

Work-Life Balance

EU legislative developments and CJEU case-law



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Structure

- ① What is Work-life Balance (WLB)?
- ① The EU legal framework
 - Maternity Leave Directive
 - Parental Leave Directive
 - CJEU case-law
- ① The new Directive EU 2019/1158 on Work-Life Balance for Parents and Carers

Principle no. 9: Work-Life Balance

‘Parents and people with caring responsibilities have the right to suitable leave, flexible working arrangements and access to care services. Women and men shall have equal access to special leaves of absence in order to fulfil their caring responsibilities and be encouraged to use them in a balanced way.’ (The European Pillar for Social Rights, 2017)



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Work-Life Balance (WLB)

Family-related
Leave

Care Services

Flexible Work
Arrangements

- Emerged to enable **women** with caring responsibilities to participate in the labour market
- Partially extended to **men**, in order to promote the equal sharing of caring responsibilities between men and women
- Priority tool for implementing the principle of **equality between men and women** (Art. 2 and 3(3) TEU)
- From Reconciliation policies to *Work-life* balance (WLB)

○ Maternity Leave

**Maternity Leave
Directive 92/85**

○ Parental Leave

○ Flexible Working Arrangements

○ Time off on grounds of force majeure

○ Paternity Leave

○ Carers' Leave

~~Parental leave
Directive 2010/18~~

**WLB Directive
2019/1158**

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The EU legal framework on the reconciliation of family and professional life

‘To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.’ (EU Charter of Fundamental Rights, Art. 33(2), 2000)



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The Maternity Leave Directive 92/85/EEC

Protecting **safety and health** at work of pregnant workers and workers who have recently given birth or are breastfeeding

- Right to 14 weeks of maternity leave to working mothers before and/or after childbirth (**Art. 8**)
- Right to an 'adequate' allowance (\geq sick pay), which can be conditioned to a period of previous employment (**Art. 11**) (see C-65/14, *Rosselle*)
- Special protection against dismissal and less favourable treatment during pregnancy/maternity leave (**Art. 10**)
- Right to maintain the rights connected with the contract of employment (**Art. 11(2)(a)**)(C-411/96, *Boyle*)



The Maternity Leave Directive 92/85/EEC

- Discrimination on grounds of pregnancy = sex discrimination
 - Duration of ML is to be considered as seniority (Case C-284/02, *Sass*; C-294/04, *Sarkatzis Herrero*) and cannot impinge career advancement (C-592/12, *Napoli*)
- Special protection against dismissal (**Art. 10**):
 - Directly effective (C-438/99, *Jiménez Melgar*)
 - Pregnancy + ML do not qualify for cumulative absences that allow dismissal (C-394/96, *Brown*)
 - Extended to cases of in vitro fertilisation (C-506/06, *Mayr*)
 - Save in exceptional cases not connected with pregnancy, e.g. collective redundancies (C-103/16, *Porras Guisado*)



Maternity leave: protecting (biological) motherhood

Emphasis on the gendered nature of maternity protection within the CJEU case-law

- Maternity leave does not cover surrogacy (C-167/12, *D*; C-363/12, *Z*.)
- Measures related to the biological event of pregnancy and childbirth are not to be extended to men:
 - C-5/12, *Betriu Montull*
 - C-463/19, *Syndicat CFTC*
- Risks of hampering the promotion of a redistribution of care responsibilities between men and women?



The Parental Leave Directive

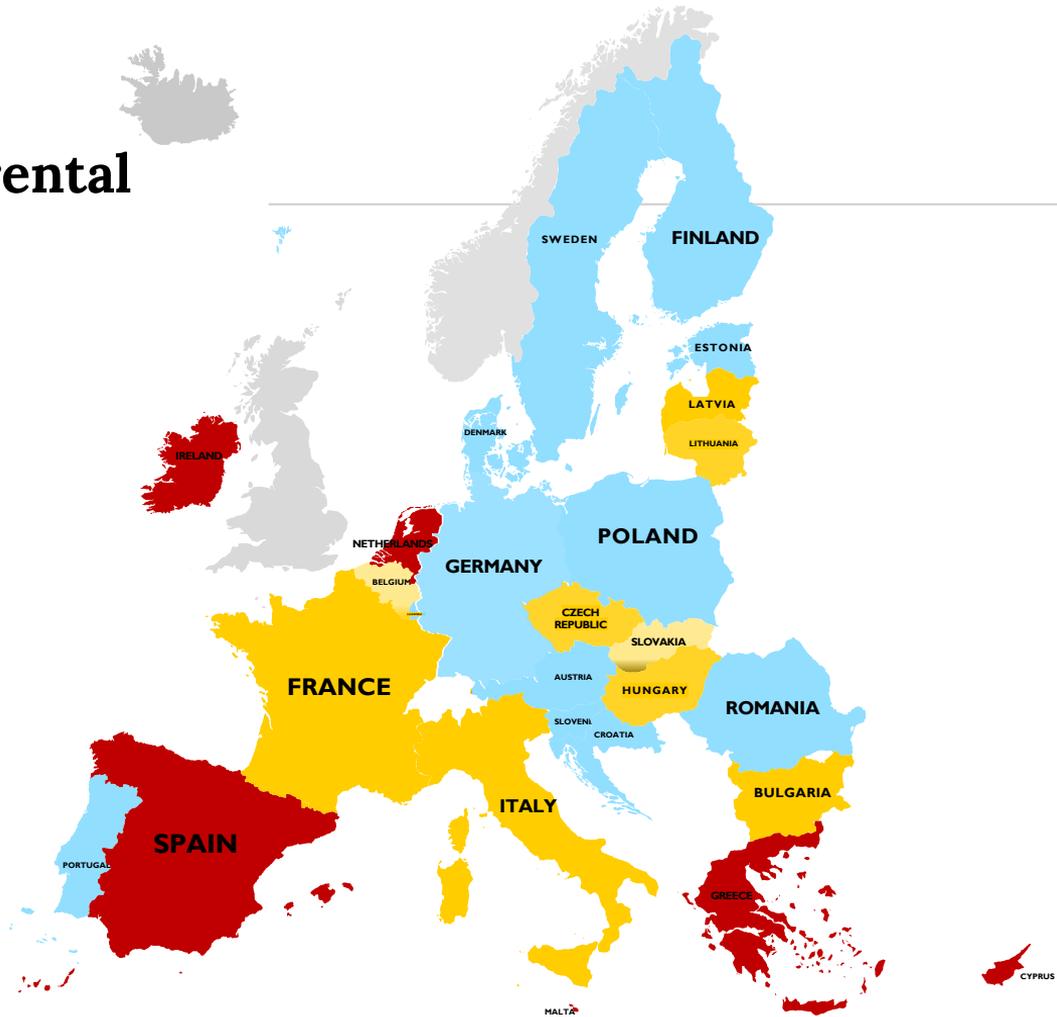
Directive 2010/18/EU on the framework agreement on parental leave concluded by social partners (repealing Directive 96/34/EC)

- Right to 4 months of parental leave **for each parent** to care for a child up to 8 years (Cl. 2(1))
 - even in the case of multiple births (see C-149/10, *Chatzi*)
- **Unpaid** - no requirement to remunerate leave
- Right to **request** flexible working arrangements after returning from PL (Cl. 6)
 - Only if returning from PL (C-366/18, *Ortiz Mesonero*)
- Right to time off from work on grounds of force majeure (Cl. 7)



Remuneration of parental leave across the EU

-  Well paid parental leave (<66% of earnings)
-  Paid parental leave (flat rate or <66%)
-  Unpaid parental leave





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The Parental Leave Directive

- Right to return to the same job/equivalent at the end of PL (Cl. 5(1))
 - PL cannot affect the possibility to carry out a probationary period (C-174/16, *H*)
- Right to maintain rights acquired/in the process of being acquired as they stand until the end of parental leave (Cl. 5(2))
 - particularly important principle of EU law (C-116/08, *Meerts*)
 - E.g. PL cannot affect the right to take annual leave (see C-350/06 and C-520/06, *Schultz-Hoff and Others*; C-486/08, *Land Tirol*)
 - but may not be regarded as a period of actual work to acquire new rights (C-12/17, *Dicu*)
- Right to be protected against dismissal and less favourable treatment (Cl. 5(4)) (C-7/12, *Riežniece*)



The Parental Leave Directive: The role of men and *daddy's quota*

- Introduction of a **daddy's quota** to encourage men's uptake of parental leave
- One month of the leave **non-transferable** between the parents
 - If the father does not take the non-transferable month, the mother cannot take it either

'... men should be encouraged to assume an equal share of family responsibilities.'
(PLD 96/34, Rec. 8)

'... in many Member States encouraging men to assume an equal share of family responsibilities has not led to sufficient results; therefore, more effective measures should be taken to encourage a more equal sharing of family responsibilities between men and women (PLD 2010/18, Rec. 12)



Promoting Gender Equality through WLB measures

WLB policies as a 'women's issue'?

They enable participation in the labour market but may reinforce gendered assumptions about care work/unequal working patterns

The old approach

- C-184/83, *Hofmann*:
'24. ... the [Maternity leave] directive is not designed to settle questions concerned with the organization of the family, or to alter the division of responsibility between parents'

- Promotion of a more egalitarian distribution of caring responsibilities between men and women - **Parenthood as a 'shared responsibility'**

- Preventing men from taking care leave may reinforce gender stereotypes

Now



Parental leave: promoting shared parenthood against gender stereotypes

● C-366/99, *Griesmar*

● C-476/99, *Lommers*

● C-104/09, *Roca Alvarez*:

'24. ... the positions of a male and a female worker, father and mother of a young child, are comparable with regard to their possible need to reduce their daily working time in order to look after their child.'

'31. The fact that the [breastfeeding leave] might be taken by the employed father or the employed mother without distinction means that feeding and devoting time to the child can be carried out just as well by the father as by the mother.'

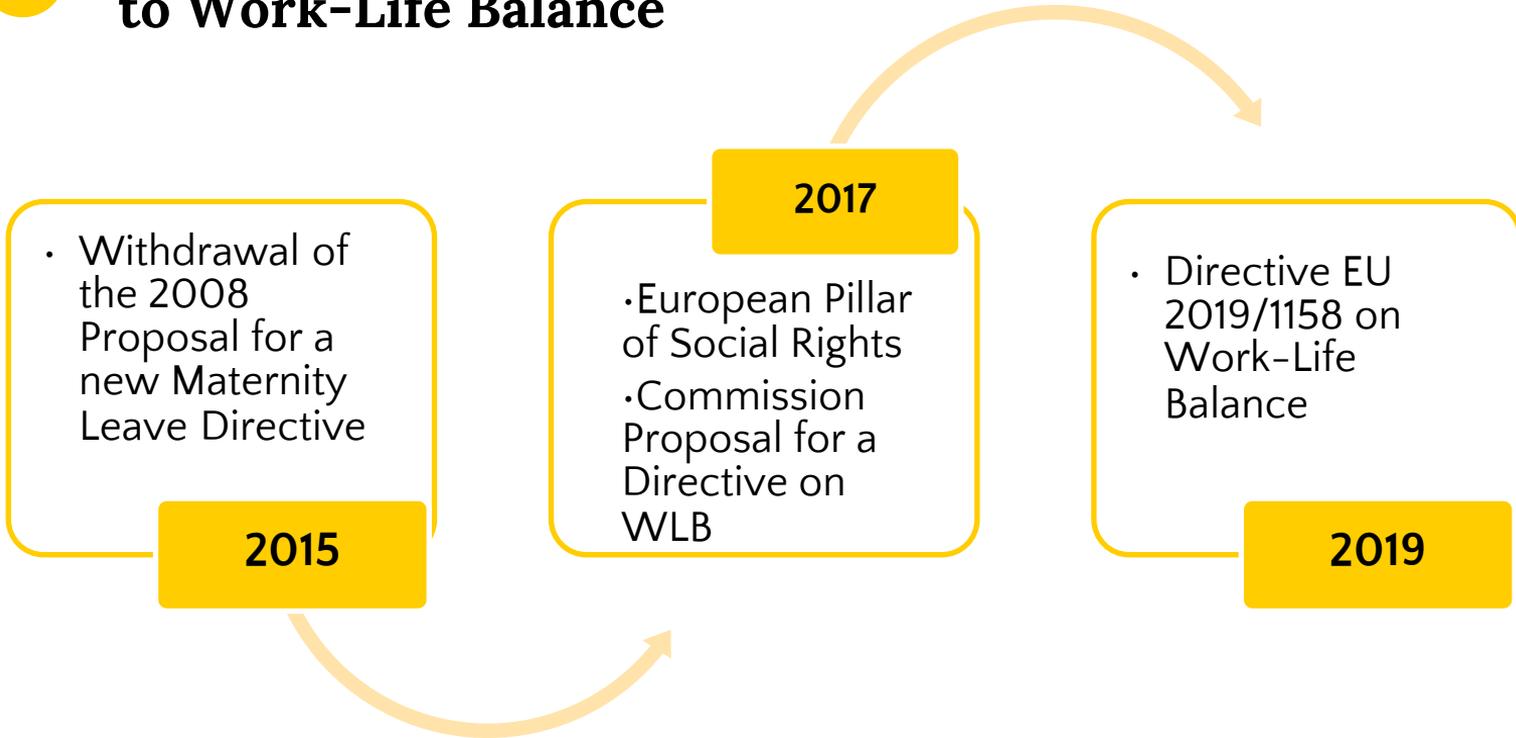
● C-222/14, *Maistrellis*

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The new Work-life balance Directive (2019)



From Reconciliation policies to Work-Life Balance





The Directive EU 2019/1158 on Work-Life Balance

to be implemented by August 2022

Paternity Leave

10 days

remunerated (\geq sick pay)

Parental Leave

Two months (out of four)

non-transferable

Carers' Leave

5 days per year

Flexible Working Arrangements

Extended to all working parents
(children ≤ 8) and carers



Paternity Leave

A 'leave from work for fathers or, where and insofar as recognised by national law, for equivalent second parents, on the occasion of the birth of a child for the purposes of providing care.'

- Introduced in Directive 2019/1158
- 10 days
- **Paid** (\geq sick pay)
- May be conditioned to periods of previous employment ≤ 6 months (Art. 8(2))
- To be granted irrespective of the worker's marital or family status
- Extended to the «**equivalent second parent**» (*contra*: ECtHR, *Hallier et al v France*, 18.01.2018)



Carers' Leave

A 'leave from work for workers in order to provide personal care or support to a relative, or to a person who lives in the same household as the worker, and who is in need of significant care or support for a serious medical reason, as defined by each Member State.'

- Introduced in Directive 2019/1158
- 5 days/year
- **Beyond childcare:** to provide men and women with caring resp. with greater opportunities to remain in the workforce (Recital 27)
- Builds on time off from work on grounds of *force majeure* for urgent family reasons
- **Unpaid**



Parental Leave

'The lack of paid paternity and parental leave in many Member States contributes to the low take-up of leave by fathers.'
(Recital 10)

'...most fathers do not avail themselves of their right to parental leave, or transfer a considerable proportion of their leave entitlement to mothers'
(Recital 20)

- Right to 4 months of parental leave for each parent to care for a child <8 years as before
- From one to **two non-transferable months** (s.c. 'daddy quota')
- Payment or allowance for the two non-transferable months to be guaranteed at a level that 'shall be defined by the Member State or the social partners' (**Art. 8(3)**)
- Right to *request* to take parental leave in flexible ways.

Well paid parental leave
($<66\%$ of earnings)

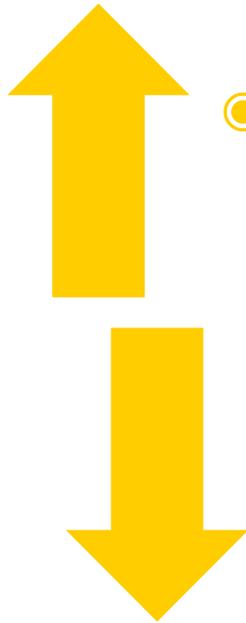
Paid parental leave
(flat rate or $<66\%$)

Unpaid parental leave





Flexible Working Arrangements



- Right extended to *all* workers with children <8 years and carers for caring purposes (Art. 9)
 - C-366/18, *Ortiz Mesonero* ?
- Still only a 'right to request' FWAs
- Employers shall only provide reasons for refusal or postponement
- FWAs may be subject to a reasonable limitation of time
- May be conditioned to a period of work qualification <6months



Non-Discrimination

- Right to be protected against less favourable treatment (Art. 11) and against 'dismissal and all preparations for the dismissal' (Art. 12)
- Reversal of the burden of proof to the employer (Art. 12(3))
- Competency of the Equality Bodies (Art. 15):

Member States shall ensure that the body or bodies designated, pursuant to Article 20 of Directive 2006/54/EC, for the promotion, analysis, monitoring and support of equal treatment of all persons without discrimination on grounds of sex, are competent with regard to issues relating to discrimination falling within the scope of this Directive.'



Conclusive Remarks

Pros

- A comprehensive approach to Work-life balance
- Introduction of **paternity** leave and **carers'** leave at EU level
- The 'second equivalent parent' and the partial recognition of LGBTI+ families
- Broader scope of application (hybrid notion of 'worker' at the EU level)

Cons

- Less ambitious than the original Proposal by the Commission
- Most measures are unpaid (parental leave!)
- What about Maternity Leave?
- Limited *inclusiveness* – right to parental leave may still be subject to a period of work qualification ≤ 1 year



Inequality in the access to Work-Life Balance measures?

10-12%

Rate of working women/men not eligible for parental leave in the EU in 2016. (EIGE 2020)

- Great variation in ineligibility rates across ages, levels of education, occupations and sectors of employment.
- Self-employed, lower-skilled and manual workers less likely to be eligible.
- COVID-19 may magnify inequalities and large differences in access to **telework** and other **FWAs** (JRC 2020)

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Thanks!

Any questions?

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