Reconciling private and professional responsibilities:
a necessary means for promoting substantive gender equality[*]

Sophia Koukoulis-Spiliotopoulos
attorney at law

Preliminary observations

1. Under Union law, gender is not just one of the prohibited grounds of discrimination. Gender equality is a general principle and a fundamental right. General principles are a cornerstone of the Union, according to Art. 6(1) of the EC Treaty (TEU) currently in force. They rank higher than secondary Union law and as high as the Treaties which, according to the ECJ, constitute '*the Constitutional Charter'* of the Union. They are thus constitutional principles of the Union and the fundamental rights that they confer are constitutional rights. This is why: i) they condition the legality and the interpretation of any Union act, within any field and pillar; and ii) they are binding on Member States, whenever they act 'within the scope' of Union law − not merely when they implement it. Fundamental rights retain the same nature and function under the Lisbon Treaty (Art. 2 of the amended TEU).

2. Gender equality is one of the constitutional principles of the Union. Moreover, Art. 3(2) EC Treaty (TEC) requires that the Community 'eliminate inequalities' and 'promote equality between men and women' in all its activities. It thus makes gender equality a horizontal Community objective and imposes on all Community/Union institutions a 'positive obligation' 'actively to promote' it. Member States are also addressees of this 'positive obligation', *via* their duty of loyal cooperation, which applies in all pillars. The provision of Art. 3(2) TEC is repeated in Art. 8 of the Treaty on the Functioning of the Union (TFU), which, by virtue of the Lisbon Treaty, shall replace the TEC. Moreover, the Lisbon Treaty includes gender equality among the fundamental values and the horizontal objectives of the Union (Arts. 2 and 3(3) of the amended TEU, respectively).

3. The concept of 'inequality' is different in nature from and broader than the concept of 'discrimination'. Gender inequalities are *de facto* situations affecting mainly women, due to 'prejudices and stereotypes' which, by infiltrating socio-economic structures, made these inequalities structural and systemic. They subsist even after discriminatory provisions are repealed and they are often multiple. Thus, gender equality is a positive and pro-active constitutional principle, permeating all EU pillars – not a mere prohibition of discrimination. The above 'positive obligation' is to promote substantive gender equality, viz. to eliminate the structural roots of gender inequalities, positive action being its logical corollary. The ECJ recognizes the existence and structural nature of gender inequalities and the necessity of positive action, underlining that:

> 'even where candidates are equally qualified, male candidates tend to be promoted in preference to female candidates particularly because of *prejudices* and *stereotypes* concerning the *role and capacities of women* in working life, so that the mere fact that a male candidate and a female candidate are equally qualified does not mean that they have the same chances' (emphasis added).

[*] This paper draws on the author's papers 'The amended equal treatment directive (2002/73): an expression of constitutional principles/fundamental rights' 12 *MJ* 4 2005 pp. 327-369, and 'The Lisbon Treaty and the Charter of Fundamental Rights: maintaining and developing the *acquis* in gender equality' European Network of Legal Experts in the Field of Gender Equality, *European Gender Equality Law Review* 2008-1, pp. 15-24. http://ec.europa.eu/social/main.jsp?catId=641&langId=en

4. Substantive gender equality is also promoted by measures protecting maternity and paternity or facilitating the reconciling of private/family life and working life for both men and women ('reconciling'). The sources of the rules relating to reconciling are Directives 2002/73 amending Directive 76/207 (gender equality in employment),[1] 2006/54 (gender equality in employment, recast),[2] 92/85 (pregnancy/maternity protection)[3], 96/34 (parental leave)[4] and 2004/113 (gender equality in access to and supply of goods and services).[5]

a) Reconciling family/private life and work: a general principle conferring fundamental rights on men, women and children

5. The ECJ deduced from Art. 8 ECHR a general principle of protection of the family and family life, which aims to safeguard family ties and allow their normal development on the basis of equality between the parents and the child's best interests. This principle is a source of fundamental rights of parents and children. As a general principle it is binding on the EU and Member States (*supra* No. 1). The principle of 'reconciling' – a particular expression of the above principle and a source of individual rights of parents and children – is, according to the ECJ, a '*natural corollary to gender equality*' and a condition for its substantive achievement. It is in this sense that it is dealt with by Community/Union instruments, including Directive 96/34 (parental leave)[6] and the reconciling Resolution[7]. Any other provision directly or indirectly related to family life and/or reconciling, in any area, including those of Directives 92/85 (pregnancy/maternity), 2002/73 and 2006/54 (recast directive) (gender equality in employment) or 2004/113 (goods and services), should be largely and teleologically construed in that same sense. Facilitating 'reconciling' for both men and women can limit the perception of women as more costly employees.

6. 'Reconciling' includes maternity, paternity or parenthood protection, but goes even further. Family obligations, whose reconciling with occupational obligations must be facilitated, with a view to achieving substantive equality, include care to children and other dependants. This broad concept is stressed by the reconciling Resolution and is reflected in Directive 96/34, which:

> 'sets out minimum requirements to parental leave and time-off from work [on grounds of *force majeure* for urgent family reasons], as an important means of reconciling work and family life and promoting equal opportunities and treatment between men and women'.[8]

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[1] Directive 2002/73/EC amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, [2002] OJ L269/15.

[2] Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L204/23.

[3] Directive 92/85/EEC 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, [1992] O.J. L348/1.

[4] Directive 96/34/EC on the framework agreement on parental leave, [1996] O.J. L145/4.

[5] Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L373/37.

[6] This Directive repeatedly states that its objective is to promote equal opportunities and treatment of men and women (see e.g. Preamble and Clause 2(2) of the Framework Agreement annexed to the Directive).

[7] See Resolution of the Council and the Ministers for employment and social policy on the balanced participation of women and men in family and working life, [2000] O.J. C218/02, which repeatedly refers to reconciling as a basic condition of *de facto* equality.

[8] Preamble to the Framework Agreement on parental leave annexed to Directive 96/34 (emphasis added). This Directive repeatedly refers to reconciling; see e.g. the Preamble to the Directive (paras. 3 and 5), the General Considerations of the Framework Agreement (paras. 3, 5 and 8) and Clause 1(1) of the Framework Agreement.

7. Therefore, 'reconciling' requires various other appropriate 'horizontal and specific' measures and policies.[9] Moreover, 'men should be encouraged to assume an equal share of family responsibilities'.[10] Directive 2002/73 adopted this broad approach, which is repeated in Directive 2006/54 (recast).[11] Thus, the consideration in *Hoffmann* ('it is apparent [...] that [Directive 76/207] is not designed to settle questions concerned with the organization of the family, or to alter the division of responsibilities between parents')[12] is now, twenty years later, irrelevant. This is why subsequent judgments do not repeat this formulation, but only the aim of maternity protection formulated in this judgment.

8. Being a fundamental right and a 'corollary' to gender equality, 'reconciling' is part of EU foundations (Art. 6(1) EU), and an EU 'aim' in all areas; thus, 'inequalities' thereto related must be eliminated, and both the EU and Member States have the obligation 'actively to promote it' (Art.3(2) EC). Some important consequences: i) by analogy to maternity (*infra* No. 12) any unfavourable treatment directly or indirectly related to 'reconciling' constitutes direct discrimination on grounds of sex (since it can affect only men, as fathers, or only women, as mothers); ii) Directive 97/80 (burden of proof)[13] is applicable in all cases.

9. The Lisbon strategy[14] includes 'reconciling', along with gender equality, among the fundamental EU social and economic goals; this is repeated by subsequent Councils and the Commission, in particular in its annual Reports on Gender Equality. Indeed, an increase in female employment, life-long learning and training of women and their mobility as workers, personal choice regarding employment and occupation, improvement of the quality of life and employment, strengthening of social cohesion – all of them strategic goals – will fail without measures enabling 'reconciling' between men and women. Such measures are vital for the future of Europe, indeed for its very survival, as essential elements of a balanced and effective social, family and demographic policy safeguarding and reinforcing a social and human Europe. This concern is reflected in the Commission's Green Paper addressing the 'demographic decline'.[15]

10. The principle of family protection is also proclaimed by the International Covenant on Civil and Political Rights (ICCPR, Art. 17(1)) and the European Social Charter (ESC, Art. 16). The 'reconciling' principle, as a particular expression of the principle of family protection and a means for substantively guaranteeing the right to work and gender equality, is proclaimed by ILO Convention 156, the CEDAW (Art. 11(2)(c)) and the revised ESC (Art. 27); the ESC Committee, stressing its importance, considered it already included in the 'vast field' of Art. 16 ESC (family protection).

11. There is thus a significant European and international *acquis* regarding 'reconciling'.[16] Relevant measures cannot possibly constitute derogations from gender equality, since they are necessary means for its substantive implementation and for

[9] See the reconciling Resolution, in particular para. 2(a).
[10] Framework Agreement on parental leave annexed to Directive 96/34, General Considerations, para. 8. This is also the very aim of the reconciling Resolution, according to its title ('balanced participation of women and men in *family and working* life' – emphasis added), as also reflected in several of its provisions.
[11] Directive 2002/73 expresses this approach by referring to the reconciling Resolution and Directive 96/34 and requiring the protection of fathers who exercise the right to paternity leave against unfavourable treatment (Preamble, para. 13 and new para. 7 (4) of Art. 2). These provisions are repeated in Directive 2006/54 (recast).
[12] Case 184/83 *U. Hoffmann v. Barmer Ersartzkasse* [1984] ECR 3047, para. 24.
[13] Directive 97/80 on the burden of proof in cases of discrimination based on sex, [1997] O.J. L14/6.
[14] Lisbon European Council, 23-24.3.2000, Presidency Conclusions.
[15] Commission Communication, Green Paper 'Confronting demographic changes: a new solidarity between generations', COM(2005) 94 final.
[16] As the reconciling Resolution underlines it. See in particular para. 6 of its Preamble.

responding to the Union's 'existential' needs. Interpreting such measures strictly amounts to restricting fundamental principles/ rights and endangering Europe's future.

b) Maternity/paternity protection

12. The ECJ acknowledged that maternity protection has a double aim: i) to protect a woman's biological condition and her special relationship with her child following pregnancy and childbirth; ii) to promote substantive gender equality. Notwithstanding the 'negative' wording of Art. 2(3) of Directive 76/207 in respect of pregnancy and maternity,[17] the ECJ has given this provision, in conjunction with Art. 2(1) and other provisions of Directive 76/207, a wide and teleological interpretation – not an interpretation befitting derogations. It thus recognized a right to maternity protection and held that any unfavourable treatment directly or indirectly related to pregnancy or maternity constitutes *direct discrimination* on grounds of sex; this is so, because such treatment can concern only women. This case law was 'recapitulated in Directive 2002/73', in particular in recital 12 of its Preamble, which is repeated in para. 23 of the Preamble to Directive 2006/54 (recast). The ECJ stressed the gender equality aspect of maternity protection by relying on Directive 76/207, even where the preliminary questions concerned Directive 92/85 alone.

13. The right to maternity protection is absolute: i) it entails derogations from well-established employment law principles, such as those regarding workers' availability or the optional renewal of fixed term contracts; ii) no male comparator is required, provided the woman has the necessary qualifications, even when her condition makes her unfit for work; iii) the employer's responsibility is not subject to fault, or to the absence of a cause of exoneration, or to his knowledge of the woman's condition; in the latter respect the ECJ goes further than Art. 2 of Directive 92/85[18] (which in any case contains minimum requirements), this knowledge thus being a prerequisite of health and safety measures or maternity leave only; iv) financial loss cannot exclude employer's responsibility; v) pregnancy and maternity can in no way be compared to a pathological condition; therefore, the periods of pregnancy and maternity leave cannot be treated as periods of sickness, the woman's condition or absence not depriving her of her rights under her contract. The above and the prohibition of unfavourable treatment also apply to longer periods of protection provided by national law.

14. Prior to Directive 2002/73, there was no express protection of paternity. However, as this protection is required by the principles of family protection and 'reconciling', the requirements of maternity protection also apply, by analogy, to fathers.

c) Maternity/paternity protection, facilitating reconciling of family and work v. positive action

15. Although they constitute means for promoting substantive gender equality, maternity/ paternity protection and 'reconciling' measures differ conceptually from positive action.[19] The latter is by definition temporary − until substantive gender equality is quantitatively, qualitatively and stably achieved − while the former are of a permanent nature, as they address biological differences of men and women and permanent needs of parents, children and other dependents.

[17] Art. 2(3) of Directive 76/207: 'This Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards *pregnancy and maternity*' (emphasis added).
[18] Art. 2 of Directive 92/85 defines 'a pregnant worker', 'a worker who has recently given birth' and 'a worker who is breastfeeding' as a worker who informs her employer of her condition.
[19] Art. 4 CEDAW distinguishes positive action (para. 1) from maternity protection (para. 2).

d) Gender equality and family protection in the Charter of Fundamental Rights

16. Art. 23 of the Charter proclaims substantive gender equality as a principle and right, in all areas.[20] Its 2nd para. is inspired by Art. 141(4) EC, but falls short of this provision and of the provision of Art. 3(2) EC in that it omits: i) the opening words of Art. 141(4), which reflect the character of positive action;[21] ii) the last words of Art. 141(4),[22] which indicate the more particular aims of positive action. This omission does not affect, however, the nature of positive action (cf. *infra* No. 20).

17. Art. 33 of the Charter[23], in para. 1 reflects the principle of family protection. Its para. 2 contains an important advance: it proclaims a 'right to paid maternity leave'. It thus goes further than Directive 92/85 Art. 11(2b) and (3), which introduces the minimum requirement of 'maintenance of a payment to, and/or entitlement to an adequate allowance', which should guarantee 'income at least equivalent to that which the worker concerned would receive in the event of a break in her activities on grounds connected with her state of health'. Thus, in this respect, the Charter provides a better guarantee, in line with the principle of family protection.

18. Furthermore, by granting the right not to be dismissed 'for a reason connected with maternity', Art. 33(2) surpasses Art. 10 of Directive 92/85 (which prohibits dismissal during pregnancy and maternity leave only) and goes in the same direction as ECJ case law and Directive 2002/73, as discussed *infra*.

19. However, regarding other rights, Art. 33(2) of he Charter falls short of the *acquis,* i.e. Directives 92/85, 96/34, 2002/73 and 2006/54 (recast), and ECJ case-law. In particular, regarding maternity protection, it omits the prohibition of a refusal to hire, the requirement that all employment rights be maintained during maternity leave and the right to health protection and security at the workplace. Moreover, it omits the rights not to be dismissed due to the exercise of the right to parental leave, to return to the same or an equivalent post of employment after parental leave and to maintain employment rights during that leave, and the right to time off for urgent family reasons.

20. However, no such shortcomings can diminish the *acquis.* This is stipulated in Charter Art. 53,[24] which reflects a general principle of international human rights law, according to which the rules affording more protection to human rights prevail, irrespective of their source. The Charter's list of rights should thus be considered non-exhaustive, so that rights which form part of the *acquis,* but are either missing from or are restrictively enshrined in the Charter, continue to apply in full as part of the *acquis*. This *acquis* can, and will, be further

[20] Art. 23 of the Charter 'Equality between women and men': '1. Equality between women and men must be ensured in all areas, including employment, work and pay. 2. The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-re[presented sex.'
[21] 'With a view to ensuring full equality in practice between men and women'.
[22] '[…] or preventing or compensating for disadvantages'.
[23] Art. 33 of the Charter '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'.
[24] Art. 53 of the Charter: 'Level of protection': Nothing in this Charter shall be interpreted as restrictively or adversely affecting human rights and fundamental freedoms as recognized, 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.'

developed, by virtue of EC/ EU legislation and ECJ case-law. Moreover, to the extent that it reflects the *acquis* or goes beyond it, the Charter also constitutes an irreducible *acquis*.

21. Thus, Charter Art. 33(1), as well as Art. 33(2) to the extent it provides for 'paid maternity leave' and prohibits dismissal 'for a reason connected with maternity', condition the interpretation of the Directives while the omissions in Arts. 33(2) and 23(2) cannot bring about any restriction to the Directives' scope or prevent their improvement.

e) Discrimination on grounds of pregnancy/maternity, paternity or parenthood

22. Directive 2002/73 maintains Art. 2(3) of Directive 76/207 and adds new provisions which are repeated by Directive 2006/54 (recast). These provisions reflect ECJ case-law on maternity discrimination and/or make more explicit certain rights conferred by Directive 92/85 (maternity protection). Moreover, Directive 2002/73 confers rights connected to paternity leave[25] or adoption leave (for mothers and fathers) provided by national legislation, which are analogous to the maternity protection rights recognized by the ECJ on the basis of Directives 76/207 and 92/85. These rights are codified in Directive 2006/54.

23. More particularly, Directive 2002/73 confers on women rights which are a particular expression of the right conferred by Art. 11(2)(a) of Directive 92/85 (maintenance of the rights connected with the employment contract); these rights, as repeated in Directive 2006/54, are the following: i) to return, after maternity leave, to the same job or to an equivalent post, on no less favourable terms and conditions, and ii) to benefit from any improvement in working conditions to which they would be entitled during their absence. Any violation of these rights constitutes direct gender discrimination. The first right, teleologically construed, means that return to the same job is required as a rule, while the equivalent post is an exception to be justified by the employer on objective grounds, in no way related to maternity leave or the woman's condition. The second right is recognized by ECJ case-law. Directives 2002/73 and 2006/43 do not prohibit dismissal during pregnancy or maternity leave, as this is prohibited (save in exceptional cases not connected with the woman's condition) by Directive 92/85, to which they refer.[26] The protection includes the whole period of maternity leave provided by national law, even where it is longer than the minimum required by Directive 92/85.

24. Directives 2002/73 and 2006/54 (recast, Art. 2(2)(c)) contain a provision inspired by ECJ case law, according to which 'less favourable treatment of a woman related to pregnancy or maternity leave shall constitute discrimination within the meaning of this Directive'. 'Less favourable' should be read as 'unfavourable', since no comparator is needed. Moreover, in order to grasp the scope of maternity protection, we should read this new provision in the light of recital 12 of the Preamble to Directive 2002/73 (recital 23 pf Preamble to Directive 2006/545, recast), which, in recapitulating ECJ case-law, recalls that it 'has consistently ruled that any unfavourable treatment of women related to pregnancy or maternity constitutes direct sex discrimination'. We should also recall that the ECJ condemned such treatment 'directly or indirectly' related to these conditions. It results from these provisions, read in light of the principle of family protection, that the directive prohibits any unfavourable treatment directly or indirectly related to pregnancy or maternity.[27] Thus, situations related to maternity, but not necessarily to maternity leave, e.g. breastfeeding, are also covered. This also accords with Art. 2(7)(1) of Directive 2002/73 (Art. 28 of Directive

[25] Paternity leave is leave granted to fathers after the birth of a child, to be taken at the same time as maternity leave (see the reconciling Resolution, supra No. 5).
[26] Art. 10 of Directive 92/85.
[27] This is also the wording of Art. 4(1)(a) of Directive 2004/113 (goods and services).

2006/54, recast), which repeats the provision of Art. 2(3) of Directive 76/207 on which the ECJ based its maternity protection case-law.

25. Furthermore, Directives 2002/73 and 2006/54 (recast. Art. 16) confer paternity and adoption rights analogous to maternity rights: they prohibit the dismissal of fathers or adoptive parents for reasons related to the exercise of the right to paternity or adoption leave, respectively, and require that it be ensured that, at the end of this leave, they will be entitled to return to their jobs or to equivalent posts. This means that any unfavourable treatment of a man directly or indirectly related to paternity leave, as well as any unfavourable treatment of a man or a woman directly or indirectly related to adoption leave shall constitute direct gender discrimination, even in the absence of a candidate of the opposite sex or who is not a parent (*supra* No. 13). It must be recalled that Directive 96/34 also confers the right not to be dismissed to workers who return from parental leave.[28]

26. Directive 2004/113 (gender equality in access to and supply of goods and services) (Art. 4) also classifies unfavourable treatment of women for reasons of pregnancy and maternity as direct discrimination on grounds of sex, and thus prohibits it. This Directive does not contain any provision on paternal or parental protection. However, it must be considered that what has been mentioned in this respect regarding the other directives, applies in the field of goods and services as well, by virtue of the general principle of family protection.

[28] Clause 2(5) of the Framework Agreement annexed to Directive 96/34: 'right to return to the same job or, *if that is not possible*, to an equivalent or similar job consistent with their employment contract or employment relationship' (emphasis added).