



15 December 2008

REVISION OF PREGNANT WORKERS DIRECTIVE

Executive Summary

First and foremost European employers are committed to the protection of the health and safety and equal treatment of pregnant and breastfeeding workers. However, BUSINESSEUROPE does not agree with the extension of the legal basis of Directive 92/85/EEC, to include measures on equal treatment at European level. Maternity leave is an issue covered by occupational health and safety protection by the EU and this should remain the case.

European companies are not in favour of extending minimum maternity leave provisions from 14 to 18 weeks. There is no proof that the current minimum does not guarantee the health and safety of pregnant and breastfeeding workers, particularly since many other provisions exist in the directive to guarantee this. In addition, extending maternity leave rights at EU level in a way that is overly restrictive for companies would actually be of detriment to women's employment opportunities.

A large proportion of Member States have developed sets of measures to promote the better reconciliation of professional, private and family, which reflect the different national labour market needs and the diversity of traditions and cultures present in Europe. Therefore, maternity leave cannot be seen in isolation to other instruments in this field. Many other measures, provided in an integrated way, can actually be more effective in including and protecting pregnant women or those returning from maternity leave in the labour market.

BUSINESSEUROPE therefore does not agree with the necessity to amend this directive, as the challenges in achieving a work-life balance including maternity protections, will not be best met with further legislation.

I. Introduction

1. The European Commission published on 3 October a proposal for a revision of 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.

2. The directive is the tenth individual directive covered by article 16 (1) of Framework Directive 89/391/EEC on health and safety at work. The revision of the directive, however, includes an extension of the legal base, to article 141 EC regarding equal treatment.

3. The aim of the revision is to improve the protection of pregnant workers and workers who have recently given birth or are breastfeeding and better facilitate their return to the labour market. Measures include those aiming to increase the minimum length of maternity leave and provisions regarding payment during maternity leave.

II. General Remarks

4. European employers are committed to the protection of occupational health and safety and equal treatment of pregnant and breastfeeding workers.

5. This directive stems from article 16 (1) of the Framework directive on health and safety at work. However, due to the extension of the legal base to include equal treatment, some of the proposed changes have a much wider remit than health and safety at work. This concerns in particular provisions on dismissal of workers and rules on payment during maternity leave. BUSINESSEUROPE does not agree with the extension of the legal base of this directive. At European level maternity leave is essentially a health and safety issue, and this should remain the case.

6. BUSINESSEUROPE is not in favour of extending maternity leave entitlements at European level from 14 to 18 weeks for a number of reasons.

7. Firstly, there is no proof nor serious indication that the EU minimum entitlement for maternity leave of 14 weeks is not appropriate to protect the health and safety of pregnant or breastfeeding workers. In fact, the elements of the directive which are just as important for the health and safety of pregnant and breastfeeding workers are those independent from the existing maternity leave of 14 weeks. These include the obligation for the employer to take the necessary measures to ensure that, by temporarily adjusting the working conditions and/or the working hours of the pregnant or breastfeeding workers, that there are no risks to the safety or health of the workers concerned.

8. Regarding equal treatment, extending maternity leave rights in a one-size-fits-all way from the EU level would in fact cause detriment to women's labour market status and employment opportunities. A disproportionate legal protection of maternity, mainly

based on creating new leaves or setting overly restrictive conditions for companies could have precisely the opposite effect by discouraging the recruitment of women. Efforts being made at national level, particularly in a time of financial crisis, to improve the employment rate of women can be put at risk by measures which are not well balanced.

9. If the proposal aims to support reconciliation, maternity leave cannot be seen in isolation to the range of other instruments in this area. These include possibilities for part-time work, child-care, flexible working time arrangements, parental leave and other forms of (statutory and non-statutory) leave, which in many cases, are more relevant in providing better reconciliation of work and family life.

10. Employers emphasise that allowing both men and women to combine professional and family responsibilities is a key element in tackling the challenge of insufficient labour market participation of women and demographic ageing. The Commission justifies the extension of maternity leave by the need 'to create a solid relationship with the child' and the 'beneficial effect on women's ability to reconcile private, family and professional obligations'. These are the aims of parental leave and it would be discriminatory to focus on creating a solid relationship with the child, by granting leave only to women.

11. Over the last ten years, most EU Member States have developed sets of diversified measures, which aim to promote the better reconciliation of professional, private and family life in a way which corresponds to the needs of workers and employers, while reflecting different national labour market needs and the diversity of traditions and cultures present in Europe. Maternity leave and parental leave in particular should be seen in combination, as in many member states it is this combination, sometimes supplemented by other means, which allows for a balance between professional, private and family life. EU-level interventions would necessitate wholesale revision of the regulations in many states, causing significant disruption and would not be able to take into account the different mixtures of measures.

12. Measures that have proved to be more effective in order to integrate and protect pregnant women or those returning from maternity leave are those linked to the creation of adequate infrastructures provided in an integrated manner, (for example child care facilities, economic incentives for companies and families, facilities to take care of dependent people). A legal approach based on new leaves or on anti-discrimination regulation has been developed extensively in the last years, whereas the communication lacks an equal emphasis and ambition on those other measures which are much more effective and contribute to tailor-made solutions at company and/or sectoral level.

III. Specific Remarks

Amendment of Article 8

13. As argued above, in BUSINESSEUROPE's opinion, there is no need for extending maternity leave from 14 to 18 weeks. There is no proof that the EU minimum entitlement for maternity leave of 14 weeks is not appropriate to protect the health and safety of workers and such an extension could be of detriment to women's equal treatment on the labour market. In addition, such an extension could have serious financial implications for companies and national social protection systems.

14. Maternity leave is closely linked to other leaves which have been created to protect pregnant women or those returning from maternity leave. Among them, the right to reduce working time is widely used in some member states, for example in Spain for women with children of under 8 years old and in the Netherlands, part-time work was initially an element of most collective agreements, leading to a legal right introduced by the government at a later stage. Modifying only the length of the maternity leave without taking into account other benefits already existing for women with children can create distortions. Some flexibility should be granted to Member States to find the best balance between all the different leaves for mothers, for example through collective agreements, which already exist in some member states in this field.

15. Since the specific challenges in this field vary widely between the member states, so too do the arrangements in place in relation to the length of maternity leave and the level of payment in respect of leave. In many member states, measures have been agreed with social partners, seeking a balance between leave arrangements and other types of arrangements in order to fit to the specific labour market challenges of the country, region, sector or company. As highlighted on page 4 of the draft proposal, the member states have divergent positions on this issue and a significant number of them are not in favour of extending maternity leave.

16. The Commission proposal to extend compulsory maternity leave after childbirth from 2 to 6 weeks would limit the capacity of the worker to freely choose her period of maternity leave.

17. In addition, the proposals concerning the flexibility of workers to choose freely the time at which the non-compulsory portion of maternity leave is taken, before or after childbirth, will create uncertainty for employers. BUSINESSEUROPE would prefer to retain the existing provisions in Article 8 which leave it to the member states to decide the time when maternity leave can be taken. Otherwise, this option should at the least be on the basis of continuous-leave before or after childbirth rather than on the basis of an intermittent-leave-period. The latter would cause problems for management or human resources, for example in terms of replacing the worker.

18. The European Commission proposes that in cases where childbirth occurs after the due date, the prenatal portion of the leave is extended to the actual date of birth, without any reduction in the post-natal portion of the leave. This creates a situation in which women will receive any period of time "overdue" as an additional period of maternity leave. It is not clear whether this extension would be added to the EU-

minimum standard or to the standard fixed at national level. In the UK, for example, the latter scenario would increase maternity entitlement beyond 52 weeks. BUSINESSEUROPE calls on the Commission that any such extension must be in addition to the minimum 14 weeks. Otherwise, this would result not only in an increase of costs for the employer and social protection systems, but also in difficulties for business to manage the increased administration in working out each employee's entitlement and increased uncertainty in the amount of time being lost to maternity leave.

19. BUSINESSEUROPE agrees with the Commission that the additional leave in the case of premature childbirth, children hospitalised at birth, children with disabilities and multiple births should be proportionate and allow the special needs of the mother and the child/children to be accommodated. That being said, some further clarity is needed regarding these provisions, in particular since the needs would vary from person to person and business to business. The Commission proposal stipulates that Member States can decide on the length of additional leave to be granted in these circumstances. However, it is unclear whether this should be taken in addition to the minimum 14 weeks or in addition to the national maternity leave period, which is in some countries longer. BUSINESSEUROPE emphasises that this should be taken in addition to the minimum 14 weeks, for the reasons stated in point 18.

20. Leave taken because of sickness should be counted within the period of maternity leave. Also, times during which pregnant workers and workers who have recently given birth or are breastfeeding and who must not be employed because of health regulations should be counted within the period of maternity leave.

Amendment of article 10

21. European companies are opposed to the provision which would prohibit all preparations for dismissal of workers within the meaning of Article 2. If such preparations were prohibited, this would result in enterprises being precluded from planning any restructuring or rationalisation that would include any workers within the definition of Article 2. This would stunt commercial development and would be particularly problematic in the current economic climate, where restructuring is likely to become more necessary for companies to remain competitive. It would also result in unjustifiable inequalities between groups of workers, those with co-workers within the definition of Article 2 and those without such co-workers.

22. Companies are not in favour of extending the obligation for employers to justify dismissal until six months after the end of maternity leave, as suggested in the amendment to article 10 of the directive. Providing reasons for dismissal, particularly in written form, would lead to an increase in bureaucracy for the employer. This would also have the opposite effect to that intended of improving equal treatment. Similarly to the extension of the length of maternity leave, this could hamper women's employment opportunities and restrictive conditions for companies could have precisely the opposite effect by discouraging the recruitment of women.

Amendment of article 11

23. The right of workers to return to their jobs or to equivalent posts on terms and conditions that are no less favourable to them is in some cases impossible to uphold. The job or equivalent post might for example not exist when the worker returns to work due to downsizing or restructuring. The text in the current directive "the employment rights relating to the employment contract" is more flexible and adequate.

24. The Commission proposes a new and more generous rule on the payment during maternity leave, providing for payment of the full monthly salary received before the maternity leave. Companies are strongly opposed to this amendment but acknowledge that the subsidiarity principle has been taken into account, as Member States would be allowed to cap the level of payment during maternity leave as long as it is not lower than the level of sickness pay. This is particularly important, considering the different ways in which the member states define sickness pay and the level of that pay.

25. Financial aspects of these questions are the competency of Member States, as it has a direct effect on the social security spending and the tax contribution levels. Increases in payment would put both the state and the employers' financed social security schemes under unnecessary financial pressures. In addition, in some member states, payment during maternity leave is dealt with under existing collective agreements. The provisions would undermine such agreements.

Amendment of article 12

26. The Commission proposal would place the burden of proof on employers, regarding breaches of the Directive. BUSINESSEUROPE considers the fact that companies will have to prove that there was no breach of the provisions of the Directive – in all cases where workers believe that their rights under this Directive have been breached – as excessive.

27. According to the Commission's proposal, penalties for breaches of national provisions adopted pursuant to this Directive must be effective, proportionate and dissuasive and may comprise sanctions which may not be limited by the fixing of a prior upper limit.

28. BUSINESSEUROPE is strongly opposed to the provision which requires the removal of the upper limit on compensatory awards. Not only would this create inequalities, it would also cause great legal and practical uncertainty.

29. In any case, there is no need for proposals which shift the burden of proof or implement the proposed payment of compensation without restriction as part of the sanctions applicable to breaches of the national provisions adopted pursuant to the amended Directive. These provisions are already covered in 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.

Conclusion

30. BUSINESSEUROPE does not accept the revision of this directive as European employers are not in favour of an extension of the legal base, to include issues regarding equal treatment and call for this to remain a health and safety directive.

31. The measures proposed are not necessary in terms of increasing the occupational health and safety protection of pregnant and breastfeeding workers. In particular European companies do not agree to the proposed increase of the minimum amount of maternity leave and an increase in the minimum financial compensation during this leave at European level.

32. Extra rules in the field of maternity protection would increase the restrictions on companies, which could have a negative impact on women's employment opportunities. European companies do not believe that challenges in achieving a work-life balance including maternity protections, are best met with further legislation.