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PROPOSAL

from:	European Commission
dated:	6 October 2008
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

Delegations will find attached a proposal from the Commission, submitted under a covering letter from to Mr Javier SOLANA, Secretary-General/High Representative.

Encl.: COM(2008) 637 final – 2008/0193 (COD)



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 3.10.2008
COM(2008) 637 final

2008/0193 (COD)

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

{SEC(2008)2595}
{SEC(2008)2596}

(presented by the Commission)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

Grounds for and objectives of the proposal

The aim of this proposal is to improve the protection offered to pregnant workers and workers who have recently given birth or are breastfeeding. In particular, the proposal extends the minimum length of maternity leave from 14 to 18 weeks. This is to help the worker to recover from the immediate effects of giving birth, while also making it easier for her to return to the labour market at the end of her maternity leave. The Directive also improves the employment rights of pregnant workers and workers who have recently given birth or are breastfeeding. The proposal will contribute to better reconciliation of professional, private and family life.

The proposal is a priority initiative¹ in the Commission's work programme for 2008² (ref. 2008/EMPL/025).

General context

In the Roadmap for equality between women and men 2006-2010³ adopted by the Commission in March 2006, the Commission committed itself to reviewing the existing EU gender equality legislation that was not included in the 2005 recasting exercise, with a view to updating, modernising and recasting texts where necessary. Directive 92/85/EEC was not included in the recasting exercise.

The March 2006 European Council stressed the need for a better balance between work and private life in order to achieve economic growth, prosperity and competitiveness, and approved the European Pact for Gender Equality. In December 2007⁴, the Council called on the Commission to evaluate the legal framework supporting reconciliation and the possible need for improvement. The March 2008 European Council reiterated that further efforts should be made to reconcile work with private and family life for both women and men.

The European Parliament has consistently called for improvements to the existing legislation relating to the protection of pregnant workers and the granting of parental leave, and for measures to improve the reconciliation of professional, private and family life. For example, in its resolution of 21 February 2008 on the demographic future of Europe⁵, Parliament called on the Member States to adopt best practices as regards the length of maternity leave and pointed out that it is possible to influence birth-rate curves favourably through coordinated public policies, by creating a family- and child-friendly material and emotional environment.

¹ The roadmap is published at:
http://ec.europa.eu/atwork/programmes/docs/clwp2008_roadmap_priority_initiatives.pdf

² COM(2007) 640.

³ COM(2006) 92.

⁴ SOC 385 Council Conclusions: Balanced roles of women and men for jobs, growth and social cohesion 2007/2156 (INI), points 14 and 15, at: [http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-](http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2008-0066+0+DOC+XML+V0//EN&language=EN)

⁵ <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2008-0066+0+DOC+XML+V0//EN&language=EN>.

In its resolution of 27 September 2007⁶, Parliament also urged the Member States to mutualise the costs of maternity and parental leave allowances in order to ensure that women no longer represent a more costly source of labour than men and welcomed the consultation procedure on reconciliation with the social partners. It also called on the Member States, in conjunction with both sides of industry, to combat discrimination against pregnant women on the labour market and to take all necessary steps to ensure a high level of protection for mothers, and asked the Commission to make a more detailed assessment of compliance with Community law in this area and to determine whether it needed to be revised.

Existing provisions in the area of the proposal

Directive 92/85/EEC (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) provides for a minimum of 14 continuous weeks' maternity leave. The Directive also lays down requirements on health and safety at the workplace to protect pregnant workers and workers who have recently given birth or are breastfeeding. A woman cannot be dismissed during maternity leave. The rights linked to the employment contract are ensured.

According to Article 2(7) of Directive 76/207/EEC⁷, a woman has the right, after maternity leave, to return to the same or an equivalent post. According to the same provision, less favourable treatment of a woman related to pregnancy or maternity leave constitutes discrimination.

Consistency with other policies and objectives of the Union

The aim of this proposal is consistent with EU policies and in particular with the Lisbon Strategy for Growth and Jobs. According to the Treaty, the Community aims to eliminate inequalities and promote equality between men and women in all its activities. Gender equality lies at the heart of the Lisbon Strategy: since the gender gap in employment rates of women with children and men with children is wide, bridging that gap is vital if the EU target for female employment rates is to be met. Reducing the gap is also crucial to achieving greater gender equality.

2. CONSULTATION OF INTERESTED PARTIES AND IMPACT ASSESSMENT

Consultation

All the consultations mentioned below were conducted on the basis of a number of options to improve legislative support for reconciliation. For the reasons explained below, the Commission's current proposal is limited to amendment of Directive 92/85/EEC.

In 2006 and 2007, the Commission consulted the European social partners on better reconciliation of professional, private and family life related to Directives 92/85/EEC and

⁶ 2007/2065(INI)) at:
<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P6-TA-2007-0423>, point 13, 28 and 29.

⁷ 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 (OJ L 39, 14.2.1976, p. 40). Directive as amended by Directive 2002/73/EC of the European Parliament and of the Council (OJ L 269, 5.10.2002, p. 15).

96/34/EC⁸ in a two-stage consultation. The Commission looked at ways in which the existing legislation on maternity protection and on parental leave could be improved and also identified new types of family-related leave (paternity leave, adoption leave, leave to care for family members). As regards other measures, the Commission highlighted childcare and care facilities for other dependants, new ways of working (including telework), and incentives for men to avail themselves of opportunities in this area.

The replies varied⁹: some of the social partners welcomed the Commission's initiative while others opposed any change to the current provisions. However, in July 2008, the European social partners notified the Commission of their intention to start the negotiation process under Article 139 of the Treaty in respect of certain family leave arrangements. At the end of the period of negotiations between the social partners (maximum nine months), the Commission will take the necessary action to give legal effect to the new agreement by means of a Directive or, if the negotiations fail, will consider whether to make its own legislative proposal.

As the social partners have confirmed that they do not intend to address maternity leave in their negotiations, the Commission considers it appropriate to bring forward this proposal now so that the social partners know, when reviewing parental leave, what the mother's entitlement would be as regards the minimum amount and conditions of the leave.

In December 2007 the Commission consulted the Member States on the same range of options which had been included in the consultation of the social partners. As regards maternity leave, some Member States were in favour of (modest) increases in the duration, some were in favour of increasing the payment and some were against any changes at EU level. Some other Member States did not reply to the questionnaire.

The Commission has also consulted European NGOs¹⁰ which are active in this area. In general they support initiatives to achieve better reconciliation.

The Advisory Committee on Equal Opportunities for Women and Men¹¹ was also consulted. The majority of members believe there is a need for further EU-level legislation to extend the length of maternity leave to 24 weeks and to increase the rate of payment to the equivalent of a full salary during this leave¹².

Finally, the Advisory Committee on Safety and Health at Work was consulted on the draft proposal.

The replies to the consultation process have been taken into account in the formulation of this proposal. Lengthening the duration of maternity leave by four weeks is a modest increase which ties in with the current situation in many Member States. A full payment ensures that women do not lose out financially when giving birth to a child.

⁸ Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC (OJ L 145, 19.6.1996, p. 4).

⁹ See under: http://ec.europa.eu/employment_social/gender_equality/legislation/new_legislation_en.html.

¹⁰ See under: http://ec.europa.eu/employment_social/gender_equality/legislation/new_legislation_en.html.

¹¹ Including members from the Member States, equality bodies, social partners and NGOs.

¹² Opinion of 3 July 2008 published at:
http://ec.europa.eu/employment_social/gender_equality/docs/2008/opinion_newforms_en.pdf.

Collection and use of expertise

In preparing this initiative, the Commission commissioned a study on costs and benefits of reconciliation measures¹³. The study came to the conclusion that amending the maternity leave provisions in the sense proposed here is a promising option because the provisions in the Member States do not differ much.

The Network of independent legal experts on gender equality has delivered a report on Pregnancy, Maternity, Parental and Paternity Rights¹⁴ in the Member States as well as a stocktaking report on national measures as to flexible working patterns¹⁵.

Impact assessment

The Commission prepared the Impact Assessment¹⁶ on the basis of the legislative options outlined in the 2007 second-stage consultative document sent to the social partners. While the Commission is currently limiting its proposal to maternity leave, the assessment of the other options may support the social partners in their negotiations, while respecting their autonomy.

The Impact Assessment Report¹⁷ sought to identify the best policy options for achieving the objectives set and improving support for reconciliation. It looked at a broad range of measures, including amendments to the existing Directives providing for family-related leave, namely Directives 92/85/EEC and 96/34/EC, and the introduction of new/other forms of leave, namely adoption leave, paternity leave and filial leave. A number of possibilities were looked at before the options were narrowed to the following: no action at EU level, dissemination of good practice, amending the maternity leave rules (Directive 92/85/EEC), amending the parental leave rules (Directive 96/34/EC), making more specific provision for adoption leave and introducing two new forms of leave, namely paternity and filial leave.

The conclusion is that failing to act would not improve the effectiveness of reconciliation measures. Non-legislative measures (for example, exchange of good practice and social partners' initiatives) will continue in any case, as will other measures to increase the employment rate of women.

Improving the entitlement to family-related leave alongside other measures notably the better provision of childcare will help women and men to achieve better reconciliation between work and private life. The starting point is an adequate maternity leave provision for the mother complemented by parental leave to be taken by either parent. The impact assessment therefore concludes that a proposal for amending the maternity leave rules (Directive 92/85/EEC) remains at this stage a very useful measure in order to improve reconciliation and can be taken into account by the social partners in their negotiations on other forms of family-related leave.

In the light of the results of the consultation process and of the study commissioned by the Commission, the option of extending the duration of maternity leave and increasing the payment was considered a proportionate way of improving the health and safety of women as

¹³ See under: http://ec.europa.eu/employment_social/gender_equality/legislation/index_en.html.

¹⁴ See under: http://ec.europa.eu/employment_social/gender_equality/legislation/bulletin_en.html.

¹⁵ http://ec.europa.eu/employment_social/gender_equality/docs/reconciliation_final_28_august_en.pdf

¹⁶ SEC (2008) 2526

¹⁷ See under: http://ec.europa.eu/employment_social/gender_equality/legislation/new_legislation_en.html.

well as allowing women to better reconcile their professional and family obligations, thereby fostering equal opportunities between women and men in the labour market.

Currently, the duration of maternity leave varies from 14 weeks in a small number of Member States to 28 weeks in other Member States, and in certain circumstances to up to 52 weeks, not all of which is paid.

Longer leave will have a positive impact on the mother's health. It will help women to recover from giving birth and to create a solid relationship with the child. Furthermore, it is easier for women to return to work when the child is older and hence it could incite women to have less recourse to parental leave. Longer leave and the strengthening of the rights of women when returning from maternity leave will also contribute to ensure equality between women and men with regard to labour market opportunities and treatment at work. Increasing the payment given during maternity leave ensures that the women concerned do not lose out financially.

From the employer's point of view, there will be greater certainty as to the length of absence of the mother, since women are expected to have less recourse to parental leave. This is especially pertinent for smaller organisations for which the impact of family-related leave is proportionally greater than for larger organisations.

The costs of this option arise from longer leave and higher compensation in those Member States where change is needed as well as from the costs of replacing the absent worker. To avoid that these costs fall unduly on businesses especially smaller ones, the Commission proposal allows Member States to cap the maternity allowance. Member States also remain free, as is the case now, to determine the share of the allowance which is financed by the state.

3. LEGAL ASPECTS

Legal basis

The proposal is based on Articles 137(2) and 141 (3) of the EC Treaty. Although Directive 92/85/EEC is based on Article 118a of the EC Treaty (now Article 137) and is an individual Directive under the framework of the Directive on Health and Safety (Directive 89/391/EEC), Article 141 EC is added to the legal base of this proposal. Maternity leave is essential for the protection of the health and safety of pregnant workers or workers who have recently given birth. The protection from dismissal or discrimination due to pregnancy or motherhood is instrumental for the protection of women's health and safety, as well as the remuneration of maternity leave. But the rules pertaining to maternity leave, its length, remuneration and the rights and obligations of women taking maternity leave or returning from it are also intrinsically linked to the application of the principle of equal opportunities and equal treatment between women and men as established in Article 141(3). Therefore the legal bases for this proposal are combined.

Subsidiarity and proportionality

The proposal aims to amend an existing Directive. Such an amendment can only be effected by another Directive.

The overall objectives of this proposal can only be achieved by a Community-wide measure, since the necessary level playing-field between the Member States for the protection of pregnant workers and workers who have recently given birth or are breastfeeding can only be

ensured by a common minimum standard. Besides protecting the health and safety of the women concerned at work, the proposal will also have a beneficial effect on these women's ability to reconcile private, family and professional obligations. The importance of policies and measures to foster better reconciliation has been recognized and emphasised by the other European institutions as well as the main stakeholders.

The proposal goes no further than necessary to ensure that the objectives are met. It is a minimum standards instrument and allows the Member States who wish to go further, to do so. The proposal does not go beyond what is absolutely necessary at EU level in order to achieve the objectives set.

Choice of instrument

Since the aim is to amend an existing Directive, a further Directive is the only legal act that can be envisaged.

In any case, Article 137(2) of the Treaty states that action by the EU legislator is to involve directives establishing minimum requirements for gradual implementation.

Correlation table

The Member States are required to communicate to the Commission the text of national provisions transposing the Directive, together with a correlation table between those provisions and the Directive.

European Economic Area

This is a text of relevance to the European Economic Area and the Directive will be applicable to the non-EU Member States of the European Economic Area, following a decision of the EEA Joint Committee.

4. BUDGETARY IMPLICATIONS

The proposal has no implications for the Community budget.

5. DETAILED EXPLANATION OF THE SPECIFIC PROVISIONS

Article 1

The proposed Directive amends the existing 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, and in particular its Articles 8 (Maternity leave), 10 (Prohibition of dismissal) and 11 (Employment rights).

Article 8 (Maternity leave) is amended so as to increase the duration of maternity leave to 18 weeks, six of which must be taken after childbirth. This corresponds to the length of leave provided for in the ILO Maternity Protection Recommendation, adopted in 2000, and is intended to generally improve the health and safety of women giving birth to a child. This

increase is designed to allow women to recover from pregnancy and childbirth, to have more time with their children, and to be able to breastfeed for a longer period. Under the current Directive the duration is 14 weeks, two weeks of which are compulsory before or after confinement.

National laws which provide for an entitlement to the mother of at least 18 weeks of leave allocated before and/or after confinement, and remunerated at least at the level provided for in this Directive, should be deemed to be maternity leave for the purposes of this Directive.

Women falling within the scope of the Directive would be able to choose freely the time at which the non-compulsory portion of the leave is taken (before or after childbirth), and would thus no longer be obliged to take a specific portion of the leave before childbirth as is presently the case in some Member States. It is for the Member States to decide on notification periods.

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, in order to guarantee that women have sufficient time to recover from giving birth and to breastfeed.

The Member States are to decide on the length of additional leave to be granted in the event of premature childbirth, children hospitalised at birth, new-born children with disabilities and multiple births. The extra time should allow women to recover from the particular stress that premature childbirth, children hospitalised at birth, the birth of children with disabilities and multiple births usually cause.

Any period of sick leave, up to four weeks before confinement, in the event of illness or complications arising out of pregnancy or childbirth shall not shorten the period of maternity leave, again in the interest of women's health.

Points 1 and 2 of Article 10 (Prohibition of dismissal) are amended: in order to take account of the case law of the European Court of Justice, it is proposed to prohibit all preparations for a possible dismissal not related to exceptional circumstances, during the maternity leave. Under the current Directive, the employer must duly substantiate the grounds for such dismissal in writing only in cases where a woman is dismissed while on maternity leave. The proposed amendment extends this duty of the employer to cases where a woman is dismissed within six months of the end of her maternity leave, if the woman requests such a written motivation. The aim of this provision is not to amend any rules on individual or collective dismissal, but only to provide, in the interest of both the business and the worker concerned, that during a certain period after the return from maternity leave, any dismissal should be duly motivated in writing if the worker so requests.

The new point 2(c) of Article 11 (Employment rights) makes it clear that following maternity leave, the woman has the right to return to the same job or to an equivalent post on terms and conditions that are no less favourable, and the right to benefit from any improvement in working conditions to which she would have been entitled during her absence. This is taken from Directive 2002/73/EC, as recast in Directive 2006/54/EC, because it is highly relevant within the context of a proposal to modify Directive 92/85/EEC.

Point 3 modifies the existing rule on the payment given during maternity leave: it provides for the principle of the payment of the full monthly salary received prior to the maternity leave. However, this is not mandatory since this payment may be subject to a ceiling, to be

determined by the Member State, provided that it is not set below the rate for sick pay. Member States may determine if the level of the payment during maternity leave corresponds to the one of the last monthly salary before maternity leave or to an average to be calculated over a certain period.

According to the case-law of the European Court of Justice¹⁸, despite the exception provided for in Article 137(5) EC, it is acceptable that EC law based on that Article regulates questions of pay 'otherwise some of the areas referred to in Article 137(1) EC would be deprived of much of their substance'.

According to new point 5 of Article 11, a worker during maternity leave or when returning from maternity leave has a right to ask her employer to adapt her working patterns and hours to the new family situation and the employer is obliged to consider such a request. However, the employer has no obligation to accept or follow-up on the request. The detailed rules on the exercise of this right are to be laid down by the Member States. This new provision is necessary to strengthen the protection of workers' health and could allow, with the consent of employers, for greater flexibility of working hours and patterns. A similar provision is included in Article 2b of the proposal to amend Directive 2003/88/EC on the organisation of working time. Should this Article be adopted, the amendment proposed here could refer to Article 2b of the proposal to amend Directive 2003/88/EC and no further change to Directive 92/85/EEC would be needed.

The provision on the burden of proof is common to most Directives on equal treatment between women and men. In judicial procedures, the general rule is that a person who alleges something must prove it. However, in equal treatment cases, it is often extremely difficult to obtain the evidence necessary to prove the case, as it is often in the hands of the respondent. This problem was recognised by the European Court of Justice¹⁹ and the Community legislator in Directive 97/80/EC²⁰, 2000/43²¹, 2000/78²², 2004/113²³ and 2004/56²⁴.

The provision on victimisation is also commonly found in equal treatment Directives. Effective legal protection must include protection against retaliation. Victims may be deterred from exercising their rights on account of the risk of retaliation, and individuals must therefore be protected from any adverse treatment where they exercise the rights conferred by the Directive.

In accordance with the case law of the Court of Justice²⁵, the provision on penalties provides that there should be no upper limit on the compensation payable in the event of a breach of the principle of equal treatment. This provision does not require criminal penalties to be introduced.

The proposal provides for the scope of the existing equality bodies established pursuant to Directive 2002/73/EC, as recast by Directive 2006/54/EC, to the issues covered by the

¹⁸ Case C/307/05, *Del Cerro Alonso*.

¹⁹ Case 109/88 *Danfoss* [1989] ECR-3199.

²⁰ OJ L 14, 20.1.1998.

²¹ OJ L 180, 19.7.2000.

²² OJ L 303, 12.12.2000.

²³ OJ L 373, 21.12.2004.

²⁴ OJ L 204, 26.7.2006.

²⁵ Cases C-180/95 *Draehmpaehl* [1997] ECR I-2195 and C-271/91 *Marshall* [1993] ECR I-4367.

Directive, where these issues pertain primarily to equal treatment and not to the worker's health and safety.

Article 2

This provision is a standard provision, which allows the Member States to provide a higher level of protection than that guaranteed by the Directive and confirms that there should be no lowering of the level of protection already afforded by the Member States when implementing it.

Article 3

This provision gives the Member States a period of two years to transpose the Directive into national law and to communicate the relevant texts to the Commission. It also requires the Commission to report to Parliament and the Council on the application of the Directive, on the basis of information from the Member States.

Article 4

This is a standard provision providing the obligation for Member States to periodically communicate to the Commission information concerning the application of the amended Directive and for the Commission to report to the Community legislator on this point and, where necessary, to join proposals to revise and update the Directive.

Article 5

This is a standard provision stipulating that the Directive is to enter into force on the day it is published in the Official Journal.

Article 6

This is a standard provision on addressees, making it clear that the Directive is addressed to the Member States.

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 EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 137(2) and 141(3) thereof,

Having regard to the proposal from the Commission²⁶,

Having regard to the opinion of the European Economic and Social Committee²⁷,

Having regard to the opinion of the Committee of the Regions²⁸,

Acting in accordance with the procedure laid down in Article 251 of the Treaty,

Whereas:

- (1) Article 137 of the Treaty provides that with a view to achieving the objectives of Article 136 of the Treaty, the Community shall support and complement the activities of Member States in improving the working conditions to protect the safety and health of workers and in ensuring equality between women and men with regard to labour market opportunities and treatment at work.
- (2) Article 141 of the Treaty provides that the Council, acting in accordance with the procedure referred to in Article 251, and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.
- (3) Since this Directive addresses not only the health and safety of workers who are pregnant, or have recently given birth or are breastfeeding, but also, inherently, issues of equal treatment, such as the right to return to the same or an equivalent working place, the rules on dismissal and employment rights, or on better financial support during the leave, Article 137 and 141 are combined to form the legal base for this Directive.

²⁶ OJ C , , p. .

²⁷ OJ C , , p. .

²⁸ OJ C , , p. .

- (4) Equality between men and women is a fundamental principle of the European Union. Articles 21 and 23 of the Charter of Fundamental Rights of the European Union prohibit any discrimination on grounds of sex and require equality between men and women to be ensured in all areas.
- (5) Under Article 2 of the Treaty establishing the European Community, promoting such equality is one of the Community's essential tasks. Similarly, under Article 3(2) of the Treaty the Community must aim to eliminate inequalities and to promote equality between men and women in all its activities.
- (6) Directive 92/85/EEC²⁹ implements measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding.
- (7) One of the six priorities laid down in the Roadmap for equality between women and men 2006-2010³⁰ is to achieve a better balance between work and private and family life. In this connection the Commission undertook to review the existing legislation in the field of gender equality with a view to modernising it, where necessary. The Commission also announced that in order to improve governance of gender equality, it would 'review the existing EU gender equality legislation not included in the 2005 recast exercise (...) with a view to updating, modernising and recasting where necessary'. Directive 92/85/EEC was not included in the recasting exercise.
- (8) In its Communication *Renewed Social Agenda: Opportunities, access and solidarity in 21st century Europe*³¹, the Commission affirmed the need to improve reconciliation of private and professional life.
- (9) The vulnerability of pregnant workers and of workers who have recently given birth or who are breastfeeding makes it necessary for them to be granted the right to maternity leave of at least 18 continuous weeks, allocated before and/or after confinement, and renders necessary the compulsory nature of maternity leave of at least six weeks allocated after confinement.
- (10) The International Labour Organization recommends a minimum duration of maternity leave of 18 weeks remunerated at the full amount of the woman's previous earnings. The ILO Maternity Protection Convention of 2000 provides for a period of six weeks' compulsory leave after childbirth.
- (11) The Court of Justice of the European Communities has consistently recognised the legitimacy, in terms of the principle of equal treatment, of protecting a woman's biological condition during and after pregnancy. It has, moreover, consistently ruled that any unfavourable treatment of women related to pregnancy or maternity constitutes direct sex discrimination.

²⁹ OJ L 348, 28.11.92

³⁰ Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions *A Roadmap for equality between women and men* - COM(2006) 92.

³¹ COM(2008) 412.

- (12) On the basis of the principle of equal treatment, the Court has also recognised the protection of employment rights of women, and in particular their right to return to the same or an equivalent job, on terms that are no less favourable, as well as to benefit from any improvement in working conditions introduced during their absence.
- (13) Women should therefore be protected from discrimination on grounds of pregnancy or maternity leave, and should have adequate means of legal protection.
- (14) This Directive is without prejudice to Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions³², as recast in 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 occupation³³.
- (15) The protection of the safety and health of pregnant workers, workers who have recently given birth or workers who are breastfeeding should be guaranteed and not run counter to the principles enshrined in the Directives concerning equal treatment for men and women.
- (16) In order to improve the effective protection of pregnant workers and workers who have recently given birth or are breast feeding, the rules on the burden of proof should be adapted where there is a prima facie case of a breach of the rights granted under this Directive. For those rights to be applied effectively, the burden of proof should fall on the respondent when evidence of such a breach is brought.
- (17) The effective implementation of the principle of equal treatment requires adequate judicial protection against victimisation.
- (18) Member States should provide for effective, proportionate and dissuasive penalties in the event of any breach of the obligations under this Directive.
- (19) Experience shows that protection against breaches of the rights guaranteed by this Directive would be strengthened by giving the equality body or bodies in each Member State competence to analyse the problems involved, to consider possible solutions and to provide practical assistance to victims. Therefore, provision should be made to this end in this Directive.
- (20) This Directive lays down minimum requirements and thus offers the Member States the option of introducing or maintaining more favourable provisions. The implementation of this Directive should not serve to justify any regression in relation to the situation prevailing in each Member State.
- (21) Since the objectives of the action to be taken, namely to improve the minimum level of protection of pregnant workers and workers who have recently given birth or are breastfeeding and to improve the effective implementation of the principle of equal

³² OJ L 269, 5.10.2002, p. 15.

³³ OJ L 204, 26.7.2006, p. 23.

treatment cannot be sufficiently achieved by the Member States in view of their diverging levels of protection, and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the EC Treaty. In accordance with the principle of proportionality as set out in that Article, this Directive does not go beyond what is necessary in order to achieve the stated objectives.

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Directive 92/85/EEC is amended as follows:

1. Article 8 is replaced by the following:

"Article 8

Maternity leave

1. Member States shall take the necessary measures to ensure that workers within the meaning of Article 2 are entitled to a continuous period of maternity leave of at least 18 weeks allocated before and/or after confinement.
2. The maternity leave stipulated in paragraph 1 shall include compulsory leave of at least six weeks after childbirth. The Member States shall take the necessary measures to ensure that workers within the meaning of Article 2 are entitled to choose freely the time at which the non-compulsory portion of the maternity leave is taken, before or after childbirth.
3. The prenatal portion of maternity leave shall be extended by any period elapsing between the presumed date and the actual date of childbirth, without the remaining portion of leave being reduced.
4. Member States shall take the necessary measures to ensure that additional leave is granted in the case of premature childbirth, children hospitalised at birth, children with disabilities and multiple births. The duration of the additional leave should be proportionate and allow the special needs of the mother and the child/children to be accommodated.
5. Member States shall ensure that any period of sick leave due to illness or complications arising out of pregnancy occurring four weeks or more before confinement does not impact on the duration of maternity leave."

2. Article 10 is replaced as follows:

"Article 10

Prohibition of dismissal

In order to guarantee that workers within the meaning of Article 2 can exercise their health and safety protection rights as recognised under this Article:

1. The Member States shall take the necessary measures to prohibit the dismissal and all preparations for a dismissal of workers within the meaning of Article 2 during the period from the beginning of their pregnancy to the end of the maternity leave provided for in Article 8(1), save in exceptional cases not connected with their condition which are permitted under national legislation and/or practice and, where applicable, provided that the competent authority has given its consent.

2. If a worker within the meaning of Article 2 is dismissed during the period referred to in point 1 the employer must cite duly substantiated grounds for her dismissal in writing. If the dismissal occurs within six months following the end of maternity leave as provided for in Article 8(1), the employer must cite duly substantiated grounds for her dismissal in writing at the request of the worker concerned.

3. The Member States shall take the necessary measures to protect workers within the meaning of Article 2 from the consequences of dismissal which is unlawful by virtue of points 1 and 2.

4. Less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Article 8 shall constitute discrimination within the meaning of Directive 2002/73/EC, as recast by Directive 2006/54/EC."

3. Article 11 is amended as follows:

(a) The following point 1a is inserted:

"1a. workers, within the meaning of Article 2, who are excluded from work by their employer who considers them not fit for work without medical indication supplied by the worker, shall, until the beginning of the maternity leave in the sense of Article 8(2), receive a payment equivalent to their full salary."

(b) In point 2, the following point (c) is added:

"(c) the right of workers within the meaning of Article 2 to return to their jobs or to equivalent posts on terms and conditions that are no less favourable to them and to benefit from any improvement in working conditions to which they would have been entitled during their absence;"

(c) Point 3 is replaced by the following:

"3. the allowance referred to in point 2(b) shall be deemed adequate if it guarantees income equivalent to the last monthly salary or an average monthly salary, subject to any ceiling laid down under national legislation. Such a ceiling may not be lower than the allowance received by workers within the meaning of Article 2 in the event

of a break in activity on grounds connected with the worker's state of health. The Member States may lay down the period over which this average monthly salary is calculated."

(d) The following point 5 is added:

"5. Member States shall take the measures necessary to ensure that workers, within the meaning of Article 2, may, during maternity leave or when returning from maternity leave, as provided for in Article 8, request changes to their working hours and patterns, and that employers shall be obliged to consider such requests, taking employers' and workers' needs into account."

4. The following Article 12a is inserted:

"Article 12a

Burden of proof

1. Member States shall take such measures as are necessary in accordance with their national judicial systems to ensure that when persons who consider that their rights under this Directive have been breached establish, before a court or other competent authority, facts from which it may be presumed that there has been such a breach, it shall be for the respondent to prove that there has been no breach of the Directive.

2. Paragraph 1 shall not prevent the Member States from introducing rules of evidence which are more favourable to plaintiffs.

3. Paragraph 1 shall not apply to criminal proceedings.

4. Member States need not apply paragraph 1 to proceedings in which the court or competent body investigates the facts of the case.

5. Paragraphs 1 to 4 shall also apply to any legal proceedings commenced according to Article 12."

5. The following Article 12b is inserted:

"Article 12b

Victimisation

Member States shall introduce into their national legal systems such measures as are necessary to protect individuals from any adverse treatment or adverse consequence resulting from a complaint they have lodged or proceedings they have initiated with the aim of enforcing compliance with the rights granted under this Directive."

6. The following Article 12c is inserted:

"Article 12c

Penalties

Member States shall lay down the rules on penalties applicable to breaches of national provisions adopted pursuant to this Directive, and shall take all measures necessary to ensure that they are applied. Penalties may comprise payment of compensation, which may not be limited by the fixing of a prior upper limit, and must be effective, proportionate and dissuasive."

7. The following Article 12d is inserted:

"Article 12d

Equality body

Member States shall ensure that the body or bodies designated under Article 20 of Directive 2002/73/EC as recast by Directive 2006/54/EC for the promotion, analysis, monitoring and support of equal treatment of all persons without discrimination on grounds of sex shall be competent in addition for issues falling within the scope of this Directive, where these issues pertain primarily to equal treatment and not to the worker's health and safety."

Article 2

1. Member States may introduce or maintain provisions which are more favourable to workers than those laid down in this Directive.
2. Implementation of this Directive shall under no circumstances constitute grounds for reducing the level of protection in the fields covered by this Directive.

Article 3

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by at the latest [two years after adoption]. They shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.
2. The measures thus adopted by the Member States shall contain a reference to this Directive or be accompanied by such reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

Article 4

1. Member States and national equality bodies shall communicate to the Commission, by [five years after adoption] at the latest and every five years thereafter, all the information necessary for the Commission to draw up a report to the European Parliament and the Council on the application of Directive 92/85/EEC as amended by this Directive.
2. The Commission's report shall take account, as appropriate, of the viewpoints of the social partners and relevant non-governmental organisations. In accordance with the principle of gender mainstreaming, the report shall *inter alia* provide an assessment of the impact on women and men of the measures taken. In the light of the information received, the report

shall, where necessary, include proposals to revise and update Directive 92/85/EEC as amended by this Directive.

Article 5

This Directive shall enter into force on the day of its publication in the Official Journal of the European Union.

Article 6

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament For the Council

The President

The President