



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 25 May 2009

**Interinstitutional File:
2008/0193 (COD)**

**10064/1/09
REV 1**

**SOC 347
SAN 133
CODEC 743**

REPORT

from : Presidency

to : Permanent Representatives Committee (Part I) / Council (EPSCO)

No Cion. prop. : 13983/08 SOC 575 SAN 217 CODEC 1285 - COM(2008) 637 final + COR 1

Subject : Proposal for a Directive of the European Parliament and of the Council amending Council Directive 92/85/EEC 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
- Progress report

I. INTRODUCTION

On 3 October 2008, the Commission submitted its proposal for a Directive of the European Parliament and of the Council amending Council Directive 92/85/EEC 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. The Working Party on Social Questions has examined the proposal submitted by the Commission at seven meetings during the French and Czech Presidencies. On 17 December 2008, the Council was informed by the French Presidency on the discussions until then¹ and on 9 March 2009 the Council held a policy debate on a number of fundamental questions.

¹ Document 16599/08.

At this stage, all delegations have maintained general scrutiny reservations on the proposal, while BE and NL have entered reservations. DK, FR, MT and UK have entered parliamentary scrutiny reservations.²

II. THE COMMISSION PROPOSAL

The aim of the proposal is to improve the protection offered to pregnant workers and workers who have recently given birth or are breastfeeding. In particular, it extends the minimum length of maternity leave from 14 to 18 weeks, the other most important changes being:

- a dual legal basis (previously only workers' health and safety, the current Article 137, but now completed by Article 141 of the EC Treaty on equal treatment between women and men introduced by the Treaty of Amsterdam and based on the former Article 119);
- the obligation to take six weeks of such leave following childbirth whereas the other weeks may be taken before or after the birth;
- the right to return to the same job or an equivalent post;
- the fact that, even during maternity leave, a worker has a right to ask her employer to adapt her working patterns and hours; the employer is obliged to consider such a request but may refuse it;
- stipulation of the provisions concerning the burden of proof (with reference to Article 3(1)(a) of Directive 97/80/EC on the burden of proof in cases of discrimination based on sex).

² Further details of delegations' positions may be found in the most recent outcome of proceedings set out in document 10002/09.

It should also be noted that the Commission's proposal forms part of the "reconciliation package" which will contribute to better reconciliation of professional, private and family life; in this context, the European social partners have conducted negotiations on the revision on Directive 96/43/EC on parental leave.

III. THE COUNCIL'S WORK DURING THE CZECH PRESIDENCY

Policy debate on 9 March

During the early part of the Czech Presidency, the Council's work concentrated on clarifying the delegations' views on the Commission's proposal. On 9 March 2009, the Council held a policy debate based on a number of questions put forward by the Presidency, concentrating on the need to revise the current Directive and, in particular, the extension of the maternity leave entitlement from 14 to 18 weeks and the possibility of limiting or setting conditions regarding the timing of maternity leave by national legislation. The Council discussed the expected consequences of the proposed revision on the situation of women on the labour market and on the reconciliation between the two objectives (health and safety, and better reconciliation of professional, private and family life) of the proposal.

During the debate on 9 March, the Council confirmed its support for the proposal's objectives, i.e. protection of workers' health and safety and equality between men and women. Some delegations, however, questioned the need for the proposal and expressed the view that the current Directive provided sufficient protection for pregnant workers. These delegations, like a number of other delegations, linked the discussions on maternity leave with the on-going discussions by the social partners on parental leave available to both parents. In general, the delegations considered that it was important that the protection reserved solely to mothers should not affect negatively the situation of women on the labour market.

A large majority of delegations stressed that the Community rules were only minimum standards and that the Member States should be allowed to decide on the other rules concerning maternity leave in national legislation, referring for example to the timing and the obligatory nature of maternity leave. While the delegations acknowledged the importance of the equality aspects included in the proposal, a number of them stressed that the proposal was essentially for a health and safety Directive. In particular, a number of delegations referred to the wide variety of national practices as regards maternity leave.

Increased clarity on issues at stake

On the basis of the Council's debate, the Presidency formulated a number of compromise texts. The Working Party discussions during March, April and May have allowed the delegations to reach a good understanding of the issues at stake in the proposal and, in particular, in its most controversial article, Article 8, dealing with the length of and other provisions regarding maternity leave.

In the context of Article 8, a majority of delegations have welcomed the Presidency's approach of including in the text an option under which Member States with less than 18 week's maternity leave would be considered to comply with the Directive if family-related leave offered to the mother other than maternity leave fulfilled the criteria set out in the Directive (so-called "passerelle" clause in Article 8(1a)), with one of the main principles being that the total period of leave must exceed the period of parental leave provided for in Directive 96/34/EC. The Presidency's text has also given consideration to the fact that, in a number of Member States, other family-related leave is less well remunerated than sick pay. In order for these Member States to still count this family-related leave as maternity leave, the Presidency has formulated the idea that, in these cases, the overall level of pay for the whole maternity leave should not fall below a certain level which could be fixed in later discussions. In any event, a number of issues related to the "passerelle" clause (or clauses) and - more generally - to the inter-linkage between maternity and other family-related leave, will require further discussion (please see also, below, the sub-section on major open issues).

Also in Article 8, the issue of an obligatory period within the maternity leave (either before or after childbirth) has been discussed in detail. The discussions have confirmed that a large majority of delegations appreciate the flexibility included in the current Directive 92/85/EEC, which gives the Member States the flexibility many Ministers were referring to during the debate of 9 March. However, some delegations have maintained their call for more ambition and, therefore, the acceptance of the Commission's proposal of six obligatory weeks of maternity leave after childbirth.

The Working Party has also progressed in improving and clarifying the text of the draft Directive, in particular the sections on prohibition of dismissal and on protection against discrimination. Regarding the first issue, the text has been made clearer by taking into account relevant European Court of Justice case law. Concerning the second issue, the Presidency has proposed simplifying the text by replacing the articles in question with one single article which now refers to all issues linked to Directive 2006/54/EC and which clearly states that the provisions in question should only apply in cases of discrimination on grounds of sex; this approach has been supported by a large majority of delegations.

Notwithstanding the tangible progress which has been made under the current Presidency, further work on the entire text will still be required.

Major open issues

These discussions have also shown that the major open issues within the Council concern, on the one hand, how to improve the protection of pregnant workers and workers who have recently given birth, taking into account the widely different maternity leave systems in the Member States and, on the other hand, how to take into account linkages between maternity and other family-related leave systems.

More concretely, the major open issues can be summarised as follows:

- **The length of maternity leave and, related to that, the possibility of counting other family-related leave as maternity leave, in the meaning of this Directive, under certain conditions (Articles 8(1) and 8(1a))**

While a majority of delegations have supported the Commission's proposal to extend the minimum maternity leave to 18 weeks, about a third of delegations have expressed their reservations on extending maternity leave as proposed, the main problem for a number of delegations being that they did not wish to extend the leave reserved solely to the mother. A number of delegations consider that the proposal should be tackled (also) from the perspective of fathers and of parenthood in general.

The Presidency has introduced Article 8(1a)(new) which is intended to be used by Member States with maternity leave shorter than 18 weeks if they offer family-related leave other than maternity leave to the mother and this leave fulfils a set of criteria, including the required level of remuneration. Such a "passerelle" clause was already referred to in the Commission's explanatory memorandum to the proposal. The Presidency's approach has been welcomed by a number of delegations.

However, a number of delegations have considered that the "passerelle" clause as drafted by the Presidency would not help all delegations, as it excluded e.g. the issue of paternity leave. Some delegations also consider that mixing the two systems could lead to confusion and problems of implementation.

Some delegations having that stressed that the Member States' maternity leave systems were very different (while some offered shorter maternity leave with allowances at the level of full salary, others had substantially longer maternity leaves but with lower allowances), one delegation has suggested an alternative passerelle clause along the following lines: "A Member State where maternity allowance is at the level of the worker's full salary may decide to offer maternity leave of less than 18 weeks, but not less than 14 weeks." While a number of delegations appreciated this suggestion, some delegations noted that it would not change the current situation, pointing out that having an array of options would lead to European legislation *à la carte*; moreover, European legislation on maternity leave should not try to regulate flexibility and diversity in the Member States, but should set minimum standards.

- **The obligatory portion of maternity leave (Article 8(2))**

The Commission, supported by some delegations, has maintained its proposal to increase the obligatory period of maternity leave to six weeks, to be taken after childbirth. Following the discussions, the Presidency has suggested that the current rules concerning the 2 weeks' obligatory maternity leave would be maintained, in order to give the Member States flexibility at national level. A large number of delegations could support such a minimalist approach as suggested by the Presidency, some of them noting that Member States could set a longer period of obligatory maternity leave.

A number of delegations have stressed the importance of obligatory prenatal maternity leave.

In fact, the Commission's proposal had two ambitions: besides increasing the obligatory post-natal maternity leave to six weeks, it had also included the principle of free choice for the pregnant worker to decide on the timing of her maternity leave. Delegations have considered it important, at this stage of the discussions, to explore different ways of better matching the different principles under discussion (women's right to choose and setting rules for the protection of the mother and the child).

- **Maternity allowance (Article 11(c))**

While a number of delegations have not considered it useful or necessary to include in the text the mere aim of paying an allowance at the level of full salary during maternity leave, the Commission has maintained its proposal that Article 11(c) should include the aim of full pay, even though the Member States would be allowed to continue the present practice of payment of an allowance at least at the level of sick pay.

IV. OTHER WORK ON THE PROPOSAL

The Council is waiting for a number of inputs to its work. The European Parliament's opinion on the proposal was expected to be adopted on 6 May, during the last plenary before the elections; however, the file was sent back to the Committee level. The results of the European social partners' negotiations on the review of the Parental Leave Directive are still to be formalised.

V. CONCLUSION AND NEXT STEPS

Substantial progress has been made on establishing a good basis on which the next Presidency can continue negotiations. The expected proposal from the Commission for a Directive implementing the agreement of the European Social Partners on parental leave will also be useful for future discussions, as it will establish a more comprehensive picture of EU legislation on family-related leave.

The future Swedish Presidency has indicated that this file is among its priorities in the field of employment and social affairs. During the second half of 2009, the Council will continue its work on the file, also in the light of:

- the European Parliament's Opinion (which will be further discussed at the Committee level in the European Parliament);
- the social partners' agreement on the revision of the Directive on parental leave;
- the Council's continued work on other files within the "reconciliation package".
