EQUALITY AND PREGNANCY AT WORK. A NEW PERSPECTIVE? THE REVISION OF THE PREGNANCY WORKERS DIRECTIVE

Leticia Fernández Macías
Inspectora de Trabajo y Seguridad Social

RESUMEN
La vigente Directiva 92/85/ECC —también conocida como la Directiva sobre trabajadoras embarazadas— se encuentra desfasada y no cubre las necesidades de la sociedad europea que, cada vez más, reclama el principio de igualdad entre hombres y mujeres y el derecho a conciliar la vida profesional y personal. El intento de mejorar la regulación de tal materia que comenzó en 2008 por medio de una propuesta de la Comisión resultó infructuoso, al ser ésta definitivamente retirada en julio de 2015. Este artículo analiza las medidas sugeridas por la Comisión y el proceso legislativo de la propuesta, que ejemplifica la falta de entendimiento entre el Parlamento Europeo y el Consejo. Mientras el primero pretendía una regulación omnicomprensiva que fuera más allá de consideraciones sobre seguridad y salud en el trabajo, el segundo se mostró reacio a mejoras legislativas que suponían un mayor gasto.

ABSTRACT
The current Directive 92/85/ECC —also known as Pregnant Workers Directive— is outdated and does not meet the needs of European society which increasingly claims over the principle of equality between men and women and the right to reconcile professional and personal life. The attempt to improve the regulation on the matter that began in 2008 by means of a Commission Proposal proved fruitless, for it was definitively withdrawn in July 2015. This article analyses the measures suggested by the Commission and the legislative process of the proposal, which exemplified a lack of understanding between the European Parliament and the Council. While the former intended to create an all-encompassing regulation beyond safety and health at work considerations, the latter was reluctant to legislative improvements which entailed higher expenditure.

PALABRAS CLAVE
Conciliación de la vida laboral, trabajadoras embarazadas, permiso de maternidad, Unión Europea, igualdad.

KEYWORDS
work-life balance, reconciliation, pregnant workers, maternity leave, European Union, equality.

1. INTRODUCTION

The achievement of the actual legal frame in relation to work-life balance in the European Union is the result of a progressive struggle, not devoid of difficulties. Its action in this field is, however, still limited, since work-life balance does not fall within its exclusive competences, but within the scope of shared or supporting competences[1].

This fact is reflected i.e. in the wording of Article 151 TFEU, which initiates Title X "*Social* Policy" of the Treaty, as it refers to both the Union and the Member States in the obligation of having *as their objectives the promotion of employment and improved living and working conditions*, inter alia. Moreover, Article 153 TFEU reinforces the idea that the EU role is to *support and complement*.

This being so, the Secondary Law arising from those Primary Law guidelines is an attempt to harmonize national laws. Therefore, given the differences between Member States in areas such as employment and working conditions, the establishment of some minimums do not entail substantial improvement, except for those states whose legislations on work-life balance are not as evolved as the ones of the leading European countries.

In the 90's the Community started to develop binding provisions which had an impact on work-life balance. The Treaty establishing the European

[1] Articles 4 and 6 TFEU.

Union (1992) provided the grounds, since it enhanced the competences of the European Union beyond economic issues and allowed the participation of the social partners.

The Pregnant Workers Directive[2] was the first binding provision that was drawn on this matter. Even though its foundation laid on health and safety at work reasons, it helped to create a minimum framework in all Member States in relation to rights which are now seen from the perspective of work-life balance. However, this directive became antiquated, and in 2008 the Commission released the Work-life balance Package, which included two legislative proposals to revise Pregnant Workers and Self-Employed Directives.

Nevertheless, in July 2015 the Pregnant Workers Directive revision[3] was finally withdrawn. This unsuccessful reform exemplifies the contradiction between the necessity to improve work-life balance measures and the reluctance to enhance them, as they usually involve economic expenditure.

On this basis, the object of this article is to examine the foundations of the Pregnant Workers Directive, as well as the process of its revision, and to draw conclusions on what could be done in order to raise the level of protection for pregnant workers and their children.

2. COUNCIL DIRECTIVE 92/85/EEC AND THE COMMISSION PROPOSAL FOR ITS AMENDMENT IN 2008

The Pregnant Workers Directive, which has its basis on former Article 118a —later Article 137 EC—, contains 15 articles and two annexes and has been slightly modified in two occasions[4]. Its fundament would rely

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2 Council Directive 92/85/EEC of 19 October 1992 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. OJ L 348, 28.11.1992, pp. 1-7.

3 Proposal for a Directive amending Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, COM (2008) 637.

4 By Directive 2007/30/EC of the European Parliament and of the Council of 20 June 2007 amending Council Directive 89/391/EEC, its individual Directives and Council

now on Article 153 TFEU, which was already mentioned. Although this directive is focused on the protection of pregnant and breastfeeding workers from the perspective of safety and health at work, it turned out to constitute a main rule in terms of work-life balance due to its recognition of a maternity leave of at least 14 weeks, two of which must be allocated before and/ or after confinement[5].

However, as it is stated in the recitals of the directive, the rationale of that maternity leave is only related to the vulnerability of pregnant and breastfeeding workers, leaving reconciliation considerations aside. The same could be said about the regulation of night work in Article 7.

With regard to the maternity leave, Article 11 establishes that the corresponding pay and allowance shall be deemed adequate if it guarantees income at least equivalent to that which the worker concerned would receive in the event of a break in her activities on grounds connected with her state of health, subject to any ceiling laid down under national legislation[6]. This right to an allowance may be subject to certain conditions, although it should not require a period of work of more than 12 months immediately previous to the presumed date of delivery.

By means of this requirement the Directive gives real content to the maternity leave, whose effectiveness is conditional to the maintenance of economic income for women during that period.

On the other hand, Article 9 of the Directive contemplates the right of pregnant workers to take leave from work without loss of pay to enable them to attend ante-natal examinations, if such examinations take place during working hours. In this case, the grounds have not been explicitly indicated, but it is reasonable to understand that they are more likely to

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Directives 83/477/EEC, 91/383/EEC, 92/29/EEC and 94/33/EC with a view to simplifying and rationalising the reports on practical implementation (Text with EEA relevance) OJ L 165, 27.6.2007, p. 21-24; and recently by Directive 2014/27/EU of the European Parliament and of the Council of 26 February 2014 amending Council Directives 92/58/EEC, 92/85/EEC, 94/33/EC, 98/24/EC and Directive 2004/37/EC of the European Parliament and of the Council, in order to align them to Regulation (EC) No 1272/2008 on classification, labelling and packaging of substances and mixtures. OJ L 65, 5.3.2014, p. 1-7.

5 Article 8 Council Directive 92/85/EEC.

6 Article 11 para. 2, 3 and 4 of Council Directive 92/85/EEC.

be founded upon a work-life balance approach than in safety and health reasons.

The Directive also establishes protection against dismissal[7], whose basis relies, according to its recitals, on the avoidance of harmful effects on the physical and mental state of pregnant and breastfeeding workers with respect to the risk of dismissal for reasons associated with their condition. Without denying that argument, it can be also considered that this protection is really against *discriminatory* dismissal. Actually, in words of *Caracciollo di Torella and Masselot*[8], it is even better than the one provided for in the former Equal Treatment Directive[9], since it gives a cover against dismissal without the need to prove the existence of discrimination[10]. Therefore, the prohibition of dismissal enshrined in the Pregnant Workers Directive is yet another illustration of its heterogeneity.

Considering that it was adopted in the early 90's on grounds of safety and health at work, this Directive needed a revision that could reflect the changes in European society by emphasizing the principle of equality as well as the necessity of a proper reconciliation of professional and family life.

That is why in 2008 the Commission released a Proposal for a Directive of the European Parliament and of the Council amending Council Directive 92/85/EEC. In its explanatory memorandum the proposal referred to the Council of the European Union of October 2007[11], which called on the Commission to evaluate the legal framework supporting reconcilia-

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7 Article 10 of Council Directive 92/85/EEC.

8 Caracciolo di Torella, Eugenia; Masselot, Annick, "*Reconciling Work and Family Life in EU Law and Policy*". (Palgrave Macmillan, 2010).

9 Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. OJ L 39 of 14.2.1976.

10 Years later, the EU adopted the Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast). OJ L 204, 26.7.2006, p. 23-36. Repealing Directive 76/207/CEE from 14.8.2009. This directive reversed the burden of proof by stating that, in case of facts which might be susceptible to being discriminatory, it is for the respondent to prove that there has been no breach of the equal treatment principle.

11 SOC 385 Council Conclusions: Balanced roles of women and men for jobs, growth and social cohesion. http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2014136%202007%20INIT.

tion and the possible need for improvement. And it also mentioned the resolution by which the European Parliament called to adopt best practices as regards the length of maternity leave[12].

According to the Proposal, the length of maternity leave in the Member States varied from 14 to 28 weeks, and in certain circumstances to up to 52 weeks, not all of which were paid. So prolonging the duration of maternity leave in four weeks more meant a moderate increase which was consistent with the situation in many Member States.

The arguments given by the Commission overcame the ones of the former Pregnant Workers Directive and, together with the improvement of the health and safety at work of women, it also contemplated a better reconciliation of professional and family life as well as the promotion of equal opportunities between women and men in the labour market. Its legal basis therefore relied on Articles 137 (2) and 141 (3) of the EC Treaty.

With regard to its impact assessment, the Proposal explained that apart from the evident advancement on the health of female workers, it also contributed to "*create a solid relationship with the child*"[13]. Furthermore, it delayed the recourse to parental leave, which has no economic allowance, and by increasing the payment given during maternity leave, it prevented the fact that pregnant and breastfeeding workers could lose out financially.

In respect of the impact on employers, the Proposal determined that "*there will be greater certainty as to the length of absence of the mother, since women are expected to have less recourse to parental leave*". On the other hand, the costs arising from the reform of the maternity leave could be limited by allowing the Member States to "*cap the maternity allowance*" and by enabling state financing.

The Proposal consisted of 6 articles, although Article 1 remained the most significant, since it affected Articles 8, 10, 11 and 12 of the Council Directive 92/85/EEC, while the rest were standard provisions which referred to the possibility that Member States could provide a higher level

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12 European Parliament resolution of 21 February 2008 on the demographic future of Europe (2007/2156 (INI)). http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2008-0066+0+DOC+XML+V0//EN&language=EN.

13 It is noticeable that the perspective of the rights of the children is introduced in this proposal.

of protection, to the period of transposition, to the periodical assessment of the Directive, to the entry into force and to the subjects of the Directive, that is, the Member States.

Moving on to the content of the Article 1 of the Proposal, it provided that Article 8 of the former Directive would include the following modifications:

An increase of the length of the maternity leave from 14 weeks to 18 weeks, 6 of which had to be taken after childbirth[14] and the provision that workers could freely choose the time at which the non-compulsory time was taken.

The prenatal portion of the leave is extended to the actual date of birth, if the childbirth occurs after the due date, without implying any reduction in the post-natal portion of the leave.

If there is any period of sick leave related to illness or complications due to pregnancy, up to four weeks before confinement, it shall not reduce the length of maternity leave.

Article 10 of the former Directive, which refers to the prohibition of dismissal, determines that the employer has to motivate the grounds for the dismissal in writing only in those cases where a woman is on maternity leave. In an attempt to increase the stability of female workers, this article is amended so that this duty of the employer is extended to cases where a woman is dismissed within six months of the end of the maternity leave, if the woman so request.

As for Article 11, which relates to Employment Rights, is amended in the following terms:

If the employer considers that a female worker is not fit for work without medical indication supplied by her, and determines that she has to be excluded from work, she will have the right to receive a payment equivalent to her full salary until the beginning of the maternity leave.

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[14] The ILO Maternity Protection Recommendation in 2000 provided for a period of 18 weeks leave. However, from the point of view of the health of the child, the World Health Organization goes beyond and recommends exclusive breastfeeding starting within one hour after birth until a baby is six months old.

Starting from the premises established in Directives 2002/73/EC[15] and 2006/54/EC[16], a new paragraph is added. It recognizes the right to return to the same or equivalent job on no less favourable conditions once the maternity leave is completed. And it also includes the right to *benefit from any improvement in working conditions to which she would have been entitled during her absence.*

While the previous regulation established that the maternity leave allowance was limited to a minimum, which was the amount of the sick pay, the amendment provides for the principle of the payment of the full monthly salary received prior to the maternity leave or an average of the salary to be calculated over a certain period, while the ceiling remains the same, that is, the sick pay.

A new point is added in order to include the right to ask for —not to get— the adaptation of the working patterns and hours during the maternity leave or when returning from it. The employer is only obliged to consider such a request[17].

The defense rights established in Article 12 of the former Directive are developed by the amendment. The first addition consist on the fact that the burden of proof rests on the respondent[18]. On the other hand, the provision on victimisation which the Proposal introduced is also included

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15 Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (Text with EEA relevance). OJ L 269, 5.10.2002, p. 15-20.

16 Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast). OJ L 204, 26.7.2006, p. 23-36

17 This point involved a variation in the regulation of working time which is not included in Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time.

18 On the grounds of the Equal Pay Directive (Council Directive 75/117), the European Court of Justice ruled in Case 109/88 *Danfoss* that *"where an undertaking applies a system of pay which is totally lacking in transparency, it is for the employer to prove that his practice in the matter of wages is not discriminatory, if a female worker establishes, in relation to a relatively large number of employees, that the average pay for women is less than that for men"*. This principle of the reversal of the burden of proof is included in Directives 97/80/EC, 2000/43, 2000/78, 2004/113 and 2004/56.

in equal treatment Directives, as a mechanism to impede that workers who exercise their rights can be victims of retaliation by the employer.

A new paragraph c is added in order to prohibit any limit on the compensation payable in the event of a breach of the principle of equal treatment. Penalties —which are not required to be criminal— shall be *effective, proportionate and dissuasive*.

Finally the Proposal determines that those bodies established pursuant to Directive 2002/73/EC, as recast by Directive 2006/54/EC, shall be competent only in matters concerning equal treatment.

3. THE LEGISLATIVE PROCEDURE OF THE COMMISSION PROPOSAL

Once the terms of the Proposal are exposed, its legislative procedure[19] is now subject to brief analysis. To begin with, it must be noted that the procedure was affected by the entry into force of the Treaty of Lisbon. Consequently, the legal basis of the Proposal was later referred to Articles 153 (2) and 157 (3) TFEU[20].

On the 3rd of October 2008 the Proposal was transmitted to the Council and to the European Parliament. In March 2009, the Council met[21] and debated on the basis of a questionnaire set out by the Presidency. Although most of the Member States agreed with the Proposal, Germany and Denmark indicated that the former Directive gave enough protection for pregnant workers. Furthermore, as the social partners were, by that time, discussing on parental leave, most delegations linked the deliberation on maternity leave to that on-going process.

In general, delegations also considered that the proposal should not affect negatively to women's situation on the labour market and that, al-

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19 Procedure 2008/0193/COD.

20 Communication from the Commission to the European Parliament and the Council Consequences of the entry into force of the Treaty of Lisbon for ongoing interinstitutional decision-making procedures. COM/2009/0665 FIN.

21 2930th meeting of the Council of the European Union (Employment, Social Policy, Health and Consumer Affairs), held in Brussels on 9 March 2009. http://data.consilium.europa.eu/doc/document/ST-7341-2009-INIT/en/pdf.

though most of them accepted the relevance of equality aspects, some opted to underline that the Proposal attended health and safety reasons.

Afterwards, the European Parliament —hereinafeter EP— released its Draft Legislative Resolution in May 2009 by means of which introduced several and various amendments to the proposal. The main modifications are summarized as follows:

The EP draws its amendment from a wider perspective in which the reconciliation of professional and family life is recognized[22].

The definitions of the former Directive are reviewed in order to involve employees "*under any type of contract, including in domestic work*".

Introduces the concepts of reproductive risks for male and female and reproductive health[23].

Night work is regulated in greater detail and pregnant workers and working mothers with a child under 12 months cannot be obliged to work overtime.

The EP increases the maternity leave to 20 weeks. Member States may extend the compulsory period of the leave —6 weeks after childbirth— to a maximum of six weeks before confinement. Moreover, the compulsory six week period shall be applied to all working women, regardless of their qualifying period, and it can be shared with the father. In cases of multiple births the compulsory period is increased in one month for each additional child.

Workers are obliged to indicate their maternity leave period two months before it commences in order to avoid organisational difficulties in small and medium sized enterprises.

The cases in which the additional leave is granted are increased[24].

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[22] In example, Amendment 1 includes "and on the introduction of measures to support workers in balancing work and family rights and responsibilities" in the title of the Directive. Amendment 15 on Recital 13 b determines that: "For the purposes of helping workers reconcile their professional and family rights and obligations, it is essential to provide for longer maternity and paternity leave, including in the event of adoption". Amendment 25 on Article 1 paragraph 1a also includes the concept of reconciliation into the scope of the Directive, on grounds of Article 141 of the EC Treaty.

[23] Amendments 27 and 28 on Articles 3 and 4 of the Directive.

[24] Amendment 38 refers to "specific situations such as in the case of premature childbirth, stillbirth, caesarean section, children hospitalised at birth, children with disa-

Incorporation of self-employed workers to the field of application of the Directive[25].

Inclusion of the patertiny/co-maternity leave of 2 weeks, non-transferrable, for "*life-partners*"[26], as well as the assignment of the *unused portion of maternity leave in the case of death or physical incapacity of the mother.*

Recognition of the rights concerning maternity and paternity in the event of adoption (adoption leave).

The prohibition of dismissal extends to 12 months. It is presumed discriminatory and shall be duly specified in writing.

Possibility for the worker to choose to work part-time for a maximum of one year period, fully protected against dismissal and enjoying the right *to recover their full time position and pay.*

Allowance in maternity leave must be *equivalent* and any salary increases must be included. The allowance amount must be *100% of the last monthly salary or the average monthly salary during the compulsory period of leave and not be lower than 85% of the last monthly salary or the average monthly salary during the remaining period of leave of the worker concerned*[27]. Furthermore, it cannot be lower than the allowance received by workers in the event of a break in activity due to the worker's state of health.

The eligibility provision in former Directive 92/85/ECC[28] is removed.

Reinforcement of the employer's obligation to provide objective reasons at the workers' request of changes to their working hours and patterns.

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bilities, mothers with disabilities, teenage mothers, multiple births or births occurring within 18 months of the previous birth".

25 Later, Article 8 Directive 2010/41/EU provided for a maternity allowance or at least 14 weeks.

26 It is noteworthy that the EP introduces changes to overcome the concept of traditional family.

27 Amendment 57 on Article 11(3) of the Directive.

28 Article 11(4).

Encouragement for employers to set up childcare facilities for employees children under 3 years old[29].

The EP includes a time off for breastfeeding consisting of two separate periods of 1 hour each, which can be reduced in cases of part-time work, but they may not be less than 30 minutes. It is increased by 30 minutes in cases of multiple birth for each additional child.

Undoubtedly, the EP made a great contribution to the amendment of the Directive 92/85/ECC and substantially enhanced its scope, but perhaps the costs associated to those changes had not been fully considered.

The Opinion of the European Economic and Social Committee in May 2009[30] supported the Commission Proposal of 18 weeks of maternity leave although it recommended "*seeking for additional legal and practical solutions, which, in terms of space and time, can facilitate breastfeeding*". The payment during the maternity, according to the Committee, must remain equal to the previous salary. Moreover, sick leave during pregnancy should not affect maternity leave duration.

The Committee also asked for consideration of parents and infants with special needs or in special circumstances and showed its concern about risks to both women's and men's fertility.

With regards to maternity, it insisted on an integrated approach which could support reconciliation. It also distinguished parental leave from maternity leave and thus determined that the former should follow on from the latter in order to enable fathers to benefit from that possibility. And as a new contribution, the Committee proposed that initiatives "*be envisaged enabling grandparents and other close family members to care for the children if working parents so wish*"[31].

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29 This amendment of the EP introduced the concept of work-life integration as a step further. The establishment of childcare facilities in enterprises would make easier for workers to take care of their children at the same time they attend their responsibilities at work. Placing work and family nearer would contribute to a better reconciliation.

30 AC SOC /329 by HERCZOG Procedure 2008/0193(COD) adopted 13/05/2009.

31 It is hard to find the innovation of this proposal, since it is quite usual that family members take care for the children, so they cannot be enabled to do what they already do. In my opinion, this suggestion should be seen from the perspective that

In June 2009 the Council met again[32]. According to the press release of this meeting, the Council only took note of a Presidency progress report on the proposal. However, there were issues such as *"the length of maternity leave and the connected issue of counting other family-related leave as maternity leave in certain cases, the obligatory portion of maternity leave and the maternity allowance"* which needed further negotiations.

After the Commission Communication on the changes following the entry into force of the Lisbon Treaty in December 2009, the EP Position on the Proposal was adopted by 390 votes to 192, with 59 abstentions in October 2010[33]. In order to prevent duplication, only those main changes which differ from the EP Draft Legislative Resolution in May 2009 will be enumerated:

The EP proposed a continuous period of maternity leave of at least 20 weeks. However, the last four weeks of the period, a scheme of family-related leave available at national level may be considered to be maternity leave, on condition that it provides an overall and equivalent protection to workers. The remuneration for this period (four weeks) cannot be lower than a certain threshold or, alternatively, *it may be the average of the remuneration for the 20 weeks of maternity leave, which shall be at least 75% of the last monthly salary or of the average monthly salary as stipulated according to national law, subject to any ceiling laid down under national legislation*.

If a Member State already provides for an 18 weeks maternity leave, the last two weeks remaining can be met through paternity leave available at national level, with the same level of pay.

The fully paid maternity leave of at least six weeks after childbirth is without prejudice to existing national laws which provide for a period of compulsory maternity leave before childbirth.

The amendment on additional leave of the EP Draft did not succeed in its exact terms, but it remains fully paid in cases of premature childbirth,

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the help provided by grandparents and other family members must be somehow rewarded.

32 2947th meeting of the Council of the European Union (Employment, Social Policy, Health and Consumer Affairs), held in Luxembourg on 8-9 June 2009. http://europa.eu/rapid/press-release_PRES-09-124_en.htm?locale=en.

33 OJ C 70E, 8.3.2012, p. 162-176.

children hospitalised at birth, children with disabilities, mothers with disabilities, and multiple births. Besides, the whole period of maternity leave shall be extended by at least eight weeks after the birth in the case of the birth of a disabled child. An additional period of leave of six weeks in the case of a stillbirth is also contemplated.

The notification of the worker with regards to her chosen non-compulsory portion of the maternity leave shall not be later than one month before the date of commencement of such leave.

In cases of multiple birth, the increase of the compulsory period of maternity leave is determined by each national legislation.

The adoption leave is limited to children of less than 12 months old.

The allowance on maternity leave shall cover the 100% of the last monthly salary or the average monthly salary, and cannot be lower than the sick pay.

The time off for breastfeeding remains in the terms of the EP Draft.

In December 2010, the Council did not agree with the EP Opinion at first reading[34]. Many ministers considered that the 20 weeks period was not a proper basis for negotiations. They based on the costs and the role of the Directive to set minimum standards. Regarding the paternity leave, many ministers were reluctant that it should be included in a provision related to pregnant workers whose main purpose was to improve their health and safety conditions. Notwithstanding this fact, many ministers accepted the idea of a "*passerelle*" clause in the draft directive, by means of which Member States were allowed to take into account forms of leave other than maternity leave.

Finally, the Belgian Presidency concluded that the Commission's original proposal could be a more acceptable basis for a compromise than the European Parliament's amendments.

In June 2011[35] the position of the Council had not changed. Moreover, some ministers, in the view of the diverging opinions on the matter, sug-

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34 3053th meeting of the Council of the European Union (Employment, Social Policy, Health and Consumer Affairs), held in Brussels, 6 and 7 December 2010. http://europa.eu/rapid/press-release_PRES-10-331_en.htm?locale=en.

35 3099th meeting of the Council of the European Union (Employment, Social Policy, Health and Consumer Affairs), held in Luxembourg, 17 June 2011. http://europa.eu/rapid/press-release_PRES-11-176_en.htm?locale=en.

gested that the Council should stop working on that topic. Some others, however, manifested their interest in continuing the negotiations.

More than four years later, the Commission decided to withdraw the Proposal in order to create a new initiative that could be finally agreed[36].

4. CONCLUSIONS

The demand for a new directive in accordance with the nature of contemporary European society still persist. It is needless to say that, apart from health and safety reasons, provisions of maternity leave are indispensable for the achievement of a better reconciliation of work and family life, for the equality between men and women, for the improvement of demographic trends and fertility rates, as well as for the increment of employment rates and the conclusion of gender gaps.

Accordingly, the European legislator should wonder whether the regulation on maternity leave could be undertaken by means of a revision of the Directive 92/85/ECC, which was formerly justified on health and safety arguments, or should be approached from a perspective that could unite all those aforementioned aspects. After all, that was one of the reservations of the Council, which showed uncertainty about the scope of the Directive[37]. Therefore, the first question that arises is related to the rationale of the instrument and the solution of legal systematic problems[38].

Furthermore, the need to meet international standards —ILO and WHO—, the European Charter of Fundamental Rights recognition of the right to reconcile[39], the variety of families nowadays, as well as the

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36 Official Journal of the European Union, C 257, 6 August 2015.

37 The Council even questioned the adequacy of the Directive to lay the grounds of the paternity leave.

38 This issue also affects concrete aspects of the maternity leave such as the compulsory period. If it is placed before childbirth, it is thus mainly grounded on safety and health reasons; but if it is placed after childbirth, then, except in cases of complications of it, reconciliation arguments are predominant. The same could be said about the time off for breastfeeding, whose foundation is principally related to the health of the newborn.

39 Article 33 of the Charter of Fundamental Rights establishes the protection of family and professional life. In particular paragraph 2 states that "*To reconcile family and*

doctrinal trend that is paying greater heed to the rights of the children[40], they all accentuate the complexity of the regulation in this matter.

As for the concrete content of the maternity leave, interrogatives arise on its duration, the amount of the allowance and the group of entitled persons. Any enhancement in any of those aspects would entail an increase in costs which some Member States are loath to bear.

Currently, the average maternity leave duration in the Member States is 23 weeks, however, nearly half of the Member States do not meet the 18 weeks period recommended by the ILO[41]. But if the maternity leave is compared with the EP's proposition, up to 64'29% of the Member States would not meet the 20 weeks period[42].

Regarding the allowance, the average compensation rate of previous incomes during maternity leave is 90%. Thirteen Member States replace previous incomes by 100% during maternity leave, while twelve Member States replace previous incomes by 90% or less[43]. The remaining three Member States provide a flat rate allowance during maternity leave[44].

On the other hand, fifteen Member States extend the mandatory part of the maternity leave to both periods —before and after childbirth—, while four Member States fix it before childbirth, six Member States fix it only after childbirth and three Member States do not stipulate any compulsory period[45].

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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."

40 I.e James, Grace, "*Forgotten children: work-family reconciliation in the EU*". Journal of Social Welfare & Family Law, Vol. 34, No. 3, September 2012, 363-379.

41 Finland, Greece, the Netherlands, Spain, Luxemburg, Latvia, France, Austria, Slovenia, Belgium, Germany and Croatia (13 out of 28 Member States).

42 In addition to those already mentioned: Romania, Malta, Lithuania, Denmark and Cyprus (18 out of 28 Member States).

43 Slovakia, Hungary, Czech Republic, Cyprus and Belgium do not even reach an 80% compensation of the previous income.

44 Statistics are extracted from "*Maternity, paternity and parental leave: Data related to duration and compensation rates in the European Union*", Policy Department C: Citizens' Rights and Constitutional Affairs, European Parliament, B-1047 Brussels (2015).

45 "*Maternity and paternity leave in the EU*", At a glance, Infographic. European Parliament, December 2014. http://www.europarl.europa.eu/RegData/etudes/ATAG/2014/545695/EPRS_ATA(2014)545695_REV1_EN.pdf.

So, from a pragmatic perspective which calls for a gradual improvement on the regulation of the maternity leave, these statistics provide some guidance on the possibility that the EP and the Council could reach to an agreement.

In terms of entitled persons, apart from the propensity to relax the conditions of eligibility, the European legislator should take into account new groups such as adoptive parents, as well as the intricate scenario of surrogate pregnancy[46].

Finally, a farsighted vision which included in the future text of the provision a commitment to boost the integration of professional and personal life would be highly welcome. Even though the involvement of the social partners is very desirable for the effective achievement of this matter, the step forward taken by the EP with the amendment of Article 11 of the Directive is a good sign.

5. RELATED BIBLIOGRAPHY

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[46] Surrogate pregnancy is not allowed in all Member States, but it is contemplated in some of them such as UK, Ireland, Denmark and Belgium, as long as the surrogate mother is not paid. The European Court of Justice ruled in Case C 167/12, *C.D. v S.T* that EU law does not provide for commissioning mothers to be entitled to paid leave equivalent to maternity leave or adoption leave as the Directive 92/58/ECC presupposes that the worker concerned has been pregnant and has given birth to a child. To complete the picture, the same reasoning could be argued for commissioning fathers in male homosexual couples.