

Work-Life Balance

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Outline

1. The context

2. EU policies, legislation and case law

- The Pregnancy Directive 92/85
- Direct sex discrimination in Gender Equality Directives
- The Work-Life Balance Directive 2019/1158
- Indirect sex discrimination
- EU Charter
- The European Pillar of Social Rights

3. Some concluding observations

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Context

Gender Employment Gaps in EU 2018 (20-64):

Employment rate gap: 11.7% (male 79.0 %; female 67.3%)

FTE gap: 18% (male 76.5%; female 58.5%). Couples with children gap: 27%

Share of part-time employment: male 8.7%; female 31.3%

Gender Care gap:

Working women spend on average 22 hours per week in unpaid work, while working men spend about 9 hours

Gender Pay Gap:

Women's gross hourly earnings were on average 14.1 % below those of men in 2019 (EU27 data)

Gender Pension Gap:

35.7 % on average in the EU in 2017

Sources:

- Employment and Social Developments in Europe 2019, Statistical Annex, p. 228-231
- European Commission, 2019 Report on equality between women and men in the EU
- Eurofound (2015) Policies to improve work-life balance
- Eurostat: Gender equality and Closing the gender pension gap?
- EIGE, Gender Equality Index 2019

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Main EU instruments

- Pregnancy Directive 92/85
- Work-Life Balance Directive 2019/1158 to be implemented by 2 August 2022: the Parental Leave Directive 2010/18 will be repealed (Directive 96/34 is repealed)
- Prohibition of direct and indirect sex discrimination:
 - Equal pay and equal treatment at work (Art. 157 TFEU; Recast 2006/54)
 - Statutory Social Security (79/7)
 - Self-employment (2010/41)
 - Goods and service (2004/113)
- EU Charter:
 - Chapter on equality: Articles 20-26
 - Reconciliation of family and professional life: Article 33(2):

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Pregnancy Directive 92/85

- Aim: encourage improvements of health and safety of:
 - Pregnant workers
 - Workers who have recently given birth or
 - Are breastfeeding (Art. 2)
- Some relevant cases on the personal scope: *Mayr* (C- 506/06); *Danosa* (C- 232/09); *CD* (C-167-12); *Porrás Guisado* (C-103/16)

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Pregnancy Directive 92/85

- 14 weeks maternity leave (Art. 8)
- No maternity leave for surrogate mothers: *CD* (C- 167/12) and *Z.* (C-363/12)
- Payment or adequate allowance (Art. 11): *McKenna* (C-191/03);
- Minimum contribution period (Art. 11(4): *Rosselle* (C-65/14)
- Period of parental leave preceding maternity leave: *TSN* (C-512/11)
- Holidays: *Merino Gómez* (C-342/01)
- Additional maternity leave in collective agreement: *Syndicat CTFC* (C-463/19)

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Protection against dismissal in relation to pregnancy

- Protection against dismissal from the beginning of the pregnancy until the end of the maternity leave (Article 10): *Brown* (C-394/96); *Melgar* (C-438/99)
- Applies to fixed-term contract: *Tele Danmark* (C-109/00)
- Requirements in case of collective redundancies: *Porras Guisado* (C-103/16)

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Return after end of maternity leave

- Art. 15 Recast Directive 2006/54:
 - Return to own or equivalent job
 - Benefit from improvement in working conditions
Thibault (C-136/95); *Napoli* (C-595/12)
- Proposal on amendments Pregnancy Directive (COM 2008, 637) withdrawn

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Direct discrimination

- Direct discrimination is defined as: 'where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation'
- Prohibition of less favourable treatment in relation to pregnancy and maternity (e.g. Art. 2(2)(c) Directive 2006/54)
- Some case law: eg. *Dekker* (177/88); *Lewen* (C-333/97); *Melgar* (C-438/99); *Gassmayr* (C-194/08); *Parviainen* (C-471/08); *Syndicat CFTC* (C-463/19)
- In relation to parental leave: *Maistrellis* (C-222/14)

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Directive 2019/1158 on work-life balance for parents and carers (repealing Directive 2010/18/EU)

- Some starting points:
 - Incentives for men to take up leaves
 - Leaves not only to care for children, but also ill or dependent relatives
- Paternity leave: new right
- Parental leave: similar to right to parental leave in Directive 2010/18 as regards length, but now partially paid instead of unpaid leave
- Carers leave: new right to leave
- Flexible working arrangements: scope and rights are clarified
- Provisions on non-discrimination, protection against dismissal, victimisation etc.

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Paternity leave

- Paternity leave for fathers (or when recognised equivalent second parents) at the occasion of the birth of the child for the purposes of providing care
- 10 working days, paid at the level of sick leave, ceiling is possible

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Parental leave

- Parental leave: leave from work for parents on the grounds of the birth or adoption of a child to take care of that child
- Repeal of Directive 2010/18
- Individual right of leave of four months, non-transferrable for at least two months
- Up to a given age (8 years)
- Payment or allowance to be defined by the MS for two months, no minimum
- No change regarding time off on grounds of force majeure

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Carers' leave

- Carers' leave for workers providing 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 due to a serious medical reason (as defined by MS)
- 'Relative' means a worker's son, daughter, mother, father, spouse or, where such partnerships are recognised by national law, partner in civil partnership;
- 5 working days a year (unpaid)

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Employment rights

- *Meerts (C-116/08); Lyreco (C-588/12); Praxair (C-486/18); Gómez-Limón (C-537/07)*
- Specific provisions apply in the Work-life Balance Directive to the three leaves (Article 10): paternity, parental and carers' leave
- Rights that have been acquired, in the process of being acquired are maintained and changes during the leave apply at the end of the leave
- Right to return to the job or equivalent job on no less favourable terms or conditions
- Member States define the employment contract or employment relationship during leave, including entitlements to social security and contributions to pensions, while ensuring that the employment relationship is maintained during that period

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Flexible working arrangements

- Flexible working arrangements for workers with children up to at least 8 years and carers
- Flexible working arrangements = adjust working patterns:
 - remote working arrangements
 - flexible working schedules or
 - a reduction of working hours

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Flexible working arrangements (cont.)

- Right to request such flexible working arrangements for workers with children up to given age (8 years) and carers for caring purposes
- Employers have to consider and respond to requests and justify any refusal
- The duration might be subject to a reasonable limitation. If the duration is limited, right to return to the original working pattern at the end of the agreed period
- Request to return to original working pattern in case of change in circumstances before the end of the agreed period: the employer has to consider and respond to such request
- Period of qualification possible (not longer than 6 months)

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Miscellaneous

- Prohibition of discrimination on the ground of applying for or taking leave or having exercised right to flexible working arrangements
- Protection from dismissal and against adverse treatment
- Burden of proof in case of presumption of dismissal
- Penalties (including e.g. fine)
- Equality bodies
- Etc.

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Indirect discrimination

- Indirect discrimination is 'where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary'
- Mobility: *Danfoss* (109/88)
- Comparability: *Österreichischer Gewerkschaftsbund* (C-220/02)
- Legitimate aim has to be pursued in a consistent and systematic manner: *Leone* (C-173/13)
- In relation to parental leave: e.g. *Lewen* (C-333/97); *Rieznice* (C-7/12); *Praxair MRC* (C-486/18)

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The Charter

- Value of parental leave as a social right. Art. 33(2):
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.
- CJEU in *Zoe Chatzi (C-149/10)*: 'observance of the principle of equal treatment, which is one of the general principles of European Union law and whose fundamental nature is affirmed in Article 20 of the Charter of Fundamental Rights, is all the more important in implementing the right to parental leave because this social right is itself recognised as fundamental by Article 33(2) of the Charter of Fundamental Rights' (cons. 63).
- Application in horizontal relationships: e.g. *Bauer (C-569/16)* and *CRESCO (C-193/17)*

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European Social Pillar Principles

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.

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Some concluding observations

- Step-by-step process, important role of the CJEU (e.g. pregnancy)
- Declining scale of rights
- Comparability issues
- Inconsistencies in case law (e.g. protection of motherhood vs parenthood; sharing work and care responsibilities between women and men)
- Potential role of the Charter
- No changes to Pregnancy Directive 92/85 up to now

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Work-Life Balance Directive

- Paid paternity and paid parental leave could be an incentive for fathers
- Care leave for the first time in EU legislation
- Rights to flexible work arrangements are stronger than up to now
- Consistency with equal treatment provisions (e.g. burden of proof, protection against dismissal)

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Some remaining issues

- Comprehensive approach is still lacking
- Combatting gender stereotyping (see e.g. art. 5 CEDAW)
- Longer leaves, in particular carers' leave; pay
- Stronger right to flexible work arrangements, also right to extend working hours
- Legislative proposals on childcare facilities
- Addressing consequences of leaves for entitlements to (statutory) social security and (occupational) pensions, also in case of a temporary reduction working hours
- Valuing care and addressing risks related to care....
- COVID-19: gender equality beyond the workplace

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Further reading

- Publications of the European network of legal experts in gender equality and non-discrimination: <https://www.equalitylaw.eu/>
- E. Caracciolo di Torella & A. Masselot, *Responsibilities in European Law and Policies: Who Cares?*, Taylor & Francis, 2020
- M. de la Corte-Rodriguez, *EU Law on Maternity and Other Child-Related Leaves. Impact on Gender Equality*, Wolters Kluwer 2019
- Eurofound and the European Institute for Gender Equality (EIGE): *EU research shows COVID-19 poised to end progress on gender equality*, see <https://eige.europa.eu>

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