RULE OF LAW AND THE EUROPEAN PILLAR OF SOCIAL RIGHTS: THE WORK-LIFE BALANCE DIRECTIVE: BALANCE FOR WHAT, BETWEEN WHAT AND FOR WHOM?

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Joana Nunes Vicente*

I. The reconciliation of work and family life, or to use the most current concept, the balance between work and private life *(work-life balance)* is today a principle and a fundamental value with legal reach at an international, European and national level and has become a central objective of national and European policies.

Over the past few decades, the European Union has developed a wide range of policy instruments and legislative measures in the area of reconciliation of work and family life, aimed at enabling working parents to balance their work and caring responsibilities.

This legal framework began to be created in the 1990s, firstly with the adoption of Directive 92/85/EEC of 19 October on pregnant workers, which granted maternity leave at least 14 weeks to working mothers after childbirth, with the aim of protecting the health and safety of women in the workplace. Secondly came Directive 96/34/EC of 3 July 1996 on parental leave, which provided for an individual right to three months' parental leave for each parent in order to care for a child up to the age of eight. In addition, Directive 2010/18/EU of 8 March 2010, which repealed Directive 96/34/EC, extended the duration of parental leave to a minimum of four months, with one of the months not

* Faculty of Law, IJ, Univ Coimbra.

transferable between the parents. Also back in the 1990s the European Union had put in place specific measures to facilitate access to part-time work for men and women, in order to reconcile work and family life, through Directive 97/81/EC of 15 December 1991 on part-time work. Later, the revised Parental Leave Directive of 2010 established the right to request part-time work for parents who work and return to work after a period of parental leave[1]. Recently, the topic of work-life balance has undergone a new impetus and it is on this current approach that we will focus on this article.

We refer to Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on the work-life balance for parents and carers, adopted by the Council and the European Parliament, which repealed the revised Parental Leave Directive of 2010. The new directive contributes to the implementation of the European Pillar of Social Rights, proclaimed in 2017 at the Gothenburg Summit, which sets out in point 9 the principle of the work-life balance, or to be precise that "parents and people with caring responsibilities have the right to suitable leave, flexible working arrangements and access to care services"[2].

In this article we will analyse the Directive on work-life balance, examining the Directive from three different angles: the objectives of the directive; the work-care model that runs through the directive; and the personal scope of the directive, considering three questions: 1) A directive for conciliation or a directive for equality? 2) A directive on reconciliation of work and parental and family care or a directive on reconciliation of work and care relationships? 3) A directive on work-life balance for all categories of workers, in particular, for the most vulnerable workers?

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[1] For a general view of this topic, see Rosário Palma RAMALHO, "Tempo de trabalho e conciliação entre a vida profissional e a vida familiar – algumas notas", *Tempo de Trabalho e Tempos de não Trabalho: o regime nacional do tempo de trabalho à luz do Direito europeu e internacional*, Lisboa: AAFDL, 2018, 101-116.

[2] There is, of course, a connection between the Work-Life balance Directive and of the EU Charter of Fundamental Rights. The Preamble of the Work-life Balance Directive refers to two provisions of the Charter: article 23 on equality between women and men and article 33 on family and professional life.

II. One of the most original features of this directive is the intersection established[3] between European social law and the law of equality and non-discrimination.

On the one hand, the directive creates rights that apply to all employed workers, men and women, in order to facilitate the reconciliation between one's professional and private life. From this point of view, the balance between professional and private life emerges as an objective whose beneficiaries are workers, both men and women, as everyone has an interest in achieving this balance.

On the other hand, we can argue that it is a Directive for equality since its goal is to create conditions that facilitate equality between men and women in the labour market[4]. In this regard, the objective of the Directive, more than conciliation itself, it is to achieve equality through the individualization of conciliation rights and flexible working formulas.

In fact, according to the problem represented in the Directive, the unequal participation of women in the labour market is closely related to the unequal distribution of responsibilities for the care of children/childcare. The fact that women continue to assume a predominant role in most of these cares and responsibilities is identified as a factor that prevents women from fully participating in the labour market, where they remain under-represented or are forced to come up with strategies that make it possible to reconcile their professional activity with family responsibilities (absences from the market that are relatively prolonged due to childcare or the option to provide part-time work) with high costs in terms of career progression and remuneration.

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[3] See Álvaro Oliveira / Miguel de la Corte-Rodríguez / Fabian Lütz, "The New Directive on Work-Life Balance: Towards a New Paradigm of Family Care and Equality?", *European Law Review* 3 (2020) 317. This intersection might not be easy because, as noted by Christina Hiessl, "Work-life balance – Introduction", *The International Journal of Comparative Law and Industrial Relations* 36/1 (2020) 56, "policy approaches to work-life balance must be aware of the delicate balance between two aims which are mutually exclusive to a certain degree: valuing and supporting care work adequately vs. discouraging women from shouldering a disproportionate burden as informal carers".

[4] This is explicitly mentioned in article 1 of the Directive: "This Directive lays down minimum requirements designed to achieve equality between men and women with regard to labour market opportunities and treatment at work, by facilitating the reconciliation of work and family life for workers who are parents, or carers."

In order to reverse this scenario, the new Directive challenged the gender assumptions about care, reinforcing the legal framework of incentives for men to assume an equal division in these responsibilities. In this context, two measures stand out in particular[5].

For the first time at an EU level, fathers, or recognized second parents[6], may take a paid 10-working-day paternity leave to be enjoyed on the birth of the worker's child. Although it can be said that this right alone does little to change the secondary *status* of the male figure in this context[7] – it is not as extensive as maternity leave[8] – it represents a positive step forward in recognising fathers as carers and as independent rights holders[9]: it does not require minimum seniority requirements or minimum periods of work; it is independent of marital or family *status*, with the clear aim of avoiding any discrimination between married and unmarried couples and between heterosexual and homosexual couples; and it is a form of paid leave, or paid at least at national sick pay level, which is fundamental in encouraging men to take such leave.

The second response as regards improving a new father's rights concerns parental leave itself. In fact, the analysis carried out during

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[5] Some of these measures (compulsory leave periods; flexible and well-compensated leaves; "father quotas"; flexible work arrangements) were already indicated by the International Labour Organization in its study, Laura Addati / Naomi Cassier / Katherine Gilchrist, *Maternity and paternity at work: law and practice across the world*, Geneva: International Labour Office, 2014.

[6] This gender-neutral wording was adopted following an amendment introduced by the European Parliament, and is intended specifically to clarify the eligibility of adoptive parents to paternity leave. As a result, in countries where same-sex couples can access adoption, same-sex partners of the mother are entitled to paternity leave – see, Elisa Chieregato, "A work-life balance for all? Assessing the inclusiveness of EU Directive 2019/1158", *The International Journal of Comparative Law and Industrial Relations* 36/1 (2020) 11.

[7] Marta Fernandez Prieto, "Conciliación de responsabilidades de progenitores y cuidadores y igualdad de oportunidades en la Directiva (UE) 2019/1158", *Revista de Derecho Social y Empresa* 12 (2020) 13. In the European Economic Social Comitee's view, a longer period – e.g. up to one month – to be agreed between employer and employee would be more appropriate to achieve the proposal's goal. Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017AE2275&rid=6>, accessed 27th September 2021.

[8] And taking it is not compulsory, in contrast to the compulsory minimum two weeks of maternity leave which, owing to health and safety reasons, are obligatory.

[9] Michelle Weldon-Johns, "EU work-family policies revisited: finally challenging caring roles?", *European Labour Law Journal* 12/3 (2020) 9.

the preparation of the Commission proposal showed that Directive 2010/18/EU 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. In this context, the new directive, while maintaining the right of each parent to a minimum of four months of parental leave, strengthens the mechanism of non-transferability of parental leave from one parent to the other from one to two months at least. By extending the non-transferable period to two months, EU law ensures that parents will have to share their license if they want to use everything. The paid nature of the leave also recognizes and values their role as carer for each parent, although in this field the European Union has acted to a sufficient degree with the requirement for an adequate income without any minimum limit, which will naturally have an impact on the effectiveness of the measure.

These two changes suggest tentative moves towards a more genuine recognition of shared gender roles. But, given that much is left to the discretion of Member States, as noted by Michelle Weldon-Johns[10], it remains to be seen whether the specific rights for working fathers and other second parents, provide them with genuine choices regarding their work-family responsibilities.

III. Another angle that is worth noting concerns the work-care model that the directive incorporates. What care situations are covered by the directive? Post-natal care, early child care/care of young children, care for sick or disabled dependents, eldercare, end-of-life care? Furthermore, are we facing a model focused on family members who work? Or more generally, on caregivers who work?

From that point of view, the Directive advances a genuine change in the approach underlying care roles.

First of all this is because care situations are no longer focused on parental care for children[11], but extend to the complex and continuous

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[10] "EU work-family policies revisited", 15.

[11] With regard to parental care for children, there have been some positive developments too. The right to request flexible working arrangements has also undergone a certain extension, as it becomes an independent right and not linked to the situation

care relationships that people who work with throughout their lives – caring for sick dependents, the elderly and end-of-care of life; and on the other hand, because the care relationship between the working carer and the person being cared for is not identified only as a parental relationship, not even within the family.

This extension is reflected, with particular accuracy, in the category of working carer that will be able to take five working days of leave per year[12] and to request flexible working arrangements (including the use of remote working arrangements, flexible working schedules, or reduced working hours).

If we look at the definition of carer for the purposes of leave (and flexible work arrangements), the Directive defines him or her as a "worker who provides personal care or support to a family member or to a person who lives in the same household as the worker and who needs significant care or assistance for a serious medical reason, as defined by each Member State" (article 3 (1) (d)). The worker-carer relationship with the person being cared for can therefore be a family relationship – "children, parents and spouses or civil partners, when recognized by national legislation" – but also includes people not related to the worker, who only live with the carer and who need care.

When it comes to family care relationships, despite the recognition of family diversity (Recital no. 37 of the Directive), the Directive still reflects a traditional model of the family. According to Elisa Chieregato, "parental rights are still premised on the assumption of a two-adult family, as they are limited to caring relationships resembling the nuclear family"[13]. Michelle Weldon-Jones observed that the definition

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of returning to parental leave, as provided for in Directive 2010 18/ EU. In addition, it can now be exercised by working parents, with children up to a certain age, at least eight years old, which most likely has the effect of extending the care situations to older children.

[12] 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. This right already existed under the 2010 Parental Leave Directive and is maintained in the new Directive.

[13] "A work-life balance for all?", 71. According to the Author, the Directive does not take into consideration the needs of other families, such as single parents, reconstituted families or extended families, which could benefit from measures providing for longer leave or the ability to choose a person with whom care responsibilities may be shared. Also The European Women's Lobby has argued that "limiting the definitions to the nuclear- family model is not only obsolete as it does not reflect the reality

focus on traditional bonds and presumed relationships of care rather than focusing on responsibilities for care that may extend beyond defined familial roles[14]. Even so, it is surprising that the categories of grandparents and grandchildren are absent, although in the recitals of the Directive, Member States are encouraged to extend the carers' leave to these categories.

In the second case, the Directive extends a care situation to people who are not related, but who live in the same house, which means that it does not fully recognize the diverse and complex relationships and responsibilities of care that may exist, such as taking care of other family members, neighbours or friends[15].

In summary, from this angle, the work-care model that supports the EU Directive takes some steps towards recognizing a broader range of carers and care situations, even though the work-care model remains focused on the nuclear family and in the care responsibilities assumed therein. On the other hand, although some progress has been made towards providing carers who work more opportunities to remain in the labour market, the limited period of carers' leave (only five days) and the fact that the request for flexible working arrangements is not an absolute right but only a right to request such arrangements (where the request is refused, the employer has to provide reasons for the refusal or postponement of such arrangements)[16] indicates that more

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of the diversity of families, it could result in the exclusion of many workers who are effectively carrying out parenting and caring responsibilities without being biologically related to the person(s) they are caring for" – see European Women's Lobby, "Work-Life Balance Directive, The EWL Assessment of the recently adopted Directive on work-life balance for parents and carers", June 2019.

[14] "EU work-family policies revisited...", *cit.*, 16. However, according to Marta Fernandez Prieto, "Conciliación de responsabilidades de progenitores", 21, although nothing is mentioned in the preamble of Directive 2019/1158, relationships by affinity will also be admitted.

[15] Michelle Weldon-Johns, "EU work-family policies revisited...", *cit.*, 16.

[16] Michelle Weldon-Johns, "EU work-family policies revisited", 16. Lisa Waddington / Mark Bell, "The right to request flexible working arrangements under the Work-life Balance Directive – A comparative perspective", *European Labour Law Journal* (2021) 20, available at <https://journals.sagepub.com/doi/full/10.1177/20319525211038270>, accessed 27th September 2021, note that "it remains uncertain whether, and to what extent, the CJEU might interpret the Directive as permitting scrutiny of the employer's reason for declining a request." The gains might be seen as pyrrhic victories if employers retain an unlimited prerogative to reject such requests for even the most flimsy or unpersuasive reasons.

will need to be done to support and complement the Member States' efforts to help families cope better with growing care responsibilities.

IV. This last section is about the personal scope of this Directive. After all, which workers will benefit from the directive's measures? Which workers are entitled to rights such as paternity and parental leave or flexible work arrangements such as flexible working hours and distance work? All categories of workers, standard workers and non-standard workers, in particular, the most vulnerable workers such as domestic workers, on-demand workers, intermittent workers, voucher based-workers, platform workers, trainees?

If we look at the formula used in article 2 to define the personal scope of the Directive, it seems that the Directive provides protection to a broad category of workers. In fact, according to article 2, the Directive applies "to all workers, men and women, with an employment contract or other employment relationship as defined by the legislation, collective agreements and national practices in force in each Member State, taking into account the jurisprudence of the Court of Justice.".

The appeal to the European Court of Justice case law is significant, since it suggests the possibility that the directive may apply to a wider range of employment relationships than that covered by the domestic Labour law of each Member State or at least prevents the use of more restrictive concepts than the concept of worker community.

Moreover, it should be noted that Directive 2019/1158 uses the same personal scope clause used by Directive 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union, which has been adopted precisely to improve working conditions by extending existing minimum standards to new forms of employment such as occasional contracts, on-call contracts, zero hour contracts, workers involved in the platform economy, etc. Since the personal scope clause of Directive 2019/1158 is based on that of the Directive 2019/1152, this is also an important point for arguing that Directive 2019/1158 provides protection for a wide category of workers.

Although we very much welcome this intention to create a potentially broad scope for Directive 2019/1158, it is important to note some weaknesses.

First of all this is because the concept of 'worker' developed by the Court of Justice is not a very ambitious concept. Despite being an autonomous concept, at the core of the definition lies the element of subordination or personal dependency. Martin Risak and Thomas Dullinger argue that the European Court of Justice has not yet used economic factors to extend the scope of application beyond those persons working not in a relationship of "personal" subordination but in one based on some form of economic dependency, since they are not really performing on the market but are working in person for only one or a very small number of contractual partners. In only a few cases, most of which concerned competition law, have such elements been taken into account[17]. And if so, it is not so clear that the concept of worker for the purposes of the Directive and access to conciliation measures includes these new categories of precarious workers[18].

Secondly, even assuming that Directive 2019/1158 responds to this broad protection concern and covers these precarious relationships, the fact that the Directive allows Member States to limit access to flexible work arrangements and leaves it to those who have been employed for a minimum work period may undermine the effectiveness of conciliation rights. In a context of increasing precariousness and atypical jobs, as mentioned by Elisa Chieregato[19], the setting of these criteria will mean that more and more workers across the EU can be excluded from parental rights and related benefits, precisely because of the occasional, intermittent, unstable nature of the activity they provide.

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[17] *The concept of worker in* EU *law – Status quo and potential for change*, Report 140, *European Trade Union Institute*, Bruxels (2018) 45, available at <https://www.etui.org/publications/reports/the-concept-of-worker-in-eu-law-status-quo-and-potential-for-change>, accessed 27th September 2021. For a more general and critical perspective of the evolution of EU concept of worker, see Joana Nunes VICENTE, "O conceito de trabalhador no Direito da União Europeia: a jurisprudência do Tribunal de Justiça e a evolução legislativa recente", in Ricardo *et al.,* coord., *Diálogos com Coutinho de Abreu*, Coimbra: Almedina, 2020, 395-413. In contrast, Emanuele MENEGATTI, "Taking EU labour law beyond the employment contract: The role played by the European Court of Justice", *European Labour Law Journal* (2021), available at <https://journals.sagepub.com/doi/full/10.1177/2031952519884713>, accessed 28th September 2021, considers that the Court has built a common European concept of 'worker', broader than that of 'employee'.

[18] For an optimistic view, see Francisco Liberal FERNANDES, *O conceito de trabalhador no direito social comunitário*, Coimbra: Gestlegal, 2019, 108.

[19] "A work-life balance for all", 14.

Thirdly, it is important to note that these precarious workers are the ones who, in practice, will have the greatest difficulties in accessing conciliation measures. Measures such as the implementation of flexible hours or the use of telecommuting may respond to the aspirations of many highly qualified intellectual workers, but may be poorly suited to meet the needs of less qualified workers, not only because the sectors of activity in which they are concentrated will be less suitable to this adaptability (e.g. restaurants, the tourism sector, domestic service, etc.), but also because, normally being workers with precarious ties, they will face, due to a lack of negotiating power, greater difficulties in requesting such conciliation measures. In addition, this greater difficulty of workers with precarious or occasional jobs in accessing conciliation measures is also relevant in that it can reflect and exacerbate other existing inequalities, due to discriminatory factors, such as age, race, ethnic origin or nationality.

V. In conclusion, this is undoubtedly a directive for equality and through it important measures are being implemented in the right direction. This is also a directive that takes some provisional steps towards recognizing a wider range of caregivers and situations of care. However, a fuller picture is even more necessary today, given the great heterogeneity of workers existing in the labour market. Since the Work-Life Balance Directive is a directive for equality, which wants to create conditions that facilitate equality between men and women in the labour market, it is part of a broader agenda on equality in the European Union, an aspect that cannot be undermined.