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DRAFT STATEMENT OF THE COUNCIL'S REASONS

Subject: **Position of the Council in first reading adopted by the Council on [8] March 2010 with a view to the adoption by the European Parliament and the Council of a Directive 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**

DRAFT STATEMENT OF THE COUNCIL'S REASONS

I. INTRODUCTION

On 6 October 2008, the Commission submitted a 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/EEC¹.

The proposal is part of a package of initiatives on the reconciliation of work, family and private life, the other items being a proposal to revise the Directive on the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, a Report on the implementation of the Barcelona objectives on childcare and a Communication on work-life balance.

Acting in accordance with the ordinary procedure, the European Parliament delivered its position in first reading on 6 May 2009².

The Economic and Social Committee delivered its Opinion on 24 March 2009.³

The Commission did not submit any formal amended proposal as a follow-up to the Parliament's opinion in first reading.

On 30 November 2009, the Council reached a political agreement by qualified majority on a Position in first reading.

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 motherhood (OJ L 359, 19.12.1986, p. 56).

² Not yet published in the Official Journal.

³ OJ C 228, 22 September 2009, page 107.

In accordance with Article 294(5) (TFEU), the Council adopted its position in first reading by qualified majority on [8] [March] 2010.

II. OBJECTIVES

The objective of the proposal is to change the Community legal framework concerning the application of the principle of equal treatment between women and men for self-employed workers and their spouses.

It aims at improving the social protection of self-employed workers, with a view to removing disincentives to female entrepreneurship. It also seeks to improve the social protection of "assisting spouses", who often work regularly with the self-employed worker without enjoying the corresponding rights.

The main features of the proposal are as follows:

- the definition of "assisting spouses" has been modified, so as to cover *life partners* (i.e. unmarried couples) when recognised by national law;
- under the provisions set out Article 7, *female self-employed workers and assisting spouses* would, *at their request*, be entitled to the same period of maternity leave as employees (cf. Directive 92/85/EC);
- under the provisions set out in Article 6, *assisting spouses* could, *at their request*, benefit from at least the same level of social protection as self-employed workers.

Once adopted, the Directive will repeal Directive 86/613/EEC⁴ and will be applicable as regards those aspects not covered by Directives 2006/54/EC, 2004/113/EC and 79/7/EEC, in order to implement more effectively the principle of equal treatment between women and men engaged in an activity in a self-employed capacity, or contributing to the pursuit of such an activity.

III. ANALYSIS OF THE COUNCIL POSITION IN FIRST READING

1. General observations:

a) Commission's position on the European Parliament's amendments

The European Parliament adopted 30 amendments (amendments 1-16, 18-19, 21-28, 36, 39, 40, 46) to the Commission's proposal. The Commission indicated in the course of the debate in plenary session that it could accept 15 of these amendments in whole, in part or after being reworded (amendments 1, 2, 3, 4, 7, 9, 12, 13, 15, 18, 21, 22, 23, 27, 28) The other amendments (amendments 5, 6, 8, 10, 11, 14, 16, 19, 24, 25, 26, 36, 39, 40, 46) were, however, not acceptable to the Commission.

2. Council position in first reading

The Council could accept 10 of the European Parliament's amendments either in whole, in part or after being reworded, namely :

⁴ 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 motherhood (OJ L 359, 19.12.1986, p. 56).

- Amendment No 4 (recital No 10: reference to affirmative action): The Council however felt that the terms "affirmative action" should be replaced with "positive action" in line with Article 3 of Directive 2006/54/EC (recital No 14 of its position in first reading);
- Amendment No 9 (recital No 18: clarification of the text to refer to self-employed workers and assisting spouses): the Council also further added a reference to life partners of self-employed workers (when and insofar as recognised by national law) in recital No 21 of its position in first reading;
- Amendment No 12 (Article 4: addition of a reference to the need of promoting entrepreneurship among women): the Council agreed with Parliament that it would be advisable to introduce a reference to the setting-up of businesses by women, taking into account the huge gender gap in entrepreneurship (Article 5 of the Council position in first reading);
- Amendment Nos 13 and 39 (Article 5: addition of the term "between" before "life partners"): The Council agreed with Parliament that this addition would make it clearer that the conditions for the establishment of businesses should be the same irrespective of the civil status (Article 6 of the Council position in first reading);
- Amendment No 18 (new Article 7a regarding the recognition of the work of assisting spouses): the Council incorporated the substance of this amendment in recital No 8 in its position in first reading;
- Amendment No 22 (Article 10(2) new point (ca)): the Council felt that the term "equivalent" should be replaced with "corresponding" (Article 11 (2) (d) of the Council position in first reading);

- Amendment No 23 (insertion of a new provision (new Article 10a) concerning gender mainstreaming): the Council considered that this new provision would clearly constitute an improvement with regard to the existing Directive (Article 12 of the Council position in first reading);
- Amendment No 27 (Article 14(2)): The Council could agree with the first part of the amendment which introduces an element of conditionality ("*if justified by particular difficulties...*") but considered that reducing the additional period to one year was not acceptable. It was also not in favour of extending the additional period to cover all provisions of the Directive (Article 16(2) of the Council position in first reading);
- Amendment No 28 (Article 14a new: minimum requirements. The Council incorporated the substance of this amendment in recital No 22 in its position in first reading).

However, the Council did not deem it advisable to take up amendments:

- No 1 (recital No 4: reference to the need to improve the situation of assisting spouses in craft occupations, commerce, small and medium-sized enterprises and the liberal professions): the Council did not consider it necessary to explicitly refer to these sectors (recital No 4 of its position in first reading);

- No 2 (new recital 4a): the Council did not consider it appropriate to introduce a mandatory registration system for assisting spouses. Furthermore, recital No 16 of the Council position in first reading states that assisting spouses or life partners of self-employed workers who have access to a system of social protection, should also be entitled to benefit from social protection. Member States should be required to take the necessary measures to organise this social protection in accordance with national law. In particular, it is up to Member States to decide whether this social protection should be implemented on a mandatory or voluntary basis);
- No 3 (New recital 7b): the Council did not consider it appropriate to introduce an obligation to provide for a clearly defined status for assisting spouses and to establish their rights;
- No 5 (recital No 11): the Council did not consider it appropriate to modify the current wording of the current Directive 86/613/EEC (recital No 13 of the Council position in first reading) ;
- No 6 (recital No 12): the Council considered this amendment unnecessary as it is of settled case-law that, when exercising their national competences, the Member States have to conform with Community law as interpreted by the Court of Justice;

- No 7 (recital No 13): the Council did not think it appropriate to provide that the level of protection of assisting spouses should be proportional to the degree to which they participate in the activities of the self-employed worker within the family business. It considered that it should be up to Member States to organise this social protection in accordance with national law and, in particular, to decide that this social protection can be proportional to the participation in the activities of the self-employed worker and/or the level of contribution (recital No 16 in the Council position in first reading);
- No 8 (recital No 16): the Council could not accept this amendment as it felt that the reference to the quality and long-term sustainability of social protection systems should be maintained (recital No 19 of the Council position in first reading);
- No 10 (Article 2(1)(a)): the Council considered it appropriate to delete this definition and to move it in a new Article (Article 2 of the Council position in first reading) regarding the scope of the Directive. In addition, the Council did not consider it appropriate to refer to such sectors as agriculture, the liberal professions, craft occupations and SMEs as it felt that there was no good reason to amend the text of the definition as set out in the existing Directive;
- Amendment 11 (Article 3(1)): The Council did not consider it necessary to add the management of a business to the situations where the principle of non discrimination should apply as it did not see any good reason to change the existing provision under Directive 86/613/EEC (Article 4(1) of the Council position in first reading);

- Amendments Nos 14 and 40 (Article 6): While the Council could agree to add a reference to life partners, it was, nonetheless, not in a position to accept the conditions set out in the amendment with regard to social protection as it considered that it should be up to the Member States to decide whether this social protection should be implemented on a mandatory or voluntary basis (as further explained in recital No 16 of the Council position in first reading);
- Amendment No 15 (Article 7(1) concerning the duration of maternity leave): the Council considered that the Directive should not provide for tailor-made periods of maternity leave subject to personal choice, as they would interfere with existing and future national legislation, but for an adequate maternity allowance enabling interruptions in occupational activity owing to pregnancy (Article 8(1) of the Council position in first reading);
- Amendment No 16 (Article 7(3)): the Council considered that any such provision would be unclear and would lead to legal insecurity as it has to be known what could be the grounds for discrimination (Article 8(3) of the Council position in first reading);
- Amendment No 19 (Article 8(1): addition of the term "effective". The Council considered that the text should be aligned on the existing provisions in Directives 2006/54/EC and 2004/113/EC (Article 9(1) of the Council position in first reading)
- Amendment No 21 (Article 10(2): reference to the body referred to in paragraph 1): the Council was of the view that the formulation used in the Commission proposal ("bodies") should be used; in order to make it clear that the bodies referred to in Article 10(2) should be the same as those responsible for Directives 2004/113/EC and 2006/54/EC (Article 11(2) of the Council position in first reading);

- Amendment No 24 (Article 11: reference to Internet as a means of dissemination of information). The Council did not see any value in changing the text of the Commission proposal which is the same as the existing provisions in Directives 2006/54/EC and 2004/113/EC (Article 13 of the Council position in first reading);
- Amendment No 25 (Article 13 (1)). deadlines for the communication of information on the application of the Directive and for the Commission's report on the Directive): The Council was not in favour of reducing the deadlines as set out in the Commission proposal (Article 15 of the Council position in first reading);
- Amendment No 26 (Article 13 (new): review of the Directive): The Council did not consider it necessary to provide for a review clause;
- Amendment No 36 (Article 2a (new) : prohibition of any discrimination based on marital or family status): The Council did not consider it appropriate to take this amendment into account for the same reasons as those relating to amendment No 6;
- Amendment No 46 (Article 7(4): provision regarding access to national social services in addition to the maternity allowance): the Council was not in favour of this amendment as it considered that Member States should be able to provide that access to those social services is an alternative or a part of the maternity allowance (Article 8(4) of the Council position in first reading).

The Commission has accepted the Council position in first reading.

3. Specific comments

Social protection (Article 7 and recital No 16 of the Council position in first reading)

The Council concurs with Parliament on the principle that, in view of their participation in the activities of the family business, spouses or, when and insofar as recognised by national law, the life partners, of self-employed workers who have access to a system for social protection, should also be entitled to benefit from social protection.

In the Council's view, the Member States should be required to take the necessary measures to organise this social protection in accordance with national law. In particular, it should be up to the Member States to decide whether this social protection should be implemented on a mandatory or voluntary basis and should be granted only upon request of assisting spouses and life partners.

The Member States should have the possibility to provide that this social protection can be proportional to the participation in the activities of the self-employed worker and/or the level of contribution.

Without prejudice to the provisions of this Directive, they should also be able to maintain national provisions limiting the access to specific social protection schemes, or to a certain level of protection, including special funding conditions, to certain groups of self-employed workers or professions, provided that access to a general scheme is available.

Maternity benefits and temporary replacement services (Article 8, recitals Nos 17 and 18 in the Council position in first reading)

In view of their economic and physical vulnerability, the Council shares Parliament's views on the need to give pregnant self-employed workers and pregnant spouses, or life partners, of self-employed workers, a maternity leave of a long enough duration to ensure the proper course of a normal pregnancy and physical recovery of the mother after a normal childbirth.

However, in view of their status as self-employed workers, the Council did not consider appropriate to provide that female self-employed workers and, by analogy, female assisting spouses or life partners of self-employed workers, should be entitled, at their request, to the same period of maternity leave as provided for in Directive 92/85/EEC. This Directive only applies to employees who are subject to different provisions as compared with self-employed women.

For this reason, the Council felt that it would be more appropriate to provide that female self-employed workers and female spouses and life partners, should, in accordance with national law, be granted an adequate maternity allowance enabling interruptions in their occupational activity owing to pregnancy or motherhood for at least 14 weeks.

The Member States should remain competent to organise such benefits, including establishing the level of contributions and all the arrangements concerning benefits and payments, provided the minimal prescriptions of the Directive are complied with. In particular, they should be able to determine in which period before and/or after confinement the right to maternity benefits is granted. They should also determine if the economic situation of the person or family in question should be taken into account when establishing contributions and/or benefits.

Furthermore, in order to take the specificities of self-employed activities into account, the Council considered that female self-employed workers and female spouses or, when and insofar as recognised by national law, the life partners of self-employed workers, should be given access, as far as possible to any existing services supplying temporary replacement enabling interruptions in their occupational activity owing to pregnancy or motherhood or to any existing national social services. Access to these services could be an alternative or a part of the maternity allowance.

IV. **CONCLUSION**

The Council considers that its position in first reading on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity represents a balanced and realistic solution to the issues covered by the Commission proposal, given the need, in particular, of not interfering with the organisation of the Member States' social security schemes or their financing.

In its view, the provisions laid down in this position should help tackling the obstacles to women's access to self-employment therefore making it easier to combine self-employed activities and family responsibilities.

The Council looks forward to a constructive discussion with the European Parliament with a view to reaching final agreement on this important Directive.
