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## Reconciliation of work and family life

EU GENDER EQUALITY LAW

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## Outline

1. The context
2. EU policies, legislation and case law
  - Legislation and case law
    - the Pregnancy Directive
    - direct sex discrimination in gender equality directives
    - the Parental leave Directive
    - indirect sex discrimination
    - EU Charter
  - Protection in relation to pregnancy and maternity versus parenthood
    - Protection of women
    - Parental rights
    - Again protection of women
    - Rights in case of surrogacy
  - The European Pillar of Social Rights and the work-life balance proposal COM (2017) 253
3. Some concluding observations



## Context

### **Gender Employment Gap** in the EU 2017 (20-64):

- Employment rate: male 78.0 %; female 66.5%
- FTE: male 75.6%; female 57.5%
- Share of part-time employment: male 8.8%; female 31.7%

Working women spend on average 22 hours per week in unpaid work, while working men spend fewer than 10 hours

**Gender Pay Gap:** women's gross hourly earnings were on average 16.2 % below those of men in 2016

**Gender Pension Gap** (40% on average in the EU)

#### Sources:

- Employment and Social Developments in Europe 2018, Statistical Annex, p. 176
- European Commission, 2018 Report on equality between women and men in the EU
- Eurofound (2015) Policies to improve work-life balance
- Eurostat: Gender equality



## Main EU instruments

- Pregnancy Directive 92/85
- Parental Leave 2010/18 (repealed Directive 96/34)
- 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)



## Main EU instruments

- EU Charter:
  - Chapter on equality: Articles 20-26
  - Reconciliation of family and professional life: Article 33(2)



## 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)
- Relevant cases: *Mayr* (C-506/06); *Danosa* (C-232/09); C-103/16, (*Porras Guisado*)



## Pregnancy Directive 92/85

- 14 weeks maternity leave (Art. 8)
- Payment or adequate allowance (Art. 11): *McKenna* (C-191/03); *Rosselle* (C-65/14)
- Leave in relation to surrogacy: *CD* (C-167/12) and *Z.* (C-363/12)
- Period of parental leave preceding maternity leave: *TSN* (C-512/11)
- Holidays: *Merino Gómez* (C-342/01)



## Protection against dismissal in relation to pregnancy

- Protection against dismissal from beginning pregnancy until end of maternity leave (Art. 10); *Brown* (C-394/96), *Melgar* (C-438-99)
- Applies also to fixed-term contracts: *Tele Danmark* (C-109/00)



- 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 withdrawn (COM 2008, 637)



## 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)
- Case law: eg. *Dekker* (177/88); *Lewen* (C-333/97); *Melgar* (C-438/99); *Gassmayr* (C-194/08), *Parviainen* (C-471/08)
- In relation to parental leave: *Maistrellis* (C-222/14)



## Parental Leave 2010/18

- Framework Agreement
- Applies also to part-time workers, fixed-term workers and temporary agency workers
- Individual right, 4 months, unpaid
- In principle non transferable
- Case law: e.g. *Meerts* (C-116/08); *Lyreco* (C-588/12); *Gómez-Limón* (C-537/07)
- Art. 16 Recast Directive 2006/54



## 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)
- *Consistent and systematic manner in the light of the aim: Leone* (C- 173/13)
- *In relation to parental leave: e.g. Lewen* (C-333/97); *Rieznice* (C-7/12)



## Principle of equal treatment in the Charter

- Value of parental leave as a social right. Art. 33(2)
- 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).



## CJEU on protection of mothers vs rights of fathers

- Protection of motherhood after birth: *Hofmann* (184/83)
- Reconciliation and link with equality between men and women: *Hill* (C-243/95); *Gerster* (C-1/95)
- Own rights of fathers: *Roca Álvarez* (C-104/09)
- Only derived rights of fathers: *Betriu Montull* (C-5/12)



## CJEU in surrogacy cases

- MS are not required to provide maternity leave to commissioning mothers, even if she does breastfeed the baby: *C.D.* (C-167/12) and *Z.* (C-363/12)
- No direct or indirect sex discrimination. Comparable situation of commissioning father and commissioning mother



## 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.*



## The Commission's proposal on work-life balance for parents and carers and repealing Directive 2010/18/EU

- COM (2017) 253 final and additional measures
- Some starting points
  - Incentives for men to take up leaves
  - Leaves not only to care for children, but also ill or dependent relatives
- New leaves
  - Paternity leave for fathers at the occasion of the birth of the child: 10 days
  - Carers' leave for workers providing personal care or support in case of serious illness or dependency of a relative: 5 days a year



## The Commission's proposal (cont.)

- Main changes concerning parental leave:
  - Individual right, non-transferrable for at least four months
  - Up to the age of 12 years at least: Council of the EU in June 2018: 8 years
  - Repeal of Directive 2010/18
- Payment of adequate income at least equivalent to sick pay in case of paternity leave, parental leave and carers' leave (no change for paid time off).
- Council of the EU in June 2018: payment to be determined at the level of the MS; parental leave at least for 1,5, month.



## The Commission's proposal (cont.)

- Flexible working arrangements for workers with children up to at least 12 years and carers
- Flexible working arrangements = adjust working patterns:
  - remote working arrangements
  - flexible working schedules or
  - a reduction of working hours



## The Commission's proposal (cont.)

- Right to request such flexible working arrangements 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 working pattern at the end of the agreed period



## The Commission's proposal (cont.)

- Request to return to original working pattern in case of change in circumstances: the employer has to consider and respond to such request
- Return to own job or equivalent post and benefit from improvements
- Prohibition of discrimination on the ground of applying for or taking leave or having exercised right to flexible working arrangements
- Protection from dismissal and adverse treatment
- Burden of proof in case of presumption of dismissal
- Penalties (including e.g. fine); equality bodies etc.



## Some concluding observations

- Step-by-step process, important role of the CJEU (e.g. pregnancy)
- Declining scale of rights
- No paid parental leave (yet), could be an incentive for fathers.
- Potential role of the Charter
- No strong rights to flexible work arrangements or influence on working hours (yet)



## Some concluding observations (cont.)

- Protection of motherhood vs parenthood: divergences in case law
- Comparability issues
- No changes to Pregnancy Directive 92/85



## Some conclusions (cont.)

- Work-life balance proposal:
  - new rights (paternity, carers' leave), payment during leaves, flexible working arrangements
  - consistency with equal treatment provisions (e.g. burden of proof, protection against dismissal)

Adoption of such directive would extend and reinforce EU work-life balance legislation



## Some concluding observations (cont.)

- Some remaining issues:
  - The Pregnancy Directive remains unchanged
  - Combatting gender stereotyping (see e.g. art. 5 CEDAW)
  - Longer leaves, in particular carers' leave
  - 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....



## Further reading

Publications of the European network of legal experts in gender equality and non-discrimination:

<https://www.equalitylaw.eu/>