

Case No: 78118  
Document No: 824186  
Decision No: 193/17/COL

## REASONED OPINION

**delivered in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice concerning Norway's breach of Article 14(1)(c) read in conjunction with Article 2(1)(c) of Directive 2006/54/EC by rendering the fathers' entitlement to paid parental leave dependent upon the mother's situation whilst this is not the case in the reverse circumstances**

## 1 Introduction

1. By letter dated 28 October 2015 (Doc. No 777814), the EFTA Surveillance Authority (“the Authority”) informed the Norwegian Government that it had opened an own initiative case regarding the assessment of whether the Norwegian provisions concerning the right to parental leave comply with Directive 2010/18/EU on parental leave<sup>1</sup> and Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation<sup>2</sup>.
2. In particular, on 16 July 2015, the Court of Justice of the European Union (“the Court of Justice”) gave its judgment in *Maïstrellis*, C-222/14<sup>3</sup>, where it concluded that the provisions of Directive 96/34/EC (currently replaced by Directive 2010/18/EU) and Directive 2006/54/EC had to be interpreted as precluding national provisions under which a civil servant is not entitled to parental leave in a situation where his wife does not work or exercise any profession, unless it is considered that due to a serious illness or injury the wife is unable to meet the needs related to the upbringing of the child, whereas, by contrast, national law does not, for a mother exercising the profession of civil servant, provide for such an exclusion relating to the employment status of her husband.
3. It appears that the Norwegian provisions on paid parental leave are similar to those examined in the *Maïstrellis* judgment and distinguish between the rights of employees to take paid parental leave on the basis of their sex. Consequently, those provisions infringe the prohibition of direct discrimination on grounds of sex under Directive 2006/54/EC.
4. On 21 June 2016 and 28 November 2016, the Authority received complaints of fathers who were not entitled to any paid parental leave due to the fact that their wives were not working or studying full time (Cases No 79295 and 79951). On 24 June 2016 and on 7 December 2016, the Authority informed the Norwegian Government about the complaints (Doc. Nos 809843 and 829962).

## 2 Correspondence

5. In the above mentioned letter of 28 October 2015, the Authority requested information from the Norwegian Government in order to assess whether and how the Norwegian Government considers the provisions as compatible with Directive 2010/18/EU and/or Directive 2006/54/EC, as also interpreted in the *Maïstrellis* judgment.

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<sup>1</sup> Act referred to at point 31a of Annex XVIII to the EEA Agreement (*Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC*), as adapted to the EEA Agreement by Protocol I thereto.

<sup>2</sup> Act referred to at point 21b of Annex XVIII to the EEA Agreement (*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)*), as adapted to the EEA Agreement by Protocol I thereto.

<sup>3</sup> Judgment of 16 July 2015, *Maïstrellis*, C-222/14, EU:C:2015:473.

6. The Norwegian Government replied by letter of 15 December 2015 (Doc. No 785308) that it considered the Norwegian legislation compatible with EEA law.
7. On 13 July 2016 (Doc. No 807544), the Authority issued a letter of formal notice to Norway for failure to comply with its obligations under Article 14(1)(c) read in conjunction with Article 2(1)(c) of Directive 2006/54/EC and Clauses 2.1 and 2.2 of the Framework Agreement on parental leave (annex to Directive 2010/18/EU) by rendering the fathers' entitlement to paid parental leave dependent upon the mother's situation whilst this is not the case in the reverse circumstances.
8. The Norwegian Government replied to the letter of formal notice on 10 October 2016 (ref. 15/3660, Doc. No 821851).
9. The case was discussed at the package meetings in Norway on 27 and 28 October 2016 and on 26 and 27 October 2017<sup>4</sup>.

### 3 Relevant national law

10. The National Insurance Act (*Lov om folketrygd (Folketrygdloven)*)<sup>5</sup> establishes the entitlements of parents to benefits from the National Insurance Scheme during the parental leave (hereinafter referred to also as “**paid parental leave**”).
11. According to Section 14-12 of the National Insurance Act, if both parents satisfy the conditions for entitlement to parental benefit, each of the parents has an individual, reserved right to ten weeks of paid parental leave<sup>6</sup>:

*“Section 14-12 Distribution of leave*

*If both parents satisfy the conditions for entitlement to parental benefit, 50 days (10 weeks) of the benefit period are reserved for the father (the father's share) and 50 days (10 weeks) of the benefit period are reserved for the mother (the mother's share). The first 30 benefit days (6 weeks) after birth reserved for the mother are part of the mother's share.*

*The father can take the father's share irrespective of whether the terms of Section 14-13 first paragraph are met.*

*<...>”*

12. In addition, there is a common period of several weeks of paid parental leave for both parents, which they may divide amongst themselves as they wish<sup>7</sup>:

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<sup>4</sup> See the follow-up letters to the package meetings (Doc. No 824382 in Case No 79432 and Doc. No 878916 in Case No 80900).

<sup>5</sup> LOV-1997-02-28-19.

<sup>6</sup> Unofficial translation by the Authority.

<sup>7</sup> Unofficial translation by the Authority.



*“Section 14-9 Benefit period for parental benefit*

*In case of birth the benefit period is 245 days (49 weeks) at full rate or 295 days (59 weeks) at reduced rate. The benefit period after birth is 230 days (46 weeks) at full rate or 280 days (56 weeks) at reduced rate.*

*In case of adoption, the benefit period is 230 days (46 weeks) at full rate or 280 days (56 weeks) at reduced rate.*

*Full rate implies that the parental benefit is paid with 100 percent of the calculation basis. Reduced rate means that the parental benefit is paid with 80 percent of the calculation basis. The beneficiary chooses between full or reduced rate at the start of the benefit period, and the choice is valid for the whole benefit period. If both parents receive parental benefits, they must choose the same rate.*

*If the mother gave birth to several babies or several children are adopted at the same time, the period is extended with 25 days (5 weeks) for each child that exceeds one if full rate is chosen. If reduced rate is chosen, the period is extended with 35 days (7 weeks). The provisions in Section 14-10 first and sixth paragraph apply equally.*

*If both parents have the right to parental benefit in accordance with Section 14-6, the parents can divide the benefit period between them. Exempted from the shared period is the last 15 days (3 weeks) before and the first 30 days (6 weeks) after the birth, which are reserved for the mother in case of birth. Exempted from sharing are also 10 weeks which are reserved for the father (the father's share), and 10 weeks which are reserved for the mother (the mother's share), see Section 14-12. The first 6 weeks after birth which are reserved for the mother are included in the mother's share.*

*<...>”*

13. Section 14-13 first paragraph of the National Insurance Act, however, states that the father is only entitled to paid parental leave as a part of the common period (*i. e.*, on top of the ten weeks reserved to him), if the mother engages in certain activities enumerated in the legislation. There is no such condition concerning the father's activities if the mother wants to take up paid parental leave in the common period (*i. e.*, on top of the ten weeks reserved to her)<sup>8</sup>:

*“Section 14-13 General conditions for parental benefits for the father*

*The father can receive parental benefits only if the mother after the birth or adoption*

- a) works,*
- b) takes officially approved full-time education,*

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<sup>8</sup> Unofficial translation by the Authority.

- c) takes officially approved education combined with work that together provides full-time occupation,*
- d) due to illness or injury is dependent on help to look after the child,*
- e) is hospitalized,*
- f) attends full time introductory studies pursuant to the Introduction Act Chapter 2,*
- g) attends a full-time qualification program under the Act of 18 December 2009 No. 131 regarding Social Services in NAV.”*

14. Furthermore, Section 14-13 second and third paragraphs of the National Insurance Act establish that also the calculation of the paid parental leave for the father in the common period (*i. e.*, on top of the ten weeks reserved to him) is dependent upon the mother's situation. More specifically, if her job percentage is less than 75 percent, the father's benefit is calculated not from his own, but from the mother's work percentage. There is no provision establishing such a limitation in calculating the parental benefit for the mother<sup>9</sup>:

*“If the mother works part-time after the birth or adoption, the father's parental benefit is reduced correspondingly to the reduction in the working hours of the mother. If the mother's work percentage amounts to at least 75 percent of full working hours, the father's parental benefit is calculated in accordance with his work percentage.*

*If the mother receives a partial parental benefit, see Section 14-16, the father's parental benefit corresponding to first paragraph letter a) cannot constitute a larger part of the full benefit than the mother's work percentage.”*

15. Finally, according to Section 14-14 first paragraph of the National Insurance Act, if only the father has earned the right to paid parental leave, the conditions in Section 14-13 are applicable with respect to the whole period of paid parental leave. That is, the father is not entitled to any paid parental leave, if the conditions in Section 14-13 first paragraph are not satisfied, not even to the ten weeks of paid parental leave reserved to the father, if both parents satisfy the conditions for entitlement to parental benefit. However, the conditions in Section 14-13 first paragraph are never applicable to the mother<sup>10</sup>:

*“Section 14-14 Specific rules where only the father has the right to parental benefits*

*If only the father has the right to parental benefits, the benefit period is limited to the benefit period after birth or adoption, ref. Section 14-9. Both in case of birth and adoption deduction shall be made for the part of the benefit period which is reserved for the mother after birth, ref. Section 14-9 fifth paragraph. It is a prerequisite that the conditions of Section 14-13 are fulfilled during the period and within the benefit period after birth or adoption, see Section 14-9 first and second paragraphs. The father's benefit period is reduced continuously when the conditions of Section 14-13 are not met.”*

<sup>9</sup> Unofficial translation by the Authority.

<sup>10</sup> Unofficial translation by the Authority.



#### 4 Relevant EEA law

16. Directive 2006/54/EC implements the fundamental principle of equal treatment and equal opportunities for men and women in matters of employment and occupation.

17. Article 2(1)(a) of Directive 2006/54/EC holds a definition of “*direct discrimination*”:

*“(a) ‘direct discrimination’: where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation”.*

18. Article 14(1)(c) of Directive 2006/54/EC forbids direct and indirect discrimination on the grounds of sex in relation to, *inter alia*, employment and working conditions:

*“1. There shall be no direct or indirect discrimination on grounds of sex in the public or private sectors, including public bodies, in relation to:*

*<...>*

*c) employment and working conditions, including dismissals, as well as pay as provided for in Article 141 of the Treaty;*

*<...>”*

#### 5 The Authority’s Assessment

##### 5.1 Breach of Directive 2006/54/EC

19. Several provisions in Norwegian legislation on paid parental leave are discriminatory on grounds of sex. In particular, the following provisions make paid parental leave for fathers less advantageous than it is for mothers.

20. First, the fact whether or not the father can take up paid parental leave in the common period – the period on top of the ten weeks reserved to him – is dependent on the mother’s situation. The father is only entitled to paid parental leave on top of the ten weeks reserved to him, if the mother engages in certain activities enumerated in the legislation (Section 14-13 first paragraph of the National Insurance Act). There is no such requirement related to the father’s activities if the mother wants to take up paid parental leave on top of the ten weeks reserved to her after birth.

21. This unequal treatment between men and women is an infringement on the prohibition of direct discrimination on grounds of sex, within the meaning of Article 14(1)(c) of Directive 2006/54/EC read in conjunction with Article 2(1)(a) of that Directive. The prohibition to discriminate on grounds of sex in relation to employment and working

conditions covers the national provisions on paid parental leave as conditions for granting paid parental leave fall within the scope of Article 14(1)(c) of Directive 2006/54/EC<sup>11</sup>.

22. Second, according to the Norwegian legislation, the father's paid parental leave in the common period (the period on top of the ten weeks reserved to him) is calculated not based on his own working hours, but rather on the hours worked by the mother if her working contribution is less than 75 percent (Section 14-13 second and third paragraphs of the National Insurance Act). There is no equivalent provision establishing such a limitation in calculating paid parental leave for the mother.

23. A provision as such constitutes an infringement on the prohibition of direct discrimination on grounds of sex, within the meaning of Article 14(1)(c) of Directive 2006/54/EC read in conjunction with Article 2(1)(a) of that Directive.

24. Third, if only the father has earned the right to paid parental leave, the conditions in Section 14-13 first paragraph are applicable with respect to the whole period of paid parental leave (Section 14-14 first paragraph of the National Insurance Act). Consequently, if the mother has not earned the right to paid parental leave and does not engage in the activities enumerated in Section 14-13 first paragraph, the father is not entitled to any paid parental leave whatsoever, not even to the ten weeks of paid parental leave reserved to him, if both parents satisfy the conditions for entitlement to parental benefit. The conditions in Section 14-13 first paragraph, however, are never applicable to the mother, and the mother will be entitled to the whole period of paid parental leave even if the father has not earned the right to paid parental leave and does not engage in the activities enumerated in Section 14-13 first paragraph.

25. A provision as such constitutes an infringement on the prohibition of direct discrimination on grounds of sex, within the meaning of Article 14(1)(c) of Directive 2006/54/EC read in conjunction with Article 2(1)(a) of that Directive.

26. Consequently, the father's paid parental leave is – in the three different ways explained above – dependent upon the mother's situation. The mother's paid parental leave is independent of the father's situation. Mothers are therefore explicitly granted more comprehensive rights to paid parental leave than fathers.

27. It should be noted, however, that, according to settled case law of the Court of Justice, the situation of a male employee parent and that of a female employee are comparable as regards the bringing-up of children<sup>12</sup>.

## 5.2 Objections by the Norwegian Government

28. In the reply of 10 October 2016 to the letter of formal notice, the Norwegian Government objects to the findings of the Authority and claims that Norwegian law does not breach Directive 2006/54/EC.

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<sup>11</sup> See, to this effect, judgment of 16 July 2015, *Maïstrellis*, C-222/14, EU:C:2015:473, paragraph 45.

<sup>12</sup> Judgment of 16 July 2015, *Maïstrellis*, C-222/14, EU:C:2015:473, paragraph 47 and the case law cited therein.



29. In particular, the Norwegian Government claims that, in contrast to the Maternity Directive<sup>13</sup>, Directive 2010/18/EU does not require the EEA States to grant paid parental leave. The right to parental leave (of absence) under Norwegian law is ensured in Chapter 12 of the Working Environment Act. Under that Act, both parents have an individual right to parental leave, and – in total – parents are entitled to three years of parental leave. The right to parental leave applies to all employees, regardless of their right to parental benefits. The father's right to parental leave is not dependent on the mother's situation. This means that the father has the right to parental leave, even when the mother stays at home. Both parents can also take parental leave at the same time. Accordingly, the Norwegian Government holds the opinion that Norwegian law more than fulfils the minimum requirements in the Framework Agreement on parental leave (annex to Directive 2010/18/EU).

30. There is no discrimination on grounds of sex in the Working Environment Act and the rules regarding paid parental leave under the National Insurance Act do not fall within the scope of neither Directive 2010/18/EU nor Directive 2006/54/EC. In support to the latter argument the Norwegian Government refers to judgments of 16 July 1992, *Jackson and Cresswell*, C-63/91 and C-64/91<sup>14</sup>, paragraphs 28, 30 and 31, and of 13 July 1995, *Meyers*, C-116/94<sup>15</sup>.

31. With regard to the *Jackson and Cresswell* judgment the Norwegian Government claims that the fact that a benefit might indirectly affect employment does not mean that it falls within the scope of Directive 2006/54/EC.

32. With regard to the *Meyers* judgment the Norwegian Government states that the link to employment in the *Meyers* judgment is closer than the parental benefits scheme under the National Insurance Act. Unlike the benefit under consideration in the *Meyers* judgment, the entitlement to parental benefits according to the National Insurance Act does not require the beneficiary to be engaged in remunerative work at the time the benefit is given. It is not necessary that the beneficiary has an employment contract at the beginning of the paid parental leave, during the leave or after the leave. The Act only requires that the beneficiary has been employed at least six of the last ten months prior to the beginning of the leave.

33. In any event, according to the Norwegian Government, Directive 2006/54/EC cannot be used to expand the rights granted by the Maternity Directive or Directive 2010/18/EU (see judgments of 13 February 1996, *Gillespie*, C-342/93<sup>16</sup>, paragraphs 18-20 and of 19 September 2013, *Montull*, C-5/12<sup>17</sup>, paragraphs 61-64).

34. The Norwegian Government also claims that in the event Directive 2006/54/EC is applicable to the national provisions on parental benefits, the provisions at issue must be considered as “*positive action*” within the meaning of Article 3 of the Directive ensuring full equality in practice between men and women in working life.

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<sup>13</sup> Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC).

<sup>14</sup> Judgment of 16 July 1992, *Jackson and Cresswell*, C-63/91 and C-64/91, EU:C:1992:329.

<sup>15</sup> Judgment of 13 July 1995, *Meyers*, C-116/94, EU:C:1995:247.

<sup>16</sup> Judgment of 13 February 1996, *Gillespie*, C-342/93, EU:C:1996:46.

<sup>17</sup> Judgment of 19 September 2013, *Montull*, C-5/12, EU:C:2013:571.



35. Finally, regarding the situation where only the father has earned the right to parental benefits discussed in the letter of formal notice, the Norwegian Government explained that when a father's share of four weeks was introduced in 1993, the contested provision in Section 14-13 first paragraph also applied to the "*father's share*", *i. e.* the father was only entitled to the father's share, if the mother returned to work or was a full time student. However, it was considered impractical for mothers to go back to work for only four weeks. The provision was hence amended in 1994, so that it did not apply to the father's share, but only to the common period. The Norwegian Government also claims that the nine weeks that are reserved for the mother before and after birth, primarily to protect the mother's health, cannot be transferred to the father. However, the father is entitled to 40 or 50 weeks of paid parental leave, provided that the conditions in the National Insurance Act are fulfilled, and this more that fulfils the minimum requirements in the Framework Agreement on parental leave (annex to Directive 2010/18/EU) and is not in breach of Directive 2006/54/EC.

36. In the view of the explanations provided for by the Norwegian Government, the Authority does not maintain in this reasoned opinion the plea raised in the letter of formal notice regarding the breach of the Framework Agreement on parental leave (annex to Directive 2010/18/EU). The arguments presented by the Norwegian Government do not, however, alter the Authority's conclusions regarding the breach of Directive 2006/54/EC, as set out in Part 5.1 above. The Authority proceeds further to discussing each of the arguments.

### **5.2.1 Application of Directive 2006/54/EC**

37. The Authority concurs with the Norwegian authorities that, contrary to the Maternity Directive, the Framework Agreement on parental leave (annex to Directive 2010/18/EU) does not require the EEA States to grant paid parental leave.

38. If, however, an EEA State choses to grant paid parental leave, this has to be done in conformity with EEA law.

39. Norway grants paid parental leave (*i. e.*, as mentioned above, leave for employees, during which benefits are paid by the National Insurance Scheme) under provisions, such as, *inter alia*, Section 14-13 first, second and third paragraphs and Section 14-14 first paragraph of the National Insurance Act, which render the father's entitlement to paid parental leave dependent upon the mother's situation whilst this is not the case in the reverse circumstances.

40. The granting of paid parental leave, which enables new parents to interrupt their professional activities to devote themselves to their family responsibilities, has consequences on the exercise of the professional activities of the employees concerned. Moreover, the paying of parental benefits during the parental leave under such a scheme as the Norwegian National Insurance Scheme is directly connected with the employment relationship of the beneficiary. Therefore, the conditions for granting paid parental leave fall within the scope of Article 14(1)(c) of Directive 2006/54/EC<sup>18</sup>.

41. Directive 2006/54/EC is therefore applicable to the case at hand.

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<sup>18</sup> See, to this effect, judgment of 16 July 2015, *Maïstrellis*, C-222/14, EU:C:2015:473, paragraph 45.

42. The Authority does not see how the *Jackson and Cresswell* judgment could alter this conclusion. That judgment assessed the question whether national benefit schemes intended to provide income support for persons with insufficient means to meet their needs fell under the scope of Directive 76/207/EEC<sup>19</sup>. The answer from the Court of Justice to this question was negative, because the subject-matter of the schemes at issue was not access to employment, including vocational training and promotion, or working conditions<sup>20</sup>.

43. The benefits under the National Insurance Scheme during the parental leave, however, do not provide income support for persons with insufficient means. Rather, they are paid to employees in respect of their employment, if they fulfil the condition of having been employed at least six of the last ten months prior to the beginning of the leave. The amount of the benefit is calculated, in essence, by reference to their employment income.

44. The parental benefits under the National Insurance Scheme cannot be considered as income support for those in need. That is also due to the fact that, as explained above, if the mother has not earned the right to paid parental leave and does not engage in the activities enumerated in Section 14-13 first paragraph, the father is not entitled to any paid parental leave whatsoever, not even to the ten weeks of paid parental leave reserved to the father, if both parents satisfy the conditions for entitlement to parental benefit. The father can then only take unpaid parental leave under the Working Environment Act. Such a family is, therefore, left without income. Thus, the National Insurance Scheme can by no means be viewed as being an income support scheme for the parents exercising their rights to parental leave.

45. Regarding the arguments of the Norwegian Government related to the *Meyers* judgment, the Authority draws the attention, first, to its conclusion set out in the letter of formal notice of 13 July 2016.

46. In particular, the Authority concluded in the letter of formal notice that, “*by maintaining in force provisions such as Sections 14-13, first, second and third paragraph and Section 14-14, first paragraph of the National Insurance Act, which render the fathers’ entitlement to paid parental leave dependent upon the mother’s situation whilst this is reciprocally not the case, Norway has failed to fulfil its obligations arising from Article 14(1)(c) read in conjunction with Article 2(1)(c) of <Directive 2006/54/EC>*”.

47. Moreover, paragraph 7 of the letter of formal notice defined paid parental leave as “*benefits from the National Insurance Scheme during the parental leave*”.

48. The letter of formal notice, as well as the Authority’s assessment in Part 5.1 above, makes clear, therefore, that the Authority refers to paid parental leave and that under the Norwegian law the conditions of granting paid parental leave are set out, *inter alia*, in Section 14-13 first, second and third paragraphs and Section 14-14 first paragraph of the National Insurance Act.

49. Accordingly, the letter of formal notice and this reasoned opinion do not concern the issue of granting parental benefits under the National Insurance Act in other instances than those where the parent is on parental leave.

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<sup>19</sup> Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (repealed and replaced by Directive 2006/54/EC).

<sup>20</sup> Judgment of 16 July 1992, *Jackson and Cresswell*, C-63/91 and C-64/91, EU:C:1992:329, paragraphs 28-31.



50. Second, the benefit at issue in the *Meyers* judgment was a family credit awarded in order to supplement the income of low-paid workers who were responsible for a child, in order to keep them in employment. One of the conditions for the award of the family credit was that the claimant should have been engaged in remunerative work. The entitlement to family credit was, however, not affected by the loss of employment or an increase in salary during the 26 weeks following the award. The worker was not always a direct recipient of the benefit, as in the case of women who were married or cohabiting and were unemployed<sup>21</sup>.

51. For the reasons explained also in paragraphs 43 and 44 above, the Authority does not, therefore, agree with the Norwegian Government that the link with the employment was closer in the *Meyers* judgment and/or that this judgment could serve as an argument showing that the parental benefits under the National Insurance Scheme fall out of the scope of Directive 2006/54/EC. It also has to be noted that the family credit in the *Meyers* judgment was acknowledged as falling under the scope of Directive 76/207/EEC.

52. For the sake of completeness, it is also worth mentioning that both the *Jackson and Cresswell* and the *Meyers* judgments concerned the issue of indirect discrimination on grounds of sex, whereas provisions such as Section 14-13 first, second and third paragraphs and Section 14-14 first paragraph of the National Insurance Act constitute direct discrimination within the meaning of Directive 2006/54/EC.

53. As regards the argument of the Norwegian Government referring to the *Gillespie* and *Montull* judgments, the Authority notes that these judgments concerned, respectively, the issue of whether Article 119 of the EEC Treaty<sup>22</sup> or Directive 75/117/EEC<sup>23</sup> required that women should continue to receive full pay during maternity leave and the issue of whether the father of a child, who was an employed person, was entitled, with the consent of the mother, to take up maternity leave following the compulsory leave of six weeks, where the mother of the child was not an employed person.

54. The Court of Justice stated in the *Gillespie* judgment that the issue went beyond the temporal scope of the Maternity Directive, and, although the benefit paid during maternity leave constituted pay within the meaning of Article 119 of the EEC Treaty and Directive 75/117/EC, the situation of a woman on maternity leave was comparable neither to that of a man nor that of a woman actually at work. Directive 76/207/EEC could not change this conclusion either, in particular having in mind that, according to its second recital in the preamble, it did not apply to pay within the meaning of the abovementioned provisions.

55. In the *Montull* judgment, the Court of Justice concluded with regard to Directive 76/207/EEC that the national measure established a difference on grounds of sex between mothers who were employed persons and fathers with the same status, but this difference was justified on the grounds of protecting a woman's biological condition during and after pregnancy (under the Maternity Directive). Moreover, in that case the mother of a child was not covered by a State social security scheme and did not enjoy any primary right to maternity leave. Therefore, the mother could not grant the right to such leave to the father

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<sup>21</sup> Judgment of 13 July 1995, *Meyers*, C-116/94, EU:C:1995:247, paragraph 23.

<sup>22</sup> Analogous to Article 69(1) EEA.

<sup>23</sup> Council Directive 75/117/EEC of February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women (repealed and replaced by Directive 2006/54/EC).

of the child either. It followed that Directive 76/207/EEC could not preclude a measure such as that at issue in the main proceedings.

56. However, as stated above, the situation of a male employee parent and that of a female employee are comparable as regards the bringing-up of children, *i. e.* as regards the entitlement to paid parental leave. Moreover, Directive 2006/54/EC repealed and replaced both Directive 76/207/EEC and Directive 75/117/EC, and Article 14(1)(c) of Directive 2006/54/EC encompasses “*employment and working conditions, including dismissals, as well as pay as provided for in Article 141 of the Treaty*”.

57. Therefore, Directive 2006/54/EC is not being applied by the Authority to expand the rights granted by the Maternity Directive or Directive 2010/18/EU, and, as explained above, provisions such as Section 14-13 first, second and third paragraphs and Section 14-14 first paragraph of the National Insurance Act, which establish conditions for granting paid parental leave, fall within the scope of Article 14(1)(c) of Directive 2006/54/EC.

### 5.2.2 Positive action

58. The argument of the Norwegian Government that the national provisions on parental benefits should be considered as “*positive action*” within the meaning of Article 3 of Directive 2006/54/EC cannot be accepted.

59. First, Article 3 of Directive 2006/54/EC refers to measures within the meaning of (currently) Article 157(4) TFEU. This Article reads:

*“With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures **providing for specific advantages** in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.”*<sup>24</sup>

60. Thus, the Norwegian legislation in question, in order to constitute positive action, would have to lead to a specific advantage for Norwegian women as regards access to vocational training and professional life. However, as currently stands, it can be construed more as introducing a disadvantage for women who wish to re-integrate into the labour market.

61. Second, since it constitutes a restriction upon the individual right to equal treatment, positive action is permitted only within narrow limits<sup>25</sup>. Moreover, as a restriction of individual rights, positive measures are only admissible where the principle of proportionality is satisfied<sup>26</sup>. The Court of Justice and the EFTA Court have thus objected to positive measures that automatically and unconditionally give priority to members of the

<sup>24</sup> Emphasis by the Authority.

<sup>25</sup> Judgment of 17 October 1995, *Kalanke*, C-450/93, EU:C:1995:322, paragraph 21.

<sup>26</sup> Judgments of 30 September 2004, *Briheche*, C-319/03, EU:C:2004:574, paragraphs 24, 27 sq., 31; of 19 March 2002, *Lommers*, C-476/99, EU:C:2002:183, paragraph 39; of 6 July 2000, *Abrahamsson and Anderson*, C-407/98, EU:C:2000:367, paragraph 55; of 15 May 1986, *Johnston*, 222/84, EU:C:1986:206, paragraph 38; and Case E-01/02 *ESA v Norway* [2003] EFTA Ct. Rep. 1, paragraph 43.



promoted group<sup>27</sup>. Even in the context of positive action, applications must be subject to an objective assessment which takes account of the specific situations of all candidates<sup>28</sup>.

62. Finally, such measures are, by their very nature, only temporary and must be flexible and adaptable to the changing circumstances.

63. The Norwegian national provisions discussed above constitute a general measure and do not comply with any of the abovementioned requirements.

64. On the contrary, provisions such as Section 14-13 first, second and third paragraphs and Section 14-14 first paragraph of the National Insurance Act, far from ensuring full equality in practice between men and women in working life, are liable to perpetuate a traditional distribution of the roles of men and women by keeping men in a role subsidiary to that of women in relation to the exercise of their parental duties<sup>29</sup>.

### 5.2.3 *Situation where only the father has earned the right to paid parental leave*

65. As regards the situation where only the father has earned the right to paid parental leave mentioned in the letter of formal notice, the Authority agrees with the Norwegian authorities that the nine weeks that are reserved for the mother before and after birth could be made not transferrable to the father, as they are intended, primarily, to protect the mother's health.

66. That does not, however, detract from the conclusion that the provision such as Section 14-14 first paragraph of the National Insurance Act constitutes an infringement of the prohibition of direct discrimination on grounds of sex, within the meaning of Article 14(1)(c) of Directive 2006/54/EC read in conjunction with Article 2(1)(a) of that Directive.

67. In particular, as explained above, under Section 14-14 first paragraph of the National Insurance Act, if the mother has not earned the right to paid parental leave and does not engage in the activities enumerated in Section 14-13 first paragraph, the father is not entitled to any paid parental leave whatsoever, *i. e.* not even to the ten weeks of paid parental leave reserved to the father, if both parents satisfy the conditions for entitlement to parental benefit. The mother is, however, entitled to the whole period of paid parental leave even in cases where the father has not earned the right to paid parental leave and does not engage in the activities enumerated in Section 14-13 first paragraph of the National Insurance Act.

68. The discrimination, therefore, does not consist of the fact that the period of leave after birth, during which benefits from the National Insurance Scheme are paid, will be by six weeks longer in the case of the mother than in the case of the father, if, accordingly, only the mother or only the father has earned the right to paid parental leave (46 or 56 weeks in the case of the mother and 40 or 50 weeks in the case of the father). Rather, the discrimination lies in the fact that, if only the father has earned the right to paid parental leave, he is only entitled to take this leave (40 or 50 weeks) under the condition that the

<sup>27</sup> Judgments of 30 September 2004, *Briheche*, C-319/03, EU:C:2004:574, paragraphs 23 sq.; of 17 October 1995, *Kalanke*, C-450/93, EU:C:1995:322, paragraph 22; and Case E-01/02 *ESA v Norway* [2003] EFTA Ct. Rep. 1, paragraphs 45 and 54.

<sup>28</sup> Judgments of 30 September 2004, *Briheche*, C-319/03, EU:C:2004:574, paragraphs 23 sq.; of 6 July 2000, *Abrahamsson and Anderson*, C-407/98, EU:C:2000:367, paragraphs 43, 52 sq.; of 28 March 2000, *Badeck*, C-158/97, EU:C:2000:163, paragraphs 22 sq.; of 11 November 1997, *Marschall*, C-409/95, EU:C:1997:533, paragraphs 32 sq.; and Case E-01/02 *ESA v Norway* [2003] EFTA Ct. Rep. 1, paragraph 45.

<sup>29</sup> See, to that effect, judgment of 16 July 2015, *Maïstrellis*, C-222/14, EU:C:2015:473, paragraph 50 and the case law cited therein.

mother engages in the activities enumerated in Section 14-13 first paragraph of the National Insurance Act, whilst this is not the case in the reverse circumstances.

69. In other words, the mere fact of being a parent is not, under the aforementioned provisions of the Norwegian legislation, sufficient for the father to gain entitlement to paid parental leave, whereas it is for a mother in an identical situation<sup>30</sup>. This difference gives rise to discrimination. In particular, that is the case with respect to the common period of paid parental leave, if both parents are entitled to parental benefits, as explained in paragraph 20 above. This is also the case concerning the entire period of the grant of parental benefits (excluding the six weeks of obligatory maternity leave after birth), if only the father has earned the right to paid parental leave.

FOR THESE REASONS,

THE EFTA SURVEILLANCE AUTHORITY,

pursuant to the first paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, and after having given Norway the opportunity of submitting its observations,

HEREBY DELIVERS THE FOLLOWING REASONED OPINION

that by maintaining in force provisions such as Section 14-13 first, second and third paragraphs and Section 14-14 first paragraph of the National Insurance Act, which render the father's entitlement to paid parental leave dependent upon the mother's situation whilst this is not the case in the reverse circumstances, Norway has failed to fulfil its obligations arising from Article 14(1)(c) read in conjunction with Article 2(1)(c) of the Act referred to at point 21b of Annex XVIII to the EEA Agreement (*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)*), as adapted to the EEA Agreement by Protocol I thereto.

Pursuant to the second paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, the EFTA Surveillance Authority requires Norway to take the measures necessary to comply with this reasoned opinion within *two months* of its receipt.

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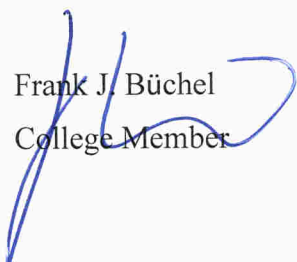
<sup>30</sup> See, by analogy, judgment of 16 July 2015, *Maistrellis*, C-222/14, EU:C:2015:473, paragraph 49 and the case law cited therein.



Done at Brussels, 15 November 2017

For the EFTA Surveillance Authority

Frank J. Büchel  
College Member



Carsten Zatschler  
Director

