

СУЧАСНА СИСТЕМА МІЖНАРОДНОГО ПРАВА

УДК 341.171

IMPLEMENTATION OF EU STANDARDS ON PARENTAL LEAVE IN EU MEMBER STATES AND UKRAINE

СТАН ВИКОНАННЯ СТАНДАРТІВ ЄС ЩОДО БАТЬКІВСЬКОЇ ВІДПУСТКИ В ДЕРЖАВАХ-ЧЛЕНАХ ЄС ТА УКРАЇНІ

Sviatun O.

PhD in Law, Associate Professor, Associate Professor of the Chair of Comparative and European Law, Expert of EU Law of the Jean Monnet Center of Excellence of the Educational and Scientific Institute of International Relations of Taras Shevchenko National University of Kyiv, Ukraine. E-mail: pep.sov@clouds.iir.edu.ua.

Святун О.В.

Кандидат юридичних наук, доцент, доцент кафедри порівняльного і європейського права, експерт з права ЄС Центра досконалості Жана Монне служби Навчально-наукового інституту міжнародних відносин Київського національного університету імені Тараса Шевченка. E-mail: pep.sov@clouds.iir.edu.ua.

Annotation. *The article is devoted to the analysis of the legal nature of the implementation mechanism of the new Council Directive 2019/1158 on work-life balance for parents and carers in EU Member States and compliance of the Ukrainian Legislation with the provisions of this Directive. It is noted that the Directive (EU) 2019/1158 repealed Directive 2010/18/EU and should be transposed into the legal system of Ukraine according to the Association Agreement. The provisions of the Directive 2019/1158 should become legally binding in all EU Member States by August 2022 but as of January 2022 only 4 States have submitted information to the European Commission regarding their transposition measures.*

Nevertheless, it is underlined that the current legislation in the majority of the EU Member States corresponds to the provisions of the Directive 2019/1158 and sometimes is even more favorable for parents than it is provided by the Directive.

Special attention is paid to the assessment of the Ukrainian efforts to bring national legislative provisions in compliance with the EU standards and requirements of the EU-Ukraine Association Agreement.

Key words: *European Union, work-life balance, parental leave, paternal leave, social policy, Association Agreement, implementation.*

With the support of the Erasmus+ Programme of the European Union within the Jean Monnet Centre of Excellence Project № 611625-EPP-1-2019-1-UA-EPPJMO-CoE “Advancing European Studies in Ukraine: Interdisciplinary Approach”.

Анотація. *Стаття присвячена аналізу правової природи механізму імплементації нової Директиви Ради (ЄС) 2019/1158 про збалансованість службових та сімейних обов'язків для батьків і опікунів у державах-членах ЄС та відповідності законодавства України положенням Директиви. Зазначається, що Директива 2019/1158 скасувала Директиву 2010/18/ЄС і має бути транспонована до правової системи України відповідно до Угоди про асоціацію. Положення Директиви 2019/1158 мають стати юридично обов'язковими для всіх держав-членів ЄС до серпня 2022 року, але станом на січень 2022 року лише 4 держави надали Європейській комісії інформацію щодо своїх заходів із транспозиції.*

Втім, зазначається, що чинне законодавство більшості держав-членів ЄС відповідає положенням Директиви 2019/1158, а іноді є навіть більш сприятливим для батьків, ніж це передбачено Директивою.

Особливу увагу приділено оцінці зусиль України щодо приведення національних законодавчих положень у відповідність до стандартів ЄС та вимог Угоди про асоціацію між Україною та ЄС.

Ключові слова: Європейський Союз, баланс між професійним та особистим життям, відпустка по догляду за дитиною, батьківська відпустка, соціальна політика, Угода про асоціацію, імплементація.

За підтримки програми Еразмус+ Європейського Союзу в межах проекту Центру досконалості Жана Моне №611625-EPP-1-2019-1-UA-EPPJMO-CoE «Поглиблений розвиток європейських студій в Україні: міждисциплінарний підхід».

Target setting. Promoting equality between men and women is one of the overarching goals of the European Union, enshrined in Article 8 of the Treaty on the Functioning of the European Union, and the key principle of its social policy [European Union, 2012]. In turn, one of the priorities in achieving gender equality at the European level is the balance of work and family life which also contributes to the achievement of other important EU goals, in particular, sustainable and inclusive development.

The aim of the article. The aim of this article is to highlight the theoretical and practical problems of the implementation of the of the new Council Directive 2019/1158 on work-life balance for parents and carers in EU Member States and compliance of the Ukrainian legislation with the provisions of the Directive. The effective activities of Ukrainian authorities in the abovementioned sphere need special coordination mechanism and revision of the existing legal provisions with the view of bringing these provisions in compliance with the Directive.

Analysis of latest researches and publications. The issues of parental leave were elucidated mainly in the latest works by N. Iolkina [Iolkina N.: 2020], B. Janta [Janta B.: 2018], A. Koslowski, S. Blum, I. Dobrotić, G. Kaufman, P. Moss, [Koslowski, A., Blum, S., Dobrotić, I., Kaufman, G. and Moss, P.: 2021], O. Rudnytska [Rudnytska O.: 2018: 154 – 158], O. Rym [Rym O. : 2021]. Unfortunately, so far, the Ukrainian and foreign publications have not paid enough attention to the research of the efficiency of the Directive 2019/1158 implementation. However, new challenges connected with implementation of the EU - Ukraine AA and its Annex XL require special research on this issue.

Presentation of basic material of the research.

In order to achieve the interrelated goals of reconciling work and family life and gender equality, in 2019 the EU Council adopted Directive (EU) 2019/1158 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU [The European Parliament; the Council of the European Union: 2019b].

The main aim of the new Directive is to achieve the gender equality in the labour market and equal treatment for men and women who are parents in the labour relationship through introduction of the work-life balance policies (par. 2 of the Preamble) [The European Parliament; the Council of the European Union: 2019b].

Article 2 provides that the Directive “applies to all workers, men and women who have an employment contract or employment relationship as defined by the law, collective agreements or practice in force in each Member State, taking into account the case-law of the Court of Justice” [The European Parliament; the Council of the European Union: 2019b].

Directive 2019/1158 introduces several types of leaves (Article 3):

- ‘paternity leave’ - leave from work for fathers or ... for equivalent second parents on the occasion of the birth of a child for the purposes of providing care;
- ‘parental leave’ - leave from work for parents on the grounds of the birth or adoption of a child to take care of that child;

• ‘*carers’ leave*’ - leave from work for workers in order to provide *personal care or support* to a relative, or to a person who lives in the same household as the worker, and who is in need of significant care or support for a serious medical reason, as defined by each Member State [*The European Parliament; the Council of the European Union: 2019b*].

As for the ‘*paternity leave*’ every father or equivalent second parent is entitled to 10 working days to be taken on the occasion of the birth the child. This right is not supposed to be conditioned to the period of work qualification or to a length of service qualification which must not exceed 6 months immediately prior to the expected date of the birth of the child. Paternity leave has to be paid at the national sick pay level [*The European Parliament; the Council of the European Union: 2019b*].

Concerning ‘*parental leave*’ each worker is entitled to 4 months’ paid leave that is to be taken before the child reaches a specified age, up to the age of eight. 2 months of the parental leave are non-transferable between the parents. Each parent should receive at least two months of adequate compensation for parental leave. Parental leave may be subject to a period of work qualification or a length of service qualification which cannot exceed one year. Employers in EU Member States should ensure that employees can take parental leave on a flexible basis, such as alternating periods of leave with periods of work [*The European Parliament; the Council of the European Union: 2019b*].

Caregiving is also regulated under the Directive (Art. 6), namely workers caring for relatives who need support for serious medical reasons. These rules also apply to individuals living in the same household as the worker. During the course of the year, each caregiver may take five days off (‘*carers’ leave*’). [*The European Parliament; the Council of the European Union: 2019b*].

Employees with children up to a specified age, but at least 8, and carers have the right to request flexible work arrangements for caring purposes. Some of these arrangements include remote working, flexible schedules, or a reduction in working hours. In such cases, employers should respond in a reasonable amount of time, and provide their reasons for refusing or delaying such arrangements. Depending on the country, flexible working arrangements may be subject to work qualification or service qualification. However, the qualification period cannot exceed six months.

In the case of an immediate family emergency requiring the immediate attendance of the worker, member states must take whatever measures are necessary to ensure that each worker has the right to time off from work due to force majeure. The right of each worker to time off on grounds of force majeure may be restricted by member states to a certain number of days per year or by case, or both.

Regulations must be implemented in EU Member States so that, firstly, the right to apply for or take flexible working arrangements and family leave is protected from discrimination and dismissal; secondly, if workers believe they've been fired due to exercising their rights, they should be able to ask the employer to provide substantiated grounds for the dismissal; and thirdly, in the event of leave, the worker maintains the previous job and all the rights he had before he took leave (Article 7) [*The European Parliament; the Council of the European Union: 2019b*].

By August 2, 2022, the Directive must become law in the EU countries (except for the payment of the last two weeks of parental leave deadline for which August 2, 2024 is the deadline). A report on the implementation of this Directive shall be drawn up by the Commission by August 2, 2027.

There are currently (as of January , 2022)only 4 (four) EU Member States that have successfully transposed the provisions of Directive 2019/1158 to their national legislation and submitted this information to the European Commission: Austria, Belgium, the Czech Republic and France [21].

Austria informed the European Commission that the federal state (Land) of Carinthia on September 23, 2021, adopted the Law on Equal Treatment of Women and Men and the Prohibition of Discrimination [*Landtag von Kärnten: 2021*] which implements the provisions of the Directive 2019/1158 at the federal state level.

In Belgium amendments were introduced to the Order of the Government of the Brussels-Capital Region laying down the administrative and financial status of staff of the Brussels regional public services (2018) [*Gouvernement de la Région de Bruxelles-Capitale: 2018a*] and Decree of the Government of the Brussels-Capital Region laying down the administrative and financial status of agents of public interest bodies in the Brussels-Capital Region [*Gouvernement de la Région de Bruxelles-Capitale: 2018b*]. These provisions concerned the right of the civil servants to be released from the implementation of their official duties due to the paternal leave. As for the parental leave both acts provide that it is unpaid. For the rest, it is connected to a period of service activity.

In France the provisions of the Labour Code since 2012 provide for the following: “After the birth of his child and within a period determined by decree, the employed father benefits from a paternity leave of eleven consecutive days or eighteen consecutive days in the event of multiple births. Paternity leave results in the suspension of the employment contract. The employee who wishes to benefit from paternity leave informs his employer at least one month before the date on which he plans to take it, specifying the date on which he intends to end it.” (Art. L1225-35) and “At the end of the paternity leave, the employee returns to his previous job or a similar job with at least equivalent remuneration” (Art. L1225-36) [19]. So in general these articles correspond to the rules of the Directive 2019/1158.

Moreover June 30, 2021 the Decree No. 2021-871 relating to maternity leave and parental responsibilities in the State civil service was adopted [20]. The Decree determines, for civil servants and contractual agents of public law in the civil service of the State, the conditions for granting and using maternity leave, birth leave, leave for the arrival of a child placed for adoption, adoption leave as well as paternity and parental leave. It also specifies the deadlines and modalities of implementation and the modalities of use of this leave.

The Czech Republic introduced amendments to 51 national legal act: starting from 1963 Code of Civil Procedure and recent amendments to 2000 Labour Code [21].

In general, the current situation of the EU member states regarding the introduction of *paternity leave* is as follows. Many countries have statutory and designated paternity leave (Belgium, Bulgaria, Czech Republic, Denmark, Estonia, Finland, Greece, Hungary, Ireland, Italy, Malta, Netherlands, Poland, Portugal, Slovenia and Sweden). In Austria the paternal leave is statutory entitled in public sector but unpaid. In Germany, many fathers take advantage of some parental leave entitlements right after birth that are specific to them, in much the same way as paternity leave. As for Luxembourg, there is no statutory paternity leave, although fathers can use ten days of well-paid leave for “exceptional circumstances”. Most paternity leaves are paid and most of the time at a high wage-related rate for the duration of the leave. The length of paternity leaves can vary from a few days (1 – Malta (private sector), 2 – Greece, 5 – Hungary, Malta (public sector), Romania) to more than 16 weeks (in Spain) [*Kosłowski, A., Blum, S., Dobrotić, I., Kaufman, G. and Moss, P.: 2021: 11*].

As was previously mentioned, under the Directive 2019/1158, all EU member states are required to offer parents at least four months of *parental leave* each. Parents' entitlement to parental leave is determined by four main factors: its length, whether it is an individual or family entitlement, its payment, and its flexibility [*Kosłowski, A., Blum, S., Dobrotić, I., Kaufman, G. and Moss, P.: 2021: 18*].

The countries can be divided into two categories based on the length of parental leave available: those that provide less than 15 months of leave; and those that provide continuous leave for up to three years. Belgium, Bulgaria, Croatia, Cyprus, Denmark, Finland, Ireland, Italy, Luxembourg, Malta, Netherlands, Poland, Portugal, and Slovenia fall under the former. In the latter group, we find the Czech Republic, Estonia, France, Germany, Hungary, Lithuania, Slovakia, and Spain. Sweden and Latvia have similar systems: paid leave is expressed in days (so it can be taken very flexibly), roughly equivalent to 18 months if taken continuously, while parents can take unpaid leave until their children reach the age of 18 months - this is similar to the Latvian system. This is also the case in Austria and Romania, with parental leave possibly lasting until a child turns two. The Greek government also sets an example by allowing for four months of leave per parent in the

private sector and sixty in the public sector. In some countries, parental leave is complemented by childcare leave, so the period of leave is extended [Kosłowski, A., Blum, S., Dobrotić, I., Kaufman, G. and Moss, P.: 2021: 18-19].

Currently, in seven countries, parental leaves (benefits) are family entitlement to be divided among parents as they wish (Austria, Estonia, Finland, Hungary, Lithuania, Poland, and Slovakia). In 16 countries (Australia, Belgium, Bulgaria, Croatia, Czech Republic, Denmark, France, Germany, Greece, Ireland, Italy, Latvia, Luxembourg, Netherlands, Slovenia, and Spain) it is individual entitlement. In Portugal, Romania, and Sweden it is a mixed entitlement (part family, part individual). In Malta, public employees have a family entitlement, and private sector workers have an individual entitlement. It is common for individual entitlements not to be transferrable, so unused entitlements are foregone (following the "use it or lose it" principle); however, in Croatia, Czech Republic, Slovenia, and Sweden, some unused entitlements are transferrable to partners [Kosłowski, A., Blum, S., Dobrotić, I., Kaufman, G. and Moss, P.: 2021: 19].

In most EU Member States, some form of payment is provided except for Cyprus, Greece, Ireland, Malta, the Netherlands, and Spain. The way payments are made varies from country to country and sometimes can include a benefit cap [Kosłowski, A., Blum, S., Dobrotić, I., Kaufman, G. and Moss, P.: 2021: 19].

National legislation of EU Member States provides for different forms of flexibility: starting from the ability for parents to combine part-time employment and part-time leave (i.e., parents could work part-time and take part-time leave together) to the option for both parents to take leave together [Kosłowski, A., Blum, S., Dobrotić, I., Kaufman, G. and Moss, P.: 2021: 19-20].

Thus it can be concluded that although only few EU Member States have officially informed the European Commission regarding their transposition activities in terms of Directive 2019/1158 the majority of them already have those provisions being in force in their legal order. So, the principle of work-life balance is being enforced in the European Union. That is why it is essential for Ukraine also to bring the appropriate legislation into compliance with EU legal provisions.

Declaring in the Constitution its European integration aspirations and committing itself to the Association Agreement (hereinafter - the AA), the Ukrainian state set itself the goal of bringing its legislation in line with current EU standards to ensure equal opportunities for men and women to care for children and work-life balance.

Thus, pursuant Article 419 AA "the Parties shall strengthen their dialogue and cooperation on promoting the decent work agenda, employment policy, health and safety at work, social dialogue, social protection, social inclusion, gender equality and non-discrimination" [European Atomic Energy Community; European Union; The Member States; Ukraine 2014]. And Art. 420 AA identifies possible means to achieve such goals, namely: aim at gender equality and ensure equal opportunities for women and men in employment, education, training, economy and society, as well as decision-making [European Atomic Energy Community; European Union; The Member States; Ukraine: 2014].

In turn, in compliance with the provisions of Art. 423 AA the European Union and Ukrainian state shall aim at enhancing cooperation on employment and social policy matters in all relevant regional, multilateral and international fora and organisations [European Atomic Energy Community; European Union; The Member States; Ukraine: 2014].

Article 291 (3) AA provides that the Parties reaffirm their commitment to effectively implement the fundamental and priority ILO Conventions that they have ratified, and the ILO 1998 Declaration on Fundamental Rights and Principles at Work [European Atomic Energy Community; European Union; The Member States; Ukraine: 2014].

In addition, the system of obligations under the AA includes the need to gradually bring Ukrainian legislation in line with EU law, standards and practices in the field of social policy, employment regulation and equal opportunities, which are listed in Annex XL to the AA. Thus, with regard to the issues of safeguarding a work-life balance, Annex XL clearly states that within three years from the date of entry into force of the AA, the Ukrainian state must bring its legislation in compliance with the provisions of Council Directive 2010/18/EU of 8 March 2010 implementing

the revised Framework Agreement on parental leave [*The European Parliament; the Council of the European Union: 2019a*] which as was mentioned above had been repealed by the Directive (EU) 2019/1158 [*The European Parliament; the Council of the European Union: 2019b*].

In accordance with the requirements of the AA and Directives 2010/18/EU and 2019/1158 in April 2021 the Verkhovna Rada of Ukraine adopted the Law “On Amendments to Certain Legislative Acts of Ukraine to Ensure Equal Opportunities for Mothers and Fathers in Child Care” [*Verkhovna Rada of Ukraine: 2021*] which introduced amendments to the Labor Code of Ukraine of 1971 and the Law of Ukraine “On Leaves” of 1996.

In accordance with these amendments to the Labor Code, it is now possible for enterprises, institutions and organizations to establish reduced working hours at their own expense for employees with children under the age of fourteen or a child with disabilities, as well as for single mothers and fathers who are raising a child without a father (mother), including in the case of a long stay of the mother in a hospital (Article 51 (4)). The Code also updates the list of persons who can enjoy the right to parental leave: this is now provided for “one of the parents” or “the mother or father of the child” [*Verkhovna Rada of Ukraine: 1971*].

In addition, the Labor Code was amended by Art. 773, and the Law of Ukraine “On Leaves” by Art. 191 “Childbirth leave”. Thus, these articles stipulate that one-time paid leave at the birth of a child lasting up to 14 calendar days (excluding holidays and non-working days) is provided to employees, namely: 1) a husband whose wife gave birth to a child; 2) the father of the child who is not in a registered marriage with the mother of the child, provided that they live together, are related by common life, have mutual rights and obligations; 3) grandparents or other adult relatives of the child who actually care for the child, whose mother or father is a single mother (single father). Childbirth leave is granted only to one person... [*Verkhovna Rada of Ukraine: 1971, 1996*]. The procedure for granting such leave is determined by the Law “On Leaves”. Moreover, in July 2021, the Cabinet of Ministers of Ukraine adopted the procedure for granting parental leave [*Cabinet of Ministers of Ukraine: 2021*].

Thus, the signing and entry into force of the AA established for Ukraine the preconditions for the approximation of domestic standards to promote a work-life balance, forcing changes in existing legislation in accordance with these standards. However, certain provisions of Directives 2010/18 and 2019/1158 have not been provided for in Ukrainian regulations, and therefore the latter need to be improved, in particular, in terms of guaranteeing the rights of mothers and fathers who seek to return to the same or an equivalent position and enjoy better working conditions after appropriate social leave as well as the creation of a legal basis for such employees to raise the issue of changing the mode of operation over a period of time.

Conclusions. Thus, the following conclusions can be drawn about the state of implementation of Directive (EU) 2019/1158 in the EU Member States and in Ukraine:

1. Even though as of January 2021 only 4 Member States officially informed the European Commission regarding their transposition measures, the provisions of the national legislation of the EU Member States on parental leave meet the minimum requirements established by the Directive. Moreover, the provisions of national law often provide more favourable conditions than the provisions of the Directive: in particular, on the duration of paternal and parental leave, remuneration and compensation provided for such types of leaves; the conditions for granting such leave; individualization and the principle of impossibility to transfer parental leave; the entitlement to parental leave; special provisions for carers leaves.

2. Regarding the main problems of national implementation of the provisions on leave for fathers and other relatives, there are two essential: lack of clarity and transparency of national legislation in some countries regarding the ratio of different types of leave aimed at work-life balance for working parents; the second problem lies in the economic terrain. Due to the fact that the traditional perception of the social roles of male and female is preserved, the responsibility for caring for a child is attributed mainly to women. Therefore, the issue of payment or compensation for leave is a key factor in the practical application (and more equal sharing) of leave and the organization of working time in order to promote work-life balance.

3. With respect to the compliance of the Ukrainian legislation, the amendments made to the Labour Code and the Law of Ukraine "On Leaves" in the spring of 2021 can be evaluated very favourably. These provisions create the preconditions for equal opportunities for men and women in terms of parental rights and responsibilities, as well as work-life balance. Although, of course, there are some drawbacks to the amendments. The mother or father of the child have no safeguards regarding their right to apply for the same or another equivalent position upon returning from parental leave, improved working conditions, or the right to raise concerns about changes to the working regime. Reduced working hours for employees with children under the age of fourteen or children with disabilities, as well as for single mothers, or parents raising a child without a father (mother), including in the case of long hospital stays the employer can arrange at his own expense, which is highly unlikely to occur.

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