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# **RECONCILIATION OF WORK AND FAMILY LIFE AND GENDER EQUALITY IN EMPLOYMENT**

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## **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. Developments in EU Law
- IV. Case law at the ECJ
- V. 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: the way towards the reconciliation of work and family life

### 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 the reconciliation of work and family life**

- **Step 1: the Parental Leave Directive (Dir. 96/34)**
- **Step 2: the Revised Parental Leave Directive (Dir. 2010/18)**
- **Step 3: the Directive on the Reconciliation of Professional and Family Life (Dir. 2019/1152)**



Source: Framework Agreements of the European Social Partners, legally enforced by the EU (for the first two Directives); and direct initiative of the EP and the Council as regards the last Directive (primary basis: Article 153 No. 2 (b) and No. 1 (i) of the TFEU)

## 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 (1<sup>st</sup> 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 (2<sup>nd</sup> 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
- Dir. 2010/18 (revised parental leave directive)
- Dir. 2019/1158 (reconciliation of family and working life)



**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 accomodated 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

### III

## MORE RECENT DEVELOPMENTS IN EU LAW IN RELATION TO RECONCILIATION ISSUES

1. Pregnancy and Maternity: Proposed amendment of Dir. 92/85
2. Independent Workers: Dir. 86/613 replaced by Dir. 2010/412
3. Parental leave: Dir. 96/34 replaced by Dir. 2010/18
4. New directive on the reconciliation of family and working life: Dir. 2019/1158 repealing Dir. 2010/18

### 1. 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. 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. The way towards the reconciliation of work and family life

- **Step 1: the Parental Leave Directive (Dir. 96/34)**
- **Step 2: the Revised Parental Leave Directive (Dir. 2010/18)**
- **Step 3: the Directive on the Reconciliation of Professional and Family Life (Dir. 2019/1152)**



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### 3. The way towards reconciliation: Step 1: The first 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 (no limits defined) (Cl. 3)
- Extension of these rights in case of adoption (Cl. 2/1)

### 3. The way towards reconciliation: Step 2: Parental leave directive No. 2010/18

- **Repeals Dir. 96/34**
- **Main changes:** the minimum duration of parental leave was increased from 3 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

### 3. The way towards reconciliation: Step 3: Dir. 2019/1158 on the reconciliation of work and family life

- Repeals Dir. 2010/18
- Basis: 153(1)(i) of TFEU and not a social partners' agreement
- Integrated perspective on the issues of gender equality and reconciliation of family and working life is now very clear (Article 1);
- Two sets of measures:
  - **New 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)

### Dir. 2019/1158 on the reconciliation of work and family life

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) – new provision
  - **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) – new leave
  - **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 (Porrás/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 unadequate 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 - 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 the gender equality principle 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
- One large directive covering both issues could be the solution? Still, the directive on the reconciliation of family and working life does not go in this direction



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