular to marital or family status (...)".

As the Bundesrat rightly points out, Directive 2004/113/EC does not mention "marital or family status" as an example of possible indirect discrimination. It cannot be interpreted as meaning that the reference to family or marital status cannot be indirect discrimination in the areas covered by Directive 2004/113/EC.

In any case, the same wording appears notably in Directive 2002/73/EC (Article 2(1)) which is applicable to conditions for access to self-employment. Therefore, for the sake of legal clarity and security, it is preferable to maintain the reference to "family or marital status" since this is already the case in another legal text expressly applicable to the self-employed workers or candidates.

4. The proposal interferes with the power of Member States to shape their own social security systems

The proposal aims to ensure the application of the principle of equal treatment between men and women. To this end, it may indeed be necessary to introduce the principle of equal treatment in the field of social security.

It is a settled case law of the Court of Justice that, while Community law does not take away the power of Member States to organise their social security systems, they must comply with Community law when exercising that power, including the general principle of equal treatment between women and men.

5. As regards assisting spouses, it must be left to the Member State to decide whether to make provision for, or to retain, a system of compulsory social insurance

The proposal does not require that Member States ensure compulsory social security coverage for assisting spouses. According to Article 6, "Member States shall take the necessary measures to ensure that assisting spouses can, at their request, benefit from at least an equal level of protection as self-employed workers under the same conditions applicable to self-employed workers".

Article 12 of the proposal states that "the implementation of this Directive shall under no circumstances constitute grounds for a reduction in the level of protection against discrimination already afforded by Member States in the fields covered by this Directive".

Article 12 has to be interpreted as meaning that Member States, who have in place a compulsory system of social insurance for assisting spouses, do not only have the right to keep it, but are also prevented from doing away with it when implementing the Directive.

As mandatory social protection is more favourable to assisting spouses, Member States are free to retain or adopt such a scheme. On the contrary, a Member State, having a compulsory scheme before implementation of the Directive, would not be allowed to do away with it when implementing the Directive.

6. Ensure a sound European framework for maternity leave which will enable well-balanced national solutions, in economic and social terms

The Commission acknowledges that self-employed activities are fundamentally different from subordinate work and that it is not possible and desirable to align the level of protection of self-employed workers to that of subordinate workers.

This is acknowledged in the proposal through the voluntary character of the maternity leave coverage and the provision on the possibility to choose, as far as possible, between a financial allowance and a temporary replacement during maternity leave.

7. Upper limits on compensation

All the Directives implementing the principle of equal treatment between women and men (see Directives 2006/54/EC and 2004/113/EC) contain a provision prohibiting the fixing of an upper limit. This provision codifies the case-law of the Court of Justice where the Court held that fixing an upper limit may preclude effective compensation.

