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*Committee on Legal Affairs
The Chair*

29.1.2010

Ms Eva-Britt Svensson
Chair
Committee on Women's Rights and Gender Equality
BRUSSELS

Subject: Opinion on the legal basis of the 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 (COM(2008)0637 – C6-0340/2008– 2008/0193(COD))

Dear Ms Svensson,

By letter of 12 January 2010 you asked the Committee on Legal Affairs pursuant to Rule 37(2) to consider whether the legal basis of the above Commission proposal was appropriate.

The committee considered the above question at its meeting of 28 January 2010.

The legal basis proposed by the Commission for the proposed directive is Article 137(2) EC combined with Article 141(3). Following the entry into force of the Lisbon Treaty, that legal basis becomes Article 153(2) and Article 157(3) TFEU.

Certain members of the lead committee have tabled amendments deleting the reference in the preamble to the proposed directive to Article 157(3). Accordingly, the question is whether the proposed directive may be based on Article 153 alone.

From the procedural point of view, the combination of the two articles does not raise any problems, since the ordinary legislative procedure applies in each case. The fact that Article

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153(2) requires both the Economic and Social Committee and the Committee of the Regions to be consulted whereas Article 157 requires only consultation of the former committee is not a problem.

I. The relevant articles of the TFEU

Article 157

1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.

2. For the purpose of this Article, 'pay' means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.

Equal pay without discrimination based on sex means:

(a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;

(b) that pay for work at time rates shall be the same for the same job.

3. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, 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, including the principle of equal pay for equal work or work of equal value.

4. ...

Article 153

1. With a view to achieving the objectives of Article 151, the Union shall support and complement the activities of the Member States in the following fields:

(a) improvement in particular of the working environment to protect workers' health and safety;

(b) working conditions;

(c) social security and social protection of workers;

(d) protection of workers where their employment contract is terminated;

(e) the information and consultation of workers;

(f) representation and collective defence of the interests of workers and employers, including codetermination, subject to paragraph 5;

(g) conditions of employment for third-country nationals legally residing in Union territory;

(h) the integration of persons excluded from the labour market, without prejudice to Article 166;

(i) equality between men and women with regard to labour market opportunities and treatment at work;

(j) the combating of social exclusion;

(k) the modernisation of social protection systems without prejudice to point (c).

2. To this end, the European Parliament and the Council:

(a)

(b) may adopt, in the fields referred to in paragraph 1(a) to (i), by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States. Such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings.

The European Parliament and the Council shall act in accordance with the ordinary legislative procedure after consulting the Economic and Social Committee and the Committee of the Regions.

.....

3. ...

II. Choice of legal basis by the Commission

It is noted that the Commission justifies its recourse to a dual legal basis in the following terms: *The proposal is based on Articles 153(2) and 157(3) of the TFEU. Although Directive 92/85/EEC is based on ... [what is now Article 153 TFEU] and is an individual Directive under the framework of the Directive on Health and Safety (Directive 89/391/EEC), Article 157 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 157(3). Therefore the legal bases for this proposal are combined¹.*

¹ The Treaty references have been updated to take account of the entry into force of the Lisbon Treaty.

III. Analysis

The proposal for a directive under consideration seeks to amend an earlier directive (98/85/EEC), which was based on Article 118a, the precursor of the Article 153 TFEU. At that time the question of equality as between men and women was not present in Article 118a but tackled in Article 119, where, however, it was dealt with only in terms of equal treatment from the point of view of pay.

Since the Treaty of Amsterdam, equality as between men and women has found its place in the Treaties. On the one hand, it is now set out as a general principle in the second subparagraph of Article 3(3) TEU, which provides that the Union “*shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between men and women, solidarity between generations and protection of the rights of the child*”. This is reinforced by Article 8 TFEU: “*In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women*”. The principle finds expression in the field of social policy in Articles 153(1)(i) (“*equality between men and women with regard to labour market opportunities and treatment at work*”) and 157, in particular paragraph 3 (adoption of measures to “*ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value*”).

In the proposal for a directive, the Commission has added to the original legal basis of what is now Article 153 TFEU, dealing *inter alia* with workers’ health and safety and equality between men and women with regard to treatment at work, Article 157(3), which relates specifically to equal treatment of men and women in matters of employment and occupation. Consequently, the Commission seeks to show that the proposed directive concerns, not only the health and safety at work of pregnant workers and workers who have recently given birth or are breastfeeding, as mentioned in the title, but also the rules pertaining to maternity leave, its length, remuneration and the rights and obligations of women taking maternity leave or returning from it, which in its view are also intrinsically linked to the application of the principle of equal opportunities and equal treatment between women and men as established in Article 157(3). This is reflected in recital 2 of the proposed directive, which justifies the additional legal basis in the following terms: “*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 153 and 157 are combined to form the legal base for this Directive*”.

The relevant amendments tabled in the Committee on Women’s Rights and Gender equality are justified as follows:

“Directive 92/85/EEC is concerned – given the biological condition of women during and after pregnancy and in the light of established ECJ case law – with improving legal provisions to protect the health at work of pregnant workers and workers who have recently given birth or are breastfeeding. No one other than a working mother can take leave to give birth. This directive does not thus affect the issues of equal opportunities and equal treatment in matters of employment and occupation or of achieving a balance between work and private and family life. Article [157] should not be cited” (Amendments 74 and 77, Anna Záborská).

“Le choix de la base juridique fondée sur l'article [157] du Traité ... pose problème. La directive de 1992 était fondée sur l'article [153] du Traité CE relatif à la protection de la santé et de la sécurité des travailleurs. L'article [157] concerne le principe de l'égalité de traitement et de l'égalité des chances entre hommes et femmes. Or ajouter cette base juridique justifie l'extension du champ d'application de la directive au-delà du congé maternité (et notamment au congé parental, de paternité, d'adoption, etc.) et réduit les questions relatives au congé maternité à un strict respect du principe d'égalité hommes-femmes” (Amendments 75 and 78, Philippe Juvin).

Two questions arise with regard to these arguments. First, it is necessary to determine whether or not there exists a direct link between the notion of equality as between men and women and the object of the directive.

If this question is answered in the affirmative, it will then be necessary to determine whether it is appropriate to add Article 157(3) to Article 153(2) given that the question of equality as between men and women as regards employment and work is present in both those articles.

Is there a link between the object of the directive and the question of equality as between men and women?

The directive in question is intended to protect women workers when they are pregnant, have recently given birth or are breastfeeding. Since, in the nature of things, those situations are peculiar to female biology, the directive concerns only women or contains provisions solely intended for women. At first glance, the argument that the directive does not deal with questions of male/female equality seems tenable, but this is not the case.

According to the case-law, the choice of legal basis for a measure *"may not depend simply on an institution's conviction"*¹ but *"must be based on objective factors which are amenable to judicial review Those factors include in particular the aim and content of the measure"*². Indeed, having regard to a large range of evidence found both in the directive itself and in its general context, it is manifestly clear that the directive is profoundly linked to the question of male/female equality. To hold the contrary would make no sense and would amount to a misunderstanding of the sense and aim of the proposed directive.

1. Definitions and general framework

It seems that the misunderstanding is rooted in the notion of equality. Article 157(3) provides for the adoption of measures *"to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation"*. The very formulation of that article indicates that equality may assume several forms. In this case, it is a question of equality of treatment and equality of opportunity. Men and women must not only be treated equally, they must also be afforded the same opportunities, or not be disadvantaged or have lesser or greater opportunities on account of the fact that they belong to a particular sex.

¹ Case 45/86 *Commission v. Council ("Generalised Tariff Preferences")* [1987] ECR 1493, at para. 11.

² Case C-300/89 *Commission v. Council ("Titanium Dioxide")* [1991] ECR I-2867, at para. 10.

The concept of equality is therefore closely connected to that of discrimination or, rather, of non-discrimination. In an article entitled *La notion de discrimination dans le droit français et le droit européen*, Daniel Lochak provides an interesting definition of the neighbouring but yet different notions of inequality and discrimination. He states in the first place that the two notions are indissociable in so far as the question of discrimination is to be seen in the broader context of the will to combat discrimination¹. He argues that inequality is a “fact situation” resulting either from factors inherent to individuals or to external factors. For its part, discrimination is related to an “act of another” and is the “doing of an agent”. In this case, by protecting a specific category, namely women who are pregnant, have just given birth or are breastfeeding, the directive prevents the emergence of discriminatory conduct by making it possible for women not to suffer a disadvantage on account of their biological condition.

The Court of Justice defines discrimination as “*the application of different rules to comparable situations or the application of the same rule to different situations*”². On the basis of that same definition, the Court found against the general ban in France on night work for women on the ground that men and women were in the same situation as regards the potential detrimental consequences of night work. As a result, having regard to the principle of equality, women could not be dispensed from night working on the sole ground of their sex. On the other hand, the Court held that the ban was valid in the case of pregnant or breastfeeding workers since, during that time, those women were in a situation different from that of their male colleagues.

On that reasoning, owing to their biological situation, women when they are pregnant, have recently given birth or are breastfeeding are in a different situation from that of men. Consequently, it can be seen that it is the application of similar rules to different situations that is discriminatory, whilst the application of rules specific to women at those times is justified by the fact that they are in a different situation from that of men. Far from causing it to be remote from the principle of equality, the fact that the directive concerns only women testifies to the fact that it applies the principle of equality in so far as it enables women, thanks to its specific rules, not to be disadvantaged on account of their specific situation. The directive is a response to discrimination and to the *de facto* inequality springing from the biological condition of women workers, as compared with men. By specifically protecting women who are pregnant, have recently given birth or are breastfeeding, the directive seeks to enable women to receive treatment equal to that of men and to be afforded more genuine equality of opportunities.

Whilst inequality is akin to a fact situation, equality may correspond to a *de facto* or a *de jure* situation, that is to say to substantive or formal equality. The argument that there is no link between the directive and male/female equality is based on the concept of formal equality. According to that argument, a measure is taken by virtue of male/female equality only where it imposes the same conduct toward both sexes or prohibits the adoption of different conduct on account of the sex of the person concerned. Paragraph 1 of Article 157 falls into this

¹ D, Lochak, “La notion de discrimination dans le droit français et le droit européen” in *Egalité des sexes : la discrimination positive en question*, p. 40.

² Case C-342/93 *Gillespie and Others v. Northern Health and Social Services Boards* [1996] ECR I-475, para. 16; Case C-394/96 *Brown v. Rentokil Ltd* [1998] ECR I-4185, para. 30.

category by laying down the principle of “*equal pay for male and female workers*”. Today, there are numerous provisions laying down the principle of formal equality between men and women and prohibiting, in particular in the sphere of employment and work, any form of discrimination on the basis of sex.

However, the statistics clearly show that whilst legal equality has been plainly prescribed, there exists flagrant inequality between men and women, as regards employment, treatment and pay. Equality between men and women at work has therefore far from been attained. It is for this reason that both national and European policies have been observed to shift towards seeking, not only formal equality, but also real, substantive equality. Some have observed that, as a result, there has been a shift from equal treatment to equal opportunities, from a principle of strict equality to the promotion of positive actions. That need was set out in General Recommendation No 25, on Article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures:

“[A] purely formal legal or programmatic approach is not sufficient to achieve women’s de facto equality with men, ... substantive equality. In addition, the Convention requires that women be given an equal start and that they be empowered by an enabling environment to achieve equality of results. It is not enough to guarantee women treatment that is identical to that of men. Rather, biological as well as socially and culturally constructed differences between women and men must be taken into account. Under certain circumstances, non-identical treatment of women and men will be required in order to address such differences.”¹

It is in this context of social policy that the rules laid down by the directive have to be understood as protecting women who are pregnant, have just given birth or are breastfeeding. Admittedly, the directive contains rules which, by their nature, are applicable only to women, but those rules satisfy a imperative, on the one hand, of non-discrimination and, on the other, of achieving substantive equality, while also helping to protect the health and safety of the women workers concerned.

2. Evidence from the content of the directive

(a) From the recitals

The recitals clearly indicate that the adoption of the directive is to be seen in the context of the protection of women who are pregnant, have just given birth or are breastfeeding against any discrimination linked to their condition and seeks in this way to help to achieve the principle of male and female equality in the sphere of employment and work.

In this way, recital 3 states that the directive addresses “*inherently, issues of equal treatment*”. Recitals 4 and 5 point out that equality between men and women is a fundamental principle which has to guide and permeate the actions of the EU. Recital 7 includes the directive in the category of legislation on “*gender equality*”. As for recitals 11 to 17, they refer to the case-law of the Court of Justice on the protection of pregnant women against discrimination pursuant to the principle of equality of treatment. Having regard to the recitals

¹ UN Committee on the Elimination of Discrimination against Women (CEDAW), General Recommendation No 25 - thirtieth session, 2004 Article 4 paragraph 1 - Temporary special measures.

as a whole, it is certain from the point of view of their content that they demonstrate that the directive is directly connected with the promotion of sex equality at work.

(b) From the enacting terms

Since the proposal for a directive under consideration is intended to amend an existing directive, this analysis should take account not only of the articles added or amended but also of such articles of Directive 92/85/EEC as will remain in application.

Some of the articles are directly connected to workers' health and safety. This is the case of Articles 3 to 8. These are concerned with the assessment of hazardous chemical, physical and biological agents (Art. 3), the obligation to assess risks and provide information about them (Art. 4), action further to assessment (Arts 5 and 6), the ban on night work (Art. 7) and maternity leave (Art. 8).

On the other hand, the following articles relate directly to the protection of women against discrimination resulting from their status as women who are pregnant, have recently given birth or are breastfeeding. Accordingly, Article 9 protects women workers against loss of pay when they take time off for ante-natal examinations, Article 10 prohibits dismissal during pregnancy and maternity leave, Article 11 guarantees the worker her rights and advantages flowing from her contract of employment and Article 12 deals with the defence of the rights described above.

This specific analysis of the content of the enacting terms suggests that the directive has in fact a dual aim, that of protecting the health and safety of women workers and of guaranteeing them equal treatment.

(3) Evidence from the documents not forming part of the directive

All the documents accompanying the proposal for a directive include it wholeheartedly amongst measures for promoting male/female equality at work.

(a) Explanatory statement

In order to justify the adoption of the new directive, the Commission takes care to call to mind its context, namely Union action designed to reconcile work and private and family life, equal opportunities of men and women on the employment market and combating discrimination suffered by pregnant women as regards employment and work. In this connection, it lists the various instruments existing in this area, such as the Roadmap for equality between women and men 2006-2010, and a number of resolutions of the European Parliament. Mention is also made of the fact that the Advisory Committee on Equal Opportunities for Women and Men was consulted.

(b) Impact assessment

The impact assessment provides us with interesting details of the type of equality targeted by the range of measures contained in the proposal for a directive. It indicates that:

"the objectives of any action would be to achieve more gender equality in labour market participation rates and a better reconciliation of professional, private and family lives."

This statement conflicts directly with the justification for the various amendments tabled to the effect that *"This directive does not thus affect the issues of equal opportunities and equal treatment in matters of employment and occupation or of achieving a balance between work and private and family life."*

The measures designed to protect women when they are pregnant, have recently given birth or are breastfeeding are directly concerned with reconciling work with family and private life. Those measures allow a woman to choose to occupy herself with her family life without her working life suffering. Logically and formally, it may be said that this question also concerns men; however, statistics show that the development of a family life disadvantages men much less in their professional lives, since women assume a significantly greater part of the responsibility for family life. The impact assessment quotes in this connection a Commission communication concerned with countering the pay gap between women and men:

*"Parenthood permanently reduces the employment rate of women but not that of men. As a result women have careers which are more disjointed, slower and shorter and thus less financially regarding."*¹

Consequently, in order to establish male/female equality at work and equality of opportunities in careers, measures to promote reconciliation of professional and family life – even if some of them are addressed only to women – directly assist in creating a substantive equality, which has not yet been achieved.

The measures set out in the proposal for a directive will therefore help, according to the impact assessment, to produce equality of the sexes as regards their rate of participation in the employment market. Indeed, it is argued that lengthening maternity leave may secure women greater stability in the job which they held before pregnancy². Thus the impact assessment predicts that a four-week increase in maternity leave may result in women being obliged less often to prolong their absence by taking parental leave. The grant of those additional weeks will enable mother and child to create a stronger bond while also enabling the mother more readily to make child-care arrangements. The impact assessment states in this regard that *"a longer maternity leave period could be a helpful way to bridge the time before childcare is available"*³.

Lastly, the provision of the proposal for a directive which will enable the worker to ask her employer to make changes to her working hours and patterns⁴ following her maternity leave should enable women to go back to full-time work and avoid being obliged to work part

¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 18 July 2007 entitled "Tackling the pay gap between women and men" (COM(2007) 424 final), point 2-1.

² Impact assessment report - SEC(2008) 2596, p. 31. See also p. 34.

³ Impact assessment report - SEC(2008) 2596, p.35

⁴ Article 11(5) (added by the proposal for a directive).

time¹. The employer is not obliged to grant the worker's request, but it has been found that this type of provision – currently in force in the United Kingdom – has had a positive impact on keeping women in the job which they had before their child was born.²

3. Conclusion of the analysis

The analysis of both the proposal for a directive and the accompanying documents clearly identifies the link between the proposed directive and the principle of equality between men and women. Whilst that link exists, it remains nonetheless that it may seem hard to classify the directive on the protection of women who are pregnant, have recently given birth or are breastfeeding. This is because in substance it does not lay down measures applying both to men and women, but only to the latter. On the other hand, it is not in the nature of a positive measure of the kind authorised by Article 157(4) TFEU. Positive measures enable specific measures to be taken to assist the under-represented sex in enjoying effective equality. However, such measures are temporary in nature and must cease to be when equality is attained. But equality between men and women with regard to pregnancy will never be attained since the biological condition of women puts them in a different situation than men. Some commentators classify such protective measures as exceptions to the principle of equality, but it seems more correct to describe them as measures enabling effective equality to be achieved between men and women in so far as they prevent discrimination against women (through the ban on dismissal, etc) and enable women through the obligations they impose (right to return to their job and to benefit by all the advantages linked to their contract of employment) to benefit *de facto* from equal treatment and not to suffer the disadvantage of their condition as women, while granting them rights related to their specific needs (maternity leave). This is more correct because it emerges from the case-law of the Court of Justice in its interpretation of Article 2(3) of Directive 76/207³, which provides as follows:

"3. This Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity."

In its judgment in *Hoffmann*⁴ and as consistently held thereafter⁵, the Court indicated, with particular reference to that provision, that it recognised *"the legitimacy, in terms of the principle of equal treatment, of protecting a woman's needs in two respects. First, it is legitimate to ensure the protection of a woman's biological condition during pregnancy and thereafter until such time as her physiological and mental functions have returned to normal after childbirth; secondly, it is legitimate to protect the special relationship between a woman and her child over the period which follows pregnancy and childbirth."*⁶

By indicating that that protection of women is legitimate *"in terms of the principle of equal treatment"*, the Court undeniably locates the proposal for a directive under consideration in

¹ Most part-time workers are women.

² Impact assessment report - SEC(2008) 2596, p.33

³ 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 1976 L 39, p. 40.

⁴ Case 184/83 *Hofmann v. Barmer Ersatzkasse* [1984] ECR 3047.

⁵ See, for example, Case C-32/93 *Webb v. EMO Air Cargo* [1994] ECR I-3567.

⁶ *Hofmann*, para. 25.

the context of the principle of equality, from which it cannot - unlike the authors of the amendments suggest - be dissociated.

IV. Since Article 153(2)(b) already provides for the promotion of male/female equality, is the addition of Article 157(3) necessary?

Ever since the entry into force of the Treaty of Amsterdam, equal treatment in the field of social policy has appeared in two articles: what are now Article 153(1)(i) and Article 157(3) TFEU, which mention, respectively, "*equality between men and women with regard to labour market opportunities and treatment at work*" and "*the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value*". Although those articles are similar in content, it is generally considered that Article 157 deals with the question of equality specifically and more fully - from the question of equal pay (paras 1 and 2) to the legality of positive actions in favour of the underrepresented sex with a view to "*ensuring full equality*" (para. 4). For its part, Article 153 establishes a catalogue of fields in which the Union has competence to act.

V. Conclusion

In the light of the foregoing, it is considered that there is every justification for maintaining the two legal bases of Article 153 and 157(3).

At its meeting of 28 January 2010 the Committee on Legal Affairs accordingly decided, unanimously, by 21 votes in favour with no abstentions¹, to recommend to you as follows: the 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 should be based on the dual legal basis of Article 153 and 157(3) of the Treaty on the functioning of the European Union.

Yours sincerely,

Klaus-Heiner Lehne

¹ The following were present for the final vote: Klaus-Heiner Lehne (Chair), Raffaele Baldassarre (Vice-Chair), Sebastian Valentin Bodu (Vice-Chair), Evelyn Regner (Vice-Chair), Marielle Gallo, Lidia Joanna Geringer de Oedenberg, Antonio Masip Hidalgo, Bernhard Rapkay, Alexandra Thein, Diana Wallis, Cecilia Wikström, Christian Engström, Zbigniew Ziobro, Jiří Maštálka, Francesco Enrico Speroni, Piotr Borys, Vytautas Landsbergis, Kurt Lechner, Arlene McCarthy, Eva Lichtenberger, Sajjad Karim.