

Position of the German Trade Union Confederation (Deutsche Gewerkschaftsbund, DGB)

The European Commission's proposed package of measures for improving work-life balance, including the Proposal for a Directive of the European Parliament and of the Council on work-life balance for parents and carers and repealing Council Directive 2010/18/EU

Effective guidelines for fairer sharing of care responsibilities

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1. Background

On 26 April 2017 the European Commission submitted its package of measures for a better work-life balance, a combination of statutory and non-statutory measures. They are intended to ensure implementation of the principle of gender equality in relation to men and women's prospects in the labour market and their treatment in the workplace and promote a better work-life balance for men and women as parents and people with caring responsibilities and more equal access to leave of absence and flexible working arrangements. They follow the ninth principle of the European Pillar of Social Rights which was presented at the same time: "Parents and people with caring responsibilities have the right to suitable leave, flexible working arrangements and access to care services. Women and men shall have equal access to special leaves of absence in order to fulfil their caring responsibilities and be encouraged to use them in a balanced way."

The proposed directive on a better work-life balance for parents and carers and repealing Directive 2010/18/EU (Parental Leave Directive) is the only specific legislative advance by the European Commission within the framework of the proposals submitted on the European Pillar of Social Rights.

The proposed directive aims to address women's underrepresentation in the labour market by ensuring a better work/life balance and supporting their professional prospects because one of the main reasons for the gender pay and pension gaps is the unsatisfactory and contradictory legal framework for ensuring work-life balance. An imbalance in parental leave for men and women, a lack of opportunities to take leave to look after children or care for family members, limited opportunities to take advantage of flexible working times, insufficient formal support and care services as well as negative economic incentives have all worsened the challenges faced by women in the workplace.

The current legal framework at EU level and the applicable regulations in Member States contain scarcely any provisions aimed at encouraging men to take on support and care tasks to the same extent as women. Many Member States do not have any regulations for paid paternity leave. Regulations relating to work-life balance that have unequal implications for men and women aggravate gender-specific differences in employment and

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when assuming responsibility for care tasks. In contrast, positive effects can be seen when fathers take advantage of regulations for a work-life balance, such as parental leave: these fathers become more involved in their children's upbringing in both the short and long term, and women have more time to take on paid employment.

2. General evaluation

The proposals of the EU for non-legislative measures and the draft directive can help to implement the objectives laid down in the Rome Treaty of equal opportunities for men and women in the labour market and non-discrimination in the workplace. According to the TFEU, the EU must work towards eliminating inequality and promoting the equal treatment of men and women.

Increasing women's participation in the work force would also contribute to implementing the Commission's priorities of growth and employment. Furthermore, the draft directive is linked to the initiative for a European Pillar of Social Rights, which aims to strengthen the social dimension of the EU and promote the upward convergence of Member States in the area of social performance.

The DGB welcomes the fact that the European Commission wants to make it obligatory to continue to expand the rights of parents and those with care responsibility by adapting the legal framework of the EU and set a minimum standard that goes beyond existing European legislation.

In the opinion of the DGB it is essential that existing standards are maintained because parents and family members with care responsibility in Germany and other European countries have more extensive rights in relation to leave of absence and continued remuneration than is proposed in the draft directive.

The DGB believes the proposal to give fathers the right to paternity leave sends out an important political signal in favour of equal treatment and raising the standard across Europe.

An individual's rights to at least four months' parental leave will also create financial incentives for partners to share childcare responsibilities.

However, the proposals, and also the regulatory approach, regarding leave of absence for care responsibilities and the arrangements for parental leave could represent a step backwards for Germany and other countries (see Art. 5, 6, 7 and 9).

In order to ensure that the standards already implemented in Germany and other countries are not lowered through the introduction of the directive, the provisions in Art. 16 must be deleted and replaced with an express, legally binding prohibition on lowering existing standards.

This is necessary so as not to endanger the achievements of the right to parental leave and parental leave benefit, in particular the flexible claim to parental leave in accordance with the German Bundeselternzeitgesetz (BEEG - federal law for parental benefit and parental leave).



Furthermore, new rights to determine agreements on flexible working hours and an enforceable legal claim can only be created if Art. 9 and Art. 5(6), are clarified: the wording “the right to request...” should be replaced by “the right to demand...”.

The DGB expressly shares the objective of the Commission to offer men and women the same opportunities in the labour market and in their working lives and to split family time on a more even basis. It supports the intention of the draft directive to give employees more opportunities and options for a work-life balance – whereby the role of men is given particular importance – as well as supporting modern approaches to family policies in the Member States. The DGB particularly welcomes minimum remuneration for parental leave, care leave and paternity leave equivalent to sick pay. This step must be followed through to its logical conclusion: such an allowance to compensate for wages lost during these periods must also include the corresponding amount to cover the contributions for all social insurance systems so that the employee’s entitlement to benefits at a later period is not lessened.

The DGB takes a critical view of the fact that exclusively non-legislative measures outside the scope of the directive are planned for the period of maternity leave, e.g. so that existing statutory provisions on protection against dismissal can be better implemented, to raise awareness of the problems related to dismissal of pregnant women and to apply strategic guidelines intended to facilitate the successful transition between maternity leave and employment. These measures are to be supported but they do not compensate for a reform of the EU Maternity Leave Directive, which has been pending for many years.

The DGB considers the scope of the directive to be important: it must apply to all employees, including those in atypical employment and also to all sizes of companies, including small and medium-sized companies.

The DGB stresses that the German word *Urlaub* (“holiday”) is completely inappropriate in relation to the actual situation and significance of parental and carers’ duties. The terms *Elternzeit* “parental leave” and *Pflegezeit* “carers’ leave” should be used instead. The DGB also recommends replacing the word “father” with the “other parent” or “partner” in order to avoid discriminating against same-gender unions.



3. Comments on the individual points

3.1. Legislative measures contained in the Proposal for a Directive of the European Parliament and of the Council on work-life balance for parents and carers and repealing Council Directive 2010/18/EU of the European Council presented by the European Commission on 26 April 2017

Art. 1 (Object)

The DGB welcomes the fact that this directive expressly lays down “minimum requirements” only. Some of these are below the level of protection achieved in Germany (particularly with regard to the provisions on parental leave in Art. 5 of the draft directive), although they represent significant improvements for many Member States. In order to prevent individual Member States implementing the directive in order to lower existing standards, in the view of the DGB it is necessary for the provisions of the directive to include an express and legally binding prohibition on lowering standards. The provisions contained in Art. 16 of the directive, which grants Member States discretionary powers to retain or introduce regulations that are more advantageous for workers, is not sufficient to satisfy this demand. It does not establish a prohibition on lowering standards and should therefore be deleted and replaced by an express prohibition on undercutting existing standards.

Article 3 (Definitions)

Individual terms require more precise definitions, such as in c) “relative” and “serious illness”. Regarding d) the DGB recommends extending the definition of a “close relative” (including parents-in-law, spousal equivalents, brother-/sister-in-law) because this enables more people to take on care responsibilities. The DGB also recommends extending leave for terminal care and care of underage children in the home or in an in-patient facility (the German law on work-life balance: Gesetz zur besseren Vereinbarkeit von Familie, Pflege und Beruf). Regarding e) the DGB also suggests adopting the definition of “dependency” from the German context: “Persons who are dependent in the sense of Vol XI of the Social Code (Sozialgesetzbuch - SGB XI) have impaired independence or abilities due to health issues and therefore require the help of others”.

Article 4 (Paternity leave)

To date there has been no regulation of paternity leave at EU level. In most Member States there are few incentives for men to make use of regulations on work-life balance or they are scarcely used. This proposal to introduce an individual’s right to at least ten working days of paternity leave on the occasion of the birth of a child while paying an allowance at least equivalent to sick pay is certainly a positive step. This regulation on paternity leave matches the DGB’s call for family-related duties to be shared. If this starts with the birth of the child, it can lead to a more balanced division of household tasks. An allowance at least equivalent to sick pay would create a financial incentive to do so.



In Germany and other European countries fathers already have the possibility of claiming paid paternity leave directly after the birth of a child and during the maternity leave of their partner. Therefore a European regulation on paternity leave should not replace the options already implemented in these Member States, but build upon it. The current legal situation in Germany would be improved if this paternity leave and allowance were not deducted from parental leave and the claim to a parental allowance. A non-regression clause should at least ensure that existing standards are not undermined when the directive is implemented.

Additionally, it must be ensured that financial compensation be given for any loss in social insurance contributions related to paternity leave for all statutory, corporate and private support and pension systems. Financial compensation for paternity leave should not only provide for the loss of remuneration while paternity leave is taken but must also ensure that the employee's entitlement to benefits at a later period is not lessened by a temporary drop in contributions.

The wording of the regulation is currently discriminatory vis-à-vis same-gender unions and should be adapted accordingly. The term "father" should be replaced with a non-discriminatory word such as "other parent".

Article 5 (Parental leave)

The clause brings workers in Germany a few improvements, but still lags behind existing standards in Germany. The directive must contain an express non-regression clause to ensure these standards are maintained when the directive is implemented.

On the positive side,

Art. 5(1) and (2) of the proposal provide for an individual right of at least four months' parental leave (as a block, on a part-time basis or in another flexible form) that cannot be transferred to the other parent. Previously only one month was not transferrable under EU law. The DGB welcomes the increase in the individual entitlement as this can help to encourage a more gender-balanced division of these partner months.

On the negative side,

the DGB rejects Art. 5(4) of the proposal, which gives Member States the possibility of introducing a qualifying period. According to the BEEG, the German law on parental benefit and parental leave, there is no qualifying period for the claim to "zero" parental leave. Only when the claim is for part-time work during parental leave (Art. 15(7) BEEG) is there a condition that the employment contract should be at least six months old. A mandatory non-regression clause is also essential for this clause.

The DGB also rejects Art. 5(5) of the proposal, whereby Member States can decide whether to grant employers the right to postpone the granting of parental leave for operational reasons. The DGB would like to point out that taking parental leave is generally necessary immediately after the end of maternity leave and cannot be postponed. This may not be



refused due to the employer's economic or operational considerations but must be available to parents when they decide they need it. The right granted to employers in Art. 5(5) to postpone the granting of parental leave for operational reasons does not satisfy this claim and would also represent a significant change for the worse vis-à-vis current German legislation because in Germany only the third stage of parental leave can currently be refused for urgent operational reasons and only after the third day following the birth of the child (Art. 16(1) BEEG). This discretionary scheduling by the employer cannot be accepted.

An appropriate solution would be to stipulate that parents merely have to notify their employer that they wish to take parental leave within the statutory time limit and do not have to apply for it. In this respect, parents need a unilateral right of choice, which should not be blocked by their employer withholding approval. The DGB recommends that the European regulation be orientated to the German provisions, which have proved their worth and are borne by both social partners, at least for the period immediately after maternity leave.

Furthermore it is imperative to ensure that standards already implemented in Member States are not undermined by introducing an explicit non-regression clause.

The DGB would like to point out that Art. 5(6) only grants the right to request flexible forms of parental leave. The DGB assumes that this is supposed to be an enforceable and binding right to such flexible forms, which can be enforced in a court of law with due consideration for the interests of both parties. However, the current wording could also be misunderstood as a mere right to request, which only obliges the employer to deal with the request (examine it, respond to it, and provide written reasons for rejection). However, it must be possible for an unjustified rejection to be reviewed by a court of law and where appropriate – should the reasons not prove to be substantive – for the rejection to be corrected so that workers can utilise their right effectively. The DGB recommends that the Commission ensures clarity on this point: the wording "right to request..." should be replaced by the wording "right to demand..." or "right to...".

Art. 5(1) of the directive contains an amendment to the maximum period for claiming parental leave, which should be extended until the child is twelve years old, instead of eight as is the case at present. The DGB is in favour of this greater flexibility for parents, which can be used for urgent care duties while the child is still at primary school.

Art. 6 (Carers' leave)

There are no existing regulations at EU level on carers' leave. Even though the provisions are below the level that applies to employees in Germany, the DGB expressly supports the introduction of an individual claim to at least five working days of carers' leave per year as well as the payment of an allowance (Art. 8) at least equivalent to sick pay. This is a major factor in recognising a carer's contribution. Here, too, the payment of a minimum allowance based on sick pay for carers' leave must ensure that this allowance includes full



compensation for all social insurance contributions based on a full wage so that the employee's entitlement to benefits at a later period is not lessened.

A mandatory non-regression clause is required here too in order to protect the standards already achieved in Germany.

Article 7 (Time off from work on grounds of force majeure)

The wording "force majeure for urgent family reasons" is ambiguous. Either it is a case of force majeure or there are urgent family reasons; combining the two is not appropriate. In the case of force majeure (destruction of the place of business by force majeure) then performance is objectively impossible. In the case of "urgent family reasons" German legislation already derives a right to leave of absence from Art. 275(3) BGB (German Civil Code) and the right to an allowance for this period from Art. 616 BGB. The sense of this clause refers to urgent family reasons and this wording should be used.

The reference to a time limit on the right to leave of absence should be deleted since it is not appropriate.

Article 8 (Adequate income)

While there has to date been no provision at EU level for financial compensation for parental leave, the proposed directive ([Art. 8](#)) stipulates payment of an allowance at least equivalent to sick pay. The DGB supports this step towards a European minimum standard regarding financial recognition of parental leave and as an incentive to use it; this also lessens the financial risks to parents when they interrupt/reduce their work. Similar to the demand for full compensation for contributions to all social insurance systems to be included in such an allowance for the planned paternity leave, the extension of parental leave must also ensure that, in the case of an allowance at least equivalent to sick pay, lower contributions are avoided so that the employee's entitlement to benefits at a later period is not lessened.

Since employees in Germany already benefit from a system which offers various options to organise their working hours during parental leave and from financial security during parental leave and for short-term carer obligations, a non-regression clause is also needed here.

Article 9 (Flexible working arrangements)

This clause regulates the right of parents of children under twelve years of age and carers within the family to request flexible working arrangements in the form of flexitime, flexible working models or a flexible place of work for a certain period. However, in the accompanying document the Commission states that workers *should* have the right to flexible working hours. Therefore the DGB assumes that this is supposed to be a statutory right to flexible arrangements, which can also be enforced in a court of law with due consideration for the interests of both parties. However, it must be possible for an



unjustified rejection to be reviewed by a court of law and where appropriate – should the reasons not prove to be substantive – for the rejection to be corrected so that workers can utilise their right effectively. The DGB recommends that the wording “right to request...” be replaced by the wording “right to demand...” or “right to...”.

The DGB also agrees with the right, as defined in [Art. 9\(3\)](#), to return to the original working pattern at the end of the agreed flexible period or when circumstances change.

This is a significant extension of the entitlement under EU legislation to flexible working arrangements when returning to work after parental leave and to part-time work.

In the opinion of the DGB, this right to flexible, family-friendly working arrangements after parental and carers’ leave is an important factor in preventing workers from leaving the labour market completely, increasing women’s participation in the labour market and hence improving their provision for old age. The DGB expressly welcomes the fact that the Commission wants to establish the right to return to work, since involuntary, comprehensive and transnational part-time work is a major factor in the symptoms of precarious employment. It also takes a positive view of the fact that this right is to apply to all workers, irrespective of the size of the company.

However, both rights only apply if the employer approves the request, which could not be enforced under the wording of [Art. 9\(1\)](#). There must be a right to flexible arrangements for working hours so that this right can function as a genuine and enforceable right. Neither should be exploited as a mere “right to request” at the discretion of the employer.

The DGB is in favour of extending the content of this directive to include the right to return to work irrespective of any reason in order to promote a work-life balance overall.

Art. 10 (Employment rights)

The wording of [Art. 10\(3\)](#) is ambiguous since it suggests that the Member States should determine the status of the employment contract in relation to taking parental leave. Even though the obligation of employers to pay remuneration is suspended when an employee is granted full leave of absence from work, the status of the employment contract must not change during parental leave or any other leave of absence for family reasons.

Art. 11 (Non-discrimination)

The DGB welcomes the fact that workers should not be subject to less favourable treatment, although it recommends replacing the wording “less favourable treatment” with “inequality of treatment” or “discrimination”, since these terms are enshrined in EU anti-discrimination law.

Art. 12 (Protection from dismissal and burden of proof)

The DGB approves these provisions on protection from dismissal and burden of proof. The burden of proof in [Art. 12\(3\)](#) is advantageous for employees – but only if its application in court cases is ensured. It must be stated clearly that the clause whereby Member States can refrain from applying the ruling on the burden of proof if it is for a court to investigate the



facts of the case (Art. 12(5)) is to be understood to the effect that these are proceedings based on the principle of the court's duty to satisfy itself of the facts (Amtsermittlung).

See Art. 13 (Penalties)

Experience has shown that fines are not sufficient as an effective penalty. Instead, provisions stipulating compensation for damages are required.

Art. 16 (Level of protection)

According to this clause Member States have the option to retain or introduce regulations that are more favourable for workers and employers. This confirms what already applies to all social policy directives, namely, that they set minimum standards that Member States may deviate from to the benefit of employees (Art. 153(2b) TFEU). In the opinion of the DGB an express prohibition on lowering existing regulations is needed in order to ensure that existing standards are not undermined when the directive is implemented or when it is invoked. This non-regression stipulation is already enshrined in some social policy directives as well as in the Directive on Fixed-Term Work (1999/70/EC, Art. 8(3) of the Appendix, agreement of social partners) and in Directive 2002/14/EC on informing and consulting employees, Art. 9(4): "Implementation of this Directive shall not be sufficient grounds for any regression in relation to the situation which already prevails in each Member State and in relation to the general level of protection of workers in the areas to which it applies." This wording must be included in the new directive.



3.2. Proposals for non-legislative measures in the European Commission's Communication "An initiative to support work-life balance for working parents and carers" of 26 April 2017

The DGB welcomes the non-legislative measures with which the European Commission wants to promote a work-life balance for working parents and carers. The Commission proposes a package of measures to improve the quality, accessibility, availability and affordability of child care and long-term care facilities, including better collection of pan-European data on the utilisation of family-related leave and flexible working arrangements by men and women, the provision of funds to finance new pilot projects to develop innovative working arrangements, sharing best practices with social partners and Member States, and the continued monitoring of gender-equitable utilisation of family-related leave and flexible working arrangements within the framework of the European Semester.

Regarding the non-legislative measures listed in the proposed directive on child care and care of family members, the DGB misses that the Barcelona objectives for developing childcare facilities for young children are not explicitly listed as a benchmark to be achieved by 2020. The high-quality development of childcare facilities in sufficient quantities is regulated in that document with binding objectives. The Commission should evaluate progress regularly and systematically and issue country-specific recommendations to Member States that do not fulfil the objectives of the Europe 2020 strategy and of the European Pact for Gender Equality.

A similar objective, procedure and evaluation is recommended by the DGB to promote long-term care and support facilities, together with a European Employment Strategy for the care sector.

The DGB has reservations regarding the ideas put forward to utilise the European Fund for Strategic Investments (EFSI) to finance social infrastructure through public-private partnerships in the sector of childcare and long-term care services. In the opinion of the DGB this approach is counterproductive to the objective of ensuring that the long-term focus is on the quality of services and not profits.

The DGB expressly welcomes the measures to counteract negative incentives for parents and carers (the majority of whom are women) to take up employment. The Commission wishes to provide country-specific aids to orientation through a coordinated European economic policy in the European Semester process, organise an exchange of information on proven procedures with social partners and Member States and improve data collection at EU level.

Specifically, the German regulations on marital tax status prevent equal participation of men and women in gainful employment and a more equal division of household and family management. Above all, German tax bracket V with its excessively high tax burden for the lower-earning marital partner, mostly the woman, makes regular employment unattractive and drives women into 'mini jobs'. The high deductions also have a negative effect when calculating all state transfer benefits. The marital fiscal split in Germany does not support



families, but rather marriages where (high) incomes are unevenly distributed. A gradual transformation to individual taxation would increase the participation of women in the labour market and would contribute to the equal treatment of different forms of living and family life.

4. Conclusion

The DGB appreciates the European Commission's package of measures to improve the work-life balance as a step in the right direction and to bring about improvements in some Member States; however, it calls for specific corrections to the draft directive.

In addition to a non-regression clause in relation to the implementation of the directive, enforceable rights of workers to flexible arrangements for working hours must also be stipulated so that employees can reduce their working hours in order to care for their children or family members and then return to their previous working hours. Therefore employees should be given a general right to models for work arrangements that are flexible regarding status and/or length of working hours as well as the place of work, in combination with the right to return to work earlier and with the same working patterns when circumstances change.

It is important that this proposal by the Commission should apply to all sizes of company.

The DGB is critical of the Commission's proposal in that the text only contains the right to negotiate with the employer, whereas the trade unions demand a statutory right to return to former working hours, for example to full-time work. An enforceable right of employees to new rights to co-determine working arrangements must be added. Furthermore, the DGB criticises the fact that the proposal lacks a legislative section on updating the directive on maternity leave.

The proposed directive can only be considered to be positive if it does not endanger the standards achieved in Germany.

Therefore the DGB calls on the Federal Government to support this package of measures presented by the European Commission and to participate in negotiations at the EU level and support implementation of the new directive, insofar as the draft directive is supplemented with a binding non-regression clause.

Furthermore, the DGB expects the Federal Government to advocate an enforceable right of employees to flexible working arrangements.