

EUROPEAN PARLIAMENT

2004



2009

Consolidated legislative document

6.5.2009

EP-PE_TC1-COD(2008)0192

*****I**

POSITION OF THE EUROPEAN PARLIAMENT

adopted at first reading on 6 May 2009 with a view to the adoption of Directive 2009/.../EC 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 Council Directive 86/613/EEC (EP-PE_TC1-COD(2008)0192)

PE 425.661

EN

EN

POSITION OF THE EUROPEAN PARLIAMENT

adopted at first reading on 6 May 2009

with a view to the adoption of Directive 2009/.../EC 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 Council Directive 86/613/EEC

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 141(3) thereof,

Having regard to the proposal from the Commission ||,

Having regard to the opinion of the European Economic and Social Committee¹,

Having regard to the opinion of the Committee of the Regions²,

Acting in accordance with the procedure laid down in Article 251 of the Treaty³,

¹ *Opinion of 24 March 2009 (not yet published in the OJ).*

² *OJ C*, p. .

³ *Position of the European Parliament of 6 May 2009.*

Whereas:

- (1) Council Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood¹ ensures application in Member States of the principle of equal treatment as between men and women engaged in an activity in a self-employed capacity, or contributing to the pursuit of such activity. As far as self-employed workers and assisting spouses are concerned, Directive 86/613/EEC has not been very effective and its scope should be reconsidered, *given that* discrimination based on sex and harassment also occur in areas outside salaried work. In the interest of clarity, Directive 86/613/EEC should be replaced by this Directive.
- (2) In its *Communication of 1 March 2006 entitled "Roadmap for equality between women and men 2006-2010"*², the Commission announced that in order to improve governance of gender equality, it would review the existing *Community* gender equality legislation not included in the 2005 recast exercise with a view to updating, modernising and recasting where necessary. Directive 86/613/EEC was not included in *that* recasting exercise.
- (3) In *its* conclusions of 5 and 6 December 2007 on "Balanced roles of women and men for jobs, growth and social cohesion"³, the Council called on the Commission to consider the need to revise, if necessary, || Directive 86/613/EEC in order to *safeguard* the rights related to motherhood and fatherhood of self-employed workers and their *assisting* spouses.

¹ OJ L 359, 19.12.1986, p. 56.

² COM(2006)0092.

³ || Document SOC 385.

- (4) The European Parliament has consistently called on the Commission to review || Directive 86/613/EEC, in particular *so as to strengthen maternity protection for self-employed women and improve the situation of assisting spouses in agriculture, craft occupations, commerce, small and medium-sized enterprises (SMEs) and the liberal professions.*
- (5) *The European Parliament proposed, in its resolution of 21 February 1997 on the situation of the assisting spouses of the self-employed¹, the mandatory registration of assisting spouses so that they cease to be invisible workers, and an obligation on Member States to make it possible for assisting spouses to be members of sickness and invalidity insurance schemes and pension schemes for self-employed workers.*
- (6) In its Communication entitled "*Renewed Social Agenda: Opportunities, access and solidarity in 21st century Europe*"², the Commission has affirmed the need to take action on the gender gap in entrepreneurship *and to improve the reconciliation of private and professional life.*
- (7) There are already a number of existing legal instruments *implementing the principle of equal treatment between men and women in the field of self-employed activities*, in particular 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 security³ and 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)⁴. This Directive should *not* therefore || apply to the areas already covered by other directives.
- (8) *This Directive should apply to self-employed workers and assisting spouses, as both participate in the activities of the business.*

¹ *OJ C 85, 17.3.1997, p. 186.*

² COM(2008)0412.

³ OJ L 6, 10.1.1979, p. 24.

⁴ OJ L 204, 26.7.2006, p. 23.

- (9) *Assisting spouses should be given a clearly defined professional status and their rights should be established.*
- (10) *This Directive should not apply to matters covered by other Directives implementing the principle of equal treatment between men and women, notably Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services¹. In particular, Article 5 of Directive 2004/113/EC on insurance and related financial services remains applicable.*
- (11) *In order to prevent discrimination based on sex, this Directive should apply to both direct and indirect discrimination. Harassment and sexual harassment should be considered discrimination and therefore prohibited.*
- (12) *Member States may, under Article 141(4) of the Treaty, maintain or adopt measures providing for specific advantages, in order to make it easier for the under-represented sex to engage in self-employed activities or to prevent or compensate for disadvantages in their professional careers. In principle, **affirmative action** measures aimed at achieving equality in practice should not be seen as in breach of the legal principle of equal treatment between women and men.*
- (13) *In the area of **self-employed activities**, the application of the principle of equal treatment means that there must be no discrimination in relation to the establishment, **management**, equipment or extension of a business or any other form of self-employed activity.*
- (14) *It is necessary to ensure that there is no discrimination based on marital or family status as regards the conditions for setting up a company between spouses or **between** life partners when recognised by national law. **For the purposes of this Directive, the terms 'marital status' and 'family business' should be interpreted in the light of the recognition accorded to life partnerships in the relevant judgments of the Court of Justice of the European Communities.***

¹ OJ L 373, 21.12.2004, p. 37.

- (15) In view of their contribution to the family business, assisting spouses should be entitled ■ to benefit from at least an equal level of protection as self-employed workers, under the same conditions applicable to self-employed workers ■ . Member States should be required to take the necessary measures to make that choice possible. In any case, the level of protection of ■ assisting spouses *should* be *proportionate* to the *degree to which they participate* in the activities of the *self-employed worker within the* family business.
- (16) The economic and physical vulnerability of pregnant self-employed workers and assisting spouses makes it necessary for them to be granted the right to maternity leave, part of which should be considered mandatory. Member States remain competent to establish the level of contributions and all the arrangements concerning benefits and payments, provided *that the minimum requirements* of this Directive are complied with. *Taking account of the specific situation of self-employed workers and assisting spouses, it should be for those workers and their spouses ultimately to decide* whether or not to benefit from maternity leave.
- (17) In order to take the specificities of self-employed activities into account, female self-employed workers and assisting spouses should be able to choose, as far as possible, between a financial allowance and a temporary replacement during maternity leave.
- (18) Enhancing the efficiency and effectiveness of welfare systems, notably *through* improved incentives, better administration and evaluation and the prioritisation of spending programmes, has become crucial to ensure the long-term financial sustainability of European social models.■

- (19) Persons who have been subject to discrimination based on sex should have adequate means of legal protection. *In order to* provide more effective protection, associations, organisations and other legal entities should be empowered to engage in proceedings, as Member States so determine, either on behalf or in support of any victim, without prejudice to national rules of procedure concerning representation and defence before the courts.
- (20) Protection *of self-employed workers and assisting spouses against* discrimination based on sex should be strengthened by the existence of a body ■ in each Member State with competence to analyse the problems involved, to study possible solutions and to provide practical assistance to || victims. ■
- (21) Since the objectives of the action to be taken, namely to ensure a common high level of protection from discrimination in all || Member States, cannot be sufficiently achieved by the Member States and can *therefore, by reason of the scale and effects of the proposed action,* be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in the same Article, this Directive does not go beyond what is necessary in order to achieve those objectives,

HAVE ADOPTED THIS DIRECTIVE:

Article 1
Subject matter and scope

1. This Directive lays down a framework for putting into effect in Member States the principle of equal treatment between men and women engaged in an activity in a self-employed capacity, or contributing to the pursuit of such an activity, as regards those aspects not covered by Directives 2006/54/EC and 79/7/EEC.
2. This Directive covers self-employed workers and assisting spouses.
3. The implementation of the principle of equal treatment between men and women in the access to and supply of goods and services remains covered by Directive 2004/113/EC.

Article 2
Definitions

|| For the purposes of this Directive, the following definitions shall apply:

- (a) "self-employed workers" means all persons pursuing, *under the conditions laid down by national law*, a gainful activity for their own account, || including ***in the areas of agriculture, the liberal professions, craft occupations, commerce and SMEs***;
- (b) "assisting spouses" means the spouses or life partners of self-employed workers, when recognised by national law, not being employees or business partners, where they habitually, under the conditions laid down by national law, participate in the activities of the self-employed worker and perform the same tasks or ancillary tasks;
- (c) "direct discrimination" means a situation where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation;

- (d) "indirect discrimination" *means a situation* where an apparently neutral provision, criterion or practice puts persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary;
- (e) "harassment" *means a situation* where unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of that person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment;
- (f) "sexual harassment" *means a situation* where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.

Article 3
Family businesses

Member States shall ensure that there is no discrimination based on marital or family status as regards the conditions for setting up a company between spouses or between life partners when recognised by national law. All companies which are jointly established by spouses or life partners when recognised by national law shall be recognised as a "family business". The recognition of life partnerships shall be based on the relevant judgments of the Court of Justice of the European Communities.

Article 4

Principle of equal treatment

1. 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, in particular in relation to the establishment, ***management***, equipment or extension of a business or the launching or extension of any other form of self-employed activity.
2. Harassment and sexual harassment shall be deemed to be discrimination on grounds of sex and therefore prohibited. A person's rejection of, or submission to, such conduct may not be used as a basis for a decision affecting that person.
3. An instruction to discriminate against persons on grounds of sex shall be deemed to be discrimination.

Article 5

Positive action

With a view to ensuring full equality in practice between men and women, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to sex ***aimed at, for instance, promoting entrepreneurship among women.***

Article 6

Establishment of a company

Without prejudice to the specific conditions for access to certain activities which apply equally to both sexes, Member States shall take the measures necessary to ensure that the conditions for the establishment of a company between spouses or ***between*** life partners, when recognised by national law, are not more restrictive than the conditions for the establishment of a company with other persons.

Article 7

Social protection for assisting spouses *and life partners*

Member States shall take the necessary measures to ensure that assisting spouses *and life partners* can benefit from at least an equal level of protection as self-employed workers under the same conditions applicable to self-employed workers. ***If this extension of benefits is not mandatory under the legislation of a particular Member State, it shall be granted upon a request made by an assisting spouse or life partner.***

Those measures shall ensure that assisting spouses become members in their own right of the social insurance schemes in place for self-employed workers and covering sickness, invalidity and old age, provided that they contribute to those schemes on the same basis as self-employed workers and even if their contributions have to be calculated on a flat-rate basis.

The insurance contributions of assisting spouses shall be tax-deductible as operating expenditure, on terms similar to those applying to the remuneration actually paid to the spouse, subject to the dual condition that the services have been correctly provided and that the remuneration is that which is normal for such services.

Article 8

Maternity leave

1. Member States shall take the necessary measures to ensure that female self-employed workers and assisting spouses *are* entitled to a period of maternity leave ***adapted to their specific needs. The maternity leave should be of a duration of their choice provided that the total length does not exceed that specified*** in Council Directive 92/85/EEC¹.
2. In order to ensure that *the persons* referred to in paragraph 1 can exercise their rights as recognised in this Article, Member States shall take the measures to ensure that they receive an adequate allowance during their maternity leave.

¹ OJ L 348, 28.11.1992, p. 1.

3. The allowance referred to in paragraph 2 shall be deemed adequate if it guarantees income at least equivalent to that which the person concerned would receive in the event of a break in her activities on grounds connected with her state of health or, if not applicable, any equivalent allowance established by national law, subject to any ceiling laid down under national legislation *in so far as that ceiling does not lead to any discrimination*.
4. Member States shall take the necessary measures to ensure that female self-employed workers and assisting spouses have access ■ to services supplying temporary replacements or to any existing national social services, *in addition* to the allowance referred to in paragraph 2.

Article 9

Recognition of the work of assisting spouses

Member States shall undertake to examine under what conditions recognition of the work of assisting spouses may be encouraged and, in the light of such examination, consider any appropriate steps for encouraging such recognition.

Article 10

Defence of rights

1. Member States shall ensure that *effective* judicial or administrative proceedings, including, where Member States consider it appropriate, conciliation procedures, are available for the enforcement of the obligations under this Directive to all persons who consider they have sustained loss or damage as a result of a failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.

2. Member States shall ensure that associations, organisations and other legal entities which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with may engage, on behalf or in support of the complainant, with his or her approval, in any judicial or administrative proceedings provided for the enforcement of obligations under this Directive.
3. Paragraphs 1 and 2 shall be without prejudice to national rules on time limits for bringing actions relating to the principle of equal treatment.

Article 11

Compensation or reparation

Member States shall introduce such measures into their national legal systems as are necessary to ensure real, effective compensation or reparation, as Member States so determine, for the loss or damage sustained by a person as a result of discrimination within the meaning of this Directive, such compensation or reparation being dissuasive and proportionate to the loss or damage suffered. Such compensation or reparation shall not *a priori* be limited by a *fixed* upper limit ¶¶.

Article 12

Equality bodies

1. Member States shall designate and make the necessary arrangements for a body or bodies *responsible* for the promotion, analysis, monitoring and support of equal treatment of all persons without discrimination on grounds of sex. Such bodies may form part of agencies entrusted at national level with the defence of human rights or the safeguard of individuals' rights, or the implementation of the principle of equal treatment.

2. Member States shall ensure that the tasks of the *body* referred to in paragraph 1 include:
- (a) providing independent assistance to victims of discrimination in pursuing their complaints of discrimination, without prejudice to the rights of victims and of associations, organisations and other legal entities referred to in Article 8(2);
 - (b) conducting independent surveys on discrimination;
 - (c) publishing independent reports and making recommendations on any issue relating to such discrimination;
 - (d) *exchanging, at the appropriate level, the information available with the equivalent European bodies, such as the European Institute for Gender Equality.*

Article 13
Gender mainstreaming

Member States shall actively take into account the objective of equality between men and women when formulating and implementing laws, regulations, administrative provisions, policies and activities in the areas referred to in this Directive.

Article 14
Dissemination of information

Member States shall ensure that the provisions adopted pursuant to this Directive, together with the relevant provisions already in force, are brought by all appropriate means, *including the Internet*, to the attention of the persons concerned throughout their territory.

Article 15
Level of protection

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 16
Reports

1. Member States shall communicate all available information concerning the application of this Directive to the Commission by ...⁺.

The Commission shall draw up a summary report for submission to the European Parliament and to the Council no later than ...⁺⁺. Where appropriate, that report shall be accompanied by proposals for amending this Directive.

2. The Commission's report shall take *into account* the *views* of the stakeholders ||.

Article 17
Review

No later than ...⁺⁺⁺, the Commission shall review the operation of this Directive and, where appropriate, propose any amendments it deems necessary.

⁺ **Four** years after *entry into force of this Directive*.

⁺⁺ **Five** years after *entry into force of this Directive*.

⁺⁺⁺ **Six** years after *entry into force of this Directive*.

Article 18
Implementation

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by ...⁺ at the latest. They shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. ***Where justified by particular difficulties***, Member States may, if necessary, have an additional period of ...⁺⁺ to comply with ***this Directive***.
3. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 19
Minimum requirements

Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in this Directive.

Article 20
Repeal

|| Directive 86/613/EEC shall be repealed *with effect from* ...⁺.

⁺ *Two years after entry into force of this Directive.*

⁺⁺ ***Three years after entry into force of this Directive.***

Article 21
Entry into force

This Directive shall enter into force on the 20th day following its publication in the Official Journal of the European Union.

Article 22
Addressees

This Directive is addressed to the Member States.

Done at ||,

For the European Parliament

The President

For the Council

The President
