The New Directive on Work-Life Balance: Towards a New Paradigm of Family Care and Equality?

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European Commission, DG Justice and Consumers

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Abstract

The article examines the new Work-Life Balance Directive of June 2019 which aims to enhance women's participation in employment by increasing the possibilities for men to take up family-related leave. The Directive includes provisions on paternity leave, non-transferability and payment of (part of) parental leave, carers' leave and extended possibilities for parents and carers to request flexible working arrangements. These provisions will have a significant impact in most Member States, obliging them to increase paid reserved periods of child-related leave for both mothers and fathers. The new Directive was one of the initiatives where the European Pillar of Social Rights has proved to be successful up to now, and at the time of writing was one of only two directives (together with the European Accessibility Act) the Union adopted since 2010 in the area of equality—which gives food for thought.

Introduction

The new Work-Life Balance Directive (the Directive, or the new Directive)[1] adopted in June 2019, introduced new rights for workers in an area where there were no fundamental changes for more than 20 years, since the adoption of the first Parental Leave Directive in 1996.[2] It provides for the right of fathers to paid paternity leave of 10 working days; the right of each parent to reserved and paid parental leave of two months, with a further two months of leave that is not required to be paid under EU law (although national legislation may go further) and which may be transferred to the other parent; the right of carers to leave of five working days per year per worker; and the right of parents and carers to request flexible working arrangements.

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[1] Directive 2019/1158 on work-life balance for parents and carers and repealing Council Directive 2010/18 [2019] OJ L188/79.

[2] As explained below, Directive 2010/18 did not bring major changes, as it extended to four months the period of non-paid parental leave of three months provided for in 1996 by Directive 96/34 and made one month non-transferable between the parents. Directive 92/85 on maternity leave was adopted in 1992.

This Directive takes stock of the lessons learned from the past. At present, it is mostly women who shoulder the majority of caring and household responsibilities, and they are more likely than men to take parental leave or to look for flexible working arrangements. Many of them leave the labour market for a certain period, sometimes completely, putting their careers on hold or choosing jobs that fit around caring responsibilities, all of which contributes to gender employment and pay gaps. Therefore, in order to improve women's participation and situation in the labour market, the Directive increases the possibilities for men to take part in parental and caring responsibilities.

This explains why, while the new Directive actually gives more rights to fathers than mothers, its legal basis is the Treaty provision allowing the Union to act towards equality between men and women in the labour market.[3] The new Directive is also interesting in two other aspects: it is at the intersection between equality law and social or labour law more generally, and it was the only binding instrument of EU law proposed when the European Pillar of Social Rights was presented in April 2017.

This article consists of four sections. The first section explains the background of the Directive, recalling the existing EU law framework of maternity and parental leave directives, the unsuccessful Commission proposal of 2008 to amend the Maternity Leave Directive and why it failed, as well as the 2017 Commission proposal for a Work-Life Balance Directive and its objectives.

Section two zooms in on the new Directive. It provides a brief account of the negotiations leading to its adoption and takes a close look at the main substantive provisions, considering how some open questions of interpretation could be solved.

The third section zooms out: it puts the Directive into a wider perspective, with an overview of national systems of child-related leave, examining the impact of the new Directive on Member States and giving a few examples of good practices to encourage fathers' take-up of leave.

The fourth section returns to the European level and sets the new Directive against the background of EU social law, notably the recent European Pillar of Social Rights. It examines also the place of the Directive within EU equality law and its developments in the last decade.

The background

Until now, the EU framework of family leave was constituted by the Maternity Leave Directive of 1992 and the Parental Leave Directive of 1996, revised in 2010.[4]

The 1992 Directive[5] provides for the right of working mothers to at least 14 weeks' maternity leave, allocated before or after the birth of the child. Two of those 14 weeks are compulsory. The payment received during the leave must be at least equal to that received in Member States when workers are sick.[6] The dismissal of a female worker is in principle prohibited from the beginning of the pregnancy until the end of the maternity leave, except in cases not connected to the pregnancy, where the employer must explain in writing the reasons for the dismissal.[7]

[3] TFEU art.153(1)(i).

[4] For a detailed description and in-depth analysis of this framework, see M. De la Corte-Rodríguez, *EU Law on Maternity and Other Child-Related Leaves: Impact on Gender Equality* (Alphen aan den Rijn: Wolters Kluwer, 2019), Ch.1.

[5] Directive 92/85 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 (10th individual Directive within the meaning of art.16(1) of Directive 89/391 [1992] OJ L348/1). The legal basis of the directive was art.118a of the then EEC Treaty, on minimum requirements on health and safety of workers. Most of its substantial provisions impose on the employer obligations to safeguard the worker's health and safety: see for example its arts 4–7 and 9.

[6] Directive 92/85 arts 8 and 11(2) and (3).

[7] Directive 92/85 art.10.

The Parental Leave Directive was initially adopted in 1996[8] and revised and replaced in 2010.[9] Initially, Directive 96/34 provided for a period of parental leave of three months for each working parent, in order to care for a biological or adopted child. There was no requirement under EU law for this leave to be paid. Later, Directive 2010/18 (the 2010 Parental Leave Directive) extended the period of parental leave to four months and made one month non-transferable between the parents. It also required that workers be protected from dismissal or other forms of discrimination based on the fact that they have applied or have taken parental leave.[10]

Finally, mirroring the rights for employees under the Maternity Leave Directive, Directive 2010/41[11] provided for the right of self-employed persons, as well as female spouses and life partners of self-employed workers, to be granted a "sufficient maternity allowance enabling interruptions in their occupational activity owing to pregnancy or motherhood for at least 14 weeks".[12] Over time, the Court of Justice of the European Union (the Court) interpreted and reinforced the rights provided by these directives.[13]

In 2008, the Commission presented a proposal to amend the Maternity Leave Directive.[14] The main novelty was the extension of the period of maternity leave from 14 to 18 weeks, including a compulsory period of at least six weeks after childbirth, instead of two weeks as before.[15] Moreover, it proposed that the allowance received during the leave should be equivalent to the last monthly salary or an average monthly salary, although Member States could subject it to a ceiling not lower than sick pay.

The proposal reinforced the rights of pregnant workers in several other ways too. The obligation of the employer to explain in writing the reasons for dismissal of a pregnant worker would be extended to six months after the end of the maternity leave. Less favourable treatment of a woman related to pregnancy or maternity leave would be explicitly stated to be sex discrimination. The standard rules of the equality directives, notably the "recast" Directive 2006/54,[16] concerning the burden of proof, protection against victimisation, the level of penalties for discrimination and the role of equality bodies were all included in the proposal for a revised Maternity Leave Directive.

The European Parliament asked for more: 20 weeks of maternity leave with payment of 100 per cent of the last monthly salary or the average monthly salary, and with no ceiling.[17] Moreover, it demanded paternity leave of two weeks, paid and non-transferable, to workers whose partner had recently given birth. Among its many other requests, the Parliament also included maternity and paternity leave for the

[8] Directive 96/34 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC [1996] OJ L145/4.

[9] Directive 2010/18 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34 [2010] OJ L68/13.

[10] Parental Leave Directive 2010 cl.5(4).

[11] Directive 2010/41 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Directive 86/613 [2010] OJ L180/1. In Directive 86/613, art.8 only provided that Member States would examine whether, and under what conditions, female self-employed workers and the wives of self-employed workers, if they stopped working because of pregnancy or motherhood, could be entitled to cash benefits under the social security or another public social protection system.

[12] Directive 2010/18 art.8. It also provided that the allowance shall be equivalent either to sick pay leave, the average loss of income, or any other family-related allowance.

[13] See E. Ellis and P. Watson, *EU Anti-Discrimination Law*, 2nd edn (Oxford: Oxford University Press, 2012), p.328; and P. Foubert and Š. Imamovic, "The Pregnant Workers Directive: Must do Better: Lessons to be Learned from Strasbourg?" (2015) 37 *Journal of Social Welfare and Family Law* 309, 311.

[14] "Proposal for a Directive amending Council Directive 92/85 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" COM(2008) 637.

[15] These two weeks have to be allocated before or after the birth of the child, and not necessarily after childbirth.

[16] Directive 2006/54 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.

[17] Legislative resolution P7_TA(2010)0373, with its detailed position on the draft proposal, P7_TC1-COD(2008)0193.

adoption of a child under 12 months, the right to time off work for breastfeeding, in two separate periods of one hour each and the maintenance of all rights linked to the employment contract.

This created a stalemate. The Council considered fully paid maternity leave of 20 weeks unacceptable and stopped discussing the proposal in 2012.[18] In 2014, following the European Parliament elections and the arrival of the new Commission, the Italian Presidency tried to revive the file and engaged in informal contacts with the Parliament, where there was a willingness to resume dialogue.[19] In December 2014, in its Work Programme for 2015,[20] the Commission announced that, if the proposal were not agreed within six months, it would be withdrawn and replaced by a new initiative. However, it proved impossible to break the deadlock. In July 2015 the Commission withdrew the proposal, explaining that the file had not progressed since 2010 and that, despite discussions in the Council, "there has been no move to engage in negotiations with the Parliament".[21]

The failure of the proposal was due to a combination of different factors.[22] There was of course the economic crisis of 2008 and its impact on national budgets, which made national governments represented in the Council less willing to commit to new types of costs.[23] There was also the disparate position of the Council and Parliament: in the typical institutional fashion, the Parliament asked for more than the Commission proposed, while the Council was perhaps ready to accept some of the Commission proposals, but not those of the Parliament. The request of the Parliament for the introduction of paternity leave raised legal and political questions, since the Maternity Leave Directive had been adopted under the Treaty provisions on health and safety at work, and most Member States considered that the Directive should cover maternity leave only.[24] Lastly, some of the provisions of the amending proposal were not completely new, but echoed the case law of the Court, for example on protection from dismissal.[25] Some national governments may have felt that there was no real need for them, since the judgments of the Court are part of EU law.

When, in 2015, the Commission withdrew the proposal to review the Maternity Leave Directive, it announced it would present a broader initiative with an "holistic approach", which would take account of developments in society over the past decade and would also examine a wider range of issues facing

[18] Council, Note of the (Italian) Presidency of 24 November 2014 (15764/14), p.1.

[19] The previous rapporteur, Ms Edite Estrela (PES-PT), was no longer an MEP, and the new rapporteur and the Chair of the Committee on Women's Rights were willing to engage with the Council: Note of the Presidency (15764/14), p.1.

[20] "Point 58 of the Annex of the Commission Work Programme 2015" COM(2014) 910 final. The withdrawal of the proposal was already mentioned in June that year in the REFIT Communication of June 2014, Regulatory Fitness and Performance Programme (REFIT): "State of Play and Outlook" COM(2014) 368 final, p.10, where the Commission stated that it "considers it good legislative management to withdraw proposals that do not advance in the legislative process, in order to allow for a fresh start or for alternative ways to achieve the intended legislative purpose". The related Staff Working Document explained that the pending proposal could be considered for withdrawal, COM(2014) 368 final, p.96.

[21] European Commission, Press Release IP/15/5287 of 1 July 2015.

[22] For a critical perspective see Foubert and Imamovic, "The Pregnant Workers Directive" (2015) 37 *Journal of Social Welfare and Family Law* 309, who put the failure in a positive perspective, arguing that it was an opportunity to start from scratch and draft a new Directive that goes beyond a health and safety approach and accommodates both men and women who combine employment and care activities: at p.310. However, their suggestions in 2015 went beyond what the Commission would propose in 2017.

[23] See, for example, Council, Report of the Presidency of 21 November 2011 summarising the state of the debate at that moment, which states that "delegations considered discussions premature and in some cases not feasible in the current economic situation" (17029/11), p.4.

[24] Council, Report of the Presidency (17029/11), at p.2.

[25] T. Ushakova "Protecting Pregnant Women against Dismissal: Subjective and Objective Components in EU Law" in L. Mendez and L. Serrani (eds), *Work-Life Balance and the Economic Crisis: Some Insights from the Perspective of Comparative Law*" (Newcastle upon Tyne: Cambridge Scholars Publishing, 2015), p.93 at p.103.

working parents and carers in their daily lives, "including various forms of maternity and parental leave, work-life balance and the role of carers".[26]

This promise was fulfilled two years later, in April 2017, when the proposal for a Directive on work-life balance[27] was presented at same time as the European Social Pillar of Rights. In order to avoid the psychodrama of the failure of the previous proposal, the Commission decided not to propose amending the Maternity Leave Directive, but to propose instead a new directive on other forms of leave,[28] including all the rights provided by the 2010 Parental Leave Directive. It also included the right to paternity leave, which the European Parliament had requested before, and since the legal basis of the new proposal was not health and safety but equal treatment between men and women, there was no difficulty from that point of view in proposing paternity leave.

The new proposal was based on evidence of how the different forms of family leave were functioning at national and European level, and a reflection on how to overcome the shortcomings of the existing EU law framework, with the clear objective of improving the situation of women in employment. The background reality is that women continue to be under-represented in the labour market (only 67.4 per cent of women are in employment, compared with 79 per cent of men)[29] and, on average, in 2018, they were paid 14.8 per cent less than men in salaries[30] and 30.1 per cent less in pensions.[31]

There are cultural reasons for this situation, as women are still often seen as the default primary carer for children (and also for other relatives in need of support). There are also concrete economic reasons. Since men's salaries tend to be higher than those of women, and benefits available during leave do not cover all the income lost, it makes financial sense for many households (at least in the short term) that the woman stays at home to take care of the children, so that the loss of income is lower than if the man were to stay at home.[32]

However, one of the main reasons for this state of affairs is that women take more child-related leave than men, and even when both parents take leave, women tend to take it for a longer period.[33] Furthermore, when women take an extended period of family leave, the related career break means that many of them end up leaving the labour market, sometimes altogether, or they delay the development of their careers compared to men, which contributes in turn to the gender pay gap.

One of the causes of this situation is that EU law only provided for very limited possibilities for men to assume an equal share of caring responsibilities with women, mainly because parental leave was not required to be paid under EU law. Therefore, in order to increase women's participation in employment, the Commission's proposal was carefully drafted in order, first and foremost, to increase the possibilities

[26] European Commission, Press Release IP/15/5287 of 1 July 2015.

[27] "Proposal for a Directive of the European Parliament and of the Council on work-life balance for parents and carers and repealing Council Directive 2010/18" COM/2017/0253 final.

[28] For an earlier analysis of work-life balance measures that have been partly promoted through soft and only partially though hard law, see: A.I. Aybars, "Work-life Balance in the EU and Leave Arrangements Across Welfare Regimes" (2007) 38 *Industrial Relations Journal* 569.

[29] See Eurostat, *Basic figures on the EU—Third quarter 2019* (Luxembourg: EU Publications Office, 2019). The employment data concerns 2018.

[30] This "gender pay gap" refers to the difference between average gross hourly earnings of male and female employees as a percentage of male gross earnings in 2018. See Eurostat, Gender Pay Gap Statistics: *https://ec.europa.eu/eurostat/statistics-explained/index.php/Gender_pay_gap_statistics* [Accessed 17 May 2020].

[31] Eurostat, "Gender pension gap by age group—EU-SILC survey", data is from 2018 and refers to people aged 65 years or over, *https://ec.europa.eu/eurostat/web/products-eurostat-news/-/DDN-20200207-1* [Accessed 17 May 2020].

[32] O. Thévenon and A. Solaz, "Labour market effects of parental leave policies in OECD countries", OECD Social, Employment, and Migration Working Papers 141 (2013), p.16, *https://www.oecd-ilibrary.org/social-issues-migration-health/labour-market-effects-of-parental-leave-policies-in-oecd-countries_5k8xb6hw1wjf-en* [Accessed 5 May 2020].

[33] OECD Family Database, section on "Use of childbirth-related leave benefits", esp. pp.1–6, *https://www.oecd.org/els/family/PF2-2-Use-childbirth-leave.pdf* [Accessed 17 April 2020].

for men to take up parental and caring responsibilities and, second, to consider the entire life cycle of workers and the people for whom they may be responsible for caring.

The proposal suggested:

- the introduction of a new right of fathers to paid paternity leave of 10 working days;
- the requirement that the four months of parental leave available to each parent would be paid and would not be transferable to the other parent;
- the new right of carers to leave of five working days, per year, per worker; and
- the extension of the existing rights to flexible working arrangements (at the time only available under EU law to workers returning from parental leave) for parents and carers.

Moreover, according to the Commission proposal, paternity, parental and carers' leave would be paid at least at the level of sick pay, i.e. at the level that workers receive in each Member State when they are sick.

The aim of the introduction of paternity leave (to be taken around the time of the birth) and the paid, non-transferable part of parental leave is to stimulate men to get more involved in the early life of their children, also benefiting the mother in what is a challenging period for many parents. The proposal for paternity leave, and at least a portion of parental leave, to be paid and non-transferable, aims to encourage men to take it, which can set a pattern of a more equal sharing of responsibilities between the parents and help mothers to return to work sooner and more successfully. As Karu and Tremblay summarise,

> "the evidence shows a reasonably high take-up of parental leave only in countries where there is a combination of fathers' quota and high level of benefit. There is no evidence that any other combination would lead to high take-up by fathers."[34]

Carers' leave takes a life-cycle approach. For reasons related to the disabilities, illness or old age of the people they need to care for, workers may encounter caring responsibilities at any time during their lives, not only during the early period of parenthood. By providing space to care for both men and women who need to care for close relatives, carers' leave aims to help women to maintain their employment, since it tends to be women who drop out of the labour market to provide informal care. Finally, the strengthened and extended right to request flexible working arrangements aims, again, to make it easier for all workers to reconcile their work with their family responsibilities, and in particular to encourage the availability of such arrangements across occupations and sectors, in order to reduce the extent to which women self-select into (often lower-paid) jobs or professions where they perceive that they are more likely to be able to work flexibly.

For all these reasons, the proposed Directive pointed towards a new paradigm of family care, one in which men and women share their responsibilities more equally.

The new Directive on Work-Life Balance

This section analyses the main content of the new Directive. It will start with a brief account of the negotiations between the Council and the Parliament. Then it will analyse in detail the most important substantive rules of the Directive. It will provide ideas for the interpretation of some open questions, taking into account the letter, objectives and system of the Directive, as well as the previous case law of the Court on similar issues.

[34] M. Karu and D. Tremblay, "Fathers on Parental Leave: an Analysis of Rights and Take-up in 29 Countries" (2018) 21 *Community, Work and Family* 344, 356.

The negotiation

The ambitious proposal of the Commission was supported by the European Parliament, but was somewhat watered down during the negotiations with the Council. However, since its core structure and main innovations were maintained, the Directive can still be regarded as a successful piece of legislation in the area of gender equality and work-life balance.

In summary, the Parliament shared the initial ambition of the Commission and even went further regarding some specific points of the Directive.[35] The report of the Parliament's Committee on Employment and Social Affairs, of August 2018, called, notably, for payment of an allowance of at least 78 per cent of the gross wage for parental and carers' leave.[36]

In its "general approach", the Council suggested leaving it to Member States to define the adequate level of remuneration of paternity and parental leave. Moreover, it agreed on payment only for 1.5 months of the new two-month period of non-transferable parental leave. It also left it to Member States to decide whether or not to provide for payment or an allowance for carers' leave.[37]

In January 2019 the *trilogue* culminated in an agreement on the main elements of the proposal. It included 10 days of paid paternity leave for fathers following the birth of a child; four months of parental leave, with two months to be non-transferable between both parents and compensated at an adequate level defined by Member States; five days of carers' leave per worker per year; and it strengthened rights for all parents with a child up to at least eight years old and carers to request flexible working arrangements.

The new rules

Personal scope—between national definitions and European case law

As a preliminary point, it is important to make some comments about the personal scope of the Directive. The Directive covers workers and therefore excludes self-employed people, although Member States remain free to extend the benefit of rights to self-employed persons.

The original Commission's proposal stated that "this Directive applies to all workers, men and women, who have an employment contract or employment relationship", and made no reference to national definitions, thus deviating from the wording of its predecessor, the 2010 Parental Leave Directive.[38]

In this way, the Commission tried to limit some of the risks associated with making the application of EU workers' rights dependent on domestic legal systems. As pointed out by Giubboni:

> "The major risk of the referral to national law appears to reside in the possibility that Member States adapt, based on their needs, the notion of employee with a view to excluding more or less broad categories of workers from the enjoyment of the forms of protection granted by the Directives."[39]

[35] See in general the briefing of N. Milotay "A new directive on work-life balance" for the European Parliamentary Research Service, PE 614.708 (2019).

[36] The European Parliament considered proposing a payment of 80% of the gross wage for paternity leave; see report of 23 August 2018 drafted by David Casa, PE 618.193v03-00, A8-0270/2018, proposed amendment 69. However, the legislative resolution of 4 April 2019 (P8_TA(2019)0348) settled on payment of two months of parental leave at an "adequate level". See art.8(3) and Recital 31 of the Directive according to the resolution, including language that was maintained in the final version of the Directive.

[37] Council, Outcome of Proceedings of 25 June 2018 (10291/18).

[38] According to cl.1(2) of the revised Framework Agreement put into effect by the Directive, "this agreement applies to all workers, men and women, who have an employment contract or employment relationship *as defined by the law, collective agreements and/or practice in force in each Member States*" (emphasis added).

[39] S. Giubboni, "Being a Worker in EU Law" (2018) 9 *European Labour Law Journal* 223, 232.

However, Member States were reluctant to accept an EU definition of worker and wanted to stick to the approach of the 2010 Parental Leave Directive. The final text of this provision was the result of a compromise between national definitions and the boundaries imposed by the case law of the Court of Justice of the EU:

> "This Directive applies to all workers, men and women, who have an employment contract or employment relationship as defined by the law, collective agreements or practice in force in each Member State, taking into account the case-law of the Court of Justice."[40]

This compromise reflects the state of play for the scope of the EU directives expressly conferring their personal scope to national systems: the margin of manoeuvre of Member States is not unlimited, and the Court always has the final word to guarantee the achievement of the objectives of the Directives. For instance, in the *Chatzi* case, the Court affirmed that the 1996 Parental Leave Directive applies to employment in the public sector and that public officials cannot be excluded from their scope.[41] More generally, Kountouris explains that these Directives are no longer immune from the pervasive concept of EU worker.[42] This concept emerged in the context of the free movement of workers and subsequently applied to Directives not explicitly relying on national definitions, such as the Maternity Leave Directive. According to the Court:

> "The essential feature of an employment relationship is that, for a certain period of time, a person performs services for and under the direction of another person, in return for which he receives remuneration."[43]

In this context, the Recitals of the new Directive give further guidance regarding its personal scope, by specifying that workers who have "employment contracts or other employment relationships" include "part-time workers, fixed-term contract workers or persons with a contract of employment or employment relationship with a temporary agency".[44]

This clarification is very important because these types of contracts, as well as other forms of precarious work, are liable to have a particular impact on the situation of workers with caring responsibilities, most notably women.[45] The minimum the new Directive could do was to make sure that it applies to them.

[40] Directive 2019/1158 art.2.

[41] *Chatzi v Ypourgos Oikonomikon* (C-149/10) EU:C:2010:534 at [27]–[30].

[42] N. Kountouris, "The Concept of 'Worker' in European Labour Law: Fragmentation, Autonomy and Scope" (2018) 47 I.L.J. 215, 219.

[43] *Danosa v LKB Lizings SIA* (C-232/09) EU:C:2010:674; [2011] 2 C.M.L.R. 2 at [39]. In comparison, Kountouris argues for a broader concept of worker in European labour law, inspired by fundamental rights language of labour and human rights international instruments, in "The Concept of 'Worker' in European Labour Law" (2018) 47 I.L.J. 215.

[44] Recital 17 of the new Directive. This was already included in the 2010 Parental Leave Directive, cl.1(3) of the Agreement that it put into effect.

[45] In 2018 in the EU, 30.8% of the employed women worked on a part-time basis compared with only 8.0% for men. The sex difference was less clear for people with temporary contracts, with 12.6% of men and 13.8% of women having such contracts. Interestingly, these types of contracts were more frequent for lower status employees: almost 20% of them have temporary contracts. In the meantime, 2.2% of the employed men and 1.5% of the employed women worked for a temporary work agency, and 2.1% of men and women had a precarious employment situation, i.e. a work contract of only up to three months. The data refers to men and women aged 20 to 64 in 2018. See Eurostat, *Employment Statistics*, *https://ec.europa.eu/eurostat/statistics-explained/index.php/Employment_statistics* [Accessed 17 April 2020].

More generally, while the European Union adopted several directives to protect the rights of these workers (on part-time work,[46] on fixed-term work[47] and on temporary agency work[48]), there has been criticism of the way the EU legal system as a whole protects them, as opposed to workers in standard employment relationships.[49] For example, Bell has criticised the way the Court has used the comparator test in sex discrimination cases "where, due to precariousness, [the] circumstances [of the plaintiff] are deemed to be incomparable to those in a standard employment relationship".[50]

While these issues certainly deserve careful consideration, the new directive alone could not solve them. Nevertheless, arguably it made a contribution into the right direction by providing explicitly that it applies to certain atypical workers.

Paternity leave—getting fathers on board

For the first time at EU level, the co-legislators introduced paternity leave, which is one of the cornerstones of the new Directive.[51]

Fathers, or recognised second parents, may take paternity leave of at least 10 working days, paid at least at national sick pay level.[52] By choosing the same level of allowance as for maternity leave, the legislator has chosen to give equivalent status to paternity leave. Although all EU Member States reserve time for fathers to look after their children in some way, the rights allocated to them do not necessarily constitute individual entitlements, but are often recognised rights for the family as a whole and can therefore be transferred from one parent to the other parent, which often means that in practice it is the mother who takes the leave.

[46] Directive 97/81 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC [1998] OJ L14/9.

[47] Directive 1999/70 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP [1999] OJ L175/43.

[48] Directive 2008/104 on temporary agency work [1999] OJ L327/14.

[49] See, for example, J.S. O'Connor, "Precarious Employment and EU Employment Regulation" in (2013) 25 *Social Policy Review—Analysis and Debate in Social Policy* 227; and A. Baylos, "The Employment Relationship, Atypical Forms of Employment and Protection Standards in the European Union" in A. Serrano-Pascual and M. Jepsen (eds), *The Deconstruction of Employment as a Political Question* (Cham: Palgrave Macmillan, 2019), pp.131–248 at p.242. See also A. Koukiadaki and I. Katsaroumpas, "Temporary Contracts, Precarious Employment, Employees' Fundamental Rights and EU Employment Law", European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs, PE 596.823 (Brussels, 2017), which, although recognising that EU secondary legislation and the Court's case law made progress "towards ensuring labour standards inclusivity and the equal treatment of atypical workers", argues that gaps in protection still exist "as a result of deficiencies in EU secondary law, the exercise of self-restraint by the [Court] and the limited effectiveness of EU law due to inadequate transposition and enforcement": at p.41.

[50] M. Bell, "EU Equality Law and Precarious Work" in U. Belavusau and K. Henrard (eds), *EU Anti-discrimination Law Beyond Gender* (Oxford: Hart Publishing, 2019), p.75 at pp.83–85. He referred to the cases *Allonby v Accrington & Rossendale College* (C-256/01) EU:C:2004:18; [2004] 1 C.M.L.R. 35; and *Wippel v Peek & Cloppenburg GmbH & Co KG* (C-313/02) EU:C:2004:607; [2005] 1 C.M.L.R. 9, which in his view gave the impression that it was enough for the employer to change the status of the worker concerned to avoid the application of equal pay law: by employing a part-time lecturer through an agency in *Allonby* and by hiring a retail worker as a "work on demand" contract, with no guaranteed hours in *Wippel*. In both cases the Court ruled that the situation of these workers was not comparable to that of those working full time with a contract with the employer.

[51] There have been numerous calls for targeting rights of men in order to reduce employers' reluctance to promote leave for fathers and create a role model for men as caregivers. See, for example, M.C Santos Pereira, "Introducing a Comprehensive Directive on Care in the European Union: Elements for Further Discussion" (5 June 2015), *SSRN*, *https://papers.ssrn.com/* [Accessed 17 April 2020].

[52] Second parents may also benefit from this right if they are recognised by national law (art.4). Arguably, this simple reference shows already a broad concept of paternity leave that is potentially open also to same-sex couples.

Paternity leave is intended to be taken around the date of the birth and should be clearly linked to this event.[53] It aims to encourage and support men to take on, from the start, a more equal share of family responsibilities, by supporting fathers to care for their child from the outset. Indirectly, the aim is to contribute towards increasing the possibilities in practice for women to participate in the labour market.

Member States can set a flexible timeframe for taking this leave: they may allow paternity leave to be taken "partly before or only after the birth of the child" and "to be taken in flexible ways".[54] This flexibility aims to increase men's take-up of their entire leave and to include situations where it is necessary for the employee to take the leave before the birth of the child. The possibility for flexible uptake is a known practice in many Member States already as a result of the implementation of the 2010 Parental Leave Directive, which gave Member States this possibility.

Finally, without it being expressly stated, paternity leave is an individual and non-transferable right, but one that it is not obligatory to take, in contrast to the compulsory minimum two weeks of maternity leave which, owing to health and safety reasons, are obligatory.[55] Moreover, since paternity leave is an individual and non-transferable right, fathers will in practice take it at the same time as mothers take their maternity leave—it is not that only one parent is allowed to be at home at the same time.

Contrary to parental leave (which can be a relatively long period of absence from work of several weeks or months), paternity leave must be granted without being made "subject to a period of work qualification or to a length of service qualification". However, regarding payment of paternity leave, it is possible for Member States to make it conditional upon having worked for a minimum period of up to six months.[56] Similarly to maternity leave, the unconditional character of the right to paternity leave can be explained by the importance of the right for the society as a whole, by the fact that it is associated with the birth of a child which is an event that cannot be changed, and also by the relatively short period of leave that does not cause major disturbances in the work organisation of employers. Employers are not permitted under the Directive to refuse or postpone paternity leave.

Parental leave—towards a more equal sharing of childcare

Article 5 of the Directive maintains the period of four months of parental leave per child for each parent, to be taken before a child reaches a certain age, up to eight years, as was already provided by the 2010 Parental Leave Directive.[57] However, the part of this leave that is not transferable from one parent to the other is increased under the new Directive from one to two months. Secondly, in order to make it more effective and attractive for fathers in particular to take leave, the new Directive adds the rule that the two non-transferable months should be remunerated at an "adequate level", leaving it to Member States to define the exact amount, within certain parameters.[58] Thirdly, parents will have the right to request to take parental leave in a flexible manner, i.e. on a full-time or part-time basis, or in blocks of leave, for example by alternating consecutive weeks of work separated by periods of work, or other flexible ways. When employers take a decision on those requests, they must take into account both the needs of the employer and the worker, but if they refuse they must do so in writing.[59]

[53] Recital 19 provides that: "Such paternity leave should be taken around the time of the birth of the child and should be clearly linked to the birth for the purposes of providing care."

[54] Directive 2019/1158 art.4.

[55] Directive 92/85 art.8(2).

[56] Directive 2019/1158 art.8(2).

[57] Agreement cl.2(1), put into effect by the 2010 Parental Leave Directive.

[58] Directive 2019/1158 art.8(3) and Recital 31. See Karu and Tremblay, "Fathers on Parental Leave" (2018) 21 *Community, Work & Family* 344, 356, explaining the importance of payment for fathers to make use of their rights to leave.

[59] Directive 2019/1158 art.5(6) and Recital 23.

Although the 2010 Parental Leave Directive had already provided for individual parental leave entitlements of at least four months, the analysis carried out during the preparation of the Commission proposal showed that that Directive was not sufficient to allow both parents to exercise their rights on an equal basis. Since it did not guarantee any payment during parental leave, many families simply could not afford to take it. Moreover, the majority of fathers do not use their parental leave entitlement, and transfer a significant portion of their rights to mothers. This has led to marked differences in the average take-up rates of parental leave by mothers and fathers, as the take-up of parental leave by fathers is still very low in many Member States.

In this context, non-transferability and payment can be seen as going hand in hand in order to increase the fathers' uptake of parental leave. Non-transferability is important to get men on board and encourage them to increase their share of caring responsibilities, since it means a "take it or leave it" situation for families. The idea is that men will take it because otherwise the family as a whole will lose it. In Norway, for example, rates of fathers taking parental leave went up from 2.4 per cent in 1992 to over 70 per cent in 1997, following the introduction of non-transferable parental leave.[60]

Regarding payment, the Commission had proposed that paternity, parental and carers' leave would all be paid at least at the level of sick pay in each Member State. However, according to art.8(3) of the adopted Directive, the amount of pay during parental leave can be defined by Member States or social partners, although it should be set in a way as "to facilitate the take-up of parental leave by both parents". Recital 29 states, generally, that parents should have the right to an "adequate allowance" while they take the different forms of leave provided for in the Directive, in order to increase the incentives for workers to take leave, and for men in particular. Recital 31 completes the explanation by stating that the payment of the two months of non-transferable parental leave should be established at an "adequate level". It adds that, for this purpose, Member States should consider that first earners in a family (who tend, especially in some Member States, to be men) are able to take parental leave only if "it is sufficiently well remunerated, with a view to allowing for a decent living".

On this basis, we submit that the freedom of Member States to define this "adequate" payment of parental leave is not absolute, but is framed by certain parameters and is, of course, subject to the control of the EU Court of Justice, which, in the last resort, will be able to make an autonomous interpretation of the concept.

The litmus test to define what is payment at an "adequate level", as defined by the Directive, is whether it is sufficient for enabling both parents (also fathers, who tend to be higher earners than mothers) to take parental leave. Several factors can be considered in order to assess this question of sufficiency.

The Commission proposal suggested a well-known criterion, used to define the minimum payment of the period of maternity leave: payment at national sick pay level.[61] In turn, the Parliament's report proposed a specific quantitative criterion: 78 per cent of the gross wage. However, the Council rejected both. Instead, the Directive sets a qualitative open criterion for each Member State to define the level of payment for the two months of paid parental leave: an "adequate level" to "facilitate the take-up of parental leave by both parents".

Recital 31 of the adopted Directive states that the level of payment should allow for a "decent living standard". On the one hand, this could relate to concrete points of reference at national level, such as

[60] See ILO, "Modern daddy—Norway's progressive policy on paternity leave" (2005) 54 *World of Work Magazine* 12, 13; and ILO, *Gender Equality and Decent Work: Good Practices at the Workplace* (Geneva: ILO, 2005). In Canada, the fathers' take-up of parental leave increased by 250% as a result of a combination of higher benefits and the framing effect of labelling some weeks as "daddy"-only: see A. Patnaik, "Reserving Time for Daddy: The Consequences of Fathers' Quotas" (October 2019), *Journal of Labor Economics*, SSRN, *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3225239* [Accessed 17 April 2020].

[61] Directive 92/85 on maternity leave art.11(3). Meanwhile, most countries in the EU have increased the payment of maternity leave to 100%, or close.

minimum wages, guaranteed minimum income, unemployment benefits, sickness benefit payments or salary replacement for other forms of family-related leave. Directly or indirectly, explicitly or implicitly, they often aim to ensure a "decent living standard". On the other hand, that reference could also mean that the adequate level of payment can change according to the level of the salaries in question. A special consideration should be made regarding the situation of workers with low salaries and, conversely, a reasonable flat rate or upper ceiling could be imposed on high salaries.

Regarding the case law of the Court, there is one close precedent: the definition of payment in the Maternity Leave Directive in situations other than maternity leave itself. Where pregnant workers or workers who are breastfeeding must change work or stop working for health and safety reasons, they have the right to receive an "adequate" allowance to be defined "in accordance with national legislation and/or national practice".[62] In spite of this last reference, the Court set certain limits on Member States' freedom to define such a payment. For example, in *Gassmayr*,[63] the Court gave some guidance to national legislators and courts by ruling that the purpose of the Directive could not be undermined by a low level of payment. First, the Court declared that the wording of the relevant provision of the Maternity Leave Directive, by referring to "a" payment and not to "the" payment, could not be used by a pregnant worker to claim all the remuneration she received before a temporary transfer for safety reasons.[64] However, the Court also ruled that the exercise by the Member States of their discretion to set the payment for a pregnant worker who was temporarily granted leave from work during pregnancy because of risks to her safety or health "cannot undermine the objective of protecting the safety and health of pregnant workers pursued by Directive 92/85".[65]

In addition, national law from other countries with regard to their performance in terms of gender equality can provide good guidance for defining the "adequate payment" for the aims and purposes of the Work-Life Balance Directive. For example, Iceland and Sweden have relatively high payment levels (80 per cent and 77.6 per cent of previous earnings, respectively)[66] which lead to high take-up rates of the family leave for both women and men.[67]

In conclusion, it is submitted that, should the issue be brought at some stage to the attention of the EU Court of Justice, it would be for the Member State concerned to show that the level of payment defined in national law, not only (1) ensures a decent living, but also (2) facilitates the take-up of parental leave by both parents. Concerning this last aspect, the Court could, inter alia, consider statistics on the take-up of parental leave before and after the introduction of national legislation to transpose the new Directive.

Carers' leave—a life-cycle approach and an ageing population

Article 6 introduces a new right to carers' leave, defined by art.3(1)(c) as available to workers who provide personal care or support to a relative, or to a person living in their household "who is in need of significant care or support for a serious medical reason".

[62] Directive 92/85 on maternity leave art.11(1), which refers to arts 5, 6 and 7 of the latter.

[63] *Gassmayr v Bundesminister für Wissenschaft und Forschung* (C-194/08) EU:C:2010:386; [2011] 1 C.M.L.R. 7.

[64] *Gassmayr* (C-194/08) EU:C:2010:386 at [61].

[65] *Gassmayr* (C-194/08) EU:C:2010:386 at [68]. The Court proceeded to define what concrete elements of the previous salary of the pregnant worker should be included in the payment in order to ensure the effectiveness of the directive in this regard, at [72] and [73].

[66] Iceland has a payment of 80% of average total earnings for a period of 12 months, up to a ceiling of ISK 520 per month (€4,142), while Sweden has 77.6% of earnings, up to a ceiling of SEK 455,000 (€44,910) per annum. See, respectively, G. Björk Eydal and I.V. Gíslason, "Country report on Iceland", p.206, and A.-Z. Duvander and L. Haas, "Country report on Sweden", p.403 (both of April 2018), available at the website of the International Network on Leave Policies & Research, *http://www.leavenetwork.org/* [Accessed 17 April 2020].

[67] See below, in the section on the national level, the sub-section on good practices to encourage fathers to take leave.

Contrary to attempts of the European Commission to specify more precisely the situations giving rise to carers' leave,[68] the Directive leaves a certain margin of discretion to Member States to define that situation. Article 6 of the Directive only specifies that: "Member States can require prior medical certification of the need for significant care or support for a serious medical reason." The Directive does define what is to be understood as a "relative" for this purpose: "a worker's son, daughter, mother, father, spouse or, where such partnerships are recognised by national law, partner in civil partnership".[69]

Working carers will be able to take five working days of leave per year. The rationale for the introduction of this right is that when workers can take a short amount of time off work to take care of a close relative who is seriously ill, make arrangements for their care, or simply spend necessary time with them, they are able to find a better work-life balance, thus maintaining their link with the labour market, in contrast to a very long leave or no leave, which can cause workers, especially women, to be absent from work for very long periods or altogether. This right is particularly relevant when read in the light of demographic change in Europe, with an ageing population, and it is important for gender equality since the burden of caring for relatives tends to fall more often on women. With the provision of carers' leave, the Directive goes beyond the provision of leave around the time of childbirth and to care for children, thereby taking a life-cycle approach to the whole question of better balancing the sharing of family tasks between women and men. Even if carers' leave is not paid, contrary to what was originally planned, it nevertheless recognises and provides for situations where workers need that time off, without them having to rely just on the goodwill of their employer or requiring them to use their annual leave or rest periods for caring tasks.

The Directive caters for the fact that Member States have different systems, by allowing them to allocate carers' leave on the basis of a reference period other than a year, per person in need of care or support, or per case.[70] Member States may also decide that such leave can be taken in periods of one or more working days per case.[71]

Finally, carers' leave is different from force majeure leave, which is a leave for urgent family reasons in the case of illness or accident making the immediate attendance of the worker indispensable.[72] This right already existed under the 2010 Parental Leave Directive[73] and is maintained in the new Directive.[74]

Flexible working arrangements

An important aspect of the Directive is the recognition that the right to a leave alone does not ensure work-life balance, and that many workers are looking to flexible working arrangements as ways to achieve work-life balance. In this regard, the Directive[75] does not introduce a completely new right, but rather extends and strengthens a right that was already provided for parents returning from parental leave under the 2010 Parental Leave Directive.[76] The right to request flexible working arrangements applies under the new Directive to all parents with children of an age specified by Member States, which cannot be less than eight years old, and to all carers (as defined by the Directive[77]). It concerns not only the reduction of

[68] Article 3 of the Commission proposal defined "carer" as "a worker providing personal care or support in case of a serious illness or dependency of a relative" and "dependency" as a situation when a "person is, temporarily or permanently, in need of care due to disability or a serious medical condition other than serious illness".

[69] Directive art.3(1)(e).

[70] Directive art.6(2).

[71] Directive, Recital 27.

[72] See Directive art.7 and Recital 28.

[73] Agreement cl.7, put into effect by the 2010 Parental Leave Directive.

[74] Directive art.7.

[75] Directive art.9. See also Recitals 34 to 36.

[76] Agreement cl.6(1), put into effect by the 2010 Parental Leave Directive.

[77] A worker providing personal care or support to a relative, or to a person who lives in the same household as the worker, and who is in need of significant care or support for a serious medical reason (Directive art.3(1)(d)).

working hours and changes in working patterns as before, but also explicitly remote working arrangements or telework.[78]

It is not an absolute right, in contrast to the rights to paternity leave or parental leave, but "only" a right to request—although the Directive imposes conditions for the employers to examine and decide on workers' requests. They must respond to a request for flexible working arrangements within a reasonable period of time, and their decision must consider the needs of both the employer and the worker. If they refuse, or postpone the requested arrangements, they must provide reasons for that decision.[79] The Directive does not impose explicitly an obligation on the employer to adopt and communicate to the worker a written decision, but doing so is certainly the best way of proving that the worker's request has been considered and that the worker has therefore been able effectively to exercise her/his right.

When a flexible working arrangement has been agreed for a limited period of time, the worker has the right to return to the original working pattern at the end of the agreed period.[80] A return to the original working pattern may also be requested by the worker before the end of the agreed period, where there is a change in the underlying circumstances[81] related to the caring responsibilities of the worker, such as a positive or negative change in the health of a child or a close relative, or a change in the employment status of the other parent of the child, which makes the flexible arrangements for one reason or another no longer desirable for the worker. Again, the employer must consider and respond to such a request for an early return to the original arrangement, taking into account the needs of both the employer and the worker.

Member States may subject the duration of flexible working arrangements to a "reasonable limitation" (which is not defined by the Directive).[82] Moreover, this right can made subject to a period of work qualification or to a length of service qualification of a maximum of six months, although fixed-term contracts with the same employer must be taken into account to calculate that period.[83] In comparison, the qualifying period for the right to parental leave[84] and the right to a maternity leave allowance is one year.[85]

Provisions of ancillary protection

Articles 10 to 16 aim to ensure the effectiveness of the rights provided by the Directive, including some provisions that are now standard in equality directives. In certain cases, the Directive simply takes up provisions that already existed under the 2010 Parental Leave Directive, but now applies them to all the forms of leave provided under the new Directive (paternity leave, parental leave and carers' leave) and to the right to request flexible working arrangements.

Rights already enjoyed by workers at the point when leave starts are maintained, and workers have the right to go back to the same job, or to an equivalent post, at the end of their leave.[86]

The Directive has a standard provision prohibiting discrimination based on the fact that a worker applied for or made use of leave, or that they exercised rights concerning time off for force majeure or flexible working arrangements.[87]

[78] Directive art.3(1)(f) and Recital 34.
[79] Directive art.9(2).
[80] Directive art.9(3).
[81] Directive art.9(3) and second part of Recital 36.
[82] Directive art.9(1).
[83] Directive art.9(4).
[84] Directive art.5(4) and cl.3(1)b) of the Agreement put into effect by the 2010 Parental Leave Directive.
[85] Directive 92/85 on maternity leave art.11(4).
[86] Directive art.10, similar to cl.5(1) and (2) of the Agreement put into effect by the 2010 Parental Leave Directive.
[87] Directive art.11, similar to cl.5(4) of the Agreement put into effect by the 2010 Parental Leave Directive.

This general rule applies also to dismissal, but in a way that goes beyond the previous provisions in the 2010 Parental Leave Directive.[88] There is an explicitly reinforced protection from discrimination in cases of dismissals that are based on the fact that a worker applied for, or exercised, one of the forms of leave, or exercised the right to request flexible working arrangements. The aim of this provision is to ensure that parents and carers are not afraid to make effective use of their rights.

Dismissal and preparations for dismissal based on that fact must be prohibited.[89] Moreover, when workers believe that they have been dismissed because they have applied for or have taken leave or flexible working arrangements, workers can request the employer "to provide duly substantiated reasons for their dismissal".[90] Where a worker who has applied for or taken leave has been dismissed, the employer has to provide those reasons in writing. In addition, the Directive provides for the sharing of the burden of proof in cases of complaints of dismissal based on applying for or taking a leave provided in the Directive. If workers establish, before a court, facts that create a presumption that they have been dismissed on such grounds, it is for the employer to prove otherwise.[91]

More generally, in cases of breach of the rights established in the Directive, Member States must provide for and implement penalties that are effective, proportionate and dissuasive.[92] This is a standard provision in equality directives,[93] but does not go as far as Directive 2006/54, since it does not explicitly refer to the possible payment of compensation to the victim of discrimination.[94]

Workers are granted protection from victimisation, i.e. from any adverse treatment by the employer resulting from a complaint or legal proceedings brought by a worker in order to enforce the rights provided for by the Directive.[95] According to a recent case of the Court, this protection must be general and covers, not only the plaintiff worker, but also all employees having, formally or informally, defended that worker or testified in her or his favour.[96]

The Directive also gives gender equality bodies, designated under Directive 2006/54 on sex equality in employment, competence to deal with discrimination issues under the scope of the new Directive.[97] Since those bodies are already competent under that Directive to deal with sex discrimination matters, this provision should be interpreted as referring to discrimination on the basis of application for or taking of one of the forms of leave, or enjoyment of rights, provided for by the new Directive.

Transposition, passerelle and bonus clauses

As a general rule, the Directive needs to be transposed into national law within three years of its entry into force, i.e. by 2 August 2022.[98] A further extension of two years is provided for the payment of the

[88] Directive art.12.
[89] Directive art.12(1).
[90] Directive art.12(2).
[91] Directive art.12(3).
[92] Directive art.13.
[93] See art.25 of Directive 2006/54; art.14 of Directive 2004/113 on sex equality in access to goods and services; art.15 of Directive 2000/43 on racial or ethnic origin equality; and art.17 of Directive 2000/78 on equality in employment.
[94] Under art.18 of Directive 2006/54 on sex equality in employment, Member States must provide for compensation for loss and damage due to discrimination.
[95] Directive art.14.
[96] *Hakelbracht v WTG Retail BVBA* (C-404/18) EU:C:2019:523 at [34]–[37], concerning the similar art.24 of Directive 2006/54 on sex equality in employment. Belgian law protected a co-worker from retaliatory measures taken by the employer, but only if that co-worker had intervened as a witness in the context of the investigation of a discrimination complaint and if the witness's statement satisfied certain formal requirements. The Court considered this limitation incompatible with Directive 2006/54.
[97] Directive art.15.
[98] By 2 August 2022, according to its art.20(1).

last two weeks of the period of two months of parental leave that have to be paid.[99] This results from the final compromise reached between the Council and Parliament, on payment for two months of non-transferable parental leave, which contrasts with the earlier "general approach" of the Council, which agreed to 1.5 months of paid parental leave. In this context, two other provisions may be highlighted: the *passerelle* clause and the bonus clause.

The word "*passerelle*" means small bridge in French, and the Directive aims to achieve exactly that: to build a small bridge for the purposes of the transposition between what the Directive requires and what already exists in the Member States.

In order to comply with the new provisions of the Directive on paternity, parental and carers' leave and with the Maternity Leave Directive, Member States may take into account any family-related leave and payment that is available at national level. However, the minimum requirements for all the concerned forms of leave must be met, and the level of protection provided to workers under those Directives cannot be reduced.[100] The idea is not to penalise countries with a system of family leave that, taken as a whole, goes beyond what EU law requires, including in the new Directive and the Maternity Leave Directive. For example, a country with a maternity leave of 42 weeks, non-transferable and adequately remunerated (28 weeks more than the European minimum of 14 weeks of maternity leave) does not have to create two months non-transferable and paid parental leave for mothers, as they are already included within the extra 28 weeks. In this way, that country is allowed to make a "transfer" between different forms of leave, provided that the minimum requirements established in the new Directive and in Directive 92/85 on maternity leave are respected and that the general level of protection of workers in the fields of application of these Directives is not reduced.

When applying this clause, in order to consider for example a period of paid maternity leave as reserved paid parental leave for mothers, it is important to note that, under national law, sometimes part of maternity leave can be transferred to the father.[101] However, only the non-transferable part of maternity leave can be considered as a part of the non-transferable parental leave for mothers provided by the new Directive.

To give an idea of how this clause would work in practice, Ireland, with 26 weeks of paid maternity leave that cannot be transferred to the father (all weeks are non-transferable), could in principle[102] use all the weeks exceeding 14 weeks (12 weeks[103]) to comply with the two paid months of parental leave reserved for women required by the new Directive.[104] Conversely, the United Kingdom, which allows the transfer of up to 37 weeks out of the 39 weeks of paid maternity leave (only two weeks are non-transferable), despite exceeding the EU standard of 14 weeks in 25 weeks,[105] would not be able to profit at all from the *passerelle* clause, since 37 weeks are transferable between the two parents.[106]

Whereas the *passerelle* clause leaves intact the minimum standards of this Directive, which need to be respected under all circumstances, the "bonus clause" seems to allow, under very specific conditions, a

[99] Directive art.20(2).

[100] Directive art.20(6) and Recital 49, which adds that, in order to implement the Directive: "Member States are not required to rename or otherwise change the different types of family-related leave" provided for under national law.

[101] The EU Court of Justice has confirmed that Directive 92/85 on maternity leave allows the mother to transfer the voluntary part of maternity leave to the father: *Betriu Montull v Instituto Nacional de la Seguridad Social* (C-5/12) EU:C:2013:571; [2014] 1 C.M.L.R. 35 at [56] and [58].

[102] All the minimum requirements of the new Directive and Directive 92/85 have to be met. For example, there should be a right to request a flexible take-up (Article 5(6) of the new Directive) for the part of maternity leave used to count as reserved parental leave for mothers.

[103] 26–14 = 12 weeks.

[104] 26 weeks are non-transferable, however, only 12 weeks exceed the EU minimum standard of 14 weeks for maternity leave.

[105] 39–14 = 25 weeks.

[106] Despite having two non-transferable weeks, they need to be used to comply with the minimum standard of two compulsory weeks in Directive 92/85 on maternity leave.

true exception to the minimum requirements of this Directive. According to art.20(7), Member States may decide not to pay paternity leave in cases where they,

> "ensure a payment or an allowance of at least 65% of the worker's net wage, which may be subject to a ceiling, for at least six months of parental leave for each parent … ."

The apparent intention of this provision is to reward Member States that have a generous system of parental leave, one that goes beyond what is provided in the Directive.[107] Recital 26 underlines that systems with a significant portion of parental leave for fathers and a relatively high replacement rate normally coincide with (a) a higher take-up of that leave by fathers, and (b) "a positive trend of employment by mothers".

The national level—systems of child-related forms of leave, impact of the new Directive and good practices

Understanding how the different kinds of child-related leave work in practice requires looking into national legislation, including where national legislation goes beyond the requirements of the EU *acquis*. This section will give a broad picture of the current child-related leave systems in the EU Member States and the impact the new Directive will have on them. It is important to recall that the new Directive only sets minimum requirements and that Member States can always adopt more generous provisions.[108]

Before the overview of national systems, some preliminary comments need to be made about the scope of this analysis. First, maternity leave also has to be considered alongside paternity leave and parental leave,[109] as the different forms of leave and how they are used are inter-related.[110] A fuller picture is even more necessary today, given the "growing tendency to blur the differences between the three main types of leave: maternity, paternity and parental".[111] This is evident, for example, in those countries that now permit part of maternity leave to be transferred to fathers in normal circumstances (not just when some problem makes the mother unavailable); or, to take another example, in those countries that have now replaced separate forms of leave (maternity, paternity, parental) by one general leave, parts of which may be reserved for mothers and fathers. Secondly, the focus will be on current entitlements for employees,[112] and only nationwide statutory entitlements in the private sector will be studied, excluding specific schemes for the public sector and other possible rights in the private sector that are recognised by collective agreements or by regional arrangements. Thirdly, this exercise is not an exhaustive analysis of national systems.

This section will be divided into three subsections. First, an overview of national systems will be presented. Secondly, an assessment of the impact of the new Directive will be carried out. The last subsection will present some good examples that encourage fathers to take up leave.

[107] In any event, by using the expression "for each parent", the text of art.20(7) may raise the question of whether or not the exception applies to Member States where the payment or allowance in question is not an individual entitlement of each parent, but a family entitlement.

[108] New Directive arts 1 and 16(1).

[109] Adoption leave will be excluded from the analysis.

[110] In theory, maternity leave is a right of female workers, to be used at the time of the birth of a child, aiming to protect the health and well-being of the new mother and the special relationship between a mother and her newborn child; paternity leave is a right of male workers or, where they are recognised under the legal systems of Member States, non-birth giving parents of either sex, to be used around childbirth; and parental leave is a right of both working parents to be used until a given age of the child, which supports the care of children while they are young and the well-being of the family.

[111] P. Moss and F. Deven, "Leave Policies in Challenging Times: Reviewing the Decade 2004–2014" (2015) 18 *Community, Work and Family* 137, 139.

[112] The cut-off date is 1 April 2019.

Overview of national systems of child-related leave

When national systems of child-related leave are analysed, the first thing that jumps out is their diversity. Kamerman and Moss explain that national systems are very diverse, especially for parental leave, and that,

> "major dimensions of diversity include length of the leave, payment (whether unpaid or paid and, if paid, at what level), flexibility in use (especially whether leave can be taken on a part-time basis and in several blocks of time) and whether leave is a family or an individual entitlement."[113]

Moreover, as indicated by Ray, Gornick and Schmitt, child-related leave "policies vary dramatically over time and across relatively similar countries".[114]

In this sub-section, we focus on two specific features that facilitate the imbalance in the take-up of leave by women rather than men. The first main feature is that in most EU countries leave entitlements are more generous for women. This has to do with maternity leave and paternity leave, which are rights granted to mothers and fathers.[115] Generally speaking, the income replacement received during these forms of leave tends to be relatively high[116] and does not differ substantially between them. However, there are significant differences in terms of duration. Maternity leave exists in all Member States,[117] and, in all cases but Germany, the duration of the paid leave[118] goes beyond the EU minimum standard of 14 weeks set in Directive 92/85 on maternity leave. In the EU, most countries provide for maternity leave of a duration that is the same as or close to that set out in that Directive, i.e. maternity leave of between 14 and 18 weeks.[119] The second largest group of Member States provide for somewhat longer maternity leave, of between 20 and 28 weeks.[120] The smallest group is formed by Croatia, Slovakia, the United Kingdom and Bulgaria, with the most generous leave of 30 weeks, 34 weeks, 39 weeks and 410 calendar days respectively. Some countries, notably those with a relatively long maternity leave,[121] allow mothers to transfer part of the leave to fathers.[122] However, official statistics show that, despite this possibility, fathers hardly ever take maternity leave and that this leave is predominantly used by mothers.[123]

Unlike maternity leave, paternity leave is not available in all Member States: Austria, Croatia, Germany and Slovakia do not have a statutory right to paternity leave. Furthermore, where it does exist, almost all Member States provide for very short leave, ranging from two days to two weeks. There are, however, a few exceptions to this general rule: Slovenia (four weeks), Lithuania (one month), Spain (eight weeks) and Finland (nine weeks).

[113] S.B. Kamerman and P. Moss (eds), *The Politics of Parental Leave Policies: Children, Parenting, Gender and the Labour Market* (Bristol: Policy Press, 2009), p.3.

[114] R. Ray, J.C. Gornick and J. Schmitt, "Who Cares? Assessing Generosity and Gender Equality in Parental Leave Policy Designs in 21 Countries" (2010) 20 *Journal of European Social Policy* 196, 198.

[115] Sweden and Portugal are not analysed here, as maternity leave and paternity leave have been dropped and integrated instead into a generic parental leave entitlement, with some periods allocated to "mothers only" and "fathers only".

[116] Between 70% and 100% of the worker's previous wage.

[117] It is a consolidated EU right provided for in art.8(1) of Directive 92/85 on maternity leave.

[118] In some countries, part of maternity leave is unpaid. Unpaid periods will not be analysed here.

[119] Austria, Belgium, Cyprus, Denmark, Finland, France, Germany, Greece, Latvia, Lithuania, Malta, Netherlands, Romania, Slovenia and Spain.

[120] Czech Republic, Estonia, Hungary, Ireland, Italy, Luxembourg and Poland.

[121] Countries in the third group (Croatia, Slovakia, United Kingdom and Bulgaria), plus Czech Republic and Poland from the second group and Spain from the first group.

[122] In the absence of exceptional circumstances, such as the death or serious illness of the mother.

[123] S. Blum, A. Koslowski, A. Macht. and P. Moss (eds), "14th International Review of Leave Policies and Related Research 2018" (2018), pp.88 (on Bulgaria), 125 (Croatia), 131 (Czech Republic), 328 (Poland), 377 (Slovakia) and 395 (Spain), *http://www.leavenetwork.org/* [Accessed 17 April 2020].

All in all, in general, mothers enjoy rights to considerably longer periods of leave than fathers around the time of childbirth. Of course, this is partly explained by the aim to protect the health of the mother, who needs time to recover from the birth and who, especially if she is breastfeeding, may be suffering from interrupted nights and severe lack of sleep. Nonetheless, significant differences in duration and payment of leave for mothers and fathers, and how those forms of leave are labelled, maintain and even exacerbate the traditional division of roles with regard to childcare, which places the mother as the primary carer and the father as the second carer. A case could be made for equalising the post-birth periods of maternity and paternity leave, to allow both men and women to create a solid bond with their child and to gain confidence in caring for their child. At the end of the day, both male and female parents are able to carry out all caring activities, except for breastfeeding, which only women can do.

The second main feature of national systems is that there are few incentives for men to make use of parental leave, because periods of leave that are both well paid and reserved for each parent are very limited or non-existent. As explained before, in the section on the background of the new directive, a good level of payment and periods designed on a "take-it-or-leave-it" basis are the features that, when combined, encourage a higher take-up of leave by fathers.[124] In the EU, only a few Member States provide some periods of parental leave that fulfil these criteria: Romania (one month at 85 per cent of earnings), Germany (two months at 65 per cent), Croatia (two months at 100 per cent), and Sweden (three months at 77.6 per cent). In addition, some other countries also have paid "daddy months", but the level of payment is relatively low: Portugal (three months), Belgium (four months), Luxembourg (between four and six months), France (six months) and Italy (six months). In sum, the majority of Member States do not, prior to the entry into force of the new Directive, make available any periods of parental leave that are both non-transferable between the two parents and paid.

However, the period of parental leave which is both reserved for each parent and compensated is only part of the picture. For this reason, it is advisable to present a short panorama of how parental leave is designed at national level. First, in some Member States,[125] parental leave is mainly conceived as a family entitlement. For instance, in Estonia there are up to three years of leave to be shared between the parents, which is compensated at 100 per cent of the worker's previous wage for 435 calendar days and at a flat rate during the remaining period. Secondly, in other countries,[126] parental leave is largely designed as an individual and transferable right. The practical effect is the same as that of a family entitlement: one of the two parents, usually the mother, could potentially make use of the full entitlement to leave. For example, in Slovenia each parent is entitled to 130 calendar days of parental leave, paid at 90 per cent of the previous earnings. Yet, the mother can transfer 100 days of her entitlement to the father (30 days are the mother's exclusive right), while the father is allowed to transfer all 130 days of his parental leave to the mother. In a third group of countries,[127] the entitlement to the leave itself is individual and non-transferable, but it is detached from the right to parental allowances, which is actually a family entitlement. This is the case of Latvia, where each parent is entitled to 18 months of parental leave, but only one parent can receive parental allowances for a maximum period of 18 months. Fourthly, in some Member States[128] the right to parental leave is individual and non-transferable, but it is mostly or fully unpaid, as in the Netherlands, where each parent has a reserved period of six months of unpaid parental leave. Finally, there are only a few countries[129] where parental leave is entirely or mostly a right both paid and non-transferable between

[124] Karu and Tremblay, "Fathers on Parental Leave" (2018) 21 *Community, Work & Family* 344, 356.
[125] Austria, Estonia, Finland, Lithuania, Poland, Portugal, Romania and Slovakia.
[126] Bulgaria, Slovenia and Sweden.
[127] Czech Republic, Denmark, Germany, Hungary and Latvia.
[128] Cyprus, France, Greece, Ireland, Malta, Netherlands, Spain and United Kingdom.
[129] Belgium, Croatia, Italy and Luxembourg.

the parents. In Italy, for example, there is a quota of six months per parent—which is paid at 30 per cent of the worker's previous earnings.

The two main features of national child-related leave systems, namely more generous rights for women and few incentives for men to take parental leave, explain, along with cultural and other economic[130] considerations, why it tends to be women rather than men who take leave entitlements.

Impact of the Work-Life Balance Directive

The new Directive, which has enhanced the rights to child-related leave for both mothers and fathers, will have a notable impact in the majority of Member States. They can be divided into different groups of countries, depending on the level of impact (high, intermediate, low). Both the legal impact on the existing rules of child-related leave and the financial impact will be considered. We assume that all countries that are eligible to do so will make use of the *passerelle* clause,[131] explained in the previous section, on the content of the new Directive. This is the most likely scenario, considering how fundamental this clause was for Member States during the negotiations of the Directive.

The Member States where the Directive will have a high impact are those who will need to increase paid reserved periods of child-related leave for both mothers and fathers. This is the largest group. Here we can distinguish two subgroups of countries. The first subgroup[132] is characterised by a relatively short paid maternity leave, i.e. between 16 and 18 weeks long—which does not allow them to fully use the "passerelle" clause towards parental leave for women.[133] In addition, parental leave, albeit an individual and non-transferable right of each parent, is unpaid. Consequently, these Member States will need to create extra paid leave reserved for mothers. On the fathers' side, they have to introduce a period of two months of "fathers only" paid leave, which will be slightly longer in countries with a paternity leave of less than 10 working days[134] and shorter in those with a paternity leave is longer.[135] In sum, there will an important financial impact on national budgets because of the need to finance new parental benefits.

The second subgroup of countries[136] in the high impact category is also characterised by a short paid maternity leave, i.e. between 16 and 20 weeks long, which does not allow them to fully use the "passerelle" clause towards parental leave for women.[137] However, unlike the previous group, parental leave is paid and the leave itself or the payment is mostly designed as a family entitlement or as an individual but transferable right. Therefore, these Member States will have to increase the paid reserved periods for mothers (up to two months), but this will not necessarily increase their expenses, as parental benefits are already being paid. Concerning fathers, they will also have to introduce two months of "fathers only" paid leave, which may be longer[138] or shorter,[139] depending on whether the current duration of paternity leave is below or above 10 working days. Here again, costs do not need to rise, as parental leave is paid. On the

[130] As mentioned before, from a short-term economic perspective, given that in general child-related benefits do not fully replace previous income, the second earners in the family (mostly women) tend to take more leave than the first earners (typically men, who tend to have higher salaries) in order to minimise the economic loss for the family.

[131] Article 20(6) of the Directive, explained in the previous section, on the content of the new Directive. It will also be assumed that countries will not make use of the "bonus" clause, also explained in the previous section.

[132] Cyprus, Greece, Malta, Spain, Netherlands and the United Kingdom.

[133] The United Kingdom, despite having a paid maternity leave of 39 weeks, is also in this group, since, as explained above in the main text, the non-transferable part is only two weeks.

[134] Greece, Malta and Netherlands.

[135] Spain.

[136] Austria, Denmark, Estonia, Finland, Latvia, Lithuania, Poland, Slovakia and Slovenia.

[137] Slovakia, despite having a paid maternity leave of 34 weeks, is also in this group as the non-transferable part is only 6 weeks.

[138] In Slovakia.

[139] In Austria, Finland, Lithuania and Slovenia.

whole, the design of child-related leave for mothers and fathers will be largely affected in terms of non-transferability, but the financial impact of parental benefits could be limited.[140]

The group of Member States with an intermediate impact is formed by a few countries[141] that will have to create paid reserved periods of child-related leave, but only for fathers. Reserved paid periods for mothers already exist under national legislation, generally because paid maternity leave is very long, namely between 24 and 58.5 weeks long.[142] These Member States will have to introduce two months of paid leave reserved for fathers,[143] which may be longer[144] or shorter,[145] depending on whether the duration of paternity leave is greater or lower than 10 working days. However, some countries will be able to restrict the financial impact,[146] while others will have higher costs.[147]

The last group concerns Member States with a lower or uncertain impact.[148] Some countries will have a rather low impact, as they will only have to introduce a paternity leave of 10 working days[149] or to increase its current duration.[150] Nevertheless, for future parents in those countries, this will be a welcome improvement. Other countries already provide in national legislation for reserved paid periods of child-related leave for mothers and fathers required under the new Directive.[151] However, as the Directive only offers some guidance for Member States to set the payment or allowance for the two non-transferable months of parental leave, it cannot be said with certainty whether payments already available at national level will eventually be considered in line with the Directive.

Good practices to encourage fathers to take up leave

Deven and Moss highlight "the growing emphasis on fatherhood" in statutory leave arrangements,[152] and O'Brien claims that "father's active participation in family life will likely be one of the most important social developments of the twenty-first century".[153] However, up to now only a few Member States have put in place systems of child-related leave which actually encourage fathers to take up leave. They have done so with three different techniques: (1) "daddy months" of parental leave; (2) sharing bonuses of parental leave; and (3) equalisation of maternity leave and paternity leave. All these systems provide periods of leave for fathers on a "take-it-or-leave-it" basis that are paid at a relatively high level. A fourth technique could be added, which is to make paternity leave compulsory for fathers. In general, incentives for fathers to take child-related leave are very important because of the leverage effect on fathers' subsequent involvement in childcare. Huerta, Adema, Baxter and Han found evidence that "fathers who took leave

[140] This impact could be narrowed even more in Slovakia if part of the 28 transferable weeks of maternity leave becomes non-transferable.

[141] Bulgaria, Czech Republic, Hungary, Ireland and Romania.

[142] Except for Romania, where the extra period of maternity leave (four weeks) is combined with one month of paid and non-transferable parental leave.

[143] Only one month in Romania.

[144] In Czech Republic, Hungary and Romania.

[145] In Bulgaria.

[146] In the Czech Republic, Hungary and Romania parental leave is paid, albeit most of the leave itself or the payment is a family entitlement.

[147] In Bulgaria and Ireland leave is unpaid (mostly transferable in Bulgaria and fully non-transferable in Ireland).

[148] Belgium, Croatia, France, Germany, Italy, Luxembourg, Portugal and Sweden.

[149] Croatia and Germany.

[150] Italy.

[151] Belgium, France, Luxembourg, Portugal and Sweden.

[152] Deven and Moss, "Leave Arrangements for Parents" (2002) 5 *Community, Work & Family* 237, 240.

[153] M. O'Brien, "Fitting Fathers into Work-family Policies: International Challenges in Turbulent Times" (2013) 33 *International Journal of Sociology and Social Policy* 542, 543.

were more likely to be involved with their child on a regular basis than fathers who did not take leave".[154] This in turn can have a positive impact on the level of mothers' participation in the labour market.

First, two good examples of the first group of techniques are Sweden and Iceland. Both countries offer, within their parental leave systems, three "daddy months" and three "mummy months" (reserved for fathers or mothers only) with a high level of income replacement: 77.6 per cent and 80 per cent of earnings respectively. In addition, they provide a period of leave that can be shared between the parents: 10 months in Sweden (seven months paid at 77.6 per cent of earnings and three at a flat rate) and three months in Iceland (paid at 80 per cent of earnings). As a result, in Sweden, in 2016, 45 per cent of the recipients of parental leave benefits were men, compared with 55 per cent who were women. However, fathers usually only take their "daddy months" (those reserved exclusively for them) and this explains why they only took 27 per cent of all parental leave days used in 2016. Similarly, in Iceland, in 2015, 81 per cent of fathers took a period of leave, but they took on average 88 days of leave, compared with 178.4 for mothers.[155]

Secondly, Germany and Portugal are examples of the successful introduction of sharing bonuses. Germany provides for parental leave of 36 months for each parent. Whereas the right to leave is an individual and non-transferable entitlement, the right to compensation, i.e. parental benefits at 65 per cent of earnings for 12 months, is a family entitlement to be shared between the parents. The right to compensation can be extended from 12 to 14 months if both parents take at least two months of parental leave. These two months of parental benefits are the so-called sharing bonus. Their introduction in 2007 worked as a powerful incentive for fathers to take two months of parental leave: the proportion of fathers taking parental benefit rose significantly and steadily from 3.5 per cent in 2006 to 35.7 per cent in 2015. However, 78.9 per cent of fathers took no more than two months.[156] In Portugal, there is a sharing bonus in the context of the former maternity leave, now called "initial parental leave". This leave has a length of 120 or 150 calendar days, depending on the payment chosen (100 per cent of earnings or 80 per cent of earnings). Most of the period of the "initial parental leave"[157] can be shared between the working parents. What is more, a sharing bonus of 30 extra days is granted if parents share the leave in a non-simultaneous way, provided that one parent (normally the father) takes 30 consecutive days or two blocks of 15 days. If so, parents may choose to receive 150 days at 100 per cent of earnings or 180 days at 83 per cent of earnings. Statistics show that more and more fathers are making use of 30 days of the "initial parental leave", going from about 600 in 2008 (before the introduction of the bonus in 2009) to more than 24,000 in 2017. Put another way, in 2017 34 per cent of initial parental leave was taken with the sharing bonus, meaning that the father took at least 30 days of leave alone, without the mother.[158]

Thirdly, Spain is progressively increasing the duration of paternity leave to equalise it to the duration of maternity leave. Spain provides for maternity leave of 16 weeks paid at 100 per cent of earnings. In 2007, paternity leave of two weeks was created and then extended several times and at a higher speed in the last years: to four weeks in 2017, to five weeks in 2018 and to eight weeks in 2019. Paternity leave will be further increased to 12 weeks in 2020 and to 16 weeks in 2021, when the full equalisation of maternity leave and paternity leave will be accomplished. By doing so, Spain will become in 2021 the

[154] M.C. Huerta, W. Adema, J. Baxter and W.-J. Han, "Father's Leave and Father's Involvement: Evidence from four OECD Countries" (2014) 16 *European Journal of Social Security* 308, 328.

[155] S. Blum, A. Koslowski, A. Macht and P. Moss (eds), *14th International Review of Leave Policies and Related Research 2018* (2018), p.407 on Sweden and p.210 on Iceland.

[156] Blum et al., *14th International Review of Leave Policies* (2018), p.184 on Germany.

[157] Among the 120 or 150 days, up to 72 days are exclusive for the mother, which are called the "mother's-only initial parental leave". From the mother's leave, 42 days are compulsory after birth and the remaining 30 days are voluntary before birth. Consequently, the period of "initial parental leave" other than the exclusive days for the delivering mother (between 42 and 72), may in principle be shared between the working parents after the birth of their child.

[158] Blum et al., *14th International Review of Leave Policies* (2018), p.341 on Portugal.

first Member State where maternity leave and paternity leave are equal rights—including both the duration and the level of payment (100 per cent of earnings). According to the available data, most fathers make use of paternity leave. It has been estimated that the coverage in 2016 was 59.8 per cent. In 2017, where leave duration doubled from two to four weeks, the number of leave users increased by 8.25 per cent. Other sources point to a higher take-up rate of 74 per cent.[159]

Finally, Portugal was the pioneer in making paternity leave compulsory for fathers in 2004. Currently, paternity leave no longer exists in this country, as it has been transformed into a "daddy quota" within a generic parental leave system. The so-called "fathers-only parental leave" is paid at 100 per cent of earnings for 25 working days, 15 of which are compulsory. Regarding the innovative obligatory nature of the leave, Guerreiro explains that, as it was difficult in Portugal for fathers to feel a sense of entitlement to paternity leave, "the leave was … made compulsory, so that each father could effectively feel a subjective sense that he was entitled to take the leave".[160] Spain has followed the Portuguese example very recently by making mandatory two weeks out of the current eight weeks of paternity leave.

The New Directive within EU social law and EU equality law

This section, first, places the new Directive against the background of EU social law, including in particular the recent European Pillar of Social Rights,[161] and, second, considers its place within EU equality law.

The new Directive can be seen as being at the intersection of the more general EU social or labour law and EU gender equality law. On the one hand, it creates rights that (except for paternity leave) apply to all employed workers, whether male or female. On the other hand, it contains a gender equality angle, since it was conceived and drafted in order to increase equality between men and women in the labour market.

EU social law and the European Pillar of Social Rights

Gender equality law[162] has always been an important part of EU social or labour law. In the founding EEC Treaty in 1957, in the original Title III on social policy, the "principle that men and women should receive equal pay for equal work"[163] was the only provision with practical content for citizens,[164] although it took more than 18 years for that principle to have direct effect.[165] Later, EU gender equality law developed considerably and now includes directives prohibiting discrimination in employment, self-employment, social security, access to goods and services, as well as the directive on maternity leave.

[159] Blum et al., *14th International Review of Leave Policies* (2018), p.395 on Spain.

[160] M.D. Guerreiro, "Chapter 13: Family Policies in Portugal" in M. Robila (ed.), *Handbook of Family Policies Across the Globe* (New York: Springer, 2014), p.207.

[161] On how the Pillar deals with equality issues, also beyond gender equality, see M. Bell, "The Principle of Equal Treatment and the European Pillar of Social Rights" (2019), Paper presented at the Berkeley Comparative Equality and Anti-Discrimination Study Group Annual Conference, Stockholm University, 17 June 2019. An attentive reader will notice that many of our reflections in this section are directly or indirectly inspired in his paper.

[162] This area is also referred to as "sex equality law". We prefer to use the word "gender", since, as Bell summarises, whereas "'sex' is typically associated with a binary, biological understanding of the characteristic, 'gender' is often used to recognise that discrimination arises because of social constructions of how 'men' and 'women' are expected to behave and the roles that they perform.": see Bell, "The Principle of Equal Treatment and the European Pillar of Social Rights" (June 2019), p.8.

[163] EEC Treaty art.119.

[164] In the sense that the other provisions were programmatic in character—such as art.117 stating that Member States "agree upon the necessity to promote improvement of the living and working conditions of labour", or were enabling provisions, like those on the European Social Fund.

[165] *Defrenne v Sabena (Defrenne II)* (C-43/75) EU:C:1976:56 at [40].

The importance of EU gender equality law was confirmed in the European Pillar of Social Rights of 2017. The Pillar is not a binding legal document per se. It was first adopted by the Commission as a Recommendation[166] and later by an "Interinstitutional Proclamation" of the European Parliament, the Council and the Commission.[167] It was presented as,

> "a guide towards efficient employment and social outcomes when responding to current and future challenges … and ensuring better enactment and implementation of social rights."[168]

The Commission stated that, while it "reaffirms some of the rights already present in the Union acquis", it also "adds new principles which address the challenges arising from societal, technological and economic developments".[169]

The Pillar enumerates 20 principles, which are divided into three chapters: (1) Equal opportunities and access to the labour market (which includes, among other principles, both "gender equality" and "equal opportunities" on other grounds); (2) Fair working conditions (including "work-life balance"); and finally (3) Social protection and inclusion (comprising "inclusion of people with disabilities").

Both gender equality and work-life balance have a relatively pre-eminent place in the formulation and implementation of the Social Pillar. First, each one constitutes one of its principles. Principle 2, on gender equality, declares that:

> "a. Equality of treatment and opportunities between women and men must be ensured and fostered in all areas, including regarding participation in the labour market, terms and conditions of employment and career progression.
> b. Women and men have the right to equal pay for work of equal value."

In turn, principle 9, on work-life balance, states that:

> "Parents and people with caring responsibilities have the right to suitable leave, flexible working arrangements and access to care services. Women and men shall have equal access to special leaves of absence in order to fulfil their caring responsibilities and be encouraged to use them in a balanced way."

In its original formulation, these two principles came together,[170] but they were separated in the final version, which is coherent with the dual objective of the new Directive: to facilitate the reconciliation of

[166] Recommendation 2017/761, C(2017) 2600 final [2017] OJ L113/56. See also the document of the same day accompanying the Commission Communication of Establishing a European Pillar of Social Rights, SWD(2017) 201 final. Earlier, in its resolution of 19 January 2017 the European Parliament had called on the Commission "to build on the review of the social acquis and of EU employment and social policies … by making proposals for a solid European Pillar of Social Rights that is not limited to a declaration of principles or good intentions but reinforces social rights through concrete and specific tools (legislation, policy-making mechanisms and financial instruments)". See Resolution 2016/2095(INI), point 1.

[167] "Interinstitutional Proclamation" [2017] OJ C428/10.

[168] Recital 12 of the Commission Recommendation 2017/761.

[169] Recital 14 of the Commission Recommendation 2017/761. The Commission also explained that it was "primarily conceived for the euro area but it is applicable to all Member States that wish to be part of it" (Recital 13), that it "does not entail an extension of the Union's powers" (Recital 18) and that its delivery "is a shared commitment and responsibility between the Union, its Member States and the social partners … within their respective competences and in accordance with the principle of subsidiarity" (Recital 17).

[170] See point 5 of Chapter One, European Commission, "First Preliminary Outline of a European Pillar of Social Rights" COM(2016) 127, Annex 1 of the "Communication Launching a consultation on a European Pillar of Social Rights", pp.1, 6 and 7.

work and family life for all workers who are parents and for all carers; and, by doing so, to achieve equality between men and women with regard to labour market opportunities and treatment at work.[171]

Moreover, as mentioned before, the new Work-Life Balance Directive was the only binding instrument of EU law proposed when the European Pillar of Social Rights was presented in April 2017. It was also one of the three Directives adopted so far in order to implement the Pillar.[172] Other instruments on social law adopted in the meantime, which implement the Pillar, include an interpretative communication[173] and a Council recommendation.[174]

The fact that work-life balance was dealt with by a binding Directive, and not by a Recommendation, for example, is also an indication that it was given considerable importance within the Pillar.

As a whole, the Pillar has had a mixed reception. Rasnacča, for example, considered that it could prove to be either a "paradigm shift" or an "ineffectual distraction'" (or something in between).[175] More cautiously, Bell has argued that: "Given its broad ambitions, a thorough evaluation of the impact of the European Pillar on Social Rights will only be possible in the longer-term."[176]

In conclusion, it seems fair to recognise that the Pillar was an attempt to bring a renewed impetus to the development of the social dimension of the European Union. It is true that it remains to be seen how the Pillar will develop in the future and what will be its final impact. However, the initial scepticism, understandable given the low development of social law in the previous years, seems to contrast with the relatively successful outcome so far, with the adoption of three new directives in two years. In this context, the Work-Life Balance Directive is clearly on the positive side of the achievements of the Pillar.

The new Directive and EU equality law—the technical hypothesis

The new Directive can also be examined in relation to other directives regarding equality.[177]

It can be argued that the Work-Life Balance Directive is not a Directive *on* equality, in the sense of prohibiting discrimination as a process or imposing equality as a result, but it is a Directive *for* equality, since its objective is to create conditions to facilitate equality between men and women in the labour market.

In this regard, it is useful to compare the Work-Life Balance Directive with other instruments of EU law directly or indirectly related to equality that have been adopted or proposed in the last decade. Since 2010, when the revised Parental Leave Directive and the Directive on gender equality for self-employed persons were adopted, no other Directive on equality was adopted until 2019.

[171] Work-Life Balance Directive art.1.

[172] The other two directives adopted were Directive 2019/882 on the accessibility requirements for products and services [2019] OJ L151/70; and Directive 2019/1152 on transparent and predictable working conditions in the European Union [2019] OJ L186/105. Meanwhile, the Union also continued with the modernisation of health and safety at work legislation and fight against cancer. Agreement on the third batch of new and/or stricter exposure limits was reached in January 2019.

[173] Interpretative Communication on Directive 2003/88 concerning certain aspects of the organisation of working time, C/2017/2601 [2017] OJ C165/1.

[174] Council, Recommendation on access to social protection for workers and the self-employed (12753/19).

[175] Z. Rasnača, *Bridging the Gaps or Falling Short? The European Pillar of Social Rights and What it can Bring to EU-Level Policymaking* (Brussels: European Trade Union Institute, 2017), p.8.

[176] Bell, "The Principle of Equal Treatment and the European Pillar of Social Rights" (17 June 2019), p.23. In his paper, in which he makes an in-depth critical analysis of the Pillar, as far as the principle of equal treatment is concerned, he also recalls that "The history of EU social policy tells us that sometimes soft law measures can be a stepping stone to stronger interventions at a later point in time": see p.11.

[177] For a more general and critical perspective of the evolution of EU equality law, see S. Benedi Lahuerta and A. Zbyszewska, "Rethinking EU Equality Law—Towards a More Coherent and Sustainable Regime", Southampton/Warwick Working Policy Paper (2018).

In 2012, the Commission proposed a Directive on gender balance in company boards of listed companies,[178] which, in certain circumstances, would impose preferential treatment for the members of the under-represented sex (usually women) when companies do not reach a minimum of 40 per cent of board members of one sex. In spite of being supported by the European Parliament and a majority of Member States, and the fact that it only requires a qualified majority in order to be approved by the Council, it has not yet been adopted. [179]

In 2014, the Commission adopted a Recommendation on the use of transparency measures to achieve equal pay between men and women.[180]

Considering other grounds of discrimination included in art.19 TFEU, there is another Commission proposal that has been waiting for adoption for a long time. It is the proposal for a new Equal Treatment Directive, presented back in 2008.[181] It would prohibit discrimination based on religion or belief, age, disability and sexual orientation in social protection (including social security and health care), education, and access to goods and services available to the public. It would also require that effective access and reasonable accommodation be provided for the benefit of persons with disabilities. This proposal, again in spite of being supported by the European Parliament and the vast majority of Member States, and in spite of all the technical work done in Council working group during 11 years of discussion, is still blocked because of the unanimity requirement for its adoption by the Council[182] and the opposition of a few Member States, including Germany.[183]

Meanwhile, the European Union adopted two non-binding documents in the area of equality: in 2013 the Council adopted a Recommendation on Effective Roma Integration Measures in the Member States[184] and in 2018 the Commission adopted a Recommendation on Standards for Equality Bodies.[185] Both recommendations would have required the unanimity in the Council for their adoption as binding instruments, according to art.19 TFEU.[186]

By contrast, a positive story of a binding legal instrument proposed and adopted during this decade is that of the "European Accessibility Act",[187] which was proposed by the Commission in 2015 and finally adopted as a Directive in 2019. In the framework of the Social Pillar, it was related to its principle 17 on "Inclusion of people with disabilities". Its legal basis is art.114 TFEU on the approximation of national provisions concerning the establishment and functioning of the internal market. The explicitly stated objective of the Directive is the elimination and prevention of barriers to the free movement of certain products and services "arising from divergent accessibility requirements in the Member States".[188] However,

[178] "Proposal for a Directive on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures" COM(2012) 614 final.

[179] Council, *Progress Report on the Proposal for a Directive of the European Parliament and of the Council on improving the gender balance among directors of companies listed on stock exchanges and related measures* (9496/17).

[180] Commission Recommendation 2014/124 on strengthening the principle of equal pay between men and women through transparency [2014] OJ L69/112.

[181] "Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation" COM(2008) 426 final.

[182] According to art.19 TFEU.

[183] For a summary of the debate on the 10th anniversary of the proposal, see Council, Outcome of proceedings (6722/18).

[184] Recommendation of 9 December 2013 [2013] OJ C378/1.

[185] Recommendation 2018/951 of 22 June 2018 [2018] OJ L167/28.

[186] Nevertheless, although they are not binding, their legal value should not be underestimated, since they can be used to interpret the related binding directives. In political terms, the Council recommendation of 2013 is particularly interesting since it was adopted by unanimity. Thanks notably to the quite remarkable work of the Lithuanian presidency, it sets out a detailed roadmap of what can be done to integrate the Roma people, which can be useful to interpret certain provisions of Directive 2000/43 on equality based on racial or ethnic origin.

[187] Directive 2019/882 on the accessibility requirements for products and services.

[188] Directive 2019/882 on the accessibility requirements for products and services, Recital 2.

the background concern about facilitating access to goods and services for persons with disabilities permeates the entire Directive and is the true reason for its adoption.

In summary, the Work-Life Balance Directive and the European Accessibility Act were the only two Directives related to equality that have been adopted by the Union since 2010.[189] Both were adopted in 2019.

Is there any particular reason for the success of these two directives and the failure of others? Do these two directives have something in common that explains their success?

There are of course many factors that play a role in the success or failure of the proposals of the Commission, and this is not the place to make even an attempt of a comprehensive analysis of all the possible factors involved.

There is, for example, an obvious important factor: whether or not a proposal for a Directive needs unanimity in the Council, notably if it has to be adopted under art.19 TFEU, or if it can be adopted by qualified majority. Both the Work-Life Balance Directive and the European Accessibility Act required only a qualified majority for the Council to agree on them. However, while the unanimity requirement helps to understand for example why the draft Equal Treatment Directive has not yet been adopted, it does not explain, either why the 2008 proposal for a revision of the maternity leave Directive had to be withdrawn, or why the 2012 proposal for gender balance in company boards is still pending. The Council could have agreed on those two directives by qualified majority only.

Another factor to take into account is that each of the two successful directives has a history behind it. In a way, both built on the failure of their predecessors. As explained before, the Work-Life Balance Directive learned from the failure of the 2008 proposal for a revision of the maternity leave directive, while the European Accessibility Act, in part, can be seen as the result of the stalemate of the proposal for an Equal Treatment Directive.[190] The latter, if adopted, would have provided for the obligation to ensure reasonable accommodation for persons with disabilities and accessibility of goods and commercial services in general (i.e. with a broader scope of application than the European Accessibility Act).

However, we would like to put forward another idea, with a certain degree of caution. Arguably, the Work-Life Balance Directive and the European Accessibility Act also have something else in common: both can be seen as technical in nature, not requiring special treatment for a disadvantaged group as such, and not requiring equality as a direct result. In this sense, these directives create the conditions for equality, but do not impose equality as such. Arguably, they "nudge" individuals and the society as a whole into achieving an outcome, but they do not ensure that outcome directly.[191]

In that line, the Work-Life Balance Directive provides rights for both women and men, on an equal basis, and technically even gives more rights to men than to women (considering the paternity leave

[189] Another directive on equality adopted during this decade was Directive 2018/957 amending Directive 96/71 concerning the posting of workers in the provision of services [2018] OJ L173/16. However, it relates closely to the free movement of workers and it ensures the equality of workers based on their nationality, which is not a ground of discrimination covered by art.19 TFEU.

[190] In turn, the origins of both the Accessibility Act and the draft Directive can also be traced back to the initiative of the European Disability Forum of collecting 1.3 million signatures in 2007 in favour of a comprehensive anti-discrimination Directive dealing with all aspects of the life of persons with disabilities. See also European Disability Forum, Proposal for a Comprehensive Directive fighting discrimination of Persons with Disabilities (January 2008), *http://cms.horus.be/files/99909/MediaArchive/Disability%20Specific%20Directive.pdf* [Accessed 17 April 2020].

[191] We refer also to the book of R.H. Thaler and C.R. Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness* (New Haven, CT/London: Yale University Press, 2008). Sunstein was administrator of the Office of Information and Regulatory Affairs with the Obama administration from 2009 to 2012, while Thaler won the Nobel Prize in Economics in 2017 for his work on behavioural economics.

rights).[192] The European Accessibility Act provides that "economic operators only place on the market products and only provide services that comply with the accessibility requirements" provided therein.[193] Beyond people with disabilities, other people with "functional limitations," such as elderly people, pregnant women, people travelling with pushchairs or even with luggage, will also benefit from the Accessibility Act.[194]

With the obvious exception of the economic operators involved,[195] in principle, nobody can reasonably claim that their rights were diminished as a result of these two directives.[196] This can also explain why, in the end, both directives gathered a wide political consensus, with quite impressive majorities in the European Parliament, including even from some Eurosceptic MEPs. The Parliament voted on the European Accessibility Act on 13 March 2019, with 613 votes in favour, 23 against and 36 abstentions. It voted on the Work-Life Balance Directive on 4 April 2019, with 490 votes in favour, 82 against and 48 abstentions.

This is by no means a claim that the proposal by the Commission of "technical" directives can be a panacea for the future development of EU equality law. Each file is different, and there are not always technical solutions that can look neutral and beneficial for the average citizen or politician. However, what we have identified as common in the two success stories in EU equality law in this decade is, perhaps, food for thought.

Conclusions

The new Directive cannot be fully understood without considering its background: the reasons for the failure of the 2008 proposal to amend the Maternity Leave Directive, as well as the limits of the existing EU law framework of family-related leave. The Commission tried to learn the lessons of the past and in 2017 presented a proposal for a Work-Life Balance Directive with the objective of enhancing women's participation in employment by increasing the possibilities for men to take family-related leave and flexible working arrangements.

During the negotiations between the European Parliament and the Council, the adopted Directive maintained its core provisions: the introduction of EU-wide paternity leave for the first time, non-transferability and payment of part of parental leave, the introduction of EU-wide carers' leave for the first time and extended rights for parents and carers to request flexible working arrangements. Some of the provisions of the Directive are completely new, such as those creating the rights to paternity leave and carers' leave, while others expand and reinforce previously existing rights under the 2010 Parental Leave Directive, such as parental leave and the right to request flexible working arrangements. We have suggested how some open questions of interpretation could be solved.

[192] Of course, in a wider perspective, we have to consider that under the maternity leave Directive women already have the right to 14 weeks of maternity leave, although one can discuss whether their situation as mothers giving birth is completely or partially comparable to that of fathers. For an analysis of this and other related issues, see De la Corte-Rodríguez, *EU Law on Maternity and Other Child-Related Leaves* (2019), Ch.4.

[193] Directive 2019/882 on the accessibility requirements for products and services art.4.

[194] These are defined in Recital 4 of Directive 2019/882 on the accessibility requirements for products and services, which states that the concept of "persons with functional limitations" includes "persons who have any physical, mental, intellectual or sensory impairments, age related impairments, or other human body performance related causes, permanent or temporary, which, in interaction with various barriers, result in their reduced access to products and services, leading to a situation that requires those products and services to be adapted to their particular needs".

[195] Such as employers for the Work-Life Balance Directive and manufacturers, importers, distributors, service providers in the case of the Accessibility Act. In a medium- and long-term perspective, however, employers will benefit from a wider pool of people in the labour market and economic operators working in the area of accessible goods and services will benefit from a larger market.

[196] Regarding the Work-Life Balance Directive, parents can also complain that their freedom of choice was restricted by the fact that there will be two months of parental leave non-transferable between both parents, instead of only one as before. However, this is a complaint that can be made by both mothers and fathers.

At the national level, systems regarding different forms of child-related leave are quite varied, but often leave entitlements are more generous for women and there are few incentives for men to make use of parental leave, since periods of leave that are both well-paid and reserved for each parent are very limited or non-existent. The new Directive will have a high impact on a majority of Member States, who will be obliged to increase paid reserved periods of child-related leave for both mothers and fathers. In other Member States the impact will be intermediate, as they will have to create paid reserved periods of child-related leave for fathers only. In some Member States, in principle the Directive will have a rather low impact, owing to the entitlements already provided for in national legislation. Meanwhile, a few Member States can be considered to have good practices to encourage fathers to take leave, such as Sweden and Iceland (through "daddy months" of parental leave), Germany and Portugal (with sharing bonuses of parental leave) and Spain (by equalising maternity and paternity leave).

Finally, we have examined the place of the new Directive within EU social law and EU equality law. We have argued that the new Directive was one of the initiatives where the European Pillar of Social Rights has, so far, proved to be more successful. Moreover, only two directives were adopted in this decade related to the grounds of discrimination covered by art.19 TFEU: the Work-Life Balance Directive and the European Accessibility Act. We put forward the idea that, among other factors, the success of these two directives can also be explained by the fact that they can be seen as technical in nature and as not requiring equality as a direct result. They create conditions for equality, they somehow "nudge" towards equality, but they do not impose equality as such.

At the time of writing, when Commission President-elect Ursula von der Leyen has recently announced her intention to introduce binding pay transparency measures,[197] these reflections seem more topical than ever.

[197] U. von der Leyen, "A Union that strives for more: My agenda for Europe—Guidelines for the next European Commission 2019–2024", presented to the European Parliament on 16 July 2019, p.11.