

The EC Directive on Parental Leave.

Bernard Fusulier
University of Louvain
bernard.fusulier@uclouvain.be

Introduction

- Both maternity leave and parental leave are the subjects of European Union (EU) legislation. In both cases, minimum standards are defined by law, not just nationally but cross-nationally.
- The EU Directive on Parental Leave was adopted in 1996, 13 years after the European Commission first proposed this measure, and following many disagreements between Member States.
- But unlike the Maternity Leave EU Directive, adopted as a health and welfare measure, the Parental Leave Directive was the first example of an agreement obtained within the framework of the European Social Dialogue, involving social partners.
- This presentation will examine the history of the Parental Leave Directive.

Before : the Maternity Leave EU Directive

- The Directive 92/85/CEE on maternity leave was adopted on 19 October 1992.
- It is interesting to note that this Directive Community has these roots in the Charter of Fundamental Social Rights for Workers (Social Charter) adopted in 1989 with the exception of the Conservative government of the UK.
- The Charter is a political declaration containing "moral obligations" whose object is to guarantee that Member States respect certain social rights mainly relating to the labour market, vocational training, social protection, equal opportunities and health and safety at work. It also contained an explicit request to the European Commission - the EU's executive branch- to put forward proposals for translating the content of the Social Charter into legislation.
- The Charter and the subsequent history of Directives on maternity leave and parental leave illustrate very clearly the politics of policy making in a multi-national system such as the European Union. The Charter included the proposal for a 'maternity directive', and based this on article 118A of the 1957 Treaty of Rome, the agreement that founded the European Economic Community, the precursor of the European Union.

- This article allowed the European Council – comprising the heads of state or government of the Member States - to intervene in the field of health and security at work through a qualified majority. In other words, a maternity directive introduced as a health and safety measure could be adopted even if some Member States were opposed. This strategic choice avoided the unanimity rule, necessary for many other types of directive, and sidestepped the opposition of the UK Government.
- This story of UK opposition and finding a way to get round was a recurrent theme in the long-running saga of getting a Directive on parental leave. However, this time there was another logic and another institutional procedure. The parental leave Directive was the first agreement obtained in the framework of the European Social Dialogue between social partners.

The European Social Dialogue

“Social dialogue is the term used to describe the consultation procedures involving the European social partners: the Union of Industrial and Employers' Confederations of Europe (UNICE), the European Centre of Enterprises with Public Participation (CEEP) and the European Trade Union Confederation (ETUC). It encompasses discussions, joint action and sometimes negotiations between the European social partners, and discussions between the social partners and the institutions of the European Union. The dialogue was started by the European Commission in 1985, and Article 138 of the EC Treaty (as amended by the Single European Act) formally requires the Commission to develop it”

The results of these negotiations vary and can be of different natures:

- general recommendations
 - precise obligations or actions, accompanied by monitoring mechanisms at national and European levels
 - joint opinions
 - agreements with juridical effects because they are transposed in national law by a Directive or national law practices.
- The Parental leave Directive was the first cross-industry framework agreement (in 1995)

The aborted 1983 Directive proposal

- In 1983, the European Commission proposed a Directive on parental leave and leave for family reasons. This was done in the frame of its action programme on the promotion of equal opportunity for women 1982-1985.
- The European Council of Ministers, under different presidencies up to 1993, made numerous attempts at finding a compromise. Since a unanimous vote was required for the adoption of this initiative, all the efforts of the Council remained deadlocked because of the implacable opposition of the Conservative government in the UK (eurosceptical and resistant to any attempts to re-regulate the UK labour market).

Legislative deadlock to the proposal

- An opportunity for unblocking the situation arose with the adoption in 1992 of the Treaty on the European Union, also called the Maastricht Treaty, and of its annex: the Social Policy Protocol, including a Social Policy Agreement concluded by the social partners in October 1991.
- While preparation for the Maastricht Treaty was underway, the social partners, with the support of the European Commission, requested to be given an official and structural role in the EU's decision-making processes. Then faced by the United Kingdom's opposition to any adoption of more advanced social measures at the European level, the other governments found a solution by adding to the Treaty a protocol that legally bound eleven of the twelve Member States. This protocol allowed these States to use European institutions and procedures to take action in the social field, allowing decisions to be made with a qualified majority (art. 137) so no one country could exert a veto .
- The United Kingdom remained outside this procedure until 1997, when the new Labour government in the UK came to power and a new treaty, the Amsterdam Treaty, was adopted (signed on 2 October 1997, and coming into force on 1 May 1999).

Second Directive proposal : unblocking, negotiation of the social partners and agreement

- In February 1995, Commissioner Padraig Flynn, in charge of social policy in the European Commission, invited his European social partners to consider parental leave measures at the European level.
- Originally, UNICE, mainly representative of large business companies, was very reticent and sceptical concerning the use of this new route opened by the European Social Dialogue.
- But UNICE changed its mind. Although it had the possibility to refuse negotiations on parental leave in the frame of the European Social Dialogue, it anticipated that it could not prevent the European Commission to move ahead by proposing a new Directive.
- At the beginning of July 1995, the General Secretaries of ETUC, UNICE and CEEP wrote a letter to Commissioner Padraig Flynn, asking the Commission to suspend its legislative initiative concerning “conciliation of professional life and family life” (parental leave), because they will begin a negotiation on the theme, following the procedures set out in the Social Agreement of the Maastricht Treaty.

- On November 6, 1995, the UNICE, CEEP and ETUC agreed on a proposal for a framework-agreement on parental leave. Employers did not win the case on the size of undertakings.
 - And if the ETUC obtained that the agreement include provisions for illness or accident reasons, the field of application was not extended to include dependent elderly parents.
 - Moreover, the agreement does not include obligations in terms of financial compensation.
 - It suggests that the leave be an individual right, of three months, non transferable, that could be taken at any time by any workers, male or female, before the child reaches 8 years of age.
 - The exact duration would be determined at national level.
 - A salaried worker has the right to return to his or her working place or to an equivalent job.
 - There is a social security coverage for all risks (pension, social security, illness, redundancy, etc.).
 - Member States may also adopt more favourable measures.
 - Member States retain discretionary power for determining the conditions for access and remuneration during parental leave, deciding to allow full time or part time parental leave, setting notification periods.
- This flexibility leads to a great variety of parental leave systems from one State to another.

Critics

- Eugenia Caracciolo (2001) argues that the fact that Member States are not obliged to ensure a payment to parents on leave is one of the weak points of the Directive. According to this analyst, the Directive also implies that it is mainly women who are responsible for taking care of children.
- Stephen Hardy and Nick Adnett (2002) argue that the Directive is inadequate for meeting its objectives of work/life balance and equality between men and women: the participation rate of fathers remains low, thus maintaining or even reinforcing gender inequality in the labour market.
- So, progress or pitfall? Recognizing this fundamental ambiguity, Fred Deven and Peter Moss (1999) consider the EU Directive on Parental Leave to be less a conclusion than a potential starting point for the redesign of an European social model more able to respond to contemporary social changes, including enabling a better equilibrium between work and family as well as between modern motherhood and fatherhood.

Conclusion

- The inclusion, in an annex to the Maastricht Treaty, of the social protocol and the recognition of a qualified majority decision-taking allowed to break the institutional deadlock (from the UK Government) and opened the way to a new initiative from the Commission.
- In a context of promotion of social dialogue, namely as an answer to an accusation of a democratic deficit in the Commission and to the will of the social partners to be recognized as the most adequate instance to find solutions corresponding to the needs of employers and workers, it was desirable to begin a collective negotiation.
- The framework agreement is, in fact, a compromise.
- Despite the great latitude given to Member States by the Directive, can we interpret it as an advance in the promotion of a society where professional life and family life could be reconciled?

The article 33 of the Charter of Fundamental Rights of the European Union, adapted in Lisbon in 2007, recognizes that “to reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child”.

- The European Employment Strategy and the Community Action programme on equal opportunities for women and men refer to the reconciliation of family and working life in various policy documents.
- The social partners' agenda also includes this subject through for instance the better provision of care services, gender equality, lifelong learning, structure of work and working conditions.
- We need to take into account a broader context where other international organisations define guidelines for policy, through conventions and resolutions (e.g. International Labour Office) or through international studies (e.g. OECD).
- Moreover others stakeholders such as Women movement and family activists as well as scholars play an important role in the public debate for instance creating expectations, showing the adverse effects of some policy developments and opening new perspectives.

- Certainly these developments and contributions constitute a statement of public commitment and central values on the symbolic level. Of course it is fundamental to produce institutional supports, legislation and collective agreements. Nevertheless legislation weakly backed up with resources is insufficient to equalise the 'capabilities' of individuals to take advantage of entitlements
- As we have seen, some analysts criticised the EU Directive on parental leave, mainly on the basis that it reproduced inequality between men and women, and also because it does not specify any payment when parental leave is taken, and leaves too many important subjects, such as the age of the child, to the discretion of Member States.
- That could mean that it is necessary to dare to defy the principle of subsidiarity in order to imagine a deeper and more effective integration of EU social policy. Utopian or a natural progression?