

Opinion of the European Economic and Social Committee on 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

COM(2008) 636 final — 2008/0192 (COD)

(2009/C 228/21)

On 24 November 2008 the Council decided to consult the European Economic and Social Committee, under Article 262 of the Treaty establishing the European Community on 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'

The Section for Employment, Social Affairs and Citizenship, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 10 March 2009. The rapporteur was Ms SHARMA.

At its 452nd plenary session, held on 24 and 25 March 2009 (meeting of 24 March 2009), the European Economic and Social Committee adopted the following opinion by 101 votes to 29 with 26 abstentions.

1. Recommendations

1.1 General recommendations

1.1.1 The Commission should be praised for making any attempts to bring greater equality to women in both the labour market and in creating opportunities for women who want to be employed, self-employed or entrepreneurs. However, for civil society the title of this Directive ⁽¹⁾ recast is misleading in that it does not discuss equality in self employment between men and women as it focuses particularly on maternity social security benefits for self-employed women, social security payments for assisting spouses and care leave. Equality must be seen in a holistic approach accounting for its impact in other areas such as social rights, equal opportunities, rights of the child and family rights.

1.1.2 The Commission should review each of the three separate areas addressed in this directive as individual cases to ensure they are given due consideration in the context of equality. Whilst the Committee understands that DG Employment is tasked with addressing social protection, the Committee would like to reinforce that the self-employed status should not be discussed in the same context as an employee status.

1.1.3 For rights to be truly addressed, any proposed measures or tools presented must be practical and implementable. The proposed amendments to this directive

undoubtedly improve the situation under European law of self-employed women and assisting spouses who have a child and will consequently benefit their children. The EESC considers that the directive's recast is necessary.

1.1.4 Better enforcement of current legislation in areas of gender equality would be more productive in removing inequalities if applied in a greater number of cases. The Commission should therefore ascertain the reasons for the weak implementation.

1.1.5 The EU, in its attempt to increase the number of entrepreneurs, and in particular female entrepreneurs, must consider the values that are important to those wanting to start in self employment. This, together with an overall cultural change towards entrepreneurship in Europe, would identify where the Commission Directorates should concentrate their efforts.

1.1.6 Any increases in social security contributions, or any administrative burden, not only to the State, but also to businesses, must be carefully considered.

1.1.7 The question has to be asked as to the cost to Europe of reviewing this directive. The impact assessment presented by the Commission clearly shows that the benefit to member states is marginal.

⁽¹⁾ 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 - 2008/0192 (COD).

1.2 Recommendations relating to Self-employed and Entrepreneurs

1.2.1 Self employment by its very nature has many unique qualities, and it is not possible to consider the self-employed in the same way as employees, nor is it possible to consider the self-employed as a general term for entrepreneurs.

1.2.2 The Committee understands that it is difficult to conceive how maternity provision for self-employed women could function. The business and responsibilities associated with self employment mean a long leave of absence cannot be taken without extensive planning, financial security or appropriate personnel to manage the work. Any such absence could result in the termination of contracts or the loss of the business, particularly when considering very small enterprises, if not managed correctly.

1.2.3 In all proposed measures consideration must be made for the time needed to ensure the proper course of pregnancy, the physical recovery of the mother after child birth, the bonding time required between mother and baby and the well being of the baby.

1.2.4 Unfortunately, the Commission offers no solutions to any of the above dilemmas, leaving the considerations to each individual Member State. Most self-employed women would have to train someone to cover their position, close the business or continue to work through the full period of maternity, which is the situation for all self-employed women under current legislation.

1.3 Recommendations relating to Assisting Spouses

1.3.1 In general the directive does not address the lack of recognition of 'assisting spouses', the quality and quantity of their contribution to a business, or policy measures to support these women. The directive does not propose any measures that will improve the social or financial standing or the social protection of assisting spouses.

1.3.2 There is a need to respect Member States' competence in this area and leave them to develop ways to bring such 'workers' into their existing employment and insurance

arrangements, and via that into social protection schemes. The EU can best add value here by supporting the sharing of information and good practice under the Open Method ⁽¹⁾.

1.3.3 The Commission should conduct research into the reasoning behind the lack of participation of assisting spouses in the formal economy or voluntary social protection provisions, as well as difficulties in cases where the assisting spouses are separated but are still partners in business.

2. Background

2.1 Women play an active role in society, socially and economically, often without recognition, reward or legal status. The EU specifically needs to concentrate on achieving the Lisbon Strategy and one of the ways highlighted is by increasing female participation in the labour market and by increasing the number of entrepreneurs and in particular female entrepreneurs.

2.2 The new directive proposed to replace Directive 86/613/EEC seeks to address shortcomings in the field of self employment and assisting spouses within family businesses, by:

- improving protection in the event of maternity by offering maternity provision for self-employed women;
- providing leave to care for family members;
- recognising the contribution of assisting spouses by providing social protection equivalent to their self-employed partners;
- giving equality bodies competence in the field.

3. General Comments

3.1 The Commission should be praised for making any attempts to bring greater equality to women in both the labour market and in creating opportunities for women who want to be employed, self-employed or entrepreneurs. However, where changes are being made the measurement of impact financially, in time and resources to all the stakeholders should be considered.

⁽¹⁾ Belgium, Luxembourg and France all have good models of integrating Assisting Spouses.

3.2 For rights of any kind to be truly addressed, proposed measures presented must be clear, practical and implementable. Unfortunately, this directive does not appear to offer substantial benefits, enforceable or workable, to address existing inequalities. Additionally, the proposal is confusing in that it highlights three separate subjects to discuss in the same document, as well as equality bodies.

3.3 Europe has a legal framework which prohibits gender discrimination through a range of legislative measures. However, all European statistics demonstrate that women remain lower paid than men, are under-represented politically, in the workforce, at management level and as entrepreneurs. Better enforcement of current legislation in all of these areas is required and the commission should first review the lack of application of the current equality framework.

3.4 The EU, in its attempt to increase the number of entrepreneurs, and in particular female entrepreneurs, must consider the values that are important to those wanting to start in self employment ⁽¹⁾. Offering maternity provision could have no effect on the numbers of women considering entrepreneurship. The Commission's own figures show a decrease in the numbers of start ups, male and female, and this is due to the negative attitude to self employment in Europe. A change in culture is required to make a significant change. As an example Europe's new Small Business Act ⁽²⁾ could offer greater measures to support female entrepreneurs.

3.5 Social protection falls within the competence of the Member States. This new directive is not currently supported by all member states and risks becoming ineffective at European level and a pointless exercise. The proposed directive would

⁽¹⁾ See for instance EESC opinions on entrepreneurship education such as:

- on 'Employability and entrepreneurship – The role of civil society, the social partners and regional and local bodies from a gender perspective', rapporteur: J.M. Pariza Castaños, (OJ C 256 of 27.10.2007);
- on 'Entrepreneurship mindsets and the Lisbon Agenda', rapporteur: M. Sharma; co-rapporteur: J. Olsson (OJ C 44 of 15.1.2008);
- on 'Promotion of Women's Entrepreneurship in the EUROMED Region', rapporteur: G. Attard (OJ C 256 of 27.10.2007);
- on 'Fostering entrepreneurial mindsets through education and learning', rapporteur: I. Jerneck (OJ C 309 of 16.12.2006).

⁽²⁾ "Think Small First" – A "Small Business Act" for Europe, COM(2008) 394 final (25.6.2008).

need significant improvement with minimum protection standards and implementation across all Member States if it is to be truly effective. In general, the Commission's proposed measures are prescriptive, ignoring the diversity of members' states social protection schemes, as well as the principles of better regulation.

3.6 In general, the concerns of small businesses and self-employed, in particular in the agriculture, craft and SME sectors, tend to be constrained financially and any additional burden may be considered negative, even though the social protection could provide a safety net for potential mothers or assisting spouses. Any increases in social security contributions, or any administrative burden not only to the State, but also to businesses, must be carefully considered.

3.7 The new directive aims at addressing the equality agenda in its proposed changes, however it makes little reference to parental leave or to self-employed men in respect of paternity leave.

3.8 In line with the UN Convention on the Rights of the Child ⁽³⁾, the Commission should conduct a parallel procedure which considers the impact on the child of the proposed measures. The child must be well nurtured and its personal well-being accounted for.

4. Specific comments

4.1 The Commission has made a comprehensive impact assessment on this directive consulting with many stakeholders. Following the review of the impact assessment the EESC considers that there are too many unanswered questions, particularly relating to true effectiveness, clarity and implementation of the proposed recast.

4.2 Self employment can be separated into several categories: the entrepreneurs, the business owners, freelancers, homeworkers and the 'pseudo-self-employed', those subcontracted by their original employers to now take on work in a self-employed capacity. However, leaving the choice of maternity protection to the self-employed and the assisting spouses is essential because it respects the choice of autonomy and independence which by definition characterise the statute of the self-employed. Creating an obligation for self-employed women

⁽³⁾ *Convention on the Rights of the Child*, adopted by General Assembly resolution 44/25 of 20 November 1989 and entered into force 2 September 1990, in accordance with article 49. In: <http://www2.ohchr.org/english/law/crc.htm>.

to leave for a longer period will not be compatible with a good functioning of their business and very often will go against the viability of their enterprise. Consequently the present directive should avoid any direct reference to the maternity leave directive 92/85/EC. Therefore it would be inadequate to try and align the self-employed and assisting spouses maternity leave system with the one for employees.

4.3 Clarity is required as to how Member States would administer the maternity leave described in Article 7.1 for those who are not employed. These workers make their own work arrangements and can choose when to take time off work. They do not need an entitlement to 'leave'.

4.4 Furthermore Member States should not only consider an allowance payment, but also the provision of assistance in form of a temporary replacement. For female self-employed and assisting spouses support replacement schemes are equally important as financial allowances. The directive should avoid the establishment of any priority order of these benefits. In addition the level of adequate allowance should be decided at national level taking into account the objective difference between self-employed and assisting spouses.

4.5 The consequences must be considered of Article 7.4, in the case of assisting spouses, which provides for specific assistance in finding a replacement worker during periods of maternity leave. No such obligation exists in respect of full employees in a business, and to provide it for assisting spouses would be an administratively complex and costly burden, mostly affecting small businesses, as well as Government.

4.6 Clarity is required in respect of Article 7.2, on ensuring an adequate maternity allowance is unconditional, in contrast to Article 6, where social security benefits are to be given to assisting spouses 'under the same conditions as those for the self-employed', and to Article 11(4) of the Pregnant Workers Directive which permits member states to attach certain conditions of eligibility to maternity benefits.

4.7 The hours worked by the self-employed in general tends to exceed that of those in an employed status adding childcare issues to the concerns of self-employed women. Here also the Commission makes not recommendations towards childcare

provisions, or indeed care responsibilities of the self-employed. All Member States should improve accessible and affordable, high quality childcare to contribute to improving reconciliation measures for self-employed and assisting spouses in the same way it is done for workers.

4.8 The general objectives of the directive are to improve gender equality for self-employed workers and for assisting spouses. Moreover, the Commission hopes that this directive will increase the number of women in self employment, give assisting spouses a recognised status, increase the number of assisting spouses covered by social security and give self-employed and assisting spouses effective legal remedies. Nonetheless,

— gender equality for all is currently covered under Europe's legal framework on equality;

— the number of women in self employment is unlikely to increase due to minor social protection measures when in almost all Member States they can already make voluntary contributions to be protected;

— assisting spouses would still not receive a legal status, or effective legal remedies, despite making voluntary social protection contributions.

4.9 18 out of the 27 member states already offer assisting spouses and the self-employed the facility to make voluntary contributions towards maternity benefits. This measure must be extended in all member states, ensuring that social security can be provided where the woman wants to participate in the scheme. It is unacceptable that any member state can discriminate against any person making a contribution to protect themselves under a government scheme whether employed or self-employed, or indeed not employed, as is the current recognised status of assisting spouses.

4.10 Article 6 would propose the creation of a wholly new category of social insurance (neither employee, self-employed, or voluntarily insured. However, the Committee believes there is no justification to create an entirely new class of social insurance or maternity cover arrangements.

4.11 Assisting spouses are part of an 'invisible' economy which contributes to Europe and remains hidden. A discussion need to take place on their legal status, either as self-employed, or as employees. The current directive, not reviewed since 1986, requests: 'Member States shall undertake to examine under what conditions recognition of the work of the spouses referred to in Article 2(b) may be encouraged and, in the light of such examination, consider any appropriate steps for encouraging such recognition'. Only few countries⁽¹⁾ have acted on this obligation due to the ambiguous legal status and therefore this directive should not be recast until an agreed status can be established. Once the legal status is established, there must be an information dissemination mechanism to inform assisting spouses of their legal rights.

4.12 The Committee understands that the legal base has been called into question by several Member States, specifically the scope and sufficiency of Article 141 EC in isolation, particularly in relation to Article 6 of the Directive. The Committee urges the Commission to carefully consider the opinion of the Council Legal Services before the implementation of the proposed directive.

4.13 Failure to do so will no doubt result in a similar conclusion to that of 1994 when the Commission adopted a report⁽²⁾ on the implementation of Directive 86/613/EEC in which it concluded: 'In strictly legal terms, it appears that Directive 86/613/EEC has been implemented in the Member States. However, the practical result is not entirely satisfactory when measured against the prime objectives of the Directive, which was a general improvement in the status of assisting spouses'. The report also stressed the lack of an overall policy for dealing with the situation of assisting spouses and pointed out that 'with a view to the recognition of the work of the spouse (...), the only way in which this objective is likely to be achieved is for spouses to be granted social security entitlements in their own right'.

4.14 The recast in 'Article 2 regroups all the definitions of the terms used in the Directive'. The definitions of 'self-employed workers' and of 'assisting spouses' are taken from Article 2 of Directive 86/613/EEC. The definition of 'assisting spouses' is amended: the words 'assisting' and 'or life partners' are added. The amendment aims to cover all persons recognised as 'life partners' by national law and regularly participating in the activities of the family business, irrespective of marital status. In order to remove ambiguity, 'partner' is replaced by 'business partner'⁽³⁾. However, if the assisting spouse remains with no legal status in their own rights, contesting their participation in the business in a court of law could still remain ambiguous, and their protection in the event of death, separation or dispute, be absent.

4.15 Care leave to look after family members is referred to in the recast without reference to practical measures for application. This is unacceptable in a Europe with an aging community. Measures must be made available for both sexes to care for elderly relatives and young dependants alike; this is of particular relevance to families with disabled children.

4.16 The Commission must review this debate outside of this directive recast due to increasing priority with Europe's demographics. The number of days which will be lost to the economy both from employees and the self-employed will only increase over the next generations if a serious debate on elderly care, as well as the nurturing of the young, does not take place.

4.17 During the consultation with civil society in the Committee, the concept of 'pseudo-self employment' was highlighted. In view of the increasing number of concerns on this question, further investigation by the appropriate EU bodies is needed. The Committee expresses its willingness to support the Commission in its work in this field.

Brussels, 24 March 2009.

The President
of the European Economic and Social Committee
Mario SEPI

⁽¹⁾ Notably Belgium, Luxemburg and France.

⁽²⁾ Report from the Commission on the implementation of Council Directive 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 - COM(94) 163 (Part II: Conclusions, pt.1 and pt. 4).

⁽³⁾ COM(2008) 636 final, Explanatory memorandum, pt. 5.

APPENDIX

to the opinion of the European Economic and Social Committee

The following amendments, which were supported by at least a quarter of the votes cast, were defeated in the course of the debate (Rule 54(3) of the Rules of Procedure):

Point 1.1.2

Amend as follows:

'The Commission should review each of the three separate areas addressed in this directive as individual cases to ensure they are given due consideration in the context of equality. Whilst the Committee understands that DG Employment is tasked with addressing social protection, the Committee would like to reinforce that the self employed status should not be discussed in the same context as an employee status. The Commission also takes this difference into account, since self-employed women must apply if they wish to have the same amount of maternity leave as provided for employed women in Directive 92/85/EC, which means that there is no ban on working in principle and such women have the right to choose between a temporary replacement and an allowance.'

Result of the voting:

For: 72 Against: 73 Abstentions: 8

Point 4.11

Delete text.

'Assisting spouses are part of an "invisible" economy which contributes to Europe and remains hidden. A discussion need to take place on their legal status, either as self-employed, or as employees. The current directive, not reviewed since 1986, requests: "Member States shall undertake to examine under what conditions recognition of the work of the spouses referred to in Article 2 (b) may be encouraged and, in the light of such examination, consider any appropriate steps for encouraging such recognition". Only few countries ⁽¹⁾ have acted on this obligation due to the ambiguous legal status and therefore this directive should not be recast until an agreed status can be established. Once the legal status is established, there must be an information dissemination mechanism to inform assisting spouses of their legal rights.'

Result of the voting:

For: 68 Against: 73 Abstentions: 11

⁽¹⁾ Notably Belgium, Luxemburg and France.