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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 examined the proposal at seven meetings in late 2008 and in early 2009. After the European Parliament adopted its opinion at first reading in October 2010, the discussions on the file continued.

The Council has received three earlier Progress reports prepared by the French, the Czech and Belgian Presidencies¹.

The European Economic and Social Committee adopted its Opinion on the proposal on 13 May 2009.

Following the adoption of the European Parliament's position in first reading on 20 October 2010, the Council held a policy debate on 6 December 2010.

All delegations have maintained general scrutiny reservations on the proposal. DK, FR, MT and UK have entered parliamentary scrutiny reservations. In addition, several delegations have recalled that their comments should be understood in line of the statement of eight delegations made to the minutes of the Council session of 6 December 2010.²

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; the legal basis for Directive 92/85/EEC (Article 137 TEC, now Article 153 TFEU) only concerned workers' health and safety, whereas the current proposal is, *in addition*, based on Article 141 TEC (now Article 157 TFEU) on the equal treatment of women and men;

¹ Documents 16599/08, 10064/09 and 16509/10.

² Document 17716/10; minutes statement by CZ, DK, DE, EE, NL, SK, SE and UK.

- 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 principle that the maternity leave allowance should guarantee an income equivalent to the last monthly salary or an average monthly salary, or at least no lower than the level of sick pay;
- 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;
- including 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).

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 Parliament and the Council adopted on 7 July 2010 Directive 2010/41/EU on equal treatment of the self-employed³, and the European social partners concluded an agreement on the revision on Directive 96/34/EC on parental leave and the Council subsequently adopted Directive 2010/18/EU in March 2010⁴.

³ OJ L 180 of 15.7.2010, p. 1.

⁴ OJ L 68 of 18.3.2010, p. 13

III. THE EUROPEAN PARLIAMENT'S POSITION AT FIRST READING

After having conducted an additional impact study during the summer of 2010, in particular on the cost implications of its draft amendments, the European Parliament adopted its position at first reading on 20 October 2010.

Stressing the need to revise the Directive, which is 18 years old and which it considers out of date, the Parliament takes the view that maternity leave should last 20 weeks and be fully paid. The Parliament argues that the period of 20 weeks is recommended by the WHO and gives mothers the possibility to recover fully from birth and to establish a close bond with the newborn child. It contends that maternity leave would serve no purpose unless accompanied by all rights linked to the employment contract, including maintenance of full pay. However, the Parliament considers that in certain cases the Member States that offer maternity leave shorter than stipulated by the future amended Directive would be considered to comply with it, if family-related leave other than maternity leave fulfilled the criteria set out in the Directive (so-called "passerelle" clause).

In addition to maternity leave, the Parliament considers that the Directive should also give an entitlement to at least two weeks' fully paid paternity leave to a person whose spouse or life partner has recently given birth. A number of amendments deal with the protection of pregnant workers and workers who have recently given birth or are breastfeeding, including amendments concerning their working conditions, night work, remuneration, training opportunities and career development in general. In total the Parliament' position at first reading includes more than 70 amendments to the Commission's proposal, including changes to a number of articles in Directive 92/85/EEC that are not amended in the proposal itself.

IV. THE COUNCIL'S WORK ON THE PROPOSAL BEFORE THE HUNGARIAN PRESIDENCY

During the early part of 2009, the Council's work concentrated on clarifying the delegations' views on the Commission's proposal. In March 2009, the Council held a policy debate, 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 interplay between the two objectives of the proposal (health and safety, and better reconciliation of professional, private and family life).

The Council confirmed its support for the proposal's objectives, i.e. protection of workers' health and safety and equality between men and women. However, 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 additional 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 June 2009, the Council was informed on the progress of the Working Party discussion. The Czech Presidency report set out the state of play and outlined the major open issues (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 how to address the linkages between maternity and other family-related leave systems).

In October 2010, after the adoption of the European Parliament's opinion at first reading, the Council continued its work on the file. In a policy debate at the EPSCO Council of 6 December 2010⁵, a very large majority of delegations were not in a position to accept the EP's amendment extending minimum maternity leave to 20 weeks on full pay. A majority of delegations expressed concern regarding the cost implications. Many delegations also emphasized respecting the principle of subsidiarity and the diversity of the situations in the different Member States. However, a number of delegations indicated their openness to discuss some EP amendments, in particular amendments on how to improve the protection of workers covered by the Directive, on the assessment of health risks and reproductive risks, on the return to the post after the end of maternity leave, and on pension rights. Eight delegations entered a statement to the minutes of the Council meeting of 6 December 2010⁶, stressing inter alia the importance of respecting the principles of subsidiarity and proportionality and their view that it was difficult to envisage how an acceptable accommodation could be reached on this file between the European Parliament and Council.

Given the gulf between the European Parliament's position and the views of the Member States, many delegations noted the need for thorough reflection in the Council. Several delegations were in favour of conducting a further impact assessment by the Council, so as to improve understanding of the effect of the suggested provisions in the Member States.

On 28 December 2010, the Belgian Presidency addressed the European social partners and asked their joint views and analysis notably on the length of maternity leave, on the level of allowance and on the “passarelle” clause to contribute to the discussions and work of the Council.

⁵ Doc. 5004/10

⁶ Doc. 17716/10.

V. THE COUNCIL'S WORK DURING THE HUNGARIAN PRESIDENCY

The Hungarian Presidency recognised that delegations needed further time to reflect on the impact of the proposed EP amendments; therefore, it concentrated the work on those areas where the Member States had already expressed some openness for further examination. While recognising that there are overlaps in some cases, the Presidency identified the following main thematic groups of amendments:

- provisions related to return to work,
- health and safety and working conditions of pregnant workers,
- combination work and family life,
- equal treatment and general non-discrimination issues, and
- amendments related to special leave and different forms of leaves

Altogether, 28 EP amendments concerning the title of the draft Directive and the articles were examined in detail by the Working Party (this is more than half of the amendments to the articles of the draft Directive⁷). As it was clear that *the length and the payment of the maternity leave* were the most sensitive topics and that reaching an agreement on these issues was likely to take some time and reflection, the Presidency left these out of the Working Party discussions for the time being, allowing the delegations more time to consider them. The amendments to the recitals were not yet discussed. Some delegations stated that their views on the amendments should be read in the light of the 6 December 2010 minutes statement.

During the Working Party discussions, some delegations recalled their openness to certain EP amendments and in some instances were able to agree with the spirit of the amendments.

⁷ See documents 8121/11 and 9616/11.

However, on the majority of the EP amendments discussed no majority support could be established. Several EP amendments were considered too detailed to be included in the draft Directive, especially related to *return to work*. While a number of delegations considered the issues and underlying principles important and even indicated that their national legislation had provisions on a number of issues raised by the Parliament (including time-off for breastfeeding, special working arrangements for parents with disabled children, additional maternity leave in certain cases etc), they considered that specificities should be left to the Member States.

Regarding the amendments on different types of leave, a large majority of delegations considered that it should be up to the Member States to decide on *additional maternity leave in special circumstances*. However, some delegations agreed that including the principle of such longer or additional leave in the Directive might be worth to explore further. One delegation explicitly supported the Commission's proposal on specific additional maternity leave in certain circumstances, however, leaving it to the Member States to decide on details. Some delegations supported the idea that the Directive could give a non-exhaustive list of examples in which cases additional leave could be granted. Some delegations reiterated that the Directive would be meant to set minimum standards. In addition, some delegations recalled that the recently amended Parental Leave Directive 2010/18/EC aimed at increasing gender equality in child care.

In general, delegations considered that the Directive *should cover only maternity leave*. In particular, many delegations stressed that the proposal should essentially remain a health and safety at work Directive. Only a few delegations were flexible on the issues of *adoption and paternity leave*.

On the basis of the above, it was considered that there was no need to amend *the title of the Directive*. However, some delegations noted that the final decision on the title should be taken at a later stage.

Many delegations rejected certain amendments, which they considered to be already covered elsewhere in the EU legislation (this concerned especially amendments *on the prevention of discrimination, burden or proof, witness protection*). For these cases, some delegations supported the text suggested during the CZ Presidency, i.e. referring to Recast Directive 2006/54/EC.

Following the ideas first introduced in the minutes statement during the Council session of 6 December 2010, the Working Party also considered the suggestion to prepare an *additional impact assessment* (IA) by the Council. It was proposed that a further IA be carried out to address gaps in the existing IAs, particularly, to extend the analysis to all 27 Member States, to assess further the impact on business, to better evaluate the benefits of the provisions and to examine other important areas, such as pensions, further paid special leave, right to return to work part-time, and right to time-off for breastfeeding. A number of delegations supported the idea of an IA by the Council. In general, these delegations considered that it would be useful to prepare an IA including also (certain) amendments that the Council was not inclined to accept. However, a number of other delegations considered that, at this stage of the discussions, an IA by the Council would not be justified, considering in particular that the Council should first complete the examination of EP amendments, define its own position on the Commission's proposal and how the Council would wish to amend it.

VI. CONCLUSION

The Hungarian Presidency made progress in examining the particular EP amendments but further discussions are needed. In the light of Council discussions, the need for an additional IA should be further explored at a later stage. Work on the proposal will continue in 2011 and the social partners' views are expected to be available shortly.