

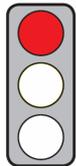
IMPROVEMENT OF MATERNITY PROTECTION

Status: 07.11.08

MAIN ISSUES

Objectives of the Directive: Health protection at work and equal opportunities for pregnant and breast-feeding workers are to be improved in particular by extending the duration of maternity leave and by protecting pregnant workers from dismissal as well as by increasing legal protection.

Groups Affected: Pregnant and breastfeeding workers; employers.



Pros: –

Cons (1) The Proposal does not contribute to the improvement of health protection at all.
(2) Ancillary labour costs will increase and thus have a negative impact on employment.
(3) The Proposal infringes the principle of subsidiarity.

Changes Required: The Proposal should not be adopted.

CONTENT

Title

Proposal COM(2008) 637 of 3 October 2008 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**

Abstract

References are made to articles of the Directive 92/85/EEC.

► Preface

- The Directive 92/85/EEC ensures an EU-wide common minimum standard for the protection of pregnant workers at work and workers who have recently given birth or are breastfeeding.
- In particular, the current Proposal is intended to amend the existing provisions on maternity leave, continuation of payment during maternity leave, protection against dismissal and legal protection.

► Maternity Leave

- Maternity leave is defined as a continuous period of at least 18 weeks (amended Art. 8 (1)).
- At least six weeks' maternity leave must be taken directly after giving birth. Female workers are free to choose whether to take the remainder of their maternity leave before or after delivery (amended Art. 8 (2)).
- Should the actual date of delivery be later than expected, thereby extending the period of maternity leave before confinement, the remaining period of maternity leave shall not be reduced accordingly (amended Art. 8 (3)).
- Member States must ensure that a "proportionate" additional maternity leave is granted in the case of "special needs", such as premature childbirth, children hospitalised at birth, children with disabilities and multiple births (amended Art. 8 (4)).
- Any period of sick leave arising out of pregnancy and occurring prior to the four-week period before confinement may not affect the duration of maternity leave (amended Art. 8 (5)).

► Continuation of Payment or Social Benefits during Maternity Leave

- During maternity leave each Member State must guarantee its female workers the right to continuation of payment or adequate social benefits (Art. 11 (2) lit. b).
- Where a Member State decides to guarantee the provision of social benefit, this is deemed adequate when it equals the last monthly salary or the average monthly salary of the worker concerned. Should a Member State choose to continue payment of the average monthly salary, it is free to determine the period from which this monthly salary is to be calculated. Member States may fix a ceiling which may not, however, be lower than the amount paid during sick leave (amended Art. 11 (3)).

► Protection Against Dismissal

- Dismissal and any preparation for dismissal are fundamentally prohibited during the period from the beginning of pregnancy to the end of the maternity leave. Exceptions to this rule are only permitted in cases not connected with the pregnancy of the worker and which are defined under national legislation (amended Art. 10 (1)).

- The employer must cite duly substantiated grounds for the exception of permissible dismissal being made before the end of maternity leave. If dismissal occurs within six months after the end of maternity leave, the employer must cite duly substantiated grounds for dismissal only if requested by the worker concerned. At all events, the employer must provide evidence that the grounds provided are lawful (amended Art. 10 (2)).

► **Legal Protection, Shifting of the Burden of Proof**

- Female workers must be entitled to claim their rights under the Directive before a court or any other competent authority (Art. 12).
- It is sufficient if a complaining worker credibly presents facts that imply a breach of rights. It is then incumbent upon the employer to prove that the alleged breach is not true (so-called shifting of the burden of proof; amended Art. 12a).
- If in relation to her pregnancy or maternity leave a worker is treated less favourably than other female or male workers, then such treatment shall constitute discrimination according to the Directive on the equal treatment of men and women (2006/54/EEC) (amended Art. 10 (4)).
- Member States must introduce penalties for breaches of the obligations under this Directive. They may also introduce indemnity claims for the workers concerned, the extent of which may not be limited (amended Art. 12 c).

► **Further Rights**

- Should an employer release a female worker from work due to her apparent inability to work, but without there being an official doctor's certificate, the employer is obliged to pay out her full salary by the beginning of the compulsory period of maternity leave (amended Art. 11 (1 a)).
- On returning from maternity leave, workers may request changes to their working hours and/or s-schedule. Employers must consider such requests, yet do not mandatorily have to satisfy them (amended Art. 11 (5)).

Changes Compared to the Status Quo

- The minimum length of maternity leave is to be extended from 14 to 18 weeks.
- Presently, Member States have to prescribe that two of the 14 weeks are taken before and/or after childbirth. This rule is to be replaced by a compulsory leave of at least six weeks following confinement.
- The rule that sick leave taken up to four weeks before the presumed childbirth and any period elapsing between the presumed date and the actual date of childbirth not be calculated against the remaining maternity leave is new.
- Until now social benefits were deemed adequate if not set below the rate paid during sick leave. In future, Member States will be entitled to limit the amount by fixing a ceiling.
- To date, EU law does not provide for legal protection against preparation for dismissal during maternity leave nor against dismissal within six months following it.
- To date, workers had to provide evidence for the breach of rights under the Directive 92/85/EEC. The Proposal of the Commission stipulates a provision on the shifting of the burden of proof.
- To date, a breach of rights under the Directive 92/85/EEC did not automatically constitute prohibited discrimination.
- To date, Member States were not obliged to impose penalties in the case of breaches of the Directive 92/85/EEC.
- An entitlement to continued pay for pregnant workers released from work without any substantiated cause would be new under EU legislation.

Statement on Subsidiarity

The amendment of an EU directive is subject to EU legislation, exclusively.

Political Context

Member States have declared the equal treatment of men and women to be a core priority in the EU (Art. 2, 3 (2) EC). In pursuing that target, the Commission particularly focuses on work life as outlined in its Roadmap for equality between women and men (2006-2010) [Communication COM(2006) 92]. In its legislative Resolution of 20. May 2008 (P6_TA(2008)0207), the European Parliament called for new parental leave models.

Currently, the Commission is engaged in introducing new forms of parental leave, such as paternity leave, adoption leave and leave to nurse family members. Moreover, the social partners at European level are currently negotiating a revision of the Directive on parental leave (96/34/EEC). This is why the Commission chose to restrict its current Proposal solely to maternity leave.

Status of Legislation

03.10.08 Adopted by Commission
 Open Adoption by European Parliament and the Council, publication in the Official Journal of the European Union, entry into force

Options for Influencing the Political Process

Leading Directorate General:	DG Employment, Social Affairs and Equal Opportunities
Committees of the European Parliament:	Women's Rights and Gender Equality (in charge), rapporteur: open; Employment and Social Affairs; Industry, Research and Energy
Committees of the German Bundestag:	Open
Decision mode in the Council:	Qualified majority (rejection with 91 out of 345 votes; Germany: 29 votes)

Formalities

Legal competence:	Art. 137 (2) EC (social policy) and Art. 141 (3) EC (equality between women and men)
Form of legislative competence:	Concurrent legislative competence
Legislative procedure:	Art. 251 EC (Co-decision)

ASSESSMENT

Economic Impact

Ordoliberal Assessment

According to the Commission, extending the period of maternity leave serves to improve "the health and safety" of pregnant workers. Though the health of these women must be protected, the Commission does not provide any evidence that the existing health protection is inadequate. The assumption that lengthening maternity leave would improve health is not substantiated. **Improving the health of pregnant workers is therefore not sufficient justification for the policy option of extending the duration of maternity leave.**

Depending on the legal status of Member States, **reciprocal effects might occur** when the Proposal is adapted to national rules, and **might even result in negative impacts on the health protection of pregnant workers**. In Germany, for instance, pregnant workers are prohibited to work longer than up to six weeks before childbirth. Yet **the right to freely choose the time at which maternity leave is taken might deliver a financial incentive to women to work until confinement** and to take the entire maternity leave after childbirth. The allowance paid during maternity leave is followed directly by family allowance; according to the Proposal, by working right up until confinement mothers can substitute the smaller sum of family allowance with the larger sum of maternity pay. Hence, the Directive does not improve the safety and health protection of pregnant workers.

Impact on Efficiency and Individual Freedom of Choice

The Directive allows for the right to choose freely the time at which maternity leave is taken and thus provides pregnant workers with the option to decide in favour of their personal well-being. However, this choice option might entail an economic loss of efficiency if companies are forced to replace workers at short notice. Due notice periods for applying for maternity leave might reduce inefficiency on the one hand, but would inevitably constrain the pregnant workers' freedom of choice on the other hand.

In Germany, maternity pay is mainly borne by companies on an allocation basis. Lengthening the duration of maternity leave by four weeks would lead to additional costs at the amount of **€ 427 million per annum**. Public health insurance funds, which carry a basic rate of € 13 per day, will incur **additional costs of € 140 million**. If women chose to take the entire maternity leave after childbirth, maternity pay would replace parental pay for more than ten weeks longer than before. **The state could thus save expenses** of an estimated amount **of up to € 700 million** ([cp. separate calculation of CEP](#)).

Impacts on Growth and Employment

If the extension of maternity leave increased costs for the employment of women, their chances on the labour market would deteriorate. This is not the case in Germany, where employers are obliged to make a contribution for each worker – irrespective of their gender – into a fund which serves to finance the companies' share in maternity pay. However, **the Directive will engender an increase** in this lump-sum and consequently **of ancillary labour costs**, too, and **thus result in a negative impact on employment**.

Impacts on Europe as a Business Location

The Directive increases ancillary labour costs and thus lowers the attractiveness of the EU as a business location.

Legal Assessment

Legal Competence

The Commission's primary aim is to achieve a better balance between work and family life (Recitals 7 and 8). Yet the EU treaties do not assign any independent competence to do so. This is why the Commission argues on grounds of the improvement of health protection, the safeguarding of equal opportunities and equal treatment. The ECJ allows for such a proceeding: a legal competence may be relied on even if it constitutes "a decisive factor" for a different objective (ECJ, C-380/03, No. 39).

All proposed provisions may be based on Art. 137 (2) EC; the provisions on equal opportunities and equal treatment at work may also be based on Art. 141 (3) EC.

The provision that continued pay during maternity leave has to equal at least the amount of payment during which leave is covered by Art. 137 EC. Although provisions on remuneration are generally not subject to this legal competence, the ECJ declared this restriction not pertinent "otherwise some of the areas referred to in Art. 137 (5) EC would be deprived of much of their substance" (ECJ, C-307/05, No. 41, *Del Cerro*). This would be the case with continued pay during maternity leave, since Art. 137 (1) EC prescribes equal treatment of workers released from work due to illness.

Subsidiarity

The Proposal infringes the principle of subsidiarity. Though the Proposal amends existing EU law, this is only subject to EU legislation. However, neither the Proposal nor the original directive to be amended affect any cross-border issues. The Commission also does not generate any added value compared to Member States' legislation.

Proportionality

The Proposal is not qualified to achieve the objectives set, namely to improve health protection. The lengthening of maternity leave is merely a financial support for pregnant workers. As for the rest, it remains inefficient since all Member States provide significantly longer parental leave following maternity leave. On the contrary: the planned provision might even be detrimental to the health of pregnant workers before childbirth. For as it creates incentives for pregnant workers to work until confinement in order to maximize the period in which maternity pay – in the form of continued pay – replaces lower family allowance.

Moreover, the effect of the proposed measures on equal opportunities are almost zero, since the modifications recommended are already laid down in other provisions subject to EU law.

Compatibility with EU Law

Unproblematic.

Compatibility with German Law

The proposed changes would have to be incorporated into the German Act on Maternity Protection (MuSchG). It protects mothers by a prohibition of employment. In Germany, pregnant workers are not allowed to work in the last six weeks prior to childbirth (§ 3 (2) MuSchG) and eight weeks after (§ 6 (1) MuSchG). These prohibitions would have to be replaced by a compulsory leave of six weeks after confinement and an option to choose freely the time at which the remaining 12 weeks of maternity leave are taken.

In the case of an illness occurring within the period between the beginning of maternity leave and up to four weeks before confinement it would have to be provided that the duration of maternity leave is accordingly extended after confinement. The same applies to confinement taking place later than the presumed date, if the maternity leave before confinement is thereby extended.

The reference to non-discrimination rules is already included in the General Equal Treatment Act (§ 3 (1) AGG).

Alternative Policy Options

A revision of the existing maternity protection directive should be waived.

Possible Future EU Actions

A proposal on amendments relating to parental leave is to be expected as soon as management and unions conclude their negotiations. Furthermore, the Commission wishes to propose new leave models.

Conclusion

The Directive should not be adopted. The changes proposed create incentives to work until confinement and thus could even be detrimental to the health of pregnant workers. Moreover, they might increase ancillary labour costs and thus have a negative impact on employment. The Directive infringes both the principle of subsidiarity and the principle of proportionality.