RECONCILIATION OF WORK AND FAMILY LIFE

Prof. Doctor Maria do Rosário Palma-Ramalho
Faculty of Law, University of Lisbon

Summary

I. Recalling the history of EU provisions on maternity and reconciliation of family and working life
II. The link between maternity and reconciliation of family and working life provisions and the gender equality principle in employment: the «exception» approach and the «integrated» approach
III. Latest developments in EU Law
IV. Case law at the ECJ
V. The implementation of EU reconciliation provisions at national level: quick overview
VI. Final remarks
I

HISTORY AND SOURCE OF EU PROVISIONS ON THE RECONCILIATION OF WORK AND FAMILY LIFE

1. Measures intended to the protection of health and safety of pregnant workers and of working women who have recently given birth

2. Maternity leave and attached rights

3. Parental leave and attached rights

1. Health and safety protection of pregnant women and working women who have recently given birth (Pregnancy and Maternity Directive - Dir. 92/85)

- Right to adapted working conditions or working time during pregnancy, or a different job or leave if necessary (Article 5);
- Right to be transferred from night work to a day time position (Article 7)
- Legal prohibition of /restrictions to dangerous work (Article 6)
- Right to short leave of absence to attend medical consultation and exams during pregnancy (Article 9)

Primary source: Article 118-A EEC Treaty (health and safety at the workplace)
Dir. 92/85 is described as a specific directive under Dir. 89/391 (Article 1/1)
2. Maternity leave and attached rights
Pregnancy and maternity Directive (Dir. 92/85)

- Right to a paid maternity leave for a minimum period of 14 weeks (Articles 8 and 11 of Dir. 92/85);
- Protection against dismissal on the grounds of pregnancy and during pregnancy and maternity leave (Article 10 of Dir. 92/85)
- Independent workers and assisting spouses: recommendation to the MS to facilitate the access to support facilities and the right to a maternity allowance (Dir. 86/613, Article 8)

Source: Article 118-A of the EEC Treaty, in the case of Dir. 92/85; Article 100 of the EEC Treaty in the case of Dir. 86/613

3. The way towards reconciliation:
Parental Leave Directive (Dir. 96/34)

- Individual right to parental leave granted to both parents for a minimum period of 3 months (Cl. 2/1); a part of the leave should not be transferable to the other parent (Cl. 2/2)
- Protection against dismissal during parental leave (Cl. 2/4)
- Right to return to same or similar job after the leave (Cl. 2/5)
- Right to ask for flexible working conditions for a determinate period after the leave (Cl. 6)
- Right to force majeure leave for care reasons (Cl. 3)
- Extension of these rights in case of adoption (Cl. 2/1)

Source: Framework Agreement of the European Social Partners, legally enforced by Dir. 96/34
II
THE LINK BETWEEN MATERNITY AND RECONCILIATION ISSUES AND GENDER EQUALITY PRINCIPLE IN EMPLOYMENT

• The evidence of the link

• The possible approaches to this link: the «exception» approach and the «integrated» approach

• The outcome of this link in the integrated approach

1. The evidence of the link between gender equality and reconciliation issues

Pregnancy, maternity and reconciliation issues have a **structural link with gender equality principle in the area of employment**:

• as regards **maternity**, because sex discriminatory practices are often related to pregnancy or to maternity (refuse to hire or to promote pregnant women, dismissal on the grounds of pregnancy or maternity, etc...);

• as regards the **reconciliation of family and working life**, because care responsibilities are not equally shared by both parents and this unbalanced division enhances direct and indirect sex discrimination practises in access to employment and at the workplace.

The importance of this link must therefore be pointed out
2. Possible approaches to the link between gender equality and reconciliation issues

• The «exception» approach: maternity provisions are a justified exception to equal treatment between men and women (1st stage)

• The «integrated» approach: maternity and paternity protection and a balanced reconciliation of work and family life are substantive conditions for the implementation of gender equality principle (2nd stage)

The «exception» approach: maternity provisions as justified exceptions to equal treatment of men and women in employment (Dir. 76/207 and Dir. 92/85)

Negative consequences of this approach

• maternity protection provisions apply only to women, since the ground for different treatment is health and safety

• prejudiced view of the ECJ in some judgments related to maternity: C-1032/79 (Larsson); C-394/96 (Brown/Rentokil) - dismissal on the ground of sickness, caused by pregnancy

• the traditional stigma regarding the share of professional and family responsibilities between men and women keeps untouched: maternity and, by extension, reconciliation tasks are still considered as women’s responsibility
The «integrated» approach: maternity and paternity protection and a balanced reconciliation of work and family life as material conditions for gender equality

- Dir. 96/34 (parental leave)
- Council Resolution 9303/00 (balance in reconciliation)
- ECFR, Article 33/2: right to reconciliation is granted as such aside gender equality principle (Article 23)
- Article 2/7 of Dir. 76/207, as amended by Dir. 2002/73
- Dir. 2006/54, recital 11 and Articles 2/2 c), 15, 16 and 21/2

Both parents are protected in reconciliation issues

Maternity and reconciliation measures promote gender equality and different practises in these areas are considered as direct gender discrimination

3. Consequences of the link between gender equality and reconciliation issues in the integrated approach

- Both parents can exercise parenthood rights and are protected in reconciliation issues, under Parental Leave Directive

- Specific rights of the mother related to pregnancy and maternity are separately accommodated under Maternity Directive

- Both maternity and reconciliation issues fall under the scope gender equality law and this allows for the application of EU gender equality law (shift of the burden of proof, access to justice, independent equality agencies, remedies and sanctions, etc...) → Dir. 2006/54 is applicable alongside Dir. 92/85 and Dir. 96/34
MORE RECENT DEVELOPMENTS IN EU LAW IN RELATION TO RECONCILIATION ISSUES

1. Pregnancy and Maternity: Proposed amendment of Dir. 92/85
   • **Main changes proposed**: extension of paid maternity leave up to 18 weeks; reinforced protection of women against dismissal, during and immediately after the leave
   • **Problems**: financial burden on the MS (as it is a paid leave); possibly a counterproductive measure for gender equality, since women would be away from their jobs longer
     (several proposals, final drop)

2. Independent Workers: Dir. 86/613 replaced by Dir. 2010/412

3. Parental leave: Dir. 96/34 replaced by Dir. 2010/18

2. Maternity protection for independent workers and assisting spouses
Dir. 86/378 replaced by Dir. 2010/41

- **Main changes**: increased protection of maternity for independent workers, by a specific indication of the duration of the maternity «leave» (14 weeks minimum); granting of a maternity allowance by the MS (Article 8)

- **Problems**: the effective amount and the decision on the compulsory nature of the allowance granted is left for the MS to decide

The protection granted to these workers is much lower than the protection granted in employment relations
(ECJ Case 5/2012 (Montul), admitting that, since Dir. 92/85 applies only to employment relations, the refusal of the use of a part of maternity leave by the father to replace the mother, when the mother is an independent worker, as stated in Spanish legislation, is admissible under EU law)

3. Parental leave
Dir. 96/34 replaced by Dir. 2010/18

- **Main changes**: the minimum duration of parental leave was increased to 4 months; at least one month of the leave is not transferable (Clause 2)

- **Problems**:  
  - the leave is unpaid;  
  - possibly a counterproductive measure for gender equality, since most likely the women will be away from work longer;  
  - the non-transferability of the leave is an important tool to fight this negative impact

• Basis: 153(1)(i) of TFEU and not on social partners’ agreement
• Integrated perspective on the issues of gender equality and reconciliation of family and working life is very clear (Article 1);
• Two sets of measures:
  • More leaves related to the reconciliation of family and working life and important changes in parental leave (Articles 4, 5, 6, and 7)
  • Flexible work schemes for reconciliation purposes (Article 8)
• Increased protection: payment at the level of sick leave; no loss of rights; right to return to the same or equivalent job; protection against discrimination; increased protection in dismissal during and after taking the leave; sanctions (Articles 8, 10, 11, 12, 13 and 14)


1. Leaves (all paid at the level of sickness allowance except short leave for force majeure reasons – Article 8)
   • Paternity leave (Article 4): 10 days minimum; next to birth(Article 4)
   • Parental leave (Article 5): 4 months minimum; individualisation; age of the child increased to 12 years; non-transferable period increased to 4 months; strict conditions for the postponing of the leave by the employer
   • Care leave (Article 6): 5 days per year (minimum)
   • Short leave for force majeure reasons (Article 7): maximum days to be determined by the MS; unpaid

2. Flexible working schemes (Article 9)
   • until the child reaches 12 years old; strict conditions for the refusal of this right by the employer; right to return to previous situation in the end
IV - Case law on the reconciliation of family and working life (1)

1. Prejudiced view of the ECJ in some judgments related to maternity based in the «exception» approach (maternity protection as admissible exception to gender equality)
   - Cases C-1032/79 (Larsson) and C-394/96 (Brown/Rentokil): dismissal after maternity leave on the ground of sickness, regardless the fact of the illness being caused by childbirth
   - Case C-103/16, of 22/2/2018 (Porras/Bankia): collective dismissal affecting a pregnant woman is admissible, provided objective criteria are indicated, and Dir. 92/85 does not impose upon the MS to grant pregnant women increased protection in that situation

2. The «integrated approach» (maternity and reconciliation measures as material conditions for gender equality) is now common and allows for the use of gender equality concepts and instruments
   - Case C-531/15, of 19/10/2017 (Otero Ramos): breastfeeding and inadequate working conditions (Article 19 (1) of Dir 2006/54, on the burden of the proof was applied in a context concerning Dir. 92/85)
   - Case C-222/14 (K. Maistrellis): national provision that doesn’t grant parental leave to the father when the mother doesn’t work is direct discrimination under Dir. 2006/54

IV - Case law on the reconciliation of family and working life (2)

3. Still no link between maternity and parental leave provisions
   - Cases on surrogacy and maternity leave (C-363/12; C-167/12): the intentional mother has no right to maternity leave because she was not pregnant and pregnancy is at the basis of maternity leave directive

   - Case C-351/14 (Estrela Sanchez): When coming back from maternity leave, the mother has no right to ask for adapted working conditions, because this is only established in relation to parental leave
**V**

**THE IMPLEMENTATION OF EU RECONCILIATION PROVISIONS AT NATIONAL LEVEL: QUICK OVERVIEW**


---

**The approach of the MS to reconciliation issues**

- All countries have complex schemes to protect pregnancy and maternity and to promote the reconciliation of family and working life.
- All these schemes are mostly directed to employment contracts rather than to independent workers.
- These schemes were not developed as in the EU Law and include several leaves, as well as time-off from work and specific working-time arrangements for family reasons.
- The combination of such schemes and even the identification of the several measures differs a lot from country to country. → Very important point to keep in mind because we may not be talking of the same thing in different MS.
Main differences

• **Interaction of the different leaves:** In some MS, parental leave and maternity leave are separated and in other MS not; some countries have a separate paternity leave and others treat it as time-off; some MS distinguish parental leave from other care leaves and some don’t

• **Payment:** the payment of maternity leave is granted, by social security; the payment of parental leave differs a lot between MS and in several MS, it is not paid at all; allowances related to maternity, paternity or childcare for independant workers are seldom addressed

• **Other reconciliation measures:** Most MS allow for specific working-time arrangements such as reduction of working-time for breastfeeding, exemption of overtime work for a limited period, flexible working hours /reduction of working hours, part-time work, and short leaves for care purposes

---

Reconciliation in practice at national level

1. **Practical use of parental leave:** Maternity leave is taken while paid; the practical use of parental leave depends upon the payment of the leave → if not paid, it is seldom taken; when the paid period is shorter than the period of the leave, it is taken only while paid

2. **Share of the leave between the parents:** Parental leave and other family-related leaves are predominantly taken by the mother, by the following reasons:
   - Traditional perspective on the social roles of men and women (male breadwinner model/ social pressure over women to take the leave)
   - Gender pay gap (especially in MS where parental leave is not paid) and lack of pay in general
   - Lack of child-care facilities / level of education
VI - CLOSING REMARKS

• The issue of reconciliation between professional and family life seems definitely on the EU agenda
• There is still a huge gap between the level of protection granted in employment relations and in self-employment
• The link between maternity and reconciliation issues and gender equality is well established, despite the original approach of EU law to maternity issues as a question of women’s health and security
• The link between maternity provisions and reconciliation provisions is still not established neither by the law nor by the ECJ
• The MS do not address these topics in the same way, so there is room for some confusion
• One large directive covering both issues could be the solution? To some extent the proposal for a new parental directive goes in this direction
• At national level, the topic is also important, despite the different approaches, but one common problem seems to be the payment of the leaves; this may affect the adoption of a new parental leave directive

This training session is funded under the “Rights, Equality and Citizenship Programme 2014-2020” of the European Commission.

RECONCILIATION OF WORK AND FAMILY LIFE

Prof. Doctor Maria do Rosário Palma-Ramalho
Faculty of Law, University of Lisbon