



EUROPEAN COMMISSION

Employment, Social Affairs and Equal Opportunities DG

Social Dialogue, Social Rights, Working Conditions, Adaptation to Change
Social Dialogue, Industrial Relations

NOTE FOR THE FILE

Subject: Legal situation regarding the implementation of the draft "European framework agreement on the prevention of health risks in the hairdressing sector"

1. BACKGROUND

By letter of 26 April 2009, Coiffure EU and UNI europa notified the European Commission of their intention to begin negotiations, on their own initiative, on an agreement on risk prevention and workers' health protection on the basis of Article 155 of the Treaty on the Functioning of the EU (ex article 139 TEC)¹. After several meetings of a negotiating task force, the social partners agreed on a draft text on 30 November 2009 and indicated to the Commission that they wished for the agreement to be implemented by way of a Council Directive.

2. STEPS TOWARDS THE IMPLEMENTATION OF THE AGREEMENT

Before the Commission can submit the social partner agreement to the Council for a decision, a number of steps need to be completed:

- (1) The text must be cleaned and edited from a legal point of view, to ensure that all provisions are compatible with existing EU legislation and that all terminology is consistent. It must also be ensured that the agreement respects all the provisions of its legal base, i.e. Article 155 of the Treaty, referring to matters covered by Article 153 TFEU.
- (2) The Commission must be in a position to confirm the representativeness of the social partner organisations that have negotiated and concluded the agreement.
- (3) Special considerations need to be made if persons other than employers and (dependent) workers are to be covered by the agreement.

¹ The full text of the relevant Treaty Articles is provided in the annex.

3. CLEANING THE TEXT

Over the past few months, the competent services of the Commission (Unit for Health and Safety at Work; EMPL/F4) have already studied the draft agreement and are in a position to inform the social partners of detailed comments and suggestions. However, the Commission cannot clean and edit the text on its own, since this is an agreement of the social partners and therefore under their joint responsibility.

Hence the European Commission services will work closely with the social partners and proposes to hold joint technical meetings with the negotiating task force in the coming months in order to arrive at a text that is fully compatible with the legal requirements. These include, amongst others, the existing health and safety legislation and compliance with the relevant provisions concerning SMEs. It should be noted in this context that it is not necessarily problematic if the agreement restates provisions that are already covered elsewhere in EU legislation as long as it does not contradict them. This issue may be further considered at the technical meetings.

One aspect of the cleaning of the text is the definition of the “employer” and the scope of the agreement. This is linked to the study to be launched (see point 5). The cleaning of the text will have also to consider possible translation issues.

4. REPRESENTATIVENESS OF THE SOCIAL PARTNER ORGANIZATIONS

The most recent representativeness study for the personal services sector was undertaken by Eurofound and published in May 2009. According to the conclusions of that study and despite the very heterogeneous representational structure in the hairdressing sector in the 27 Member States, the Commission anticipates no special difficulties in confirming that Coiffure EU and UNI europa Hair & Beauty are the only representative social partner organizations on the EU level for employers and workers in sector.

However, in connection with the scope of the agreement (see below under 5), the Commission will need to collect additional information on the structure of representation on the national level, in particular with respect to the representation of the self-employed.

5. THE SCOPE OF THE AGREEMENT, THE SELF-EMPLOYED, AND TREATY PROVISIONS

Throughout the negotiations and in the current draft text, the social partners have expressed their desire to include all persons active in the hairdressing trade within the scope of the agreement, regardless of their contractual status. In particular, the self-employed – whether owner-operated salons or those renting a chair in someone else's salon – should be covered by its provisions.

The Treaty allows for the implementation of social partner agreements by Directive only for subject matters expressly enumerated in Article 153, which includes the fields of "improvement in particular of the working environment to protect workers' health and safety" and “working conditions” in general. The Treaty provisions are therefore generally interpreted as providing an explicit legal base for legislation covering dependent workers only and not the self-employed.

This provision in the Treaty notwithstanding, there is a precedent for including the self-employed in the scope of European health and safety legislation. This is the case for Directives 92/57/EEC (temporary or mobile construction sites), 92/29/EEC (medical treatment on board vessels) and 2009/13/EC (implementing a social partner agreement on the maritime labour convention). In

each of these cases, all persons active at a particular construction site or onboard a ship are covered by the Directive, regardless of their contractual status. This is necessary so that the self-employed, who exercise their activity at the same workplace as workers, do not endanger the health and safety of workers by their lack of respect for health and safety regulations. As an example, at a construction site, it is necessary that everyone is provided with a helmet, the self-employed included.

This legal precedent could be applied by analogy to the agreement in the hairdressing sector, but only for those self-employed who rent a chair in a salon in order to exercise their activity in the same space alongside workers. This would leave owner-operated salons without workers outside the scope of the agreement.

However, based on the opinion of the Legal Service of the European Commission, this type of self-employed could also be included in the scope of the agreement if it can be shown that their exclusion would have negative effects for overall EU social policy objectives as described in Article 151 of the Treaty.

Such negative effects could include, for instance, an increased danger of dismissal for (dependent) workers due to the costs of implementing the agreement, or due to competition from owner-operated salons that do not have to implement the agreement's provisions. It should be pointed out, however, that "unfair competition" on its own will not be a sufficient argument for the inclusion of the self-employed in the scope of the agreement; it would need to be shown that such competition would indeed have negative effects for social policy (such as the promotion of employment, improved living and working conditions, etc.).

6. THE STUDY OF THE EFFECTS OF THE SCOPE OF THE AGREEMENT

Given the above, there is a need for further in-depth empirical and analytical evidence regarding the effects that the scope of the proposed agreement would have on the (labour) market for hairdressing services. The European Commission therefore plans to launch a study examining these issues, initially covering 8 Member States. The Commission kindly requests the social partners' cooperation for this study.

The results of the study should be available by the end of 2010. If the study positively concludes that the agreement should include the self-employed in order to avoid negative employment effects or other consequences detrimental to the general social policy objectives, the Commission could then widen the study to additional Member States to confirm this conclusion for the entire EU. There would then be a sound basis on which to go forward with the implementation of the agreement in accordance with the social partners' wishes and including the self-employed. If, on the other hand, the study shows that no negative employment and social policy consequences are to be expected from limiting the agreement to employers and (dependent) workers, this would provide important evidence, too. This evidence would in particular allow the social partners to decide on the most appropriate way to implement the agreement.

In either case, the evidence gathered through the study will help provide arguments for the discussion in the Council before the agreement's implementation as a Directive. It will also help improve the image and visibility of the hairdressing sector, as will indeed the implementation of the agreement itself, regardless of its scope.

TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION
(EXCERPT)

TITLE X
SOCIAL POLICY

Article 151

(ex Article 136 TEC)

The Union and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.

To this end the Union and the Member States shall implement measures which take account of the diverse forms of national practices, in particular in the field of contractual relations, and the need to maintain the competitiveness of the Union's economy.

They believe that such a development will ensue not only from the functioning of the internal market, which will favour the harmonisation of social systems, but also from the procedures provided for in the Treaties and from the approximation of provisions laid down by law, regulation or administrative action.

Article 152

The Union recognises and promotes the role of the social partners at its level, taking into account the diversity of national systems. It shall facilitate dialogue between the social partners, respecting their autonomy.

The Tripartite Social Summit for Growth and Employment shall contribute to social dialogue.

Article 153

(ex Article 137 TEC)

1. With a view to achieving the objectives of Article 151, the Union shall support and complement the activities of the Member States in the following fields:

- (a) improvement in particular of the working environment to protect workers' health and safety;
- (b) working conditions;
- (c) social security and social protection of workers;
- (d) protection of workers where their employment contract is terminated;
- (e) the information and consultation of workers;
- (f) representation and collective defence of the interests of workers and employers, including co-determination, subject to paragraph 5;

- (g) conditions of employment for third-country nationals legally residing in Union territory;
- (h) the integration of persons excluded from the labour market, without prejudice to Article 166;
- (i) equality between men and women with regard to labour market opportunities and treatment at work;
- (j) the combating of social exclusion;
- (k) the modernisation of social protection systems without prejudice to point (c).

2. To this end, the European Parliament and the Council:

- (a) may adopt measures designed to encourage cooperation between Member States through initiatives aimed at improving knowledge, developing exchanges of information and best practices, promoting innovative approaches and evaluating experiences, excluding any harmonisation of the laws and regulations of the Member States;
- (b) may adopt, in the fields referred to in paragraph 1(a) to (i), by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States. Such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings.

The European Parliament and the Council shall act in accordance with the ordinary legislative procedure after consulting the Economic and Social Committee and the Committee of the Regions.

In the fields referred to in paragraph 1(c), (d), (f) and (g), the Council shall act unanimously, in accordance with a special legislative procedure, after consulting the European Parliament and the said Committees.

The Council, acting unanimously on a proposal from the Commission, after consulting the European Parliament, may decide to render the ordinary legislative procedure applicable to paragraph 1(d), (f) and (g).

3. A Member State may entrust management and labour, at their joint request, with the implementation of directives adopted pursuant to paragraph 2, or, where appropriate, with the implementation of a Council decision adopted in accordance with Article 155.

In this case, it shall ensure that, no later than the date on which a directive or a decision must be transposed or implemented, management and labour have introduced the necessary measures by agreement, the Member State concerned being required to take any necessary measure enabling it at any time to be in a position to guarantee the results imposed by that directive or that decision.

4. The provisions adopted pursuant to this Article:

- shall not affect the right of Member States to define the fundamental principles of their social security systems and must not significantly affect the financial equilibrium thereof,
- shall not prevent any Member State from maintaining or introducing more stringent protective measures compatible with the Treaties.

5. The provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs.

Article 154

(ex Article 138 TEC)

1. The Commission shall have the task of promoting the consultation of management and labour at Union level and shall take any relevant measure to facilitate their dialogue by ensuring balanced support for the parties.
2. To this end, before submitting proposals in the social policy field, the Commission shall consult management and labour on the possible direction of Union action.
3. If, after such consultation, the Commission considers Union action advisable, it shall consult management and labour on the content of the envisaged proposal. Management and labour shall forward to the Commission an opinion or, where appropriate, a recommendation.
4. On the occasion of the consultation referred to in paragraphs 2 and 3, management and labour may inform the Commission of their wish to initiate the process provided for in Article 155. The duration of this process shall not exceed nine months, unless the management and labour concerned and the Commission decide jointly to extend it.

Article 155

(ex Article 139 TEC)

1. Should management and labour so desire, the dialogue between them at Union level may lead to contractual relations, including agreements.
2. Agreements concluded at Union level shall be implemented either in accordance with the procedures and practices specific to management and labour and the Member States or, in matters covered by Article 153, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission. The European Parliament shall be informed.

The Council shall act unanimously where the agreement in question contains one or more provisions relating to one of the areas for which unanimity is required pursuant to Article 153(2).