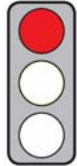


MAIN ISSUES

Objective of the Directive: The Commission wishes to improve the reconciliation of work, family and private life by developing more family-friendly parental leave provisions.

Parties Affected: Employers and employees.



Pros: –

Cons: (1) The Directive interferes to an unacceptable extent with the personal lifestyle of the individual and the regulatory powers of Member States.

(2) The Directive infringes the principle of subsidiarity and the principle of proportionality.

(3) Contrary to what the Commission thinks, the Directive requires a unanimous vote on the part of the Council in order to be passed.

CONTENT

Title

Proposal COM(2009) 410 of 30. July 2009 for a Council **Directive** implementing the revised Framework Agreement on **parental leave** concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC

Brief Summary

The legal provisions cited refer to the Directive, whereas the paragraphs cited refer to the Framework Agreement concluded by the European social partners.

► General

- The Directive is to give legal effect to the Framework Agreement concluded by the European social partners on parental leave in all Member States (Art. 1).
- The Framework Agreement aims at improving work-life balance and at integrating both parents equally (§ 1 (1) and (2)).
- With this Directive the social partners wish to encourage “a more equal sharing of family responsibilities between men and women” (Recital 12 of the Framework Agreement).

► Provisions of the Framework Agreement

– Parental Leave

- Each parent is entitled to a leave of at least four months which, in principle, is not transferable to the other parent. However, in deviation of this rule the Member States or social partners may provide for transferable periods of up to three months. (§ 2 (2))
- Each parent has the right to take parental leave until the child reaches the age of eight years (§ 2 (1)).

– Detailed rules for parental leave

- It is left to the Member States and national social partners to define the details of parental leave (§ 3 (1)). In particular they may:
 - grant parental leave either on a full time or part time basis, in a piecemeal way or in the form of a time-credit system – taking into account the employers’ and employees’ needs (§ 3 (1a));
 - make the entitlement to parental leave subject to the length of employment and/or job tenure which, however, may not exceed one year (§ 3 (1b));
 - stipulate that the employer is allowed to postpone parental leave if this seems necessary for operational reasons. In this case, the relevant national laws, collective agreements and practice must be taken into consideration, and, where necessary, the requirements of small undertakings in particular (§ 3 (1c) and (1d)).
- The Member States and/or social partners must define the period of time by which the employees must inform the employer as to when he or she wishes to take parental leave. In so doing the interests of both the employees and employers are to be taken into account (§ 3 (2)).
- In particular the specific needs of parents of children with a disability, long-term illness or parents of adopted children should be taken into account when setting the conditions for parental leave (§ 3 (3), § 4 (1)).

– Employment rights and non-discrimination

- In order to ensure that employees really can exercise their right to parental leave, Member States and/or social partners should take measures to prevent employees from being discriminated against or even dismissed on the grounds of having applied for or having taken parental leave (§ 5 (4)).

- The Member States and/or social partners are to ensure that protection through social security schemes, in particular health care, is maintained during parental leave (§ 5 (5)).
- The Member States and/or social partners should establish rules which take into account the fact that an income is also required during parental leave (§ 5 (5)).
- **Return to work**
 - Employees have the right to return to their former job or, if that is impossible, to return to an equivalent position (§ 5 (1)). In addition, all rights acquired or which are in the process of being acquired by employees before parental leave must be maintained as they stand until the end of parental leave. If, during parental leave, national laws, collective agreements or practice are changed, the acquired rights must be adjusted accordingly. (§ 5 (2))
 - When returning from parental leave, employees should be able to request changes to their working hours and/or patterns. When deciding as to these requests, employers take into account their own and the employees' needs. (§ 6 (1))
 - In order to facilitate the return to work, employees and employers should maintain contact during parental leave and agree on appropriate reintegration measures (§ 6 (2)).
- **Time off from work on grounds of force majeure**
 - The Member States and/or social partners must entitle employees to time off from work on grounds of force majeure. This includes urgent family reasons such as illness or accidents which demand the immediate presence of the employee. (§ 7 (1))
 - The details of a period of absence from work can be defined by Member States and/or social partners. The period of absence can be limited (§ 7 (2)).
- **Final provisions of the Framework Agreement**
 - Member States and/or social partners may introduce provisions that go beyond the minimum requirements set out in the Framework Agreement (§ 8 (1)).
 - The existing level of protection afforded to employees may not be reduced by the implementation of the Framework Agreement. However, Member States may develop different legislative, regulatory or contractual provisions as long as the minimum requirements are complied with. (§ 8 (2))
 - National and European social partners are still entitled to conclude agreements adapting or complementing the provisions of the Framework Agreement (§ 8 (3)).
- ▶ **Provisions of the Directive**
 - Member States must lay down effective, proportionate and dissuasive penalties for infringement of the Framework Agreement (Art. 2).
 - Member States must implement the provisions of the Framework Agreement by two years at the latest after the Directive has come into force. They may mandate the social partners with the implementation. (Art. 3 (1))
 - The implementation period may be extended for one year if difficulties occur or if implemented by collective agreement (Art. 3 (2)).
 - The Directive 96/34/EC is repealed (Art. 4).

Changes Compared to the Status quo

- ▶ To date, the provisions for parental leave have been contained in the Council Directive 96/34/EC.
- ▶ Until now, Member States or social partners have been able to decide themselves the maximum age of the child until when parents are entitled to take parental leave. The new agreement mandatorily prescribes that parents have the right to take parental leave until their child reaches the age of eight years.
- ▶ Currently, men and women are equally entitled to a parental leave of three months. That is now to be extended to at least four months.
- ▶ To date, parental leave was transferable if and when permitted by Member States or social partners. In future, however, one month of parental leave will always remain non-transferable.
- ▶ The existing protection from dismissal is to be complemented with protection from discrimination.
- ▶ The Framework Agreement is the first to underline the necessity for an appropriate income during parental leave and for an adjustment of parental leave to the special needs of parents of children with a disability or a long-term illness, yet does not prescribe any minimum requirements.
- ▶ The provisions on reintegrating employees after returning to work and the option to choose flexible working hours and patterns are new.

Statement on Subsidiarity

The Commission's comment regarding the principle of subsidiarity is limited to what is laid down in Art. 5 TEC. According to the Commission, the fact that the Framework Agreement was concluded by "recognised general" and "representative" organisations ensures that it does not infringe the principle of subsidiarity.

Political Background

In line with the roadmap for equality between women and men (2006-2010) [COM(2006) 92], the Commission has committed itself to assessing all provisions for gender equality and the reconciliation of work, family and private life. As a consequence, the Commission has submitted two Proposals for Directives [Proposal COM(2008) 637, cp. [CEP Policy Brief](#)] and on equal treatment of assisting spouses [Proposal COM(2008) 636, cp. [CEP Policy Brief](#)]. Since the provisions on parental leave are based on a Framework Agreement dating from 14. December 1995, the Commission has asked the social partners to revise it.

Legislative Procedure

18.06.09 Adoption by European social partners
 30.07.09 Adoption by Commission
 Open Adoption by Council, publication in the Official Journal of the European Union, entry into force

Options for Influencing the Political Process

Leading Directorate General:	DG Employment and Social Affairs
Committees of the European Parliament:	Women's rights and gender equality (leading), rapporteur: n.a.; Employment and social affairs
Committee of the German Bundestag:	n.a.
Decision mode in the Council:	Qualified majority (approval by a majority of Member States and at least 255 out of 345 votes; Germany: 29 votes)

Formalities

Legal competence:	Art. 139 (2), 137 TEC (Social Policy)
Form of legislative competence:	Concurrent legislative competence
Legislative procedure:	Art. 139 (2) TEC, procedure of declaration of general applicability A participation of the European Parliament is not provided

ASSESSMENT

Economic Impact Assessment

Ordoliberal Assessment

From an ordoliberal standpoint there are no objections to the aim of the agreement to improve the reconciliation of work, family and private life. The implementation in the form of a Directive, however, and the concrete regulatory content is problematic.

In a liberal society, parents should be free to choose how they share their right to parental leave.

Moreover, **Member States have developed quite different models for improving the** reconciliation of work, family and private life **in** accordance with their respective national preferences. Key factors are access to day care for smaller children and to all-day schools and the acceptance of flexible work schedules. The question of whether or not parents can rely on the help of relatives depends on the labour mobility in Member States. **The Directive ignores these individual differences and, in part, acts in contradiction to them by setting minimum harmonisation standards.**

Moreover, it is questionable what benefits raising the age of the child until which parents have the right to take parental leave to eight will bring about. For in many Member States most children can begin kindergarten at the age of three. Taking parental leave later will hardly improve their **work-life balance**.

Impact on Efficiency and Individual Freedom of Choice

The proposed measures will increase labour costs; it will often be necessary to employ temporary replacement staff who will have to leave the company just when they have become acquainted with the job. A flexible design of parental leave (e.g. in the form of part-time work) and the encouragement of employees to apply for flexible work schedules after their return from parental leave could incur further costs.

However, how much this is exactly will depend on how the Member States and national social partners use their freedom of design. Lengthening the time period prior to parental leave by which an employee must announce their intention to take parental leave would enable companies to make arrangements for employees on parental leave at an early stage. Moreover, the – though somewhat limited – option of a company to postpone the parental leave of an employee due to operational reasons could reduce economic hardship.

Impact on Growth and Employment

Measures to improve the reconciliation of work, family and private life increase personnel costs for companies and thus have a negative impact on growth and employment.

Impact on Europe as a Business Location

How high personnel costs are and the extent of social employee demands are criteria for decisions regarding the business location of companies.

Legal Assessment

Legal Competence

Unproblematic. The declaration of the general applicability of an agreement concluded by social partners through a Council Directive follows from Art. 139 TEC. The provisions of the Framework Agreement are based on the competences in Art. 137 (1) lit. c, d and i TEC (adoption of minimum requirements for social security and the social protection of workers, protection against dismissal and equality between women and men).

Subsidiarity

The Directive infringes the principle of subsidiarity. There is no cross-border reference at hand. The Commission also fails to produce evidence to show that the aim of the Directive – an improvement in work-life balance – can be realised at least as well by the Member States themselves as by the EU. Further, though different social models in this area already exist in the Member States, the Commission also does not make it clear that the various models need to be adapted in order to improve the smooth operation of the internal market. Hence, any benefit, that can be reached only through joint action, is evident.

Proportionality

The Directive infringes the principle of proportionality. There is no necessity to declare the agreement of the social partners generally applicable at European level.

Compatibility with EU Law

Contrary to the Commissions belief, unanimity is required in the Council. This is because the agreement also contains provisions for the protection against dismissal and for the social protection of workers. Such provisions are subject to the competences following from Art. 137 (1) lit. c and d TEC and must be adopted by the Council unanimously (Art. 137 (2) sub-sec. 2 TEC).

Compatibility

If the **German government**, despite the presented infringements of the principle of subsidiarity and proportionality, accepts the Proposal for a Directive, **its acceptance** in the Council **must first be approved by the German parliament (Bundestag)**. With its provision that at least one month of parental leave must be non-transferable the Commission wishes to promote a “more equal sharing of family responsibilities by mothers and fathers”. This represents significant interference with the national legislator’s competence in defining the framework on social and family affairs and therefore must be subject to the approval of the German Bundestag (cp. German Federal Constitutional Court, 2 BvE 2/08, “Lissabon”, par. 252, 257–259.).

§ 15 (2) p. 4 of the law on parental pay and leave (BEEG) must be adjusted. At the moment it states that the right to extend parental leave until the child’s eighth year is only with the prior approval of the employer. In order to make the law consistent with the proposed Directive, the period, in which every parent is entitled to parental leave of up to four months, would have to be set at eight years.

Alternative Policy Options

The establishment of provisions on parental leave should be the sole decision of national social partners and legislators who are closer to the specific social conditions in their Member States.

Possible Future EU Action

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Conclusion

The Framework Agreement does not take into account the fact that Member States have different concepts and policies for improving work-life balance, each of them forming an essential part of national social policy. To intervene in these national concepts would constitute an infringement of the principle of subsidiarity and the principle of proportionality.

The significant interference into national competences which the Directive would entail is subject to prior approval by the German Bundestag before it can be approved by the German representative in the Council. The Commission is mistaken in its belief that the Directive does not require a unanimous decision on the part of the Council.