The Importance of a Balanced Reconciliation of Family and Professional Life between Men and Women for the Practical Implementation of Gender Equality Principle in employment area

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1. The practical difficulties in the implementation of gender equality communitarian principles in the area of work and employment

I. The starting point of the reflections suggested by this subject is a well-established assumption: the recognition of the practical difficulties in the implementation of gender equality communitarian principles in the area of work and employment.

Individual rights regarding gender equality were formally recognised by the Treaty of Rome fifty years ago, from the perspective of equal remuneration (Article 119 of the Treaty), and have gained a broader and broader scope since 1975, by the form of Directives which have been transposed to the Member States. On the other hand, both the rules of the Treaty and those of the several Directives dealing with gender equality issues[2] have been applied and interpreted by the Court of Justice for many years in an

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[2] Directive 117/75, from 10 February 1975, regarding equal pay; Directive 76/207, from 9 February 1976, modified by Directive 2002/73, from 23 September 2002, regarding equal treatment between men and women in access to employment, in working conditions and training; Directive 79/7, from 19 December 1987, and Directive 86/378, from 24 July 1986, regarding gender equality in social security; Directive 86/613, from 11 December 1986, regarding gender equality for independent workers, agriculture and including maternity protection; Directive 92/85, from 19 October 1985, regarding the protection of pregnant workers and newly mothers; Directive 96/34, from 3 June 1996, regarding parental leave; Directive 97/80, from 15 December 1997, regarding the burden of proof in actions concerning gender discrimination; Directive 2004/113, from 13 December 2004, regarding gender equality in the access to goods and services; and Directive 2006/54, from 10 July 2006 (recast directive regarding gender equality principle in the areas of employment and professional activity).

intensive and very creative way[3]. As a result of this *accquis* the main principles and the ruling in the area on gender equality have been reinforced and enlarged in the Treaties of Amsterdam and Nice (Article 2, Article 3 paragraph 2, Article 13, and article 141 of the TEC). Finally, these rights are maintained at the Lisbon Treaty (Article 3 No. 3 paragraph 2 of the TEU, and Articles 8, 10, 19, 153 No. 1 i) and 157 of the TFEU), and will indeed be reinforced - provided the ratification of this Treaty will succeed - by the formal recognition of the binding effect of the Charter of Fundamental Rights of the European Union (Article 6 No. 1 of the TEU), where these issues are also contemplated.

II. Despite these important developments of gender equality principle in employment area in issues that go from equality in access to work (including promotions and training), to equal pay and social security and, finally, to maternity rights and more broadly, to the issue of reconciliation between family responsibilities and working life, the difficulties in the practical implementation and the lack of effectiveness of the principle itself are a well known fact.

Being proved by statistic data in several areas this conclusion needs no further demonstration. Moreover, it seems that this practical weakness of gender equality principle is common to Member States with very different economical development, different working models, and various social and cultural background.

In short, the formal recognition of gender equality rules and the traditional methods used to implement them along the years seem not to be enough to assure the effectiveness of gender equality principle.

[3] In fact, The Court of Justice is responsible for the development of gender equality system on several grounds. We underline the role of the Court in the development of notions related to this issue, such as the concept of remuneration, the notion of like work and work of equal value (for instance Judgement from 4/02/1988(*Murphy*), the notions of direct and indirect discrimination (Judgements from 26/02/1986 (*Marshall*), from 9/02/1982 (*Garland*), from 7/02/1991 (*Nimz*), in the discussion regarding positive actions (for instance Judgements from 17/10/1995 (*Kalanke*) and from 11/11/1997 (*Marschall*); it was also the Court of Justice that established the direct effect of the community rules on gender equality at the Member State level, of not transposed (Judgement from 8/04/1976 (*Defrenne*); and, finally, it was again the Court of Justice that was responsible for the extension of the equal pay principle to social security issues (for instance Judgements from 17/05/1990 (*Barber*) and from 13/05/1986 (*Bilka*) and for the link between gender equality, and maternity issues (for instance, Judgements from 25/07/1991 (*Stoeckel*), from 13/02/1996 (*GillespieI*), or from 30/06/1998 (*Brown-Rentokill)*.

The lack of effectiveness of gender equality principle in the area of work and employment has inspired many researches on this topic[4].

When looking at the results of these studies, there seems to be a clear link between equal (or unequal) treatment of women and men in access to employment and at the working place and the topic of reconciliation of family and working life.

It is this link that we would like to explore a little further in this paper.

2. The link between gender discriminatory practises at work and the reconciling of family and working life by women and men

I. The link between gender discriminatory practises at work and the reconciling of family and working life between men and women is easily established, if one takes into consideration the main factors that are responsible for the lack of effectiveness of gender equality principle in itself.

In our view, five reasons can be held responsible for the lack of effectiveness of gender equality principle in the area of work and employment: the first one regards the low visibility of the principle itself; the second one regards the complexity of the notions related to gender discrimination ruling; the third one arises from the difficulties of judicial procedures in gender equality area; the fourth one regards the traditional segregation of the labour market between «feminine» and «masculine» professions; and the last one is the social stigma attached both to professional responsibilities and to family responsibilities [5].

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[4] We have been involved in two international researches in this area, both of them in the scope of European countries and under the support of the European Commission, and both of them with experts from several Member States, therefore with very different backgrounds in this area.

The first project regarded the issue of pay gap between men and women. In what regards the Final Report on this Project, see MARIA DO ROSÁRIO PALMA RAMALHO, *Guaranteeing Equal Pay between Women and Men in the European Union,* Lisbon (CITE), 2004 (also available in French and in Portuguese versions under the titles *Garantir a Igualdade Remuneratória entre Mulheres e Homens na União Europeia,* e *Garantir l'égalité de remuneration entre femmes et hommes dans l'Union Européenne*). The second project regarded the issue of reconciliation of family and working life. The Final Report that came out of this Project was published under the title *Concilier famille et travail pour les hommes et es femmes: droit et pratiques*, Athènes - Bruxelles (Ant. N. Sakkoulas / Bruylant), 2005.

[5] These conclusions can be confronted in ROSÁRIO PALMA RAMALHO, *Guaranteeing Equal Pay…cit.* , 42 ss. They came out of a questionnaire addressed to the partners of the Project, regarding

These reasons can be explained briefly.

i) The first reason for the lack of effectiveness of gender equality principle is the low visibility of the principle itself, not only in the law, but also in its practical application by the judges, and finally for the social partners. On the one hand, gender equality issues are not always clear in the law, and seem not to be well known by the judges that seldom apply these ruling. On the other hand, gender equality issues are not among the strongest worries of trade unions and are certainly not an important issue for employers as well. Finally, in many countries these issues seem not to be a priority to public inspection services.

Of course, the low visibility of the principle makes the practical implementation of the ruling in this area more difficult.

ii) The second reason for the lack of effectiveness of gender equality principle regards the technical concepts supposed by gender equality. In fact, notions like indirect discrimination, like work and work of equal value are not very clear and their content is difficult to integrate and even harder to explain.

This situation also contributes to the difficulties in the implementation of the ruling in this area.

iii) The third reason for the lack of effectiveness of gender equality principle regards the difficulties of judicial procedures in gender equality area. It is well established that very few actions are brought before the Courts, and that even fewer prevail since the proof is difficult, because of the «faulty» system and the need of a determined comparator. On the other hand, even when judicial procedures are successful, the results are modest from the perspective of the global development of gender equality system, since their effect is limited to the plaintive.

This situation also contributes to the difficulties in the practical implementation of the principle.

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the diagnosis of discriminatory practises in employment and at the workplace, and it is important to emphasize that these conclusions were common to all Member States involved, despite their different economical situation and social traditions.

iv) The fourth factor responsible for the low effectiveness of gender equality principle has an economical ground. It regards the traditional segregation of the labour market between professions or areas of economical activity which are dominated by women («feminine professions») and those that employ mostly men («masculine professions»). The fact is that this social segregation of the labour market often goes alongside with a less favourable evaluation of the so-called feminine professions (for instance the work in social services, which is considered a mainly feminine area, is less valued than other mainly masculine professional areas).

This «natural» segregation of the labour market is directly responsible for systematic discrimination, meaning not the individualised discrimination between two concrete workers (female A *versus* male B), but the discrimination in the labour market as a whole between different categories of workers or different professions. One can easily understand that when the labour market is sex-segregated (which is the common situation in most countries) discrimination in access to employment and in working conditions arises directly from the lower value recognised to certain categories of workers, if these categories are mainly feminine.

v) The last reason for the difficulties in the implementation of gender equality principle is the social stigma attached both to professional responsibilities and to family responsibilities: because women are socially supposed to be more devoted to family and to care[6] than men, that fact has consequences on their professional life that induce to discriminatory practises.

In short, there is a clear link between gender equality and the social traditions regarding the reconciliation of family and working life.

[6] We use the expression «care» in the large sense of the word, including the duties related to maternity but also the duties related to one's family, not only to assist the children, but also to give assistance to other dependants, like elderly people or handicapped or sick relatives.

II. We would like now to pay specific attention to the last reason indicated above (the social stigma attached to professional and family responsibilities), to underline its major importance amongst all the factors responsible for the difficulties in the implementation of gender equality ruling, mainly in employment law.
The utmost importance of this factor is proved by a simple assumption: even if we could eradicate all the other sources of discrimination, throughout legal measures and with a joint action of all relevant partners in the process, discriminatory practises in access to employment and at the workplace would persist since the responsibilities regarding care are still attributed mostly to women.

In fact, it is commonly recognised that a non-equitable division of family responsibilities between men and women is the source for both direct and indirect sex discrimination. For instance, in access to employment, women are often left aside, since the employer is afraid of their more frequent absences from work, for maternity or family reasons, and also due to the more probable breaks on their careers, on account of maternity leaves or other long-term leaves for reasons related to childcare. Also, women are discriminated in the course of their employment contracts, in promotions or in access to benefits related to productivity or lack of absences, again for reasons related to maternity and care.
But, on the other hand, if a working father wants to participate more actively in family life and to take advantage of his paternity rights, he might have to endure discriminatory practises at work or in access to employment. And, when this happens, in some countries he may not be covered by the legal measures which protect women during pregnancy and as mothers, since these measures often apply only to women.
These examples prove the importance of this factor to the practical development of gender equality principle, mainly in the area of employment. However, it is also easy to conclude that, more than any other, this factor is very difficult to eradicate or even to grasp, at least throughout legal actions, since it lies beyond the legal system in cultural tradition.

III. This reasoning is enough to confirm the assumption that there is a material bound between gender equality law and the rights attached to maternity, paternity and the reconciliation of family and working life.

This assumption being made, the question is to establish how this bound should be dealt with by the legal system, always baring in mind the goal of the practical implementation of gender equality principles.
The next lines are devoted to this question.

3. The link between legal provisions regarding gender equality and provisions regarding the reconciliation of family and working life: possible approaches

The link between gender equality provisions and provisions regarding the reconciliation of family and working life can be established in two ways, by the legal system.
One possibility is to conceive the rules regarding maternity as an *exception* to gender equality principle. In this perspective, the eminent value of maternity rights justifies the different treatment accorded to women in employment due to that reason, and therefore the rules that establish such a «different» treatment are not to be considered discriminatory.
The other possible approach to this issue is to conceive the right to a balanced share of care responsibilities between men and women that work as a *part* of gender equality principle itself, in fact as a *material condition* for the efficiency of this principle. In this perspective, maternity provisions aiming to the protection of pregnant women and newly mothers would find their place amongst the rest of the measures regarding the reconciliation of family and working life, and all the other measures in this area should be directed both to mothers and fathers.[7]

[7] For a more developed view of this approach to the problem of the relation between gender equality and the reconciliation of family and working life, see MARIA DO ROSÁRIO PALMA RAMALHO, *Conciliação equilibrada entre a vida professional e familiar - uma condição para a igualdade entre mulheres e homens na União Europeia, in Estudos de Direito do Trabalho I*, Coimbra (Almedina), 2003, 269-277.

a) The «exception» approach: maternity provisions as a justified exception to equal treatment between men and women

I. European Law has adopted the first approach to this issue for a long time. In fact, since Directive 76/207, from 9 February 1976, regarding equal treatment between men and women in access to employment, working conditions and professional training, that legal measures concerning the protection of women during pregnancy and after birth were justified as an exception to equal treatment principle[8]. And it was also under this view that Directive 92/85, from 19 October 1992, regarding the protection of pregnant women and newly mothers at work, was approved.

II. In our view, despite the protection granted by these rules to women during pregnancy and maternity, this line of approach had negative consequences for the subsequent development on gender equality law, mainly for the development of rules concerning the reconciliation between family responsibilities and working life in a balanced or equitable way. Among others, we underline the following negative consequences of the «exception» approach to this issue.

On the one hand, this approach had a narrowing effect in the content of the ruling regarding the protection of maternity, which became more limited than it might have been if maternity, paternity and reconciling issues had been considered altogether. In fact, despite the importance of Directive 92/85, namely to grant maternity leave, to protect women against dismissal during pregnancy and maternity leave and to ensure their rights when returning from maternity leave, the fact is that this Directive is applicable only to women, since pregnancy in itself was the justification for the exceptional protection provided by this ruling[9]. And being so, men were necessary left out of the scope of the Directive, when exercising their own paternity rights.

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[8] This approach comes out of art. 2, n. 3 of the Directive, and has been developed in this sense of exceptional but justifiable measures to gender equality principle. This approach was also adopted by the Court of Justice, in several judgments.

[9] It should be noticed that the basis of Directive 92/85 was not article 119 of the Rome Treaty, regarding equal pay, but article 118-A, regarding working conditions and the protection of health at work. With this basis, the Directive naturally kept itself to the biological and medical justification for the protection ruling, which was pregnancy, and therefore its scope was necessarily limited to women.

On the other hand, the perspective of maternity rules as an exception to gender equality principle has led to several judgments of the Court of Justice which show a somewhat prejudiced view on these issues. We just recall cases such as *Larsson*, *Hertz* or *Brown*, that discussed things like «if an illness comes out of pregnancy, is the woman still protected under the European rule that prohibits dismissal during pregnancy?», as well as the several cases where the Court agreed with the refusal to extend maternity leave to fathers in case of adoption (for instance Case *Commission v. Italie*[10]) or in the case of long-term maternity leaves (for instance *Case Hofmann*[11]). These examples illustrate how limited this approach is[12].

Finally, the fact of Directive 92/85 being applicable only to women contributed to increase different treatment between men and women in what regards the reconciliation of family and working life. In short, this Directive protected pregnant women but kept untouched the traditional stigma regarding the share of professional and family responsibilities between men and women.

b) The integrated approach: maternity and paternity protection and balanced reconciliation of work and family life as a material condition for gender equality

I. More recent developments show that European law is evolving from this traditional approach to maternity issues to an approach that contemplates also paternity issues and, more broadly, the matters regarding the reconciliation of family and working life. In this sense, we recall several provisions and Directives:

i) Directive 96/34, from 3 June 1996, establishing the right to parental leave, grants this leave both to the father and the mother of the child, on a non-transferable basis, which means that for the first time European law promotes

[10] *Case Commission v. Italie* (Case n. C-163/82, from 26/10/1983).

[11] *Case Hofmann* (Case C-184/83, from 12/07/1984)

[12] For a detailed approach of the traditional view of the Court of Justice in issues related to maternity provisions, ANNICK MASSELOT, *Les rapports entre l'égalité de traitement et la protection de la maternité au travers de la jurisprudence de la Cour de Justice sur la grossesse et la maternité, in L'Égalité entre femmes et hommes et la vie professionnelle. Le point sur les développements actuels en Europe,* Paris (Dalloz), 2003, 103-120.

the role of both parents in the care of their young children. The other interesting point in this Directive is the fact that it was based on a social partners framework agreement and not directly on the Treaty, and this basis shows the increasing importance of this issue at the social partners level.

ii) Council Resolution No. 9303/00 from 19 June 2000[13], regarding the promotion of a balanced participation of men and women in the professional activity and in the family activities: this Resolution is based on a substantive approach of gender equality principle in art. 2 of the TEC, in the sense that this principle demands not only the elimination of discriminatory practises that already exist, but in the sense that it also demands that adequate conditions are established in order to prevent new forms of discrimination from arising. In short, gender equality principle is to be understood also as a proactive goal.

In this sense, the Resolution establishes that the right to a balanced participation of women and men both at the professional life and in family life is a material condition to achieve gender equality at work, and therefore encourages the Member States to take the necessary steps to protect fathers that wish to contribute to this more balanced reconciliation.

iii) The European Charter of Fundamental Rights, in Article 33 No. 2, mentions maternity and paternity rights and the right to the reconciliation of family and working life altogether, which is also an important argument in favour of this integrated approach to the two subjects[14].

iv) The new version of art. 2 No. 7 of Directive 76/207, as amended by Directive 2002/73, from 23 September 2002, firmly states that a less favourable treatment of a woman for a reason related to pregnancy or to maternity is to be considered as gender discrimination.

v) Finally, in what regards the Recast Directive on gender equality (Directive 2006/54, from 5 July 2006), despite the fact that this Directive decided not to include all the rules from Directive 92/85, an integrated approach to maternity issues and reconciliation issues is also to be noticed. On

[13] JO - C218 from 3/07/2000.
[14] The importance of this rule will of course increase if it becomes binding and with same value of the Treaties, under the terms of Article 6 No. 1 of the TEU, in the version of the Lisbon Treaty, if this Treaty comes into force.

the one hand, in its preamble (point 11) the Directive explicitly recognises the reconciliation of family and working life as a task of both men an women. On the other hand, the Directive states that any less favourable treatment of a woman related to pregnancy or to maternity leave is integrate in the notion of discrimination (Article 2 No. 2 c)) and is to be considered as direct discrimination (point 11 of the preamble). Finally, this Directive reaffirms the right of the mother to return the same or an equivalent job at the end of maternity leave (Article 15) and recognises the right to an equivalent protection of the workers in the Member States that have instated paternity leave and/or adoption leave (Article 16).

II. Also, when looking at more recent developments in European Union's policies we notice that the subject of reconciliation of family responsibilities and working life is now firmly set on the agenda.

In this perspective, promoting reconciliation is part of the amended Lisbon Strategy (Guideline 18 of the Employment Guidelines (2005-2008)[15], and the Roadmap for Equality between Men and Women for the period 2006-2010, established by the European Commission, indicates reconciliation as a priority[16].

Also this subject is being discussed with the European social partners since 2006, in order to review the framework agreement on parental leave. And on October 2008, the European Commission issued a Communication on the issue of reconciliation between professional, private and family life[17], which established the following goals in this area:

- to improve legal measures tending to reconciliation, including legislative proposals concerning the Directives regarding maternity leave and parental leave, with the aim of extending the first leave and to promote the father's access to the second one;
- to promote equal treatment and maternity protection for independent workers and helping spouses, throughout a new Directive that would replace Directive 86/613, which is considered relatively useless;

[15] In this Guideline it mentioned, as one of the priorities of the employment strategy, to promote a lifecycle approach to work, through a better reconciliation of work and private life and the provision of child-care facilities and care for other dependants.

[16] To promote reconciliation, the Roadmap establishes targets like introducing flexible working arrangements and increasing child care services.

[17] Communication from 3 October 2008 - COM (2008) 635 final

- to promote assessment reports on childcare facilities in the Member States, and other actions and studies tending to the practical implementation of reconciliation policies.

Following this Communication, a Proposal for the amendment of Directive 92/85 has already been presented to the Parliament[18]. This proposal contemplates the extension of paid maternity leave up to 18 weeks (instead of the present 14 weeks) and reinforces the protection of women against dismissal, during and immediately after the leave.

4. Final remarks

I. This brief description of the more recent evolution of European law in this area gives ground for some conclusions.

The first conclusion that we would like to point out is to recognize that the issue of reconciliation between professional, family and private life seems definitely to be considered an important issue for the European Union.

The second conclusion is also to recognize that, despite the option of the Recast Directive on gender equality (Directive 2006/54, from 5 July 2006) to leave maternity leave and parental ruling out of its own scope, the link of maternity issues with gender equality is already well established, both due to work of the Court of Justice in judgments like *Thibault* (where different treatment of pregnant women was qualified as direct sex discrimination)[19] and to the several references to this link in other ruling (mainly in Directive 2002/73). Moreover, this link is even more explicitly assumed in the Proposal for the amendment of Directive 92/85, which indicates Article 141 No. 3 of TEC as its primary basis, alongside with Article 131 No. 2, thus firmly recognizing that maternity provisions involve not only a question of women's health and security, but indeed a problem of gender equality.

[18] SEC (2008) 2595; SEC (2008) 2596; COM/2008/0637 final - COD 2008/0193*/
[19] Case C-136/95.

II. After establishing these conclusions, we can however go a little further in order to come to a third and final point, which relates to the integrated approach of maternity issues and reconciliation issues.

In our opinion, the evolution of European law that we have just described is still not enough to increase the effectiveness of gender equality principle, since there is not yet a clear assumption of the link between maternity provisions and reconciliation provisions. In fact, European law keeps progressing in this area by two apparently independent topics: the maternity topic, contemplated in maternity leave directive; and reconciliation measures, tested in parental leave directive.

Contrary to this perspective, we think that these topics would gain to be considered together, since «progressive» measures related to one of them can in fact have a negative effect on the other one[20]. Thus, instead of two revised or new Directives respectively on maternity leave and parental leave, it would be interesting to test the possibility of one Directive, regarding reconciliation issues, which would apply to men and women that work but who also play a family role, and where specific provisions to protect women that are pregnant or have recently given birth would find their place.

In our view, this unified approach to both topics would be more useful to promote a more balanced division of family responsibilities between men and women, since at least it would give a strong sign that for European Union reconciliation is essentially a task for men and women. And since the issue of reconciliation is the key point for the practical progress of gender equality - as we have established in the beginning of this paper - this perspective deserves at least a deeper look.

[20] For instance, the rule regarding the extension of maternity leave up to a minimum of 18 weeks, including in the Proposal for the revision of Directive 92/85, may have e negative effects from the perspective of and equitable reconciliation of professional life and family responsibilities, since it will most probably keep women (and not men) away from their jobs for a longer period.