SPECIAL REPORT

TUTB OBSERVATORY
PREGNANT WORKERS

The transposition of Directive 92/85/EEC on the safety and the health of pregnant workers, and workers who have recently given birth or are breastfeeding (I)

Community Health at Work Directives refer to "workers" of unspecified gender. This omission fails to take account of how centrally important the gender division of labour is to the health of men and women workers. In most national laws, a workers' body is recognized as female only in relation to reproductive functions which seem to be regarded as purely and peculiarly female. This is why the Community has no Scandinavian-style laws on reproductive risks, but instead a Directive on pregnant workers, and workers who have recently given birth or are breastfeeding.

This article looks only at selected aspects of the national laws transposing the Directive[1]. ***Aspects not dealt with here will be addressed in a future issue****. Existing regulations in most Community countries were ahead of the Directive in many respects. The information in this article is from a survey carried out by the TUTB between December 1996 and April 1997, and was collated with the assistance of Barbara Costa of the University of Messina, a trainee in the TUTB.*

Scope

The Directive excludes workers in domestic service. Is this because the Community considers that women's bodies are by nature so suited to domestic work that it cannot constitute a risk factor during pregnancy?

It is difficult to say precisely how far the scope of national transpositions square with the Directive's minimum requirements because many countries have split the Directive's provisions and transposed them in separate instruments. In the United Kingdom, for instance, the risk assessment provisions apply to all employed women workers (except those in domestic service), while the rules concerning protection against dismissal and paid protective leave exclude subcontracted workers and those with contracts of service. The Italian situation is even more of a muddle. The 1971 Act, which remains in force, nominally covers all women workers, but excludes domestic employees and home workers from many provisions. The 1994 legislative decree transposing the Framework Directive excludes domestic employees and home workers from most of its provisions. The 1996 legislative decree which transposes aspects of the Community Directive not covered by the previous legislation fails to define a "worker", and applies only to pregnant workers, and workers who have recently given birth or are breastfeeding who have notified their employer of their condition, and so will clearly fall within the restrictive scope of the 1994 legislative decree. Some national transposing legislation covers domestic employees (Austria, Germany).

The main benefits of the Directive are to extend various rights to women workers who fell entirely or partially outside previous national legislation either because they were in non-

standard employment (the United Kingdom being the most striking case) or because they were public servants (Belgium, as regards paid protective leave).

Definitions and formalities

There is, however, an ambiguity which could restrict the effective scope of the Directive. Article 2 contains three definitions: pregnant workers, workers who have recently given birth, and workers who are breastfeeding. While the first is a purely biological fact, the other two are to be interpreted in accordance with national legislation, which may define them more or less liberally. So what exactly does the concept of a worker who is breastfeeding cover? What is the period during which a worker can be regarded as breastfeeding? or as having recently given birth? The latter varies widely between six weeks (Finland) and six months (the United Kingdom). The Italian instrument does not expressly define either but limits the scope of the Directive to a period of seven months following the birth, which is an indirect definition of the period during which a worker is regarded as having recently given birth or breastfeeding.

But the main uncertainty stems from the fact that all these definitions include an obligation to inform the employer of her condition in accordance with national legislation and/or practices. Virtually all the employers' obligations (except for article 4.2 - information about the risk assessment - see below) refer to these definitions. But it is clear that a relatively long period may elapse between the beginning of the worker's pregnancy and the moment when the employer is informed (which may include an obligation to produce a medical certificate), during which there is a real need for preventive measures. This period may well not be covered by the Directive's provisions. A worker may be pregnant unbeknown to herself, just as she may know herself to be pregnant but not wish to inform her employer of the fact immediately (for example, if she is considering a termination or awaiting the renewal of her contract, etc.). The obligation to inform makes sense only in relation to the application of personal rights. It is hard to see how a worker could avail herself of maternity leave, an adjustment of working conditions or protective leave without informing the employer of her pregnancy. But there is equally no reason why the employer's obligation to ensure collective prevention by eliminating risks, assessing working conditions, providing information, etc, should be subject to receiving notice of pregnancy. This is not a purely academic issue. It is in the very real interests of many women in non-standard employment who wish to keep their jobs not to inform the employer at the very start of their pregnancy.

By sticking too closely to the Directive's own wording, some transposing legislation has introduced ambiguities which undermine existing protection. This seems to be the case with Belgium, where no preventive measures need be taken until the worker has informed her employer of her condition, while in Austria, the fact that the employer knows of a worker's pregnancy may be taken as constructive notice of it.

Risk assessment

Risk assessment is central to the Directive, which lays down no specific preventive measures but simply gives a non-exhaustive statement of risk factors which must be taken into account when deciding on preventive measures. Unfortunately, the Directive is very unclear on how the risk assessment is to be conducted. Article 4.1 could be interpreted restrictively to mean that a risk assessment need be carried out only where the company employs pregnant, recently confined or breastfeeding workers who have informed the employer of their condition, and it

relates only to the jobs performed by these workers. But article 4.2 runs counter to such a narrow construction in providing that information on the risk assessment must be provided not only to the workers referred to in article 4.1 and/or their representatives, but also workers **likely** to be in one of the situations covered by the Directive (i.e. likely to be pregnant, have recently given birth, etc.). Obviously, that information cannot be provided unless a risk assessment has been carried out. We would argue, therefore, that the risk assessment must cover all the jobs on which women are or are likely to be employed because the great majority of women of working age are likely to become pregnant and, in any event, it would be discriminatory and a violation of privacy to allow employers to check whether the workers they employ are "likely" to be pregnant. This interpretation is consistent with the reference in article 5 to the Framework Directive's hierarchy of preventive measures. If the emphasis is to be on eliminating risks at source and favouring permanent collective measures over provisional personal ones, it is hard to see how a risk assessment carried out after a worker has informed her employer of her pregnancy contributes to an effective prevention policy.

This initial ambiguity over the time and purpose of the risk assessment is compounded by uncertainty about the assessment criteria. The Directive is about the health and safety of pregnant workers, and workers who have recently given birth or are breastfeeding. But the non-exhaustive list of agents, processes and working conditions annexed to it mentions only physical agents likely to endanger the unborn child. But experience shows that some work situations which may not necessarily endanger the unborn child may still damage the worker's health in the short or long term (i.e. after the period during which the worker's "reproductive" functions are protected). There is, for instance, an observable correlation between working standing while pregnant and the development of varicose veins.

It is the Commission's job to draw up guidelines on risk assessment. It would have been more logical to do so before the Directive came into force (October 1994), particularly as the list in the Directive's Annex is described as "non-exhaustive". Community guidelines adopted well beforehand would have helped the Member States to adopt common approaches on national transposition. Italy's plans to transpose and supplement the Community guidelines by specific regulations are being held up - this time - because of the Community institutions' delay. At the time of writing (June 1997), the debate in the Luxembourg Advisory Committee is just getting under way, so it is unlikely that the guidelines will be adopted before year-end.

In some countries, a pregnancy risk assessment must be carried out immediately a woman is employed in the firm. Austrian legislation contains the clearest statement of this obligation, but a similar approach is found in Denmark, Finland, Ireland and Sweden. In the Scandinavian countries, this obligation also reflects the focus on prevention at source and the desire to mainstream all reproductive health hazards into an overall solution. So, Finland, has a longer list of agents that are reproductive health hazards than the Annex to the Directive, plus a list of agents that are dangerous during pregnancy, both largely based on co-operative research between the Nordic countries.

The United Kingdom regulations provide that a specific risk assessment must be carried out where women of reproductive age are employed and the work may constitute a risk related to the condition of women who are pregnant, breastfeeding or have recently given birth. The British regulations distinguish between general measures resulting from the risk assessment and individual measures to be taken only after the employer has been informed about the condition of the workers concerned. The Irish guide drawn up by the factory inspectorate

expressly states that the general risk assessment under the Framework Directive must in all cases cover the risks related to pregnancy, and that once an employer is informed of a pregnancy he must carry out a fresh assessment which takes account of the actual situation of the worker concerned and determines the measures to take. The British and Irish guides are virtually identical and essentially re-enact Annex I. Where the British and Irish regulations differ, however, is on worker information: in the United Kingdom it is merely recommended; in Ireland, it is compulsory.

Risk assessment is most narrowly construed in the French regulations, which simply transpose the prohibitions and risk assessment aspects of the Directive. A specific risk assessment is required only for the Annex II biological agents (toxoplasma and rubella virus), simply to check whether the worker has immunity to them. This obligation was added to the different risk assessment measures provided for by the transposition of the Community Biological Agents Directive. In so doing, the French legislation circumvents all the Annex I working conditions (which, despite its limits, is wider than Annex II). The French authorities justify their failure to transpose the risk assessment provisions of the Directive on the grounds that the Framework Directive requires all employers to carry out a general risk assessment. This argument might be admissible if one criterion of the general assessment were that all jobs must be appropriate to pregnant women at all times. Such is not the case. Neither the legislation nor the official general risk assessment guidance notes require it. One of our correspondents, Mr. Philippe Martin of Bordeaux University, sees an evident confusion in the French transposition between the risk assessment of working conditions, and the individual medical supervision intended to certify the workers' aptitude. In fact, pregnant workers and mothers with children under two years old are subject to the same specific medical supervision as disabled workers and young workers under the age of eighteen (a very telling comparison!). The Spanish transposition was laconic to say the least; it does not even offer employers the guidance of the few conditions contained in the Directive's Annexes to target their risk assessments.

Preventive measures

Article 5 of the Directive ranks the measures to be taken. The first requirement is to comply with the ranked list of prevention measures in article 6 of the Framework Directive (elimination of risks and prevention at source are the priority), followed by temporary adjustments to the working conditions. If this is not technically and/or objectively feasible, the employer must move the worker to another job. If moving her to another job is not technically and/or objectively feasible, the worker must be granted leave for the whole of the period necessary to protect her health. The Directive offers no criteria for judging what is not objectively feasible. Are cost grounds alone enough to exempt an employer from taking measures?

Few national transposing instruments have anything to say on this. Most transcribe the Directive's provisions practically verbatim. Some States, however, (Austria, Spain, United Kingdom) have linked the maternity protection measures more explicitly to the general prevention requirements under the Framework Directive. This should increase the legal certainty of employers complying with the ranking of preventive measures which makes permanent elimination of risks the top priority. Considerable doubt remains about the United Kingdom, however. Whereas provisions deriving under the Framework Directive are generally qualified by a *"reasonably practicable"* clause - which in itself seems to conflict Community law - the prevention obligations arising out of the Maternity Directive are subjected to the

even more uncertain requirement that the employer must only act *"if it is reasonable"*. This leaves him considerable latitude.

Prohibited or non-compulsory activities?

Under the heading "*cases in which exposure is prohibited"*, the Directive provides that pregnant workers *"may under no circumstances be obliged to perform duties for which the assessment has revealed a risk of exposure"* to some of the hazards listed in Annex II, Section A. This short list is described as non-exhaustive. This qualification reveals the unease of the Community legislators in that it has legal import only to the extent that Article 118A clearly always allows more stringent protective measures to be taken - including by an extension of the listed hazard factors. The list is limited to work in hyperbaric atmospheres, with two biological agents (toxoplasma and rubella virus), with lead and lead derivatives and underground mining work. Only the latter two factors apply to workers who are breastfeeding. There is a difference between the title of the Article (*"cases in which exposure is prohibited"*) and the content, which is actually a prohibition on obliging the worker to be exposed. This reflects the very acrimonious dispute which surrounded the drafting of the Directive between those who favoured banning certain activities, and those who feared that such prohibitions might encourage discrimination against women. Article 7 on night work is couched in fairly similar terms to article 6.

The Member States fall into two camps according to whether they prohibit various activities or allow the worker to take leave - generally after a risk assessment and possibly with a medical certificate - in certain circumstances. Whatever option is chosen, however, almost all countries found the Annex II, A list far too short, and national regulations take many other factors into account.

Austria, Belgium, France, Italy, Luxembourg, Portugal and Switzerland have all opted for prohibitions, while Denmark, Finland, Norway, the United Kingdom and Sweden have chosen to make leave subject to a specific risk assessment. In the latter group, however, there is an almost universal ban on work which entails exposure to ionizing radiation. Spain is a case apart. Act 31/1995 transposed the Directive only very incompletely, and the question of prohibited work or work that workers can refuse was not considered. On the other hand, it does re-enact specific prohibitions from previous regulations (in particular, ionizing radiation, lead, tobacco, etc.). The Spanish legislation corresponds barely at all with the Directive's conditions. Ireland falls somewhere in between: its regulation provides that where Annex II, A risks are present, the onus is on the employer to prove that the conditions in question are without danger to the worker or the unborn child. Failing any such assessment, the worker may not continue to work in those conditions. Norway does not make a change of job dependent on a medical assessment, but provides that even if the working conditions are not considered medically dangerous but that they cause the worker to fear for the possible consequences on her pregnancy, a change of job is justified.

A much wider range of working conditions which are prohibited or grounds for leave are provided than in the Directive, but there is no room in this Article to detail them all. Austria and Luxembourg have also included work organization criteria by prohibiting all piecework or performance-related activity.

Night work

A number of countries prohibit night work by pregnant women and those who have recently given birth, in some cases subject to exceptions. This is the case with Germany (complete ban on women who have recently given birth), Austria, Italy, Luxembourg, Portugal (complete ban for a period of 112 days allocated before and after confinement, dispensation subject to medical certificate outside this period) and Switzerland. In other countries (Belgium, Denmark, Finland, Ireland, the United Kingdom and Sweden) the worker herself must produce a medical certificate certifying the danger which night work represents to be dispensed from it. The situation in France is more complex: while in theory, it is unlawful for any woman to carry out night work, there are many exemptions to the rule, and it is no longer applied since France's denunciation of ILO Convention N° 89. The specific situation of workers who are pregnant or have recently given birth is addressed in the French night work regulations only in a peripheral fashion by provisions prohibiting the stacking of shelves at night by pregnant women. The conclusion from this is that the only way to gain an exemption from night work is by medical surveillance (certifying their unfitness to work). In Norway, night work is unlawful (for everyone: men and women) except in a strictly limited number of cases stipulated by the Work Environment Act. The factory inspectorate guidance notes consider night work to be the type of working condition which may be dangerous for pregnant women. The United Kingdom legislation does not give the employer an obligation to offer day work to a pregnant worker who produces a medical certificate exempting her from night work.

Maternity leave

In providing 14 weeks' maternity leave, but making only two of them compulsory, the Directive moves only fractionally towards Article 118A's aim of harmonization while maintaining the improvements made. Even so, two countries fell short of the minimum set by the Directive. Dutch legislation made no express provision for any maternity leave. In practice, the Commission said, it could be estimated at twelve weeks at the time of drafting the Directive. British legislation provided for eighteen weeks' maternity leave (which could be extended to forty weeks) but subject to two conditions: at least six months' employment in the same firm and a minimum level of earnings. These conditions excluded the majority of part-time women workers as well as many low-paid workers and those in non-standard employment[2]. In Sweden, where maternity leave was only twelve weeks, it could generally be combined with parental leave to create a longer entitlement.

The real extent of the protection given by maternity leave obviously depends on the level of guaranteed earnings. The Directive is severely lacking here. In failing to set a specific minimum level and referring only to the allowance which a worker would receive for absence due to sickness, the Directive maintains considerable disparities between countries, and even between categories of women workers in the same country. Notwithstanding its denials, Community legislators persist in regarding pregnancy as an abnormal interruption of paid work, analogous to sickness. They rejected the demands of the European Women's Lobby and trade union organizations for guaranteed full pay during periods of protective leave and maternity leave.

The table below summarizes the available data on maternity leave and protection of pay during this period.

Conclusions

Other aspects of the Directive - notably maternity leave, protective leave and protection against dismissal - will be considered in a future article. It already seems likely, however, that the Directive will be fairly ineffective on all these matters due to the refusal of several Member States (and not just the United Kingdom) to take account of the relationship between health at work and other aspects of labour law and social policies. The post-Maastricht climate which brought the Directive into being was unfavourable to social policy. The Italian government abstained from adopting it, protesting that it did not go far enough, and insisted that the Council and Commission's commitment to re-examine and improve the Directive be minuted. That commitment was watered down in the body of the Directive itself. The Council will re-examine the Directive before October 1997 on the basis of reports submitted by the Commission. It will improve it only if the Commission puts forward proposals to that effect.

In publishing these facts about national transposing legislation, the TUTB intends to call all the actors concerned to account, to ensure that the October 1997 deadline is not missed and that serious proposals for improvement are discussed. Serious questions would be raised about the credibility of the Community commitment to mainstream anti-discrimination measures into all its policies if the failings and contradictions of the Directive were not put right.

A list of references for the transposing legislation which was used for this SPECIAL REPORT will be given in Part II, to be published in the next issue of our *Newsletter*.

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Principal provisions of the Directive

Directive 92/85/EEC provides health protection for pregnant workers in four key areas.

- The employer carries out a risk assessment and adopts preventive measures of various kinds:
  - prevention at source based on the priority list of preventive measures in article 6 of the Framework Directive;
  - temporary individual measures to adjust the working conditions and/or working hours;
  - change of job;
  - leave.

- The Directive provides that the workers concerned cannot be obliged to suffer exposure to certain agents and night work.

- The workers concerned must be granted maternity leave. It consists of a compulsory period of two weeks (which cannot be waived) and a minimum period of fourteen weeks in all. The allowance paid during this period is guaranteed only up to the amount of the allowance that she would receive for absence from work due to sickness.

- The Directive requires the Member States to make legal arrangements by which workers can enforce compliance with the Directive's obligations. Workers may be dismissed during the period of pregnancy and breast feeding only for reasons unconnected with their condition and with the consent of the competent authorities.

Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and the health at work of pregnant workers and workers who have recently given birth or are breastfeeding, *OJ* No L 348 of 28 November 1992, p. 1.

Sources

Germany: amendment of 20 December 1996 (*Bundesgesetzblatt No 69*) to the Maternity Protection Act 1976 (*Mutterschutzrechts*)
Austria: Federal Act of 30 June 1995 (*Bundesgesetzblatt No 434*) amending the Maternity Protection Act 1979 (*Mutterschutzgesetz*) and the Parental Leave Act 1989 (*Eltern-Karenzurlaubsgesetz*)
Belgium: Maternity Protection Regulations (Royal Decree) of 2 May 1995
Denmark: Employment Regulation 867/1994
Spain: Prevention of Occupational Risks Act 31/95 of 8 November 1995
Finland: amendment to Contracts of Employment Act (320/1970)
France: Decree 96-364 of 30 April 1996
Ireland: Safety Health and Welfare At Work (Pregnant Employees etc.) Regulations 1994 (S.I No 446, 1994), Maternity Act Protection, 1994
Italy: Act No 1204 of 30 December 1971, Legislative Decree 645/96 of 25 November 1996
Luxembourg: Bill amending, inter alia, the Maternity Protection At Work Act of 3 July 1975
Norway: Reproductive Health Hazards at Work Regulations (Royal Decree 768) of 25 August 1995 (AT-535)
The Netherlands: Pregnant Workers Regulations of 19 May 1994
Portugal: Act 17/95 of 9 June 1995
United Kingdom: 1994 amendments to Management of Health and Safety At Work Regulations 1992, and Employment Protection (Consolidation) Act 1978
Sweden: Factory Inspectorate, Pregnant Workers and Workers Who are Breastfeeding Order of 17 November 1994 (AFS 1994:32)

At the date of completion of this survey (May 1997), the Luxembourg Bill had not passed into law. No information was received from Greece or the Netherlands.

[1] Including Norway and Switzerland. Greece and the Netherlands are not covered because no information from the authorities or unions had been received at the time of writing.

[2] It is estimated that out of an annual average of 380,000 pregnant workers, 40% had no entitlement to paid maternity leave (cf, Helen Collins, *The EU Pregnancy Directive. A Guide for Human Resource Managers*, Oxford: Blackwell, 1994).