Balancing work and family life

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SOME PRELIMINARY REMARKS

To be sure, policies aiming to reconcile work with family & private life have long been on the EU agenda, and have been dealt with more or less effectively.

This issue is on the European agenda:

EU leaders adopted a pillar of social rights at the Gothenburg social summit in November 2017. Among these rights are an I**NITIATIVE TO PROMOTE THE BALANCE BETWEEN THE PROFESSIONAL AND PRIVATE LIVES OF WORKING PARENTS AND CAREGIVERS**

It was included in the recent draft directive that was part of a provisional agreement reached on 24 January 2019 between the European Parliament and the Council on the European Commission's proposal: a directive on reconciling the professional life and private lives of parents and caregivers

However, reconciling professional and family life is only a part of the issue. There are several other aspects involved:

1 – **Its scope of application**, which mainly includes the rights of salaried workers, but also temporary, part-time, and workers with uncertain prospects, as well as self-employed persons, who also have some rights, as we shall see.

2 – The rules deal **mainly with motherhood and parenthood**, although the need for caregiving is an increasingly touchy issue that also deals mostly with women, even though that shouldn't be the case.

3 – Only **mandatory conciliations** are considered, even though reconciliation includes workers' other activities and choices, including social, cultural, political and other activities that require no disclosure.

To ensure equality, these constraints must be taken into account, along with the need for innovation.

Hence, a dual objective:

- Protect the health of the mother and child (and the father (?), measures against ionizing radiation, etc. during and just after pregnancy (when the mother is nursing her child).
- Reconcile the right to work with family and private life (children, caregivers, care for the sick and elderly).
- Should time off from work based on gender?
- Ensure that women are not penalised if they exercise these rights and that doing so does not promote stereotypes, while ensuring that they are fully able to exercise their rights.
- Promote equality through desegregation measures and aggressive policies.

However, reconciliation is a specific issue.

Is this an equality issue to be treated on an exception basis,

or, rather, as a construction? (see Maria Ramalho).

For now or for the future? While taking the past into account?

To ensure reconciliation now.
To avoid dragging out the consequences of the failure of past attempts at reconciliation (retired persons).
To build equality for the future?

What are some possible roles of reconciliation? Are any of them being played now?

This issue has been dealt with very broadly.

See my predecessors' contributions on the ERA website:
http://www.era-comm.eu/oldoku/SNLLaw/Pregnancy_and_Work.htm

Here is all the documentation:
http://www.era-comm.eu/oldoku/SNLLaw/kiosk/pdf/Table_of_Content_GENDER_FR.pdf

That's why this presentation will be limited to one practitioner's remarks to other practitioners:

It will present sources thematically and not chronologically, in order to provide some instruments for action.

Here are some statistics, to begin with.

BACKGROUND

Background

- Where do we come from?
- Women's professional roles are secondary in couples, behind their family role. Men are considered the main breadwinners.
- But in reality, there exist homo-parental families, broken families, and unstable couples. And women have always worked outside the home.
- Having a family is a factor in lower pay for women, as well as loss of freedom, and difficulty in finding work, both when handling their maternal role and throughout life. There can also be consequences on pensions.
- Various political choices are involved

Background, some figures

Employment rate in Europe in 2017:
- Overall: men 78.0%; women 66.5%
- Full-time work: men 75.6%; women 57.5%
- Part-time work: men 8.8%; women 31.7%

Working women average 22 hours per week on unpaid tasks, vs. 10 hours for men

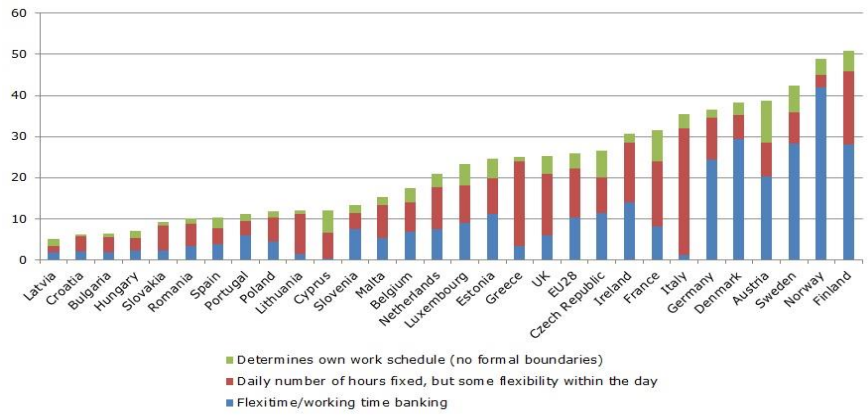
Wage gap: on average women's remuneration was 16.2% lower in 2016

Pension gap: 40% on average in the EU

Sources: S. BURRI PRESENTATION ERA OCTOBER 2018
- 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

Background, some figures
Employees who work under employee-friendly flexible working time, 2010 (%)

Source: LFS 2010 Ad-Hoc Module on reconciliation between work and family life



SOURCES

SOURCES

1 – GENERAL SOURCES: Treaties

2 – CHARTER OF FUNDAMENTAL RIGHTS

3 – GENERAL EQUALITY DIRECTIVE: amended Directive 2006/54

4 – SPECIAL DIRECTIVES

Maternity Directive 92/85

Parental Leave Directive 2010/18 (reworking of Directive 96/34)

5 – OTHER TEXTS:

- Social Security (79/7)
- Self-employment (2010/41)
- Goods and services (2004/113)

Fundamental sources

Article 157 TFEU

1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.

4. With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

Article 19 TFEU

Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

Charter of fundamental rights of the European Union

Article 20 **Equality before the law**

Everyone is equal before the law.

Article 23 **Equality between women and men**

Equality between women and men must be ensured in all areas, including employment, work and pay.

The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.

Article 33 **Family and professional life**

1. The family shall enjoy legal, economic and social protection.

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.

Article 53 **Level of protection**

- Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

Scope of the Charter

- 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, 17 April 2018, Egenberger, (C-414/16), 15 January 2014, Association de Médiation Sociale, (C-176/12), direct application

Case-law of the Committee of Social Rights

- **Even in a completely different area (working time), the issue of reconciliation overrides case-law.**
- Example: Interpretative observation of Article 2§1 and the Confédération Française de l'Encadrement CFE-CGC vs. France, claim no. 9/2000, decision on merits of 16 November 2001, paragraphs 29 to 38: cited in a ruling of 15 March 2019 CGT

- **iv) Fourth, to protect workers' family and private life, the Committee "recognises the importance of informing such workers clearly and within a reasonable amount of time of any change in working times".**

Amended Directive 2006/54 Whereas…

- (23)

It is clear from the case-law of the Court of Justice that unfavourable treatment of a woman related to pregnancy or maternity constitutes direct discrimination on grounds of sex. Such treatment should therefore be expressly covered by this Directive..

- (24)

The Court of Justice has consistently recognised the legitimacy, as regards the principle of equal treatment, of protecting a woman's biological condition during pregnancy and maternity and of introducing maternity protection measures as a means to achieve substantive equality. This Directive should therefore be without prejudice to Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (12). This Directive should further be without prejudice to Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC (13).

Amended Directive 2006/54 Whereas (cont.)

- (25)

For reasons of clarity, it is also appropriate to make express provision for the protection of the employment rights of women **on maternity leave** and in particular their right to return to the same or an equivalent post, to suffer no detriment in their terms and conditions as a result of taking such leave and to benefit from any improvement in working conditions to which they would have been entitled during their absence.

- (26)

In the Resolution of the Council and of the Ministers for Employment and Social Policy, meeting within the Council, of 29 June 2000 on the **balanced participation of women and men in family and working life** (14), Member States were encouraged to consider examining the scope for their respective legal systems to grant working men an individual and non-transferable right to paternity leave, while maintaining their rights relating to employment.

Amended Directive 2006/54
Whereas… (cont.)

- (27)

Similar considerations apply to the granting by Member States to men and women of an individual and non-transferable right to leave subsequent to the adoption of a child. It is for the Member States to determine whether or not to grant such a right to paternity and/or adoption leave and also to determine any conditions, other than dismissal and return to work, which are outside the scope of this Directive.

Amended Directive 2006/54
Relevant provisions

- Article 2
- **Definitions of direct and indirect discrimination.**

But an important detail:

2. For purposes of this Directive, discrimination includes: (…)

c) any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EEC.

Taking pregnancy into account is direct discrimination. No counter-proof, no justification. However, this does not rule out the possibility of indirect discriminations, as we shall see.

Amended Directive 2006/54
Relevant provisions

- Article 15
- **Return from maternity leave**
- A woman on maternity leave shall be entitled, after the end of her period of maternity leave, to return to her job or to an equivalent post on terms and conditions which are no less favourable to her and to benefit from any improvement in working conditions to which she would have been entitled during her absence.

Amended Directive 2006/54
Relevant provisions

- *Article 16* **Paternity and adoption leave**
- This Directive is without prejudice to the right of Member States to recognise distinct rights to paternity and/or adoption leave. Those Member States which recognise such rights shall take the necessary measures to protect working men and women against dismissal due to exercising those rights and ensure that, at the end of such leave, they are entitled to return to their jobs or to equivalent posts on terms and conditions which are no less favourable to them, and to benefit from any improvement in working conditions to which they would have been entitled during their absence.

Conclusion on these general texts

- Insertion of reconciliation into the framework of principles.
- Some special provisions
- Reference to special directives and their relevant case-law.

- **BUT** special rights conferred by directives do not rule out the use of general rules on discrimination.
- **In a way, the principle is actually reversed. Taking pregnancy into account is not an exception to the ban on discrimination, but is discrimination in and of itself**.
- **An action not covered by special directives may be contested on the grounds of these general texts.**

Special sources; relevant directives and implementation in connection with general texts.

Protection of maternity
Maternity Directive
Self-employed Workers Directive.

Maternity Directive 92/85

BACKGROUND

- **Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work**

Article 15 Risk groups

Particularly sensitive risk groups must be protected against the dangers which specifically affect them.

Article 16 Individual Directives 1. The Council, acting on a proposal from the Commission based on Article 118a of the Treaty, shall adopt individual Directives, inter alia, in the areas listed in the Annex.

Community Charter of the Fundamental Social Rights of Workers adopted by the European Council at Strasbourg, on 9 December 1989, by the heads of state and government of the 11 Member States, Item 19;

- "Every worker must enjoy satisfactory health and safety conditions in his working environment. Appropriate measures must be taken in order to achieve further harmonization of conditions in this area while maintaining the improvements made:"

Directive 92/85 (Whereas…)

- https://eur-lex.europa.eu/legal-content/FR/TXT/HTML/?uri=CELEX:31992L0085

This directive, which is based on Article 118, for the implementation of Directive 89/391 contains important substantive provisions on the court's case-law.

WHEREAS

- Whereas pregnant workers, workers who have recently given birth or who are breastfeeding must be considered a specific risk group in many respects, and measures must be taken with regard to their safety and health;
- Whereas the protection of the safety and health of pregnant workers, workers who have recently given birth or workers who are breastfeeding should not treat women on the labour market unfavourably nor work to the detriment of directives concerning equal treatment for men and women;

- HENCE A DUAL OBJECTIVE:

Protect health and security

But also promote equality.

Directive 92/85 Beneficiaries

- **BENEFICIARIES OF PROTECTION**
- **Article 2: Definitions**
- For the purposes of this Directive:
- (a) pregnant worker shall mean a pregnant worker **who informs her employer of her condition, in accordance with national legislation and/or national practice**;
- (b) worker who has recently given birth shall mean a worker who has recently given birth within the meaning of national legislation and/or national practice and **who informs her employer of her condition, in accordance with that legislation and/or practice**;
- (c) worker who is breastfeeding shall mean a worker who is breastfeeding within the meaning of national legislation and/or national practice and **who informs her employer of her condition, in accordance with that legislation and/or practice**.

Directive 92/85 Beneficiaries

CJEU, 11 November 2010, Danosa, case C-232/09

- **Meaning of female worker:** application through analogy of criteria used for free movement of workers (see Lawrie Blum ruling, C-66/85)
- **Meaning of pregnant worker:** broad interpretation of Article 2, a). Criterion = employer's knowledge of the pregnancy

*"If, without having been formally informed by the worker in person, **the employer learns of her pregnancy**, it would be contrary to the spirit and purpose of Directive 92/85 to interpret the provisions of Article 2(a) of that Directive restrictively and to deny the worker concerned the protection against dismissal provided for under Article 10."*

Directive 92/85 Beneficiaries

Regarding the meaning of "pregnant worker": in vitro fertilisation

JP MAYR 26 February 2008 C-506/06,

Directive protections regarding in vitro fertilisation, but not until implantation.

BUT, first, protection on the basis of Articles 2, paragraph 1, and 5, paragraph 1, of Directive 76/207/EEC

These provisions oppose the dismissal of a female worker who, in circumstances such as those of the principal, is in an advanced stage of in vitro treatment, i.e., between follicular puncture and the immediate transfer of in vitro fertilised ovules into the uterus of this female worker, as long as it is demonstrated that this dismissal is based mainly on the fact that the worker has undergone such treatment.

Directive 92/85 Beneficiaries

Commissioning mother

- JP CD / ST 18 March 2014 C-167/12,

1) Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) must be interpreted as meaning that Member States **are not required to provide maternity leave pursuant to Article 8 of that directive to a female worker who as a commissioning mother has had a baby through a surrogacy arrangement, even in circumstances where she may breastfeed the baby following the birth or where she does breastfeed the baby.**

2. Article 14 of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, read in conjunction with Article 2(1)(a) and (b) and (2)(c) of that directive, must be interpreted as meaning that **an employer's refusal to provide maternity leave to a commissioning mother who has had a baby through a surrogacy arrangement does not constitute discrimination on grounds of sex**.

Directive 92/85 Beneficiaries

- *Protection OBJECTIVE.* **CJEC 4 October 2001, Tele Danmark, case C-109/00**

- *This therefore applies even in the case of dismissal of a* ***worker on the grounds of pregnancy where she was recruited for a fixed period****, she failed to inform the employer that she was pregnant even though she was aware of this when the contract of employment was concluded, and because of her pregnancy she was unable to work during a substantial part of the term of that contract (case C-109/00).*
- Remarkably, this ruling is also based on the amended directive.

Directive 92/85: Protection of pregnancy

ESTABLISHING PROTECTION GUIDELINES (Article 3)

ASSESSMENT AND INFORMATION (Article 4)

MEASURES OF PROTECTION (Article 5)

1- **temporary adjustment to working conditions** and/or work time of the female worker concerned, in order to avoid exposing her to such risks.

2. Otherwise (if not technically and/or objectively possible) **a change in position.**

3. Otherwise, **dispensation from working** throughout the period necessary to protect her security and health.

FORBIDDEN ACTIVITIES (Article 6)

NIGHT WORK (Article 7)

ORGANISATION OF WORK DURATION AND PERIODS OF LEAVE (Article 9)

Dispensation from working for pre-natal examinations, with no loss of remuneration.

Directive 92/85 maternity leave

Article 8

Maternity leave

1. Member States shall take the necessary measures to ensure that workers within the meaning of Article 2 are entitled to a **continuous period of maternity leave of a least 14 weeks** allocated before and/or after confinement **in accordance with national legislation and/or practice**.

2. The maternity leave stipulated in paragraph 1 must include compulsory maternity leave of at least two weeks allocated before and/or after confinement **in accordance with national legislation and/or practice**.

The period of leave is short: **14 weeks of which only two are mandatory.**

Grounds: the cost, as well as the risk of hyper-protection.

WITHOUT PREJUDICE TO NATIONAL LEGISLATIONS BUT...

FAILURE of the revision of the directive. 2015: maternity leave extended to 18 weeks (Commission) or 20 weeks (Parliament)

Directive 92/85 Maintaining remuneration

- **During pregnancy and in the event of a change in position**

Wages and/or adequate services to female workers must be maintained, as defined by Article 2, **in accordance with national practices (with no minimum)**

Directive 92/85 Maintaining remuneration

During maternity leave

- Income at least equivalent to that which the female worker concerned would receive in the event of an interruption in her activities for health-related reasons, **within a ceiling if such is established by national legislation;**
- 4) the Member States may submit the right to compensation or the service mentioned under Item 1 and Item 2 b) on the condition that the female worker concerned meets the conditions for being entitled to such benefits under national legislation.
- Under no circumstances may these conditions include periods of work greater than 12 months prior to the presumed date of birth.

So this is at least equivalent to sick leave, but some conditions are possible

Ditto: failure of the revision.

Case-law

Suitable remuneration or service (Article 11) **; McKenna (C-191/03) ; *Rosselle* (C-**

- **65/14)**
- **CJUE 14 July 2016, Ornano, case C-335/15: no right to full maintenance of remuneration**

Directive 92/85 Prohibition of dismissal

- Article 10

Prohibition of dismissal

In order to guarantee workers, within the meaning of Article 2, the exercise of their health and safety protection rights as recognized under this Article, it shall be provided that:

1. Member States shall take the necessary measures to prohibit the dismissal of workers, within the meaning of Article 2, during the period from the beginning of their pregnancy to the end of the maternity leave referred to in Article 8 (1), save in exceptional cases not connected with their condition which are permitted under national legislation and/or practice and, where applicable, provided that the competent authority has given its consent;

2. if a worker, within the meaning of Article 2, is dismissed during the period referred to in Item 1, the employer must cite duly substantiated grounds for her dismissal in writing;

3. Member States shall take the necessary measures to protect workers, within the meaning of Article 2, from consequences of dismissal which is unlawful by virtue of Item 1.

Directive 92/85 Prohibition of dismissal

- **CJEC 4 October 2001, Jiminez Melgar, case C-438/99**
- Protection of female workers under temporary contracts
- Non-renewal of contract is not prohibited by the directive.
  But it may constitute a prohibited discrimination if pregnancy is involved.

- **CJEC 11 October 2007, Paquay, case C-460/06**
- **Prohibition of preparatory measures of dismissal**
- **CJEU 22 February 2018, Guisado, case C-103/16**
- **Possibility of being included in a collective redundancy**

Directive 92/85 End of period of leave

Post-maternity leave right to reinstatement
NOTHING IN THE MATERNITY DIRECTIVE
BUT

Article 15 of Directive 2006/54 (as amended)
– Return of female workers to their position or an equivalent one

– Eligibility for all improvements in working conditions
Thibault case-law (C-136/95); Napoli (C-595/12) and Gillepsie *et a*l. (C-342/93)

Maternity protection of self-employed female workers: Directive 2010/41 replacing 86/613/EEC

- This directive applies to the protection of maternity for female workers who cannot be considered to be covered by Directive 92/85
- **So its scope of application is hard to establish.**
- (v. *Catherine Barnard and Alysia Blackham, 2015)*
- "Although the Court of Justice justifiably prefers a narrow definition of the Allonby style, the reference in Article 2, Item a) to "conditions provided by national law" gives national systems the freedom to extend protection to self-employed persons (i.e., those who are truly self-employed and are included in the third category), for, in this case, the party responsible for enforcing the obligations – i.e., the party who makes the social welfare or maternity payments – is not a private party, but the national government, which may decide to assume greater responsibilities."

Maternity of self-employed female workers

- **VERY LITTLE THAT IS MANDATORY (Article 8)**

1 The Member States shall take the necessary measures to ensure that female self-employed workers and female spouses and life partners referred to in Article 2 may, **in accordance with national law**, be granted **a sufficient maternity allowance enabling interruptions in their occupational activity owing to pregnancy or motherhood for at least 14 weeks.**

BUT

2. The Member States **may decide whether the maternity allowance referred to in paragraph 1 is granted on a mandatory or voluntary basis.**

Self-employed female workers: amounts of indemnity

Level of indemnity possible

3) The allowance referred to in paragraph 1 shall be deemed sufficient if it guarantees an income at least equivalent to:

(a) the allowance which the person concerned would receive in the event of a break in her activities on grounds connected with her state of health and/or;

(b) the average loss of income or profit in relation to a comparable preceding period subject to any ceiling laid down under national law and/or;

(c) any other family related allowance established by national law, subject to any ceiling laid down under national law.

Self-employed female workers, replacement

- The Member States shall take the necessary measures to ensure that female self-employed workers and female spouses and life partners referred to in Article 2 have access to **any existing services supplying temporary replacements or to any existing national social services**. The Member States **may** provide that access to those services is an alternative to or a part of the allowance referred to in paragraph 1 of this Article.
- REPLACEMENT MAY BE IN LIEU OF INDEMNITY
- IN SUM, FEW OR NO OBLIGATIONS

Protection of maternity: An assessment

- No change in measures since the directive. Failure of the revision.
- Few or no restrictive measures for self-employed workers
- No improvement (debate on the consequences of extending the period of leave on its financial burden)
- Enforced very differently in the Member States (cf. Réseau study)

RECONCILIATION: PARENTAL LEAVE

THE VARIOUS TYPES OF FAMILY LEAVE

Apart from maternity leave

Paternal leave when the child is born: nothing on this so far

Leave to care for a loved one: nothing on this so far

Parental leave: directive

But such periods of leave exist in many member-states, with the resulting difficulties of classification and nomenclature.

They are covered by the new draft, which we will review below.

Parental leave: purpose and scope of application

- This agreement lays out the minimum requirements for reconciling the professional and family responsibilities of parents who work, given the increasing diversity of family structures, and in compliance with legislation, collective-bargaining agreements and/or national practices.
- INCLUDING PART-TIME WORK CONTRACTS OR TEMPORARY OR INTERIM WORK CONTRACTS

Parental leave

- CAUSE
- Birth or adoption

- ELIGIBLE PERSONS
- This agreement applies to all workers, both men and women, holding a contract or in a working relationship governed by legislation, collective-bargaining agreements and/or common practice in each member-state
- And all contracts

- DURATION
- Minimum of four months, including one non-transferrable month
- Before the child reaches the age of eight years

- TO BE DETERMINED BY THE MEMBER STATES

Parental leave: Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave

MINIMUM REQUIREMENTS

- An individual right to parental leave (Clause 2)
- Protection against unfavourable treatment and dismissal (Clause 5, Item 4)
- Right to re-employment (Clause 5, Item 1)
- Right to retaining benefits that have been acquired or are being acquired (Clause 5, Item 2)
- Authorisation of absence for reasons of *force majeure* (Clause 7)

Directive parental leave: PROCEDURES LEFT TO MEMBER STATES TO DECIDE

- **Clause 3**
- Full-time, part-time, fragmented leave, time credit
- Condition of seniority within the one-year limit
- Employer option of postponement
- Worker obligation to comply with the notice period
- **Clause 5**
- Worker contract and relationship maintained during parental leave
- Health insurance and income linked to the agreement

AND OF REMUNERATION, WHICH IS OPTIONAL

Parental leave

- So, systems are very, very flexible…
- And not transposed very much.

Reconciliation of general and specific texts. Will this result in effective protection? Use of notions of direct and indirect discrimination.

- The Court uses the prohibition of **direct discrimination.**
- **Pregnancy or maternity as grounds for taking an unfavourable measure is DIRECT discrimination.**
- **Hence, NO COUNTER-PROOF OR JUSTIFICATION.**
- *Dekker (*177/88); *Lewen (C-333/97); Melgar* (C-438/99); *Gassmayr (*C-194/08)*, Parviainen (*C-471/08)
- Parental leave: *Maïstrellis* (C-222/14)

Reconciliation of general and specific texts. Will this result in effective protection? Use of notions of direct and indirect discrimination.

- Differences in remuneration, which are not covered by derivative law, may be punishable as a violation of Article 157, which is subject to direct application.
- **Direct discrimination may be cited as grounds in cases in which material prohibitions under specific directives cannot be cited.**
- **(cf. Mayr, for instance) as well as CD and Danosa, etc.**
- A case of direct gender-based discrimination was involved in the Maïstrellis case (C-222/14): male judges had no right to parental leave. This was tantamount to gender-based direct discrimination.

Reconciliation of general and specific texts. Will this result in effective protection? Use of notions of direct and indirect discrimination

- In the Danfoss case in 1989, for example, the Court acknowledged that, while the criterion of mobility included "the employee's ability to adjust to various working times and places, the criterion of mobility could also place women at a disadvantage, as household and family duties, for which they are most often responsible, make them less able than men to organise their working time in a flexible manner." The criterion of mobility may be justified only in relation to certain specific tasks.

- The Court has ruled in many cases of indirect discrimination involving part-time work. I will not discuss those cases here, but the link between part-time work and issues of reconciliation is clear when we look at the impact of part-time work among mothers compared to fathers in the EU.

- In the Rieznice case (C-7/12), the right to an evaluation of workers on parental leave was cited. The Court provided directives on how to enforce the prohibition on indirect discrimination in such a situation.

CONCLUSION

- Protection is provided only from an accumulation of sources.
- But is this enough?
- Some examples suggest the answer is no.
- Legislation and case-law always provide a dynamic view.
- Let's look at the rights of fathers.

Rights of fathers

- Protection of post-birth maternity: Hofmann (184/83)
- Reconciling working and family life and the link with gender equality : Hill (C-243/95), Gerster (C-1/95)
- Rights especially for fathers: Roca Álvarez (C-104/09)
- Flashback: derived rights only for fathers: Betriu
- Montull (C-5/12)

- We are still vulnerable to the traditional view….

WHAT ABOUT THE FUTURE: the new directive.

New directive: objectives

FROM THE OFFICIAL PRESS RELEASE

- *Today's agreement sets a European **minimum standard of 10 days of paternity leave for fathers** following the birth of their child, **to be compensated at the level of sick pay**.*
- ***It strengthens the existing right to 4 months of parental leave, by making 2 months non-transferable between parents***
- *and introducing **compensation for these 2 months** at a level to be determined by the Member States.*
- *We also agreed on European provisions for **carer's leave by attributing 5 days per worker per year**, as a new European entitlement for workers.*
- *Last but not least, the new rules strengthen **the right for all parents and carers to request flexible working arrangements**.*
- ***But this is not only about strengthening the rights of individuals. The new rules are a model for how to align social and economic priorities. Businesses will be able to attract and retain talented women and men. The European economy will gain from this proposal, which will contribute to closing the gender employment gap. Better work-life balance for both women and men is not only the fair, but also the smart thing to do."***

New directive

- **Paternity leave:** introduction of an individual right to 10 days' leave, paid in the same amount as sick leave;
- **Parental leave:** revision of existing law to guarantee: i) the right to take it flexibly (i.e., fragmented part-time work); ii) four months' leave not transferrable between parents; and iii) the payment of at least four months in the same amount as sick leave;
- **Caregiver's leave:** introduction of an individual right to five days' leave per year, paid in the same amount as sick leave;
- **Flex-work:** the right for parents of children up to 12 years of age and caregivers to request flex-work in working hours, schedule or place of work during a given period, with the employer under no obligation to grant the requested change.

New directive

- Clear progress
- But still lots of uncertainties…
  Let's keep going.

Overall findings