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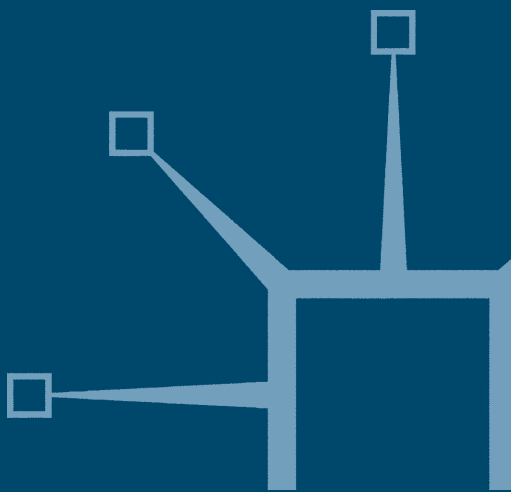
Reconciling Work and Family Life in EU Law and Policy

Eugenia Caracciolo di Torella and Annick Masselot



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Ai miei genitori, Emanuela e Giuseppe che nonostante non siano mai stati pagati per allevarmi, mi hanno insegnato che ogni cosa ha un valore prima ancora che un prezzo.

Pour Julia et Soeren, dans l'espoir qu'ils mèneront des vies plus équilibrées.

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Acknowledgements

The idea for this project was first discussed in 1999 while walking back from a conference in Oxford to catch our train home. Over the past ten years, we have continuously discussed and developed our ideas in numerous contexts including a Ph. D, several conference papers and journal articles. Although this book proceeds from our academic interests, it foremost arises out of our life experience. In the last decade, we have experienced the joy and the constant tensions that exist between trying to look after a young family whilst applying ourselves to demanding careers. We have encountered first hand difficulties in balancing our life courses: as workers, mothers, partners, and, of course, as women. Indeed, four children, employment in five different universities, across four countries, a stint in part-time and lots of flexible working arrangements have only made our work, paid and unpaid, more real.

Although life for women has certainly improved since our mothers' time, we are now facing new challenges while many of the old ones remain. On the one hand, our mothers might not have benefited from the many legal rights in the workplace (or access to frozen food!) that we are enjoying now. On the other hand, many women today do not have access to the ready-made informal support that, generally, previous generations were able to rely upon. If technology has improved the way we work, it has also rendered it more demanding and intrusive on the personal life of the individual. Moreover, our role as parents has changed: modern mothers take for granted their productive role and often manage their reproductive functions accordingly. Fathers increasingly appear to be more willing to be involved in their children's lives but still remain very remote from actively participating into most domestic tasks. The law has evolved in order to allow and encourage women to enter and participate in the public sphere of paid employment and the European Union (EU) has had a pivotal influence in this area. The law however, remains largely underdeveloped with regard to the role of men in the domestic sphere. The elusive quest for an effective reconciliation between our multiple life courses remains as challenging as ever, maybe just a little more frantic than ever. We hope that this book provides some keys to unlock the many issues surrounding reconciliation between work and family life in EU law.

It is probably not possible to recall and give credit to the very many people who have contributed to the production of this book. Indeed, writing a book is never an individual effort, and some special thanks go to the colleagues whose discussions, comments and criticism have helped to shape our arguments: Mark Bell, Pascale Lorber and Arabella Stewart. Thanks also to those who have read drafts: Louise Ackers, Grace James, Francis Kessler, Sue Millns and Clare McGlynn. Other colleagues have been generous with their time and resources; among these, the members of the European Network of Legal Experts, in particular Susanne Burri, Maria do Rosário Palma Ramalho and Sacha Prechal; the Association des Femmes de L'Europe Méridionale, specifically Sophia Koukoulis-Spiliotopoulos; the European Women's Lobby, in the persons of Cécile Greboval and Mary Collins; as well as Christine Boch and Tammy Hervey.

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Last but not least, at home, we are grateful for the precious support and love of our families and, above all, for Will and Jon's continued support and understanding. And our children can now be assured that yes, "mummy has finished her story!".

This book states the law as at the end of February 2009.

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Introduction: Old Problems and New Challenges

> I am not a member of the Women's Rights League. Whatever I have written has been without any conscious thought of making propaganda. (...) I (...) must disclaim the honour of having consciously worked for the women's rights movement. I am not even quite clear as to just what the women's right movement really is. To me it has seemed a *problem of humanity in general*.[1]

Introduction

In this book, we explore how the European Union (EU) has, over the years, addressed the diverse and complex situations arising from the interdependence between paid employment and the family with a view to assessing whether an effective system has been established. Working parents and, more generally workers with family responsibilities, often find themselves juggling between these two scenarios at great cost. No longer can the law ignore this struggle. Nor can the legislator ignore the fact that these concepts are rooted in societal attitudes which tend to predetermine the legal approach. Therefore, relying solely on legislative instruments in order to redress the conflict between paid work and family responsibility, might prove a difficult and fruitless task. At the same time, attitudes can and should be influenced by the relevant legislation. The task of the legislator, therefore, should go beyond the mere codification of socially accepted behaviour and encourage the development of society by proposing new models.

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[1] H. Ibsen, Speech made at the banquet given in his honour by the Norwegian Women's Right on 26 May 1898, as quoted in S. Ledger, *Henrik Ibsen* (Horndon: Northcote House Publisher, 1999), p. 33, emphasis added.

The solutions to this challenge provided by the EU legislator include a range of policy and legislative measures such as a system of leave available to both parents in connection with the birth of a child, as well as to care for children and other dependants and the possibility of rearranging working hours.[2] These measures come under the broad definition of 'reconciliation between work and family life' (reconciliation). Reconciliation represents a major challenge both for individuals and governments. For individuals, it is a crucial issue as it dictates the kind of family life they can afford. Accordingly, it influences individuals' choices on, for instance, whether, when and how many children to have. Reconciliation measures also contribute to the decision on what kinds of childcare will suit families best, and whether individuals (typically mothers) remain in full or part-time employment or withdraw completely. This is not to say that all parents (mothers) should engage in paid work if they are eager to care for their children at home, but they should have the opportunity to choose, and therefore provisions making this choice feasible must exist.[3] Such provisions can also benefit fathers by providing them with a (legal) opportunity to be involved in family life and their child's development.[4] Moreover, children benefit from reconciliation measures as these provide the potential for greater interaction with both parents. Indeed, recent studies have highlighted that this interaction is more significant to children than their parents' income or background.[5] It is also children those who suffer the most when reconciliation measures are lacking or are ineffective. Furthermore, reconciliation measures mean that employees (mostly mothers) do not have to leave their jobs in order to meet their family commitments or feel unable to apply for jobs involving

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[2] Resolution of the Council and the Ministers for Employment and Social Policy on 'The Balanced Participation of Women and Men in Family and Working Life', OJ [2000] C218/02.

[3] On this point see E. Vigerust, *Arbeid, barn og likestilling – Rettslig tilpasning av arbeidsmarkedet* (Oslo: Tano Aschehoug, 1998), p. 37; see also J. Lewis, S. Sarre, and J. Burton, 'Dependence and Independence: Perceptions and Management of Risk in Respect of Children aged 12–16 in Families with Working Parents', *Community, Work and Family*, 10(1) (2007), 75–93.

[4] H. Kaul, 'Who Cares? Gender Inequality and Care Leave in the Nordic Countries', *Acta Sociologica*, 34 (1991), pp. 115–125; D. Sommer, 'Fatherhood and Caring: Who Cares?', in S. Carlsen and J. Larsen (eds), *The Equality Dilemma* (Copenhagen: The Danish Equal Status Council, 1999), p. 155; E. Dermott, *Intimate Fatherhood* (London: Routledge, 2008).

[5] See also DTI, 'Work and Families: Choice and Flexibility' (London: DTI, 2006).

long hours.[6] They also mean that employers benefit through increased productivity as their employees are no longer distracted by 'worry[ing] day in, day out, about their children's care'.[7]

For domestic governments (and the EU) the promotion of reconciliation policies and legislation has also become a necessity for a range of compelling reasons. Traditionally these measures originated from gender equality concerns. They also support the economy as they facilitate the participation of individuals with family responsibilities in paid work. They can have a positive effect on fertility rates (which are currently a concern for most European countries) and can therefore help fighting the demographic crisis. By underpinning economic and demographic growth, reconciliation policies can also boost pension systems.[8] They can also contribute to the improvement of the general welfare of women and their children, which can ultimately reduce the mother's, and thus children's, poverty which impacts negatively on child development.

Yet, underlying policy objectives vary across the EU Member States and what is considered to be a key issue in one Member State might be completely unimportant in another. In the UK, for example, the driving force has been concerns about child poverty, whilst the Netherlands has been primarily motivated by increasing maternal employment. The Scandinavian countries have tackled the reconciliation issue as part of the gender equality discourse, a view shared to a certain extent by Portugal.

For all of these reasons, and many more, during the last decade, reconciliation has become an increasingly important topic on both domestic and international agendas. At EU level, it has become an integral part of the European Employment Strategy[9] (EES) and the European Commission has heralded it as the key to economic and social success.[10] This was reiterated by the Roadmap for Equality

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[6] 'Female Attraction', *Financial Times*, 3 June 1997.

[7] OECD, *Babies and Bosses – Reconciling Work and Family Life* (Paris: OECD, 2007). This had already been pointed out a decade ago; see 'Childcare Gap is Bad for Business, Parents and Children', *IRS Employment Review*, March 1997, 628, and 'The Childcare Gap', Briefing Paper 1, Daycare Trust, 1997.

[8] OECD, *Babies and Bosses: OECD Recommendations to Help Families Balance Work and Family Life*, http://www.oecd.org/document/23/0,2340,en_2649_201185_33844621_1_1_1_1,00.html

[9] J. Lewis, 'Men, Women, Work, Care and Policies', *Journal of European Social Policy*, 16(4) (2006), 387–392; see also further discussion in Chapter 3, 'The Time Provisions'.

[10] Communication from the European Commission on *The EU Social Agenda 2005–2010*, COM(2005) 33 final. See also Communication from the European

between Women and Men, which included the development of reconciliation policies as one of the six priority actions for gender equality.[11] The importance of reconciliation has also been acknowledged at national level. In Scandinavia, for example, reconciliation is a key component of employment policies where it has been on the agenda since the 1970s,[12] while the UK government has sought to promote a 'change of culture of relations in and at work'[13] with a view to achieving 'a society where to be a good parent and a good employee are not in conflict'.[14]

Reconciling work and family life, family friendly policies or work-life balance?

In this book, we discuss the legal measures that aim to *reconcile* work and family life. All too often policy-makers and legislation, as well as the academic discourse, align the concept of reconciliation with that of 'work-life balance'; in our view, there is a fundamental distinction between the two. Although these two concepts might appear to enable the pursuit of both work and family/private life, 'work-life balance' normally implies the *desire* to limit the involvement in paid activity in order to pursue other interests which can be, for example, gardening or further education with the overall aim of contributing to individuals' well being,[15] while 'reconciliation' expresses the *need* to spend less time in the workplace in order to care for one's family. Whilst in the first case there is an element of *choice*, in the second the choice is limited, if not, non-existent (apart from, possibly, choosing to have a family in the first place). To analyse the two concepts within the same theoretical framework can hinder the essence of the debate: 'work-life balance' places

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Commission, *The Green Paper, Confronting Demographic Change: A New Solidarity Between the Generations*, COM(2005) 94 final.

[11] Communication from the European Commission, *A Roadmap for Equality Between Women and Men, 2006–2010*, COM(2006) 92 final.

[12] Inter alia NOU 1995:27 *Pappa kom hjem*; E. Caracciolo di Torella, 'A Critical Assessment of the EU Legislation Aimed at Reconciling Work and Family Life: Lessons from the Scandinavian Model?', in H. Collins, P. Davies, and R. Rideout (eds), *Legal Regulation of the Employment Relation* (London: Kluwer Law International, 2000), 441–458; A. Leira, *Working Parents and the Welfare State* (Cambridge: Cambridge University Press, 2002).

[13] T. Blair, Foreword to *Fairness at Work*, Cm 3968 (1998).

[14] DTI, *Work and Parents: Competitiveness and Choice*, Cmnd 5005 (2000).

[15] H. Collins, 'The Right to Flexibility', in J. Conaghan and K. Rittich (eds), *Labour Law, Work and Family* (Oxford: Oxford University Press, 2005), 99–124.

the emphasis on individual rights that have little to do with family responsibilities or more generally, with gender equality. Indeed, considering that families' needs are often met by women, to focus generally on work-life balance hinders, with dangerous consequences, the gender dimensions of the issue. Moreover, the reference to a balancing act is somewhat misleading: it assumes that if somebody manages to combine earning and caring responsibilities, a balance is reached.[16] In reality, such balance conceals a series of pressures and conflicts that have very little to do with any sort of reconciliation. In other words, balance neither means nor implies reconciliation.

By reconciliation, we mean a dynamic set of policies and legal provisions which focus specifically on the *tension* inherent in juggling work commitments and family responsibilities. At the same time, these measures should ensure the adequacy of family resources, enhance children's development, facilitate parental choice regarding work and care and promote gender equality and employment opportunities.[17] With that said, we are well aware that the term 'reconciliation' is not without criticism: as with work-life balance, reconciliation can also all too readily lead to an assumption that it is reached when individuals manage to be both active workers and parents or carers. More specifically, in the EU discourse reconciliation has been synonymous with accommodating women, so that they could attend to their family responsibilities and at the same time participate in paid (albeit often low paid and unskilled) employment. Within this discourse, the term has failed to challenge the presumption that women are primarily responsible for child caring, and thus, to promote equality.[18]

In the context of this book, there is a further reason to consider the concept of reconciliation rather than work-life balance, namely, that reconciliation has been the terminology used by the EU. Indeed, the European Court of Justice (ECJ) held that '*reconciliation* is the natural corollary to gender equality and a condition for its substantive

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[16] See further R. Crompton and C. Lyonette, 'Work-Life Balance in Europe', *Acta Sociologica*, 49 (2006), 379–393.

[17] OECD, *Babies and Bosses- Reconciling Work and Family Life* (Paris: OECD, 2007).

[18] E. Caracciolo di Torella, 'A Critical Assessment of the EU Legislation Aimed at Reconciling Work and Family Life: Lessons from the Scandinavian Model?'in H. Collins et al. (eds), *Legal Regulation of the Employment Relation* (Oxford: Hart Publishing, 2001), 441–458. See also the debate in C. McGlynn, 'Reclaiming a Feminist Vision: The Reconciliation of Paid Work and Family Life in European Union Law and Policy', *Columbia Journal of European Law*, 7(2) (2001), 241–272.

achievement',[19] and the Commission refers to *reconciling* as a basic condition for de facto equality.[20] *Reconciliation between family and professional life* is also expressly mentioned in Article 33 of the EU Charter of Fundamental Rights, now attached to the Lisbon Treaty. However, this position seems to have changed very recently. Some of the Commission's documents refer to the expression 'reconciliation between work, *private* and family life'. The Legal Experts Report on reconciliation also adopted this expression.[21] Moreover, the recent package of reconciliation measures presented by the Commission is ambiguously entitled 'Work-Life Balance'.[22] Arguably, the Commission's change in terminology suggests a shift in the emphasis: reconciliation is now considered for everyone and not just for families. However, a closer look at these new measures shows that, although there might be a political will to move towards a more inclusive concept, in reality not much has actually changed. The Commission's package continues to exclusively address families' needs. In addition, the families considered by the Commission are limited to those with young children, while wider family responsibilities are paid only lip-service. Consequently, we remain of the opinion that the concept of *reconciliation* is the more appropriate term to use in the context of EU policy and legislation as considered in this book.

Finally, the concept of 'family-friendly policies' has also been used interchangeably with that of reconciliation between work and family life. However, we agree with Moss who suggests that 'family-friendly' has a more bland and static connotation than 'reconciliation' and is geared more towards the world of marketing rather than addressing equality issues.[23]

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[19] Case C-243/95 *Hill and Stapleton* v. *The Revenue Commission and the Department of Finance* [1998] ECR I-3739, at paragraph 42; see also Case C-1/95 *Gerster* v. *Freistaat Bayern* [1997] ECR I-5253, at paragraph 38.

[20] Resolution of the Council on 'The Balanced Participation of Women and Men in Family and Working Life', OJ [2000] C218/2.

[21] The European Network of Legal Experts in the Field of Gender Equality, *Legal Approaches to Some Aspects of the Reconciliation of Work, Private and Family Life in Thirty European Countries* (Brussels: European Commission, 2008).

[22] Communication from the European Commission, 'A Better Work-Life Balance: Stronger Support for Reconciling Professional, Private and Family Life', COM(2008), 635. See further discussion at p. 46

[23] P. Moss, 'Reconciling Employment and Family Responsibilities: A European Perspective', in S. Lewis and J. Lewis (eds), *The Work-Family Challenge* (London: Sage, 1996), 20–33.

The traditional theoretical framework

> Man for the field and woman for the hearth
> Man for the sword and for the needle she
> Man with the head and woman with the heart
> Man to command and woman to obey
> All else confusion.[24]

From a theoretical perspective, the issues related to work and family life have traditionally been based on and legitimised by the so-called 'two spheres' structure. This structure implied that life is divided into two spheres: the public and private/domestic. Issues relating to employment have been regulated in the public sphere, while matters concerning the family and its organisation, such as the care of young children, the elderly[25] and disabled[26] members of the family, have been confined to the private sphere. According to this model, men dominate the public sphere whilst the private sphere is dominated by women. As only the public sphere was, and often still is, regarded as productive,[27] it follows that the employment market only involved paid work while unpaid work, such as informal care, was excluded.[28] Ultimately, the public/private divide has been the basis of the breadwinner structure. However, as James notes, it is important to remember that this division is socially and politically constructed and can, therefore, be deconstructed.[29]

The public/private dichotomy is entrenched in the vast majority of legal systems[30] and has several implications. Firstly, it encourages the

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[24] Tennyson, *The Princess*, 1874.

[25] Inter alia, J. Phillips, 'Paid Work and the Care of Older People: A UK Perspective' in E. Drew, R. Emerek, and E. Mahon (eds), *Women, Work and the Family in Europe* (London: Routledge, 1988), p. 66.

[26] For example, the case of Ms Drake who had to stop working in order to care for her disabled mother; Case 150/85, *Drake* v. *Chief Adjudication Officer* [1986] ECR 1995. See also I. Moebius and E. Szyszczak, 'Of Raising Pigs and Children, *Yearbook of European Law*, 18 (Cambridge: Cambridge University Press, 1998), 125–144.

[27] Inter alia, F. Olsen, 'The Family and the Market: A Study on Ideology and Market Reform, *Harvard Law Review*, 96 (1993), p. 1497.

[28] K. O'Donovan, *Sexual Divisions in Law* (London: Weidenfeld & Nicolson, 1984).

[29] G. James, *The Legal Regulation of Pregnancy and Parenting in the Labour Market* (London: Routledge-Cavendish, 2009) Chapter 1.

[30] For example, guidelines issued by the ILO differentiated from economic active and economic inactive persons, see also L. Hantrais, *Family Policy*

perception that the areas falling within the private sphere are somewhat outside and above the scope of the law; as a consequence, States have been reluctant to intervene in such 'private' areas, perceiving the organisation of the roles within the family as a private choice.[31] Secondly, the unpaid work taking place in the private sphere is considered akin to leisure activities which should have no relevance for employers.[32] Accordingly, caring for young children was regarded as equivalent to fishing or gardening. Thirdly, as the two spheres were considered as separate, the influence of the private sphere upon the public sphere, and vice versa, were largely denied.[33] Feminist critics have, however, convincingly argued that the relationship between the two spheres is not based on separation but on interdependence:[34] unpaid work, such as housework and caring responsibilities, often performed in addition, or as an alternative, to paid work, is at the basis of paid employment.[35] Indeed, the 'bottom line is that if babies are not looked after they will die; if food preparation ceased people would eventually starve'.[36] As the paid employment market (public sphere) depends intrinsically upon the contribution of women in the

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Matters.– Responding to Family Change in Europe (Bristol: Policy Press, 2004), p. 77.

[31] See for instance Case 184/83 *Hofmann* [1984] ECR 3047; see also N. Rose, 'Beyond the Public/Private Division: Law, Power and the Family', *Journal of Law and Society*, 14 (1987), p. 61.

[32] The ECJ seems to have confirmed this interpretation in a recently decided case in which it compared the situation where an employee resigns because of childcare commitments to that of an employee who resigns for 'unimportant' reasons, Case C-249/97 *Gruber* v. *Silhouette* [1999] ECR I-5295.

[33] J. Plantenga, J. Schippers, and J. Siegers, 'Towards an Equal Division of Paid and Unpaid Work: The Case of the Netherlands', *Journal of European Social Policy* 9 (2) (1999), 99–110.

[34] S. Boyd, 'Challenging the Public/Private Divide: A Overview' in S. Boyd (ed.) *Challenging the Public/Private Divide* (Toronto: University of Toronto Press, 1997); K. Rittich, 'Feminization and Contingency: Regulating the Stakes of the Work for Women' in J. Conaghan, R. M. Fishl, and K. Klare (eds), *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (Oxford: Oxford University Press, 2002), 117–136; R. Crompton and C. Lyonette, 'The New Gender Essentialism – Domestic and Family "Choices" and Their Relation to Attitudes', *British Journal of Sociology*, 56(4) (2005), 601–620.

[35] See further E. Vigerust, *Arbeid, barn og likestilling – Rettslig tilpasning av arbeidsmarkedet* (Oslo: Tano Aschehoug, 1998), in particular Chapter 1.

[36] M. Glucksmann, 'Why Work? Gender and the "Total Social Organisation of Labour"', *Gender Work and Organisation*, 2 (1995), 63–75.

private sphere, it is important to understand the relationship between the two spheres and its impact on women, in particular on women who become mothers. Thus, we argue that it is for the State to reconcile and regulate the tensions that exist between the two spheres (production and reproduction). Finally, the public/private dichotomy perpetuates the view that certain activities (caring roles in particular) are natural rather than constructed, and are the natural 'extension' of the female activities belonging to the private sphere. This perception has meant that women have historically been excluded from major professions such as medicine, law, political life and managerial positions. It also remains one of the main reasons for gender segregation in employment.[37]

The two spheres structure has also shaped the traditional understanding of parental models, where being a mother and being a father are constructed as conceptually different. Leira emphasises the cultural and social elements inherent in motherhood which she describes as:

> [a] multidimensional concept [which] refers to biological process and *cultural symbols*, to the individual experience of being a woman parenting and to the *social construction* of woman as mother.[38]

Traditionally, the dominant traits of motherhood are rearing and nurturing. Accordingly, full-time motherhood was assumed to be the norm: 'all women need to be mothers, (...) all mothers need their children and all (...) children need their mothers'.[39] This construction was further emphasised by assumptions such as that a good mother should not work and that full-time employment of a mother is equivalent to 'death

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[37] See generally J. Rubery and C. Fagan, 'Gender Segregation in Societal Context', *Work Employment and Society*, 9 (1995), p. 213. See L. Imray and A. Middleton, 'Public and Private, Marking the Boundaries', in E. Gamarnikow et al. (eds), *The Public and the Private* (London: Heinemann, 1983), 12–27.

[38] A. Leira, *Welfare States and Working Mothers* (Cambridge: Cambridge University Press, 1992), emphasis added.

[39] A. Oakley, *Women's Work: The Housewife Past and Present* (New York: Pantheon Books, 1974), p. 186. See also E. Nakano Glenn, 'Social Construction of Mothering: A Thematic Overview' in E. Nakano-Glenn, G. Chang, and L. R. Forcey (eds), *Mothering: Ideology, Experience and Agency* (London: Routledge, 1994).

of a parent, imprisonment of a parent, war [or] famine'.[40] Society was made to believe that a good mother:

> can prevent delinquency by staying at home to look after the children, she can reduce unemployment by staying at home and freeing jobs for men, she can recreate a stable family unit by becoming totally economically dependent on her husband so that he cannot leave her.[41]

By contrast, the 'good' father was traditionally seen as a patriarch and a provider.[42] Accordingly, his role was clearly distinct from that of the mother:

> the fundamental explanation of the allocation of the roles between the biological sexes lies in the fact that the bearing and early nursing of children establish a strong presumptive primacy of the relation of the mother to the small child and this in turn establishes a presumption that the man, who is exempted from these biological functions, should specialise in the alternative instrumental direction.[43]

A good father meant essentially one who was involved in income-generating work, even when this included activities away from home.[44] The law supported the idea that the role of the father within the family was confined to breadwinning. In the post-war period it was argued that it would have been wrong to ratify the International Labour Organisation (ILO) provisions on paid maternity leave, as these would

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[40] J. Bowbly, *Maternal Care and Mental Health* (Geneva: World Health Organisation, 1951), p. 11; see also B. Tizard, 'Employed Mothers and the Care of Young Children', in A. Phoenix, A. Woolet, and E. Lloyds (eds), *Motherhood, Meaning, Practices and Ideologies* (London: Sage, 1991), p. 178.

[41] C. Smart, *The Ties that Bind* (London: Routledge, 1984), p. 136.

[42] V. Seidler, 'Fathering Authority and Masculinity', in R. Chapman and J. Rutherford (eds), *Male Order: Unwrapping Masculinity* (London: Lawrence and Wishart, 1988).

[43] T. Parson, 'The American Family: Its Relations to Personality and to the Social Structure', in T. Parson and R. F. Bales (eds), *Family Socialization and Interaction Process* (Glencoe, IL: Free Press, 1955) at 23; see also R. Collier, 'Feminising the Workplace? Law, the "Good Parent" and the "Problem of Men"', in A. Morris and T. O'Donnell (eds), *Feminist Perspectives on Employment Law*, (London: Cavendish, 1999), 161–181.

[44] B. Brandth, E. Kvande, 'Masculinity and Child Care: The Reconstruction of Fathering', *The Sociological Review*, 46(2) (1998), 293–313.

usurp the father's responsibility for supporting the family and therefore encourage family disintegration.[45]

This construction, based on a strict specialisation and thus division of tasks between the two parents, where the father provides for the economic welfare (the breadwinner) and the mother is the home maker (the dependent care giver), was somehow incorporated in the EU discourse with the decision of the Court of Justice in the *Hofmann* case. Here, it was held that the Equal Treatment Directive is not designed to settle questions concerned with the organization of the family, or to alter the division of responsibility between parents."[46] The inherent distinction between motherhood and fatherhood was further captured by Phoenix, Woolett and Lloyd:

> [f]atherhood is experienced in different ways from motherhood. Being a parent is a less embracing definition of a man than a woman. To know a man is a father is generally less informative about how he spends his time and energies than to know that a woman is a mother. It is still possible for men to be seen and to see themselves as 'good fathers' without being closely involved in childcare or spending much time with the children.[47]

This original framework has been challenged by the mass entry of women into the paid labour market. The potential benefits of female labour were highlighted by World War I and World War II:[48] with the majority of men away in the conflict or injured, women's role in supporting the economy became evident. Since then, this phenomenon, although with regional variations, has steadily grown and today a fast increasing proportion of women, either because of choice or need, participate in paid employment.[49] In 2006, in the EU25 as a whole,

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[45] J. Jenson, 'Gender and Reproduction', *Studies in Political Economy*, 20 (1986), 9–26.

[46] Case 184/83 *Hofmann* [1984] ECR 3047 at paragraph 24.

[47] A. Phoenix, A. Woollett, and E. Lloyd (eds), *Motherhood: Meanings, Practices and Ideology* (London: Sage, 1991), p. 4.

[48] G. Bock and P. Thane, *Maternity and Gender Policies: Women and the Rise of the European Welfare State, 1880s 1950s* (London: Routledge, 1990) see also J. Gravensgård, *Psykisk arbeidsmiljø -en veiledning* (Oslo: TidenNorsk Forlag, 1997), p. 93.

[49] L. Hantrais, *Social Policy in the European Union* (New York: Palgrave 1995), p. 112.

over 57 per cent of women aged 15–64 were in paid employment.[50] As a consequence of this trend, perspectives on motherhood changed and by the end of World War II, the traditional model of motherhood was in rapid decline throughout Western Europe. The 'good mother' now was not only supposed to embrace caring and nurturing roles; she was also expected to be an economic earner. Consequently, mothers are now burdened with the responsibility of being both a productive earner and at the same time providing the primary care for children, the household and sometimes elderly parents or disabled dependants.[51] The two roles, however, are not easily combined but rather generate tensions and conflicts: paid employment often creates obstacles to the duties of being a good mother while motherhood is conceived as an impediment to women's equality in the workplace.[52] Reconciliation policies and legislation have developed against this background. In response to the increasing participation of women in paid employment, the Community and its Member States saw the need to reconcile the private and the public spheres in the first instance to grant *women* (rather than *parents*) the opportunity to participate in the labour market whilst also fulfilling their responsibilities within the family. At this stage, the vast majority of Member States addressed the issue of reconciliation by adopting measures for the protection of *pregnant employees* and the provision of paid *maternity* leave. In *Hill*,[53] the ECJ attempted to reconcile women's two tasks. On the one hand, it recognised that women are in reality the primary carers for children in the family and that this is precisely why, often, they can only take up part-time or other flexible work arrangements such as job-sharing.[54] Accordingly, the ECJ called upon employers to review their long-term indirectly discriminatory

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[50] EUROSTAT, *The Life of Women and Men in Europe – A Statistical Portrait* (Brussels: European Commission, 2008), p. 53. Although this represents a relatively high average level of paid employment for women, the rate is still far below that of men, which was 72 per cent in the same age group.

[51] A. Myrdal and A. V. Klein, *Women's Two Roles* (London: Routledge, 1956). See also T. Hervey and J. Shaw, 'Women, Work and Care: Women's Dual Role and Double Burden in EC Sex Equality Law', *Journal of European Social Policy*, 8 (1998), 44; A. Hochshild, *The Second Shift: Working Parents and the Revolution at Home* (Berkeley: University of California press, 1989) .

[52] For an early discussion of this theory, see for example J. Bowlby, *Maternal Care and Mental Health* (Geneva: World Health Organisation, 1951). See also C. McGlynn, 'European Union Family Values: Ideologies of "Family" and "Motherhood" in European Union Law', *Social Politics*, 8(3) (2001), p. 325.

[53] Case C-243/95 *Hill and Stapleton* [1998] ECR I-3739.

[54] Case C-243/95 *Hill and Stapleton* [1998] ECR I-3739 at paragraph 41.

assumptions about certain forms of paid work. On the other hand, however, the Court held that women's role within the family should be 'protected' by Community law,[55] thus entrenching the stereotype that women are necessarily the primary carers of children. It explicitly stated that 'Community policy in this area is to encourage and, if possible, adapt working conditions to family responsibilities'.[56] Thus it appears that the Court distanced itself from its previous decision in *Hofmann* to refuse to settle questions relating to family organisation.[57] Indeed, Community law now does indeed aim to facilitate specific ways of organising family life, namely, ways in which women can be both the primary carers in the family and at the same time productive earners in the labour market. However, in doing so the concept of reconciliation became constructed essentially as a woman's problem and the very two spheres structure which the concept aimed to challenge in the first place was perpetuated. Paradoxically, the more generous these reconciliation measures were, the more they reinforced gender stereotypes. For instance, by introducing long periods of extended maternity leave, these measures allowed women to recover from giving birth and to care for the newborn, but also reinforced the stereotype that women are the primary carers of young children. These measures both perpetuated women's financial dependence on men and hindered the ability of men to care for their young children because, as the main breadwinners, they needed to work. Thus, although these measures might have attempted, more or less successfully, to facilitate women's entry into and retention in the public sphere, they did very little to address the assumptions underlying the two spheres structure.

An evolving framework

The challenge, however, did not end with the entry of women into the paid labour market. The changes to the traditional framework described in the previous section set in motion a process that is in continuous evolution. These challenges are responsible for the deconstruction of the public/private dichotomy.[58] Over the last decade, drastic changes

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[55] Case C-243/95 *Hill and Stapleton* [1998] ECR I-3739 at paragraph 42; see C. Farrelly and C. McGlynn, 'Equal Pay and the "Protection of Women within Family Life"', *European Law Review*, 24(2) (1999), 202–207.

[56] Case C-243/95 *Hill and Stapleton* [1998] ECR I-3739 at paragraph 42.

[57] Case 184/83 *Hofmann* [1984] ECR 3047 at paragraph 24.

[58] See G. James, *The Legal Regulation of Pregnancy and Maternity in the Labour Market*, (London: Routledge-Cavendish, 2009), Chapter 1, 'The Development of

in society, and more specifically in the family (the private sphere) and the employment market (the public sphere), have questioned this traditional concept of reconciliation geared towards mothers. The composition of European society has undergone considerable transformation: data confirms that there is a trend towards decreased birth rates and an increase in the elderly population and this trend is accelerating.[59] Life expectancy continues to rise in developed countries and the European Commission's Green Paper on Demographic Change predicted that the ratio of the population aged between 0 and 14 and over 65 years (the demographic dependency ratio) would rise from 49 per cent in 2005 to 66 per cent in 2030.[60] This has changed the overall picture of the individuals in society who need care: reconciliation measures can no longer be limited to caring for young children but need to be reshaped in order to include the somewhat different needs of older people and, more generally, adapting working responsibilities to family needs.

These societal challenges are met by changes in the family and in the employment market. The family is perhaps the institution which has mostly been under scrutiny. Changes to the very nature of intimate relationships which are now more pure,[61] fluid, individualistic and continually reorganised,[62] have resulted in changes in traditional family values, structure, roles and the assumptions behind them. Traditional family *values* such as the role and authority of the pater familias and the

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the Reconciliation Principle in EU Discourse', and the discussion in the previous section, 'The Traditional Framework'.

[59] Communication from the European Commission, 'Green Paper: Confronting Demographic Change: A New Solidarity between the Generations', COM(2005) 94 final; Communication from the Commission 'Promoting Solidarity between Generations', COM(2007) 244 final.

[60] Communication from the European Commission, 'Green Paper: Confronting Demographic Change: A New Solidarity between the Generations', COM(2005) 94 final, p. 4.

[61] R. E. Bellah, R. Madsen, W. M. Sullivan, A. Swider, and S. M. Tipton, *Habits of the Heart: Individualism and Commitment in American Life* (Berkeley: University of California Press, 1985 and 1996) quoted in J. Eekelaar, *Family Law and Personal Life* (Oxford: Oxford University Press, 2007), p. 24.

[62] A. Giddens, *The Transformation of Intimacy: Sexuality, Love and Eroticism in Modern Society* (Cambridge: Polity, 1992); E. Beck-Gernsheim, *Reinventing the Family: in Search of New Lifestyles* (Cambridge: Polity, 2002). For a thorough discussion see J. Eekelaar, *Family Law and Personal Life* (Oxford: Oxford University Press, 2007) Chapter 1, 'The Development of the Reconciliation Principle in EU Discourse'.

institution of marriage have been questioned. This has led to an increase in the number of divorces, fewer marriages, more atypical and de facto unions, more reconstituted and also more single parent (often mother) families.[63] The changes in the *structure* of the family and the rise of the so-called 'non-conventional' family have shaken the traditional understanding of what a 'family' is. Yet, a precise definition remains crucial, as only unions falling within this category will be covered and protected by the relevant legislation. Changes in the structure of the family have gone hand in hand with a redistribution of the *roles* within the family.[64] If the entry of women into the paid labour market has meant that they now take for granted their productive, as well as reproductive, role and thus have prompted a rethinking of the model of motherhood, we are now also witnessing a cultural shift in the perception of fatherhood. Fathers now appear to be willing to take an active part in the daily upbringing of their children and, more importantly, they appear to value the time spent with them above their work commitments.[65] Yet, some aspects of family life have not experienced the same degree of change: women, on average, continue to spend more time than men on domestic (unpaid) work[66] and this often means that women, in particular when they become mothers, continue to experience a 'double shift'.[67] The 1990s EU policies obstinately 'lacked reference to women's double burden' of paid and unpaid domestic work.[68]

Although the family has changed and is becoming more diversified than ever before, a survey compiled by Eurobarometer in 2006

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[63] L. Hantrais, *Family Policy Matters. Responding to Family Change in Europe* (Bristol: The Policy Press, 2004).

[64] J. Lewis, 'The Changing Context for the Obligation to Care and to Earn', in *Family Law and Family Values* (Oxford: Hart, 2005), 59–77.

[65] M. Brien and I. Shemilt, 'Working Fathers – Earning and Caring', EOC Research and Discussion Series & Working Papers (2003); C. McGlynn, 'Work, Family and Parenthood', in J. Conaghan and K. Rittich (eds), *Labour Law, Work and the Family* (Oxford: Oxford University Press, 2005), 217–236.

[66] C. Aliaga, 'How Is the Time of Women and Men Distributed in Europe?', *Eurostat Statistic in Focus – Population and Social Conditions*, 4 (2006), p.1; L. Craig, *Contemporary Motherhood: The Impact of Children on Adult Time* (Aldershot: Ashgate, 2007).

[67] A. Mochschild quoted in G. James, *The Legal Regulation of Pregnancy and Parenting in the Labour Market* (London: Routledge Cavendish, 2009); T. Hervey and J. Shaw, 'Women, Work and Care: Women's Dual Role and Double Burden in EC Sex Equality Law', *Journal of European Social Policy*, 8 (1998), 44–63.

[68] R. Guerrina, *Mothering the Union: Gender Politics in the EU* (Manchester: Manchester University Press, 2005), p. 83.

indicated that in most Member States, European citizens rate family as one of the three most important aspects of life (health and friends being the other two).[69] The changes in the family have been supported by the case law of the European Court of Human Rights (ECtHR) which has gradually, and indistinctly, used concepts such as 'family', 'family life', 'family ties', 'family relation' and 'family cell'. It explicitly acknowledged that 'family' can result, *among other things*,[70] from a marriage: 'the notion of family under [Article 8 of the European Convention on Human Rights] is not confined to marriage-based relationships and may encompass other de facto family ties where the parties are living together out of wedlock';[71] it also 'may encompass other de facto relationships';[72] and finally Article 8 'makes no distinction between the "legitimate" and the "illegitimate" family'.[73] The ECtHR's dynamic interpretation of the definition of family life best represents the evolving societal structure.[74] It also had a concrete impact on the signatory Member States which are now under both a negative as well as a positive obligation

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[69] Eurobarometer, 'European Social reality', 273 (February 2007), p. 14.

[70] ECtHR, *Abdulaziz, Cabales et Balkandali* v. *United Kingdom* Judgement of 28 May 1985, application number 15/1983/71/107–109. The ECtHR held '[w]hatever else the word "family" may mean, it must at any rate include the relationship that arises from a lawful and genuine marriage' and 'it is scarcely conceivable that the right to found a family should not encompass the right to live together' at paragraph 62 of the judgement.

[71] ECtHR, *Elsholz* v. *Germany* Judgement of 13 July 2000, application number: 25735/94 at paragraph 43.

[72] ECtHR, *X, Y, Z* v. *the United Kingdom* Judgement of 22 April 1997, application number: 75/1995/581/667 at paragraph 36. The ECtHR held that '[w]hen deciding whether a relationship can be said to amount to 'family life', a number of factors may be relevant, including whether the couple live together, the length of their relationship and whether they have demonstrated their commitment to each other by having children together or by any other means'. See also the *Marckx* v. *Belgium* Judgement of 13 June 1979, Series A no. 31, p. 14, paragraph 31, the *Keegan* v. *Ireland* Judgement of 26 May 1994, Series A no. 290, p. 17, paragraph 44 and the *Kroon and Others* v. *the Netherlands* Judgement of 27 October 1994, Series A no. 297–C, pp. 55–56, at paragraph 30.

[73] ECtHR, *Marckx*, where the Court held that the State not only has the (passive) obligation to abstain from arbitrary interference into individuals' family life, but 'in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective "respect" for family life'.

[74] F. Sudre, 'La "construction" par le juge européen du droit au respect de la vie familiale', in *Droit et Justice*, Acte du colloque des 22 et 23 mars 2002 organisé par l'institut de droit européen des droits de l'homme (Brussels: Bruylant, 2002).

to actively 'allow those concerned to lead a normal family life'[75] and has triggered a (albeit disappointing) debate at EU level.[76] This debate is likely to gain importance as Article 6 of the Treaty of Lisbon provides that '[t]he Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms'. The same provisions also reiterates that fundamental rights, as guaranteed by the ECtHR, shall constitute general principles of the Union's law. This implies that the concept of family in EU law will have to be interpreted in a broader way.

In addition, the nature of employment and the traditional structure of the workplace (the public sphere) have been questioned.[77] Yet, the very role of employment has remained unaltered; this has been recognised and celebrated at both the national[78] and international level.[79] Employment is not only important because it contributes to the maintenance of society's overall economy, but also because it gives individuals their main source of income and wealth; by means of employment individuals achieve social security and financial independence which allow them to make choices. In turn, the possibility of making choices brings freedom. Furthermore, employment provides the forum where people can build their social relationships and seek meaning for their lives. Thus, employment provides 'purposeful activity and personal fulfilment, dignity, social contacts, recognition and a basis for organising daily or weekly time'.[80] The wider scope of employment has been acknowledged by the EU which includes amongst its aims 'the raising of the standard of living and quality of life' (Article 2 TEU). Along the same vein, the Treaty of Amsterdam committed the EU to achieving 'a high level of employment' (Article 2 TEU) and this commitment has been

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[75] ECtHR, *Marckx*, p. 14 paragraph 31.

[76] Inter alia, M. Bell, 'We are Family? Same-sex Partners and EU Migration Law', *The Maastricht Journal of European and Comparative Law*, 9 (2002), 335–355.

[77] See further the discussion in Chapter 3, 'The Time Provisions'.

[78] For example, Article 1 of the Italian Constitution states that 'Italy is a democratic republic founded on employment'.

[79] See for example also Article 15 of the EU Charter of Fundamental Rights, '[e]veryone has the right to choose an occupation and the right to engage in work (...)'.

[80] European Commission, Communication by Mr Flynn, 'Green Paper, European Social Policy – Options for the Union', COM(93) 551, at 19. See also H. Collins, K. Ewing, and A. McColgan (eds), *Labour Law, Text and Materials* (Oxford: Hart Publishing, 2005).

reiterated on several occasions, inter alia in the Lisbon Strategy.[81] In other words, employment must be fulfilling and this goes hand in hand with quality of life. When it comes to workers (in particular mothers) with family responsibilities, however, this can be far from the truth.

Traditionally in Western Europe, the employment relationship was constructed according to the Fordist model, which offered jobs for life with standard working hours.[82] Such a model presupposed a strong male breadwinner structure, with a (male) full-time employee who did not have any other commitments and was able to concentrate exclusively on his job: an employee with a wife dealing with all the issues stemming from his private life. This model disregarded the contribution of unpaid employment which consequently became invisible. The Community's legal order was largely based on this model and this should hardly be surprising, given that it was established as an economic organisation. As the market-oriented element clearly defined the Community's competencies, the concept of 'workers' contained in Article 39 (previously Article 48) EC was consistently interpreted as meaning only those pursuing, or wishing to pursue, 'a genuine economic activity'[83] and excluded unpaid contributions.[84] Recent events such as the entry into the workplace of a considerable number of women[85] and the evolving needs of the market in the sense of the growing service-based economy and globalisation,[86] have meant that traditional structures are no longer viable[87] and new forms of employment which have challenged the 9 to 5 full-time (and

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[81] W. Kok, *Facing the Challenge: The Lisbon Strategy* (2004).

[82] G. James, *The Legal Regulation of Pregnancy and Parenting in the Labour Market* (London: Cavendish-Routledge, 2009); R. Crompton, *Employment and the Family* (Cambridge: Cambridge University Press, 2006), Chapter 1.

[83] Case 53/81 *Levin* v. *Staatssecretaris van Justitie* [1982] ECR 103; see also Case 344/87 *Bettray* v. *Staatssecretaris van Justitie* [1989] ECR 1621.

[84] See, for example, Case 150/85 *Drake* [1986] ECR 1995. I. Moebius and E. Szyszczak, 'Of Raising Pigs and Children', 18 *Yearbook of European Law* (Cambridge: Cambridge University Press, 1998), 125–156.

[85] See discussion in the previous section.

[86] See further J. Conaghan, R. M. Fishl, and K. Klare (eds), *Labour Law in an Era of Globalisation: Transformation, Practices and Possibilities* (Oxford: Oxford University Press, 2002).

[87] For a more detailed discussion in this book see Chapter 3, 'The Time Provisions'; see also R. Crompton and F. Harris, 'Attitude, Women's Employment and Changing Domestic Division of Labour: A Cross National Analysis' in R. Crompton (ed.), *Restructuring Gender Relations and Employment* (Oxford: Oxford University Press, 1999), 105–127.

male) standard have emerged.[88] This has created a growing demand for employees who need to be flexible, willing to retrain or to work 'atypical' hours.[89]

The changes described above have created a more fluid society where the concept of reconciliation presents new perspectives and specific challenges. Reconciliation has become a more complex concept to engage with. If it was traditionally seen as a 'women's issue', it now matters to more people, regardless of their age, gender and whether or not they are a primary carer. At the same time, there are more people to care for and, paradoxically, fewer carers.[90] But is the legislation up to the challenge? And, more specifically, can such a challenge be confronted by the EU?

Aim, method and structure of the book

Against this background, we seek to scrutinise the evolution of the reconciliation principle and how this fits into the fast-changing EU legal framework. For this purpose, we deconstruct the relevant EU measures, both in terms of policy and legislation, with a view to establishing a conceptual framework in this area to underpin the relevant legislation as well as to support future developments. Ultimately, we advocate an 'EU family principle'[91] rooted in human rights where caring should be seen as 'an ongoing process that demands our attention daily and thus should figure prominently in any scenario for future social policy'.[92]

In our analyses, we have found it useful to refer to a feminist perspective. Broadly speaking, the law does not attach particular legal

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[88] See further the discussion in this book in Chapter 3, 'The Time Provisions'; D. Perrons and W. Sigle-Rushton, 'Employment Transitions over the Life Cycle: A Literature Review' (2006) EOC Working Paper Series n. 47.

[89] G. James, *The Legal Regulation of Pregnancy and Parenting in the Labour Market* (London: Routledge Cavendish, 2009).

[90] K. Fredriksen-Goldsen and A. Scharlach, *Family Care and Work: New Directions in the Twenty-First Century* (Oxford: Oxford University Press, 2001), p. 7.

[91] The expression is borrowed from J. Kristiansen, 'Familielivbeskyttelse i arbejdsretten', in H. Petersen (ed.), *Kvindelig arbejdsret* (Copenhagen: Gad Jura, 1995), p. 41; see also E. Vigerust, *Arbeid, barn og likestilling* (Oslo: Tano Aschehoug, 1998).

[92] S. Sevenhuijsen, 'A Third Way? Moralities, Ethics and Families: An Approach through the Ethic of Care', in A. Carling, S. Duncan, and R. Edwards (eds), *Analysing Families* (London: Routledge, 2002), p. 138.

significance to the fact of 'being a woman'.[93] However, in reality, men and women lead different kinds of lives with different expectations, needs and opportunities and therefore legal rules necessarily affect them in different ways. The raison d'être of a feminist perspective is therefore to analyse the impact that the law has on women and how it responds to their constructed reality. In this book we use feminist legal theory as a method of analysis;[94] its main contribution lies in the fact that it provides a new, critical method of interpretation of the relevant legal provisions.[95] When discussing the impact of a specific area of law on women, however, it must not be forgotten that a single category of women does not exist: women's individual positions differ depending on several elements, such as their social and cultural background or financial situation.[96] Reconciliation policies clearly illustrate this.[97] For example, the very construction of the 'good mother' linked exclusively to the private domain was a class concept, which differentiated bourgeois or higher-class mothers from working-class mothers who always worked in addition to raising their children and taking care of the household. Furthermore, specific reconciliation policies can be perceived and used differently by different groups of women. Indeed, the single mother, who cannot afford to work full-time because of the prohibitive cost of childcare, differs from the middle-class mother who relies on her husband's income and chooses to work part-time to spend more time with her children.

In the context of this book, the feminist's perspective approach is relevant as reconciliation has, at least historically, affected mainly women. It is therefore used as a critical tool to analyse the gender-equality principle and as the basis of a legal framework in the area of reconciliation.

We have also found that our discussion benefits from a – broadly speaking – comparative law approach. As this book analyses how

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[93] T. Stang Dahl, *Women's Law* (Oslo: Norwegian University Press, 1987).

[94] T. Stang Dahl, 'Fra kvinners rett til kvinnerett', *Retfærd Juridisk Tidsskrift*, 37 (1987), p. 67.

[95] T. Eckoff, 'Can We Learn Anything From Women's Law?', in *Methodology of Women's Law* Studies in Women's Law n° 27 Institutt for offentlig retts skrifteserie, 7(38) (1988).

[96] Inter alia, C. Smart, 'The Woman of Legal Discourse', *Social and Legal Studies* 1(29) (1992), 29. See also S. Walby, *Gender Transformation* (London: Routledge, 1997); P. Smith, 'On Law and Legal Theory', in P. Smith (ed.), *Feminist Jurisprudence* (Oxford: Oxford University Press, 1993), p. 483.

[97] R. Crompton, *Employment and the Family: The Reconfiguration of Work and Family Life in Contemporary Societies* (Cambridge: Cambridge University Press, 2006).

reconciliation has evolved in the EU, at times it has been necessary to refer to the relevant domestic provisions of individual Member States to further our understanding of this area. EU law, in fact, reflects the Member States' positions and at the same time is able to influence their individual approaches. Comparative law compares different legal systems with the purpose of ascertaining their similarities and differences. It ultimately aims towards:

> working with the similarities and differences that have been ascertained, for instance explaining their origin, evaluation of the solutions utilized in the different legal system, grouping of legal systems into families of law, or searching for the *common core of the legal system*.[98]

Comparative studies provide a major contribution to legal education and research. They can explain the genesis of a specific piece of legislation, help us to group different legal orders into the same family and explain why and how they have evolved similarly or differently. Using comparative law also facilitates an appreciation of how a specific problem has been tackled and solved in a legal system with a view to seeking the best solution elsewhere; ultimately this can lead to a 'legal transplant'.[99] More simply, comparative studies can provoke critical thinking and promote policy learning and innovation.

In this book we refer to different Member States in order to assess whether there are substantial differences between them and explore what can be used as a common platform to develop this area. However, we acknowledge that there are difficulties in this approach which can ultimately render the comparison ineffective or misleading. Although the EU Member States might have broadly similar standards of employment legislation and protection, they differ in their welfare structures, which often indicates that they have access to different resources. More importantly, however, they differ in the cultural and traditional values underpinng the development of the relevant policies and strategies: who will look after children? Who will adjust his/her working life to cater for the family needs?

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[98] M. Bogdan, *Comparative Law* (Oslo: Kluwer Nortstedts Juridik Tano, 1994), p. 18, emphasis added.

[99] Inter alia, H. Collins, 'Methods and Aims of Comparative Contract Law', *Oxford Journal of Legal Studies*, 11(3) (1991), 396–406; O. Kahn-Freund, 'On Uses and Misuses of Comparative Law', *The Modern Law Review*, 37(1) (1974), 1–27.

This book is organised in four main chapters. In Chapter 1 (The Development of the Reconciliation Principle in EU Discourse), we analyse the evolution of the principle of reconciliation in the EU with a view to highlighting the recent policy shift in this area. Such a principle, although it has been on the agenda for several decades, has not been developed as a self-standing concept but as part of (admittedly often successfully) other specific strategies, namely gender equality, economic and, more recently, as a human rights discourse.[100] This chapter considers how EU legislative instruments including hard and soft law, the Open Method of Coordination (OMC), and ECJ case law have shaped the principle. We also look at the rationale that has prompted and underpinned EU intervention in this area over the years.

Against this background, the book continues with an investigation of the three types of measures which are normally associated with reconciliation – leave, time and care – with a view to assessing their contribution to this area.[101] The leave provisions, namely the provisions granting workers the right to take time off in order to care for their children or other relatives in need, and their social implications are the focus of Chapter 2 (The Leave Provisions). These measures are maternity, paternity and parental leave. We submit that amongst the leave measures, parental leave is potentially the most important and certainly the most interesting for the academic debate, as it is the only one which can truly bring about social change. At the same time, however, depending on its practical implementation, it can entrench stereotypes. More than a decade after the implementation of the Parental Leave Directive, the situation remains disappointing. In this chapter we argue that, at the time of writing, these provisions are limited as they are mainly geared towards parents (in particular, mothers) of young children and to the 'traditional family'. Consequently, they exclude a vast number of people with different caring responsibilities and needs, such as the elderly, disabled people or step-children. The leave provisions also include a situation which has, until recently, been

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[100] J. Lewis, 'Work/Family Reconciliation, Equal Opportunities and Social Policies: The Interpretation of Policy Trajectories at EU Level and the Meaning of Gender Equality', *Journal of European Public Policy*, 13(3) (2006), 420–437.

[101] S. Hadj Ayed and A. Masselot, 'Reconciliation between Work and Family Life in the EU: Reshaping Gendered Structures?', *Journal of Social Welfare and Family Law*, 26(3) (2004), 325–338.

largely missing from the academic debate, namely the possibility of taking leave for family emergencies. As family emergencies are not restricted to children, this chapter argues that this is the only truly 'family-friendly' binding measure and the one which is best suited to addressing the needs of an evolving society. But has the potential of this provision been fully addressed?

In Chapter 3 (The Time Provisions), we discuss the provisions which allow workers to alter their working arrangements. These cover a vast array of working arrangements and are a necessary corollary of the leave provisions: a system of leave might mean little in practice if it is not followed by the possibility of re-arranging working hours on a more permanent basis. Such provisions can also offer a good solution to workers with wider caring responsibilities, for example, to elderly or dependent parents. Superficially, at least, these provisions are the most important part of the reconciliation measures as they provide parents and/or carers with a flexible, long-term solution. However, the EU has not yet developed a system of working arrangements geared specifically towards working carers. A closer analysis reveals that these provisions are not designed with the needs of individuals in mind: rather, they are concerned with satisfying economic needs. They can therefore be truly family-unfriendly.

Finally, Chapter 4 (The Care Strategy) explores the existing care facilities. It argues in favour of a more structured system, intended as both child and adult care. To date, care provisions at EU level have been addressed primarily in terms of statistics regarding the Member States' position where the standard and availability of such provisions has varied greatly. When addressed by the EU legislator, it has been in terms of soft law. Yet, there is a clear relationship between such measures and the employment of carers. Therefore, these provisions are an essential element of reconciliation and they are likely to receive increasing attention from policy-makers. Indeed, it is arguable that the lack of care provisions has the potential to become grounds for claiming discrimination on the same footing as pregnancy and maternity discrimination. Care provisions, however, especially when considered in isolation, cannot address the gender-equality issues underlying the reconciliation debate as they do not imply a reconsideration of the balance of care responsibilities within the family. Accordingly, the development of a specific set of care provisions available for the benefit of frailer members of society is crucial. This chapter critically analyses this gap in the EU provisions on reconciliation and seeks to suggest a new way forward.

The conclusion draws together the analyses presented in the previous chapters and emphasises that satisfactory reconciliation measures must be underpinned by a comprehensive theoretical framework. Accordingly, it proposes a new structure to address the relevant measures. The three rationales – gender equality, economics and human rights – are all crucial for the development of the concept. Equally, it is imperative that the three sets of provisions – leave, time and care – are regarded as complementary and not mutually exclusive and that they are developed at the same speed.

1
The Development of the Reconciliation Principle in EU Discourse

Introduction

Neither the concept of reconciliation of work and family life nor family policies[102] were contemplated by the original Treaty of the European Community. This is unsurprising in an economically oriented Treaty, the primary aim of which was to create a single market. The Treaty of Rome was market-making rather than market-correcting and it aimed to create an integrated labour market that functioned efficiently, rather than to correct its outcomes in line with political standards of social justice.[103] Such an approach was reinforced by the European Court of Justice (ECJ) which was initially reluctant to deal with questions concerning the family, its organisation and the division of responsibility between parents.[104] Accordingly, in this context, social goals were seen as merely side issues to achieving greater economic integration.[105] Over the last two decades, however, the political and legal context has changed dramatically and in recent years there has been a substantive shift towards more social-based legislation. In particular, the Treaty of Amsterdam made it clear that equality is to be viewed as a proactive

[102] See the discussion in the Introduction.

[103] W. Streeck, 'Neo-Voluntarism: A New Social Policy Regime', *European Law Journal*, 1 (1995), p. 31.

[104] Case 184/83, *Hofmann* [1984] ECR 3047.

[105] B. Ohlin, 'Social Aspects of European Economic Co-operation: Report by a Group of Expert', *International Labour Review*, 102 (1956), 99, further discussed in C. Barnard, 'The Economic Objectives of Article 119', in T. Hervey and D. O'Keeffe (eds), *Sex Equality Law in the European Union* (Chichester: Wiley, 1996), 321–334.

obligation within the EU.[106] As a result of this process, reconciliation has gradually been included in the agenda. Its development, at least at an early stage, has been ancillary to the development of other issues rather than as a stand-alone concept. This was also the trend at national level where measures to combine work and family life were initially addressed, more or less successfully, as part of broader welfare policies.[107] This has never been the case of the EU which does not, strictly speaking, have a welfare state.[108] Instead, reconciliation within the EU was first addressed within gender equality policies although its potential as an economic tool was also quickly unveiled. More recently reconciliation has increasingly been described as a human right. The main implication of such an approach is that it becomes a *right* for mothers, fathers, and carers in general and would be available to any family formation. The precise identification of the strategy underpinning the reconciliation discourse is important in order to fully assess the EU competencies in this area and thus the way forward.

Over the years, the principle of reconciliation has been steadily shaped and developed thanks to the interplay of several actors, in particular the Community political institutions (Parliament, Council and Commission) and the Social Partners namely UNICE (Union of Industrial and Employers' Confederation of Europe, now Business Europe), CEEP (European Centre of Public Enterprises), ETUC (European Trade Union Confederation) and UEAPME (European Association of Craft, Small and Medium-Sized Enterprises).[109] The European Parliament and the Commission have consistently called for improvements to existing legislation with a view to promoting reconciliation.[110] Equally, the EU Council has stressed the need for reconciliation, although its main focus has been achieving economic growth and improving women's position in the employment market.[111] In addition, reconciliation has been on

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[106] A. Numhauser-Henning, 'EU Sex Equality post-Amsterdam', in H. Meenan (ed.), *Equality Law in an Enlarged European Union* (Cambridge: Cambridge University Press, 2002), 145–177.

[107] A. Leira, *Working Parents and the Welfare State* (Cambridge: Cambridge University Press, 2007).

[108] See T. Hervey, *European Social Law and Policy* (Harlow: Longman, 1998).

[109] On the role of the Social Partners see C. Barnard, *EC Employment Law* (Oxford: Oxford University Press, 2006) and the extensive bibliography.

[110] See for example the European Parliament Resolution on 'Reconciling professional, private and family lives', 2003/ 2129 (INI) P5_TA (2004) 0152.

[111] See, inter alia, Conclusion of the Presidency of the Brussels European Council (23 and 24 March 2006) in particular Paragraph 40; and the 2002

the agenda of the Social Partners for many years. The Social Partners were incorporated into the EU law making process in the 1980s and have made an important contribution towards the promotion of reconciliation. They have prompted measures in areas such as parental leave and the organisation of working arrangements. They have recently reiterated their commitment to reconciliation in the Framework of Actions on Gender Equality[112] by setting four priorities namely, addressing gender roles; promoting decision-making; supporting work-private life balance and tackling the gender pay gap. The interplay of these actors has produced a mix of soft and hard law. Although the very mixture of these provisions has proved an asset in such a complex area of law, they are not always in tune with each other and arguably this has not helped the coherence of the discourse.

Soft law measures play an important role in this area and are responsible for having put the issue on the EU agenda and encouraged an ongoing debate.[113] Suffice it to say that, as early as 1974, the Social Action Plans called for the implementation of measures for the purpose of achieving equality between men and women in the workplace, and in particular with the aim 'to ensure that the family responsibilities of all concerned may be reconciled with their job aspirations'.[114] This commitment was reiterated on several occasions. The subsequent Action Programmes have not merely emphasised the importance of the principle, but have also triggered further measures. For example, the Commission draft Directive on Parental Leave and Leave for Family Reasons followed the suggestions made in the First Action Programme on the Promotion of Equal Opportunities for Women (1982–5). In the past two decades, the Commission has steadily issued documents such as Recommendations and Communications to herald the importance of reconciliation. Although not legally binding, these documents have

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Barcelona Summit where the Council agreed that Member States should remove disincentives to female labour force participation and the Presidency Conclusions of the European Council (March 2005) which re-launched the Lisbon Strategy.

[112] UNICE/UEAPME, CEEP and ETUC, Framework of Actions on Gender Equality, 2005.

[113] On the role of soft law see generally F. Beveridge and S. Nott, 'A Hard Look at Soft Law', in P. Craig and C. Harlow (eds), *Law Making in the European Union*, W. G. Hart Legal Workshop Series, IALS (The Hague: Kluwer, 1998), 285–309; see also C. McGlynn, 'Work, Family and Parenthood: The European Union Agenda', in J Conaghan and K. Rittich (eds), *Labour Law, Work and Family* (Oxford: Oxford University Press, 2005), 217–236.

[114] Social Action Programme 1974, EC Bull Supp 2/74.

certainly contributed to creating a favourable environment for reconciliation. However, it was only after the Lisbon (2000) and Barcelona (2002) European Council[115] and the application of the Open Method of Coordination (OMC) to social policy that the potential of soft law in this area has been fully unveiled.[116] In broad terms, rather than a form of legislation, OMC is a system that relies on regular monitoring of progress to meet specified agreed targets, thus allowing Member States to compare their efforts and learn from the experiences of others. In the words of the Commission, it is 'a means of spreading best practice and achieving greater convergence towards the main EU goals'.[117] Thus, although OMC is not, strictly speaking, a form of soft law, the two share some important features. Most notably, neither is legally binding under Community law, and there is no set mechanism to ensure enforcement. The main difference remains that, whilst the main aim of 'traditional' soft law is to emphasise general principles and declarations of intention, the OMC is a process of cross national policy learning where 'the objective is not to achieve a common policy in selected issue areas, but rather to institutionalise process for sharing policy experience and the diffusion of best practice.'[118] Such a process can be criticised for lacking in transparency and essentially being left to the Member States to operate.[119] Also, OMC measures lack the involvement of both the European Parliament and the Court of Justice. The absence of these institutions, especially of the European Parliament, is regrettable as they have often supported and given a favourable input to reconciliation. With that said, for its specific features OMC is particularly suitable for encouraging the development of reconciliation where a more formal approach will not always be successful or desirable: a good example is in the area of care, in particular childcare.[120]

Overall, soft law measures, both traditional and OMC, have proven to be an asset to reconciliation but regrettably this potential has not been

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[115] Respectively, European Council of Lisbon, 23–24 March 2000, Presidency Conclusions, http://www.europarl.europa.eu/summits/lis1_en.htm, 15–16 March 2002, Presidency Conclusions, document SN 100/1/02 REV 1.

[116] See in particular, the discussion in Chapter 4, 'The Care Strategy'.

[117] COM (2002) 629, paragraph 14.

[118] G. Esping-Andersen, D. Gallie, A. Hemerijk, and J. Miles, *A New Welfare Architecture for Europe?* Report Submitted to the Belgian Presidency of the European Union, September 2001.

[119] See for instance: F. Beveridge and S. Velluti, *Gender and the Open Method of Coordination Perspectives on Law, Governance and Equality in the EU* (Dartmouth: Ashgate, 2008).

[120] See further discussion in Chapter 4, 'The Care Strategy'.

matched by the legislator. Hard law measures are the EU's primary and secondary legislation. Traditionally, reconciliation has been addressed indirectly by secondary legislation namely Directives, in particular the original Equal Treatment,[121] Pregnant Workers,[122] Parental Leave,[123] Working Time,[124] Part-Time Work,[125] Fixed-Term Work[126] and the recently adopted Recast[127] Directives. These Directives, however, are not all based on the same principles: their different objectives are reflected in their various legal bases. The Equal Treatment Directive is based on Article 235 EC (now 308 EC) which emphasises its underlying economic rationale; the Pregnant Workers Directive on Article 118a EC, a health and safety provision; whilst the legal base of the Parental Leave Agreement/Directive is to be found in Article 2 of the Social Policy Agreement (now 137 EC) annexed to the EC Treaty by the Treaty of Maastricht (now Article 138 EC) and this is clearly a socially-oriented measure. A further dimension is added by the Recast Directive based on Article 141 EC which mirrors the general shift triggered by the Treaty of Amsterdam from non-discrimination to the promotion of equality of opportunities.[128] Crucially, the preambles of all these measures expressly link the leave provisions to the general aim of gender equality.

Prima facie, the combined application of these Directives has created a minimum standard, a safety net, on which parents, and to a certain

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[121] Council Directive 76/207/EEC, OJ [1976] L39/40 as amended by Directive 2002/73/EC, OJ [2002] L269/15.

[122] Council Directive 92/85/EEC, OJ [1992] L348/1, now under revision Proposal for a Directive of the European Parliament and of the Council 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) 600/4.

[123] Council Directive 96/34 EC, OJ [1996] L145/04.

[124] Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time, OJ [1993] L307/18; now Directive 2003/88/EC, OJ [2003] L 299/9.

[125] Council Directive 97/81/EC, OJ [1998] L14/9.

[126] Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, OJ [1999] L175/43.

[127] 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 [2006] L/204.

[128] Ibid.; on the Recast Directive see, N. Burrow and M. Robinson, 'An Assessment of the Recast of Community Equality Laws', *European Law Journal*, 12 (2007), 186–203.

extent also carers, within the territory of the EU, can rely; their diversity has ensured that all the relevant issues related to reconciliation are contemplated. A closer look, however, reveals that the different legal bases of the Directives have de facto caused a multi-speed approach where the economic dimension is prioritised. Furthermore, the Directives have mainly codified the existing position of the Member States, often without adding much, and are therefore failing to challenge the basic assumptions of traditional arrangements. Recently, however, reconciliation has been elevated to primary legislation and has been inserted into the Lisbon Treaty.[129] The latter gives binding legal status to the EU Charter of Fundamental Rights[130] whose article 33(2) expressly mentions the concept of reconciliation between work and family life. Regrettably, there are uncertainties surrounding the Charter, inter alia that it merely follows the path of the secondary legislation and adds little to the existing national legislation.[131]

Finally we cannot forget the contribution of the case law of the ECJ and its ongoing dialogue with the Member States. From the early judgments protecting emerging maternity rights in Europe, the Court has increasingly promoted a broad interpretation of reconciliation.[132] Litigation is a very important part of such a debate, not only because it delivers individual justice,[133] but also because it has prompted policy and legislative action as well as clarifying and further developing the relevant legislation. In very broad terms, the case law of the Court can be divided into two main categories: pre and post the entry into force of the Treaty of Amsterdam. Before Amsterdam, the traditional approach of the Court failed overall to either capitalise on the potential of the soft law measures or to improve the scope of application of hard law. By distinguishing between the role of women *qua employees* and *qua mothers*, the Court promoted their rights in the workplace but

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[129] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ [2007] C 306/1.

[130] OJ (2007) C 303/1.

[131] See further discussion on p. 41.

[132] E. Caracciolo di Torella and A. Masselot, 'Pregnancy, Maternity and the Organisation of Family Life: An Attempt to Classify the Case Law of the Court of Justice', *European Law Review*, 26 (2001), 239–260; S. O'Leari, *Employment Law at the European Court of Justice* (Oxford: Hart Publishing, 2002), in particular Chapter 5.

[133] On this point see further G. James, *The Legal Regulation of Pregnancy and Parenthood* (London: Cavendish-Routledge, 2009).

at the same time emphasised their role as primary carers.[134] As such, the Court encouraged a traditional form of family where parents have different roles.[135] The changes introduced by the Treaty of Amsterdam have brought a different policy climate.[136] The new proactive gender-equality agenda and the introduction of the Employment Title have equipped the Court with new tools for addressing reconciliation. Also of some potential relevance has been the fact that around the same time a number of female judges and Advocates-General were appointed and this has, to some degree, had an impact on the agenda.[137]

In this chapter we focus on the development of the concept of reconciliation from an ancillary policy to a fully fledged, core element of EU law. It aims to outline the theoretical framework, the main actors and legislative tools involved in promoting reconciliation as well as to map the chronological development of the concept. The overall aim of the chapter is to equip the reader with the necessary background to appreciate the present legal position as discussed in the remainder of the book.

The underlying conceptual approach

Reconciliation is first of all a sociological concept: it is closely linked to how we view the position and the role of individuals – men and women – in the family, and more generally in society.[138] Accordingly, the policies and legal provisions adopted to regulate reconciliation can only be understood in light of the underlying broader discourse. There are two main approaches which support and frame the EU debate in this area: a traditional approach and a more modern and dynamic one. Intriguingly although prima facie conflicting, these two approaches seem to coexist and, naturally, this can create tension.

The traditional approach sees policy and legislative measures anchored in stereotypical assumptions on gender roles where mothers

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[134] E. Caracciolo di Torella and A. Masselot, 'Pregnancy, Maternity and the Organisation of Family Life: An Attempt to Classify the Case Law of the Court of Justice', *European Law Review* 26 (2001), 239–260.

[135] This position was initially expressed in Case 163/82 *Commission* v. *Italy* [1983] ECR 3273 and Case 184/83 *Hofmann*.[1984] ECR 3047.

[136] See further discussion on p. 39.

[137] C. Stix-Hackl, 'The Future of European Law from Women Lawyers' Perspective', Opening address to the 6th Congress of the European Women Lawyers Association, Budapest, 19–20 May 2006.

[138] See the discussion on the two spheres in the Introduction.

remain the main carers and in charge of household tasks.[139] While proponents of this approach might question the legitimacy of the assumptions, they generally submit that these are inevitable and inherent in society.[140] In light of this traditional approach therefore, the aim of reconciliation policies and legislation is to adjust women's work so as to make it feasible to balance different tasks.[141] This fails to challenge the status quo that women's (especially if they become mothers) role is that of caregiver and that men's role is the one of the main breadwinner. In other words, although women may enter paid employment, their role as caregivers remains unaltered. In addition, the traditional approach is framed on the dubious assumption that 'a family' is made up of a father, a mother and children.[142]

The second approach alternatively sees reconciliation as a more dynamic concept. In particular, it perceives it as an issue for both parents.[143] This approach therefore questions the traditional roles of mothers and fathers and promotes the 'shared roles model', a model originally theorised in the relevant Scandinavian literature.[144] This model presupposes that both parents have the same capacity for being both workers and carers and is made up of three elements: legal, economic and practical parenting.[145] Legal parenting refers to the legislative framework regulating the entitlements (both in terms of periods of leave and financial) of parents in order to care for new borns and young children; economic parenting indicates the obligation which parents have

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[139] R. Crompton and F. Harris, 'Attitude, Women's Employment, and the Changing Domestic Division of Labour: A Cross National Analysis', in R. Crompton (ed.), *Restructuring Gender Relations and Employment* (Oxford: Oxford University Press, 1999), 105–127.

[140] M. Barbera, 'The Unsolved Conflict: Reshaping Family Work and Market Work in the EU Legal Order', in T. Hervey and J. Kenner (eds), *Economic and Social Rights under the EU Charter of Fundamental Rights* (Oxford: Hart Publishing, 2003), 139–160.

[141] See the discussion in the Introduction.

[142] Inter alia, see C. McGlynn, 'Families and the European Union', in R. Probert (ed.), *Family Life and the Law* (Dartmouth: Ashgate, 2007), pp. 247–258.

[143] C. McGlynn, 'Reclaiming a Feminist Vision: The Reconciliation of Paid Work and Family Life in European Union Law and Policy', *Columbia Journal of European Law*, 7(2) (2001), 241–272.

[144] R. Liliestrom, 'Sweden', in S. B. Kamerman and A.J. Kahan (eds), *Family Policy: Government and Families in Fourteen Countries* (New York: Columbia University Press, 1978).

[145] K. Moxnes, *Kjerneprengning i familien?* (Oslo: Universitesforlaget, 1990).

to financially provide for their children; finally, practical parenting refers to the daily care of young children.[146] In addition, this approach acknowledges that reconciliation does not solely involve overburdened parents and children in 'traditional' families, but expands the scope of the debate to those with caring responsibilities in general. Ultimately, it has the benefit of promoting a new, more equal, way of organising family responsibilities and challenges the existing stereotypes that underpin the structure of the employment market and society in general.

It would be tempting to say that, after the entry into force of the Treaty of Amsterdam, we can witness in the EU an increasing move towards a more dynamic interpretation of reconciliation. Although in very broad terms this might appear to be the case, the reality is more complex. Indeed, stereotypes about mother's role and responsibilities have proven difficult to dismiss. Indeed Vladimír Špidla, the Commissioner for Employment, Social Affairs and Equal Opportunities, in 2008 commented on the Commission's most innovative proposal, namely the Work-life Balance Package, as a 'help [to] *women* to combine work and family life'.[147]

The historical development of reconciliation

Over the years, reconciliation has steadily developed from soft law to a core element of EU law. Its development can be broadly divided into four inter-related phases. This organisation is intended to aid our understanding of the evolution of reconciliation rather than suggesting a strict delineation of approaches.

The first phase: The establishment of equal pay

The first phase set the basis for the development of reconciliation. Yet, paradoxically reconciliation itself was not addressed. Instead, the principle of equal pay for equal value introduced in the Treaty of Rome by Article 119 EEC (now 141 EC). This provision was introduced thanks to a delicate mixture of economic and feminist claims. At the time of the Treaty negotiations, considerable differences existed between the scope and the content of the social legislation of the six founding Member States. Whilst France had a number of rules to protect workers, including

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[146] H. Kaul., 'Who Cares? Gender Inequality and Care Leave in the Nordic Countries', *Acta Sociologica*, 34 (1991), p. 115.

[147] Commission improves work-life balance for millions with longer and better maternity leave, Brussels 3 October 2008 IP/08/1450; emphasis added.

legislation on equality between men and women, Germany remained strongly committed to a minimum level of government interference in the area of wages and prices. Italy, too, despite having inserted the principle of equality in the Constitution, implemented the rule in a way which reflected women's domestic responsibilities rather than their full social involvement. Essentially France was concerned about the competitive disadvantages stemming from the lack of equal pay in other countries and Article 119 EEC reflected the compromise between the different standards. It thus 'responded above all to the fear that unless employment costs are harmonised, economic integration will lead to competition to the detriment of countries whose social legislation is more advanced.'[148] With that said, it must not be forgotten that the principle of equal pay was also a result of the activism of the feminist movement of the 1940s.[149] It was against this background that Walby commented that the inclusion of Article 119 in the Treaty 'should be seen as the working through of the implications of women winning political citizenship in much of Western Europe during the early decades of the twentieth century'.[150] The subsequent development of the equal pay principle, both in term of legislation and case law, is thus firmly rooted in economic and feminist considerations.

Article 119 EEC quickly became the 'spiritual parent' of all gender equality initiatives including the Equal Treatment Directive.[151] Despite this economic motivation, it paved the way for effective gender equality to enter the market. Seen it in this light, the principle of equal pay lays the foundations for all subsequent reconciliation measures: if women do not earn as much as their partners, the choice of who will reduce his/her working hours or even leave the job to care for a family will be a set one. If women continue to earn less than their male counterparts,

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[148] N. Valticos, *Droit International du Travail* (Paris: Dalloz, 1970) paragraph 80, quoted in M. Budiner, *Le Droit de la Femme à l'Egalité de Salaire et la Convention N° 100 de L'Organisation International du Travail* (Paris: Libraire Générale de Droit et de Jurisprudence, 1975), p. 3.

[149] C. Hoskyns, *Integrating Gender. Women, Law and Politics in the European Union* (London, New York: Verso, 1996).

[150] S. Walby, *Gender Transformations* (London: Routledge, 1997), quoted in C. McGlynn 'Reclaiming a Feminist Vision: The Reconciliation of Paid Work and Family Life in European Union Law and Policy', *Columbia Journal of European Law*, 7(2) (2001), 241–272.

[151] See further C. Barnard, 'The Economic Objectives of Article 119', in T. Hervey and D. O'Keeffe (eds), *Sex Equality in the European Union* (London: Wiley, 1996), 321–334.

in the interest of domestic economics it will be more likely that *they* will choose a financially less rewarding part-time job. The lack of equal pay is the primary reason for the gender pay gap: it is worrying that fifty years on from the Equal Treatment Directive's adoption, pay disparities remain open across Europe.[152]

The second phase: From 1974 to the late 1980s – The triumph of rhetoric

The second phase opened with the 1974 Social Action Program in which the term reconciliation was first officially employed.[153] This document 'took community policy [on reconciliation] in a potentially new, radical and dynamic direction.'[154] Yet, the push 'to ensure that the family responsibilities of *all* concerned may be reconciled with their job aspiration',[155] was in reality the push to allow *women* to reconcile work and family life. Therefore, at this stage reconciliation was intended first of all as a core element for the successful achievement of the gender equality strategy and equal opportunities. Indeed, there has always been an obvious link between reconciliation measures and gender equality: simply put, family responsibilities, in particular the daily upbringing of young children, was viewed as affecting men and women very differently. This is due to the many stereotypes and cultural factors which construct the mother as the primary and most natural carer of children, elderly parents and generally frailer members of the family.[156] Reconciliation is, however, the main reason why gender equality remains a struggle to be achieved:

> [e]ven where male and female candidates are equally qualified, male candidates tend to be promoted in preference to female candidates particularly because of prejudices and stereotypes concerning the role and the capacities of women in working life and the fear, for example, that women will interrupt their careers more frequently, that owing to household and family duties they will be less flexible

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[152] D. Grimshaw and J. Rubery, *The Gender Pay Gap: A Research Review* (Manchester: Equal Opportunities Commission, 2001).

[153] Social Action Programme 1974, EC Bull Supp 2/74.

[154] C. McGlynn, 'Reclaiming a Feminist Vision: The Reconciliation of Paid Work and Family Life in European Union Law and Policy', *The Columbia Journal of European Law*, 7(2) (2001), 241–272.

[155] Social Action Programme 1974, EC Bull Supp 2/74.

[156] L. Ackers, Shifting Spaces – Women, Citizenship and Migration in the European Union (Bristol: Policy Press, 1998).

> in their working hours, or that they will be absent from work more frequently because of pregnancy, childbirth and breastfeeding.[157]

At this initial stage, reconciliation was formulated along the lines of 'sharing on equal terms' the responsibilities within the family between men and women.[158] The same objectives were later reiterated in two equal opportunities action programmes[159] and eventually in the Community Charter of the Fundamental Social Rights of Workers.[160] Nevertheless, the type of equality employed here evokes the Aristotelian mantra 'things that are alike must be treated alike, while things that are unalike should be treated unalike in proportion to their unalikeness'.[161] Such an approach ignores the fact that structural inequalities are inherent in society and places individuals in different positions. It also assumes that individuals make free choices when often this is not the case: a woman often chooses neither to stay home nor to go into employment.[162]

Other considerations ensured that the debate continued throughout the 1980s. Firstly, the Community appeared to have an increasing impact on the family through a gradual emergence of a Community 'family policy'. This policy is formed by a set of mainly soft law measures aimed to assessing the impact of EU law on the family. They stem essentially

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[157] Case C-409/95 *Marschall* v. *Land Nordrhein-Westfalen* [1997] ECR I-6363 at paragraph 29.

[158] S. Hadj-Ayed and A. Masselot, 'Reconciliation between Work and Family Life in the EU: Reshaping Gendered Structures?', *Journal of Social Welfare and Family Law*, 26(3) (2004), 325–338.

[159] Communication from the Commission, 'A New Community Action Program on the Promotion of Equal Opportunities for Women 1982–1985', COM(81) 758 final; Communication from the Commission, 'Equal Opportunities for Women: Medium Term Action Program', COM(85) 801 final.

[160] Community Charter of the Fundamental Social Rights of Workers on Equal Treatment for Men and Women, paragraph 16.

[161] Aristotle, *Ethica Nicomachea*, V. 3 1131a–1131b (W. Ross trans, 1925). Aristotle, however, based his model of equality on structural injustice as he applied it only certain categories of individuals. In this context, it is relevant that he used the term *anthropos* (human being) only referring to men. In his conception, in fact, women did not possess the virtues necessary to participate in the active life of the *polis*; *La Politica* (C. Bari trans., 1925).

[162] S. Fredman, 'European Discrimination Law: A Critique', *Industrial Law Journal* 21 (1992), 119–134; L. Finley, 'Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate', *Columbia Law Review*, 86 (1986), 1118–1182, (p. 1119).

from the desire to facilitate the free movement of workers.[163] Secondly, soaring unemployment emphasised that, in order to be successful, the internal market needed as many workers as possible; therefore women needed to be encouraged back into employment. Seen in this light, the potential importance of reconciliation measures as a major tool for the success of economic strategies became clear.[164]

This stage put reconciliation firmly into the EU policy discourse as part of the gender equality *and* economic strategies. However, the discussion was based on a traditional understanding of reconciliation, in particular as it was limited to biological parents of very young children and did not contemplate the need to care for adult members of the family. Furthermore, it remained framed in terms of soft law. It was only in the third stage that legislative measures started complementing the soft law policies.

The third phase: The 1990s – Legislative activism and the involvement of the Social Partners

This phase opened with the Third Action Programme and spans the 1990s; it is based on the policies developed in the earlier phases. At the same time, the Treaty of Maastricht establishing the European Union entered into force with two main consequences. Firstly, it expanded the Community competences beyond mere economic aims and accordingly the principle of equality gained momentum. Secondly, it legitimised the role of the Social Partners. Indeed, although the idea of involving the Social Partners in the decision-making process was not new,[165] it was the Treaty of Maastricht, in particular Article 138 EC,

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[163] European Parliament Resolution on 'Family Policy in the EC', OJ [1983] C184/116; Communication from the Commission on 'Family Policies', COM(89) 363 final; Conclusions of the Council and of the Ministers Responsible for Family Affairs, OJ [1989] C277/2. See also C. McGlynn, 'A Family Law for the European Union?', in J. Shaw (ed.), *Social Law and Policy in an Evolving European Union* (Oxford: Hart publishing, 2000), 223–241; see also L. Hantrais and M.-T. Letablier, *Families and Family Policies in Europe* (Harlow: Longman; 1996).

[164] M. Stratigaki, 'The Cooptation of Gender Concepts in EU Policies: The Case of "Reconciliation of Work and Family"', *Social Politics* 11 (2004), 30–56; H. Collins, 'The Right to Flexibility', in J. Conaghan and K. Rittich (eds), *Labour Law, Work and Family* (Oxford: Oxford University Press, 2005), 99–124.

[165] Inter alia, H. Cullen and E. Campbell, 'The Future of Social Policy-making in the European Union' in P. Craig and C. Harlow (eds), *Law Making in the European Union* (London: Kluwer Law International, 1998), 262–284; G. Falkner, 'The Maastricht Protocol on Social Policy: Theory and Practice', *Journal of European Social Policy*, 6 (1996), p. 1.

which expressly conferred upon them a role in both consultation and negotiation.[166]

As a result, it was in this stage that the first binding provisions were introduced. The most significant success of this period is the Pregnant Workers Directive which granted specific rights for employed expectant and new mothers, in particular a 14-week period of leave regardless the length of their employment.[167] The Directive, however, merely reflected the statutory provisions for leave entitlements of the majority of Member States.[168] By failing to provide any financial compensation and by focusing on women and omitting to mention the position of fathers, cemented the two-sphere structure.[169] The role of men was instead addressed in the Communication on Childcare,[170] which was described as 'the first EC equality measure actively to target male behaviour,' also adopted at this stage.[171] Unfortunately by lacking binding force, the impact of this measure was inherently limited.[172]

A significant feature of this phase is that reconciliation was slowly removed from the Community agenda to become part of the Social Partners' negotiations. Their contribution to reconciliation was remarkable; it was indeed at this stage that the Parental Leave, Part-Time Work and Fixed-Term Work Directives were introduced. It is, however, regrettable that the potential of these measures was not fully achieved: the limited rights of the Parental Leave Directive do not provide an answer to the needs of working parents, and the adoption of this measure in reality changed very little in the Member States.[173] The Part-Time Work and Fixed-Term Work Directives were framed by business concerns rather

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[166] See further M. Stratigaki, 'The European Union and the Equal Opportunities Process', in L. Hantrais (ed.), *Gendered Policies in Europe: Reconciling Employment and Family Life* (London: Macmillan, 2000), 27–48.

[167] Council Directive 92/85/EEC, OJ [1992] L348/1, further discussed in Chapter 2, 'The Leave Provisions'.

[168] The UK being a noticeable exception.

[169] M. Benn, *Madonna and Child: Towards a new Politics of Motherhood* (London: Jonathan Cape, 1998).

[170] Council Recommendation on 'Child Care', OJ [1992] L123/16. See also the discussion in Chapter 4, 'The Care Strategy'.

[171] C. Hokyns, *Integrating Gender: Women, Law and Politics in the European Union* (London: Verso, 1996), p. 52; P. Moss, 'Childcare and Equality of Opportunity – Consolidated Report to the European Commission' (CEC V/688, 1988).

[172] See further discussion in Chapter 4, 'The Care Strategy'.

[173] See further discussion in Chapter 2, 'The Leave Provisions'.

than working parents' quest for time.[174] In other words, it was clear that the Social Partners' priority was the problem of high unemployment in the 1990s and the much needed restructuring of the labour markets, rather than the demands of carers.

In conclusion, prima facie this phase might seem successful as relevant measures to the area of reconciliation were gradually introduced. Yet, these were still very much anchored to a traditional conception of equality; furthermore, the overall economic situation across Europe meant that the economic rationale underpinning the principle of equality was firmly embedded in the agenda. This was confirmed by the Commission statement that a reconciliation policy was necessary to 'harness the economic potential of women' and to meet their 'desire to enter or re-enter the labour market'.[175]

The fourth phase: From Amsterdam to Lisbon – Reconciliation as a fundamental right

By the end of the 1990s the general political climate was changing. If the economic events of the previous decades had emphasised the importance of women's role in employment, this was now matched with growing human rights awareness which placed social rights in the spotlight. Additionally, the traditional structure and composition of the family was scrutinised and men became more aware of their roles as fathers.[176] To a certain extent, this change of climate was captured by the Treaty of Amsterdam. Although this was not directly concerned with issues of reconciliation, indirectly it set a clear basis to boost the entire area. In particular, the Treaty contained two important changes. On the one hand, it reinforced the concept of equality. The new Article 2 EC required the Community to *promote* equality rather than prohibit discrimination and Article 3 EC officially introduced the idea of gender mainstreaming: it prohibits inequality between men and women in *all*

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[174] E. Caracciolo di Torella, 'The Family Friendly Workplace – the EC Position', *The International Journal of Comparative Labour Law and Industrial Relations*, 17 (2001), 325–344 and see further discussion in Chapter 3, 'The Time Provisions'.

[175] Interim Report of the Commission on 'The implementation of the Community Action Program on Equal Opportunities for Men and Women (1996–2000)', COM(98) 770 final; on the same vein see C. McGlynn, 'Reclaiming a Feminist Vision: The Reconciliation of Paid Work and Family Life in European Union Law and Policy', *The Columbia Journal of European Law*, 7(2) (2001), 241–272.

[176] See the discussion in the Introduction.

areas. At the same time the Court started interpreting the concept of equality free 'from market roots'.[177] On the other hand, the introduction of the Employment Title in the Treaty gave more powers to the Community to monitor national employment strategies. These were discussed in the 2000 European Council where the Lisbon Strategy was adopted.[178] The latter successfully linked economic needs to equality and highlighted that such a link could also reduce stress for workers and increase work productivity. Furthermore, the prospect of shortages in workers and skills forced the EU and Member States' economies to consider the adoption of reconciliation policies.[179]

This new improved legislative landscape creates the right environment for a new phase in the development of the reconciliation principle, which prima facie, relies on a modern interpretation of reconciliation. Thus, the fourth phase dramatically differed from the previous ones as, at this stage, it became clear that reconciliation could not be seen solely as an economic or a gender equality strategy. Reconciliation can instead start to be described as a self-standing principle, indeed, as a fundamental right.

It is during this phase that the 2000 Council Resolution on the balanced participation of women and men in family life was adopted. This clearly acknowledged that:

> [t]he beginning of the twenty-first century is a symbolic moment to give shape to the new social contract on gender, in which de facto equality of men and women in the public and private domains will be socially accepted as a condition for democracy, a prerequisite for citizenship and a guarantee of individual autonomy and freedom, and will be reflected in all European policies ... Both, men and

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[177] Case C-85/96 *Martinez Sala* v. *Freistaat Bayern* [1998] ECR I-2961; see further G. More, 'The Principle of Equal Treatment: From Market Unifier to Fundamental Right?', in P. Craig and G. de Búrca (eds), *The Evolution of EU Law* (Oxford: Oxford University Press, 1999), 517–553.

[178] See further discussion in Chapter 3, 'The Time Provisions'.

[179] Taoiseach Bertie Ahern, 'Living to Work – Working to Live Tomorrow's Work-Life Balance in Europe', European Foundation for the Improvement of Living and Working, Dublin, 3–4 November 2004. This argument, however, can apply in different ways in each Member States. For example, the UK Government in light of recent economic problems is considering delaying any extension of family friendly reforms; see 'TUC Attacks Mandelson Plan to Delay Flexible Working Reforms', guardian.co.uk, 20 October 2008.

> women, without discrimination on the grounds of sex, *have a right to reconcile family and working life*.[180]

Importantly, the 2000 Resolution also expressly referred to the care of elderly, disabled and other dependent persons. The potential of this fourth phase has, however, been somewhat curtailed and this is shown in the measures subsequently adopted. Later that year, the Charter of Fundamental Rights was solemnly declared.[181] Article 33 states that:

> [t]he family shall enjoy legal, economic and social protection. To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.

Prima facie, this provision offers a unique possibility for (re)conceptualising and developing the concept of reconciliation. However, a closer look reveals its inherent uncertainty. The first paragraph, which is based entirely on Article 8 ECHR, includes a clear reference to the family: yet, it is unclear what *kind* of family it refers to. It might not be the stereotypical family (married, heterosexual with children) which had traditionally shaped the EU debate in this area, but the wording of the provisions remains vague and therefore, arguably open to too many interpretations. On the contrary, a clear and wide definition of family is important for conceptualising reconciliation as a fundamental right. In order to provide a definition we need to look at the relevant legislation and case law in this area. Regrettably, this is not particularly useful. Regulation 1612/68 on the free movement of workers within the Community[182] provided a very limited interpretation of family. The recently adopted Citizenship[183] and Family Reunification Directives[184] do indeed acknowledge that the

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[180] Resolution of the Council and the Ministers for Employment and Social Policy, meeting within the Council of 29 June 2000 on 'The Balanced Participation of Women and Men in Family and Working Life', OJ [2000] C218/5; emphasis added.

[181] OJ [2000] C364/1.

[182] OJ [1968] L257/2.

[183] Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ [2004] L229/35.

[184] Directive 2003/86/EC on the Right to Family Reunification, OJ [2003] L251/12.

family has changed but do not reflect this assumption.[185] The same can be said of the case law of the Court of Justice where, although the changes undergoing in this area are increasingly acknowledged, their practical effects remain limited. A broader understanding comes instead from the case law of the European Court of Human Rights. The interpretative value of these cases will soon be enhanced by the fact that, under Article 6 of Lisbon Treaty, the EU will accede to the ECHR.

The second paragraph of Article 33 of the Charter, which specifically mentions a right to reconciliation, is arguably even more ambiguous. To start with it limits the concept of family responsibility to maternity and parental leave. These types of leave necessarily only include babies and very young children. This is in contrast with the idea that reconciliation includes wider responsibilities, which were envisaged in the 2000 Council Resolution. Furthermore, Article 33(2) of the Charter is not a progressive provision as it neither respects nor builds upon the relevant *acquis communautaire*.[186] For example, the Article mentions protection from dismissal on grounds of taking maternity leave, but omits to mention protection on grounds of taking parental leave which is specifically provided by the Parental Leave Directive.[187] Equally, it does not refer to the right to return to the same or equivalent job after parental leave, or the protection of employment rights during the period of parental leave; both entitlements are expressly referred to in the Parental Leave Directive.[188] It also falls short of including the case law developments in relation to substantive pregnancy and maternity rights. Additionally, by omitting any reference to paternity leave the provision reinforces gender assumptions. Finally, the Charter only partly provides a suitable legal

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[185] M. Bell, 'We are Family? Same-Sex Partners and EU Migration Law', *The Maastricht Journal of European and Comparative Labour Law*, 9 (2002), 335–355; C. McGlynn, 'Family Reunification and the Free Movement of Persons in European Union Law', *International Law FORUM du Droit International*, 7(3) (2005), 159–166.

[186] Namely, the Pregnant Workers Directive 92/85, the Parental Leave Directive 96/34 and the Equal Treatment Directive 76/207 (as amended by Directive 2002/73/EC) as well as the ECJ case law; See S. Spiliotopoulos, 'L'article 33 de la Charte des droits fondamentaux de l'UE (vie familiale et vie professsionnelle) correspond-il à l'acquis communautaire?', in AFFJ/EWLA (ed.), *L'égalité entre femmes et hommes et la vie professionnelle. Le point sur les développements actuels en Europe* (Paris: Dalloz, 2003), 143–150.

[187] Respectively, Clauses 2(4) and (5) on the Framework Agreement on Parental Leave attached to Directive 96/34.

[188] Clause 2(5) on the Framework Agreement on Parental Leave attached to Directive 96/34.

base for reconciliation: it merely refers to (certain forms) of leave and omits to mention to the possibility of rearranging work or care facilities.

The potential of Article 33 of the Charter thus lies in expressly placing reconciliation amongst fundamental rights. As for the substantive rights encapsulated in the provisions, however, those have already passed their sell-by-date before the Charter has even entered into force: the continuous development of the relevant *acquis* is a constant reminder of these limitations. To unveil its full potential, Article 33 needs a proactive interpretation by the Court. However, either because of the political debate surrounding the Charter[189] or its unclear legal status, the situation has proven complex and the Court has been reluctant to use this instrument. Although the Charter originally was not intended to be legally binding, it has since been relied upon by Advocates General,[190] domestic Courts[191] and by the Court of First Instance.[192] Recently, the European Court of Justice has mentioned the Charter, interestingly in a case involving family reunification.[193] It is likely that this will soon change as the Treaty of Lisbon gives the Charter binding legal status.[194] It remains to be seen, however, whether the Court is prepared to provide a progressive interpretation of the Article.

The contribution of the Court

This might well prove to be the case as, in the last two decades, the Court has handed down a set of judgements which, more or less directly,

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[189] S. Koukoulis-Spiliotopoulos, 'Incorporating the Charter into the Constitutional Treaty: What Future for Fundamental Rights?', in N. Kakouris (ed.), *Problèmes d'Interprétation* (Athens: Sakkoulas; Brussels: Bruylant, 2004), pp. 223–258; S. Koukoulis-Spiliotopoulos, 'The Lisbon Treaty and the Charter of Fundamental Rights: Maintaining and Developing the *acquis* in Gender Equality', *European Gender Equality Law Review*, 1 (2008), 15–24.

[190] Advocate General Mengozzi in Case C-291/05 *Minister voor Vreemdelingenzaken en Integratie* v. *R.N.G. Eind* [2007] ECR I-10719.

[191] See the Constitutional Tribunal of Spain in a ruling about how to protect personal data (STC 292/2000 of November 30, 2000 recurso de inconstitutionalidad No.1463–2000) and the Corte Costituzionale Italiana, Sentenza No.135, Anno 2002, 1–11, at 9 and 10.

[192] For example, see Cases T-177/01 *Jégo-Quéré & Co* v. *Commission* [2002] ECR II-2365, paragraphs 41, 42, 47; T-211/02 *Tideland Signal Ltd* v. *Commission* [2002] ECR II-3781.

[193] Case C-540/03 *Parliament* v. *Council* [2006] ECR I-5769.

[194] S. Koukoulis-Spiliotopoulos, 'The Lisbon Treaty and the Charter of Fundamental Rights: Maintaining and Developing the *acquis* in Gender Equality', *European Gender Equality Law Review*, 1 (2008), 15–24.

addressed and had a positive impact on reconciliation. These cases are an improvement given the Court's pre-Amsterdam position which de facto reinforced women's function as primary carers. On a general level, the Court has been eager to present reconciliation as a right for both men and women. This was clear in *Gerster* where it held that '[t]he protection of women – and men – both in family life and in the workplace is in principle broadly accepted in the legal systems of the Member States as a natural corollary of the fact that men and women are equal, and is upheld by Community law.'[195] A year later this was confirmed in *Hill* when the Court held that:

> Community policy in this area is to encourage and, if possible, adapt working conditions to family responsibilities. Protection of women within family life and in the course of their professional activities is, in the same way as for men, a principle which is widely regarded in the legal systems of the Member States as being the *natural corollary of the equality* between men and women, and which is recognised by Community law.[196]

More specifically, the Court has also addressed explicit areas of reconciliation. If over the years it has gradually strengthened the rights of pregnant women in the workplace, this was taken further in the recent decision of *Sabine Mayr*[197] where the Court was asked to rule on the starting point of pregnancy in the case of in vitro fertilisation (IVF). Ms Mayr had been dismissed whilst undergoing IVF treatment. At the time of the dismissal her ova had been fertilised with the sperm of her partner but had not yet been transferred to her uterus. The ECJ found that Ms Mayr could not rely on the Pregnant Workers Directive because at the date she was given notice of her dismissals the in vitro fertilised ova had not been transferred into her uterus, but that she could rely on the Equal Treatment Directive as such a situation 'directly affects only women'.[198] It thus concluded that 'the dismissal of a female worker essentially because she is undergoing that important stage of in vitro fertilisation treatment constitutes direct discrimination on the grounds

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[195] Case C-1/95 *Gerster* [1997] ECR I-5253, at paragraph 38.

[196] Case C-243/95 *Hill and Stapleton* [1998] ECR I-3739, at paragraph 42; emphasis added.

[197] Case C-506/06 *Mayr* v. *Bäckerei und Konditorei Gerhard Flöckner* [2008] ECR I-1017.

[198] Case C-506/06 *Mayr* [2008] ECR I-1017 at paragraph 50.

of sex'.[199] In other words, the Court appears to be willing to extend the protection from discrimination on grounds of sex to pregnant women as well as to someone who is not technically pregnant yet but who is *trying* to become pregnant. Does this case mean that that there is a fundamental right to try for a family?[200]

The Court has also interpreted the scope of the Parental Leave Directive in a broad way. In *Griesmar*, it made clear that parental leave is for both parents 'as the situation of a male civil servant and a female civil servant may be comparable as regards the bringing up of children'.[201]

In a further string of cases, the Court has reinforced the position of carers. Indeed in *Carpenter,*[202] *Baumbast* [203] and *Chen*[204] for the first time the Court introduced concepts such as the 'primary carer'. In *Carpenter* the Court looked, as a domestic Court could possibly have done, at the role that Mrs Carpenter played in her household: 'Mrs Carpenter lead[s] a true family life, in particular by looking after her husband's children from a previous marriage'.[205] The importance of the position and the potential rights of carers was recently re-emphasised in the case of *Coleman* where protection against discrimination on the ground of caring responsibilities was discussed.[206] This case was based on the Disability Directive rather than on traditional reconciliation measures; nevertheless this decision potentially has considerable implication for the reconciliation discourse. Nonetheless, it may be difficult to regard these cases, however important, as part of a conscious and cohesive

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[199] Case C-506/06 *Mayr* [2008] ECR I-1017 at paragraph 50.

[200] For a different interpretation see G. James, *The Legal Regulation of Pregnancy and Maternity in the Labour Market* (London: Routledge-Cavendish, 2009).

[201] Case C-366/99 *Griesmar* v. *French Republic* [2001] ECR I-9383, in particular paragraphs 55 and 56. This position was however somewhat undermined by the statements in Case C-476/99 *Lommers* v. *Minister van Landbouw Natuurbeheer en Visseij* [2002] ECR I-2891.

[202] Case C-60/00 *Carpenter* v. *Secretary of State for the Home Department* [2002] ECR I-6279, paragraphs 40–42.

[203] Case C-413/99 *Baumbast and R.* v. *Secretary of State for the Home Department* [2002] ECR I-7091.

[204] Case C-200/02 *Zhu and Chen* v. *Secretary of State for the Home Department* [2004] ECR I-9925.

[205] Case C-60/00 *Carpenter Mary Carpenter* v. *Secretary of State for the Home Departmen* [2002] ECR I-6279, paragraph 44.

[206] Case C-303/06 *Sharon Coleman* v. *Attridge Law and Steve Law* [2008] ECR I-5603.

strategy on reconciliation between work and family life, especially as their consequences are still unfolding.

The 2008 Commission 'Work-Life Balance package'

At the same time, the various institutional and case law developments have been supported by a flurry of activities from the EU political institutions and the Social Partners. In 2006, the Commission presented the Roadmap for Equality[207] where the enhancement of reconciliation of work, private and family life was designated as a priority objective. In particular, this document focuses on three priorities, namely the role of flexible working arrangements, the need for care provisions and the importance of adapting services and structures as to meet the needs of both women and men.[208] This document was followed by a formal consultation of the Social Partners launched by the Commission.[209] The consultation documents reiterated the importance of reconciliation and highlighted, inter alia, the necessity of extending the traditional forms of leave to paternity leave, adoption leave and leave to care for dependent family member as well as of care facilities beyond young children.[210] The Consultation documents also emphasise the relevance of the principle of equal pay.[211]

Finally, in October 2008 the Commission presented a whole new package concerning reconciliation measures. It is noteworthy to mention that the terminology used by the Commission is changing. From the denomination of 'measures aiming at *reconciling work and family life*' employed in earlier documents, the Commission moved to measures for the reconciliation of '*work, private and family life*' and finally presented its most recent document as the *Work-Life* Balance Package. The change

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[207] Communication from the Commission, 'A Roadmap for Equality between Women and Men 2006–2010', COM(2006) 92 final.

[208] Communication from the Commission, 'A Roadmap for Equality between Women and Men 2006–2010', COM(2006) 92 final, p.5.

[209] Communication from the Commission, 'First-Stage Consultation of European Social Partners on Reconciliation of Professional, Private and Family Life', SEC (2006), 1245 and 'Second-Stage Consultation of European Social Partners on Reconciliation of Professional, Private and Family Life', SEC (2008), 571, respectively.

[210] In particular, see 'Second-Stage Consultation of European Social Partners on Reconciliation of Professional, Private and Family Life', SEC (2008), 571, p. 8.

[211] In particular, see 'Second-Stage Consultation of European Social Partners on Reconciliation of Professional, Private and Family Life', SEC (2008), 571, p. 7.

in emphasis represents a clear attempt to broaden the scope of reconciliation and to make it relevant to more people and to include more situations. In other words, this represents an attempt to make reconciliation a universal right and not just a right for families. But has this really been achieved?[212]

Although the Work-Life Balance Package appears to be a breakthrough, it is in reality motivated by the need to achieve economic growth, prosperity and competitiveness, in line with the Lisbon Strategy for Growth and Jobs, much more than for the achievement of equality measures per se. The Commission justifies the adoption of reconciliation measures on the grounds that:

> gender equality lies at the heart of the Lisbon Strategy: since the gender gap in employment rates of women with children and men with children is wide, bridging that gap is vital if the EU target for female employment rates is to be met. Reducing the gap is also crucial to achieving greater gender equality.[213]

The Work-Life Balance Package includes a Communication from the European Commission [214] explaining the background and context, two legislative proposals to revise the existing Pregnant Workers[215] and Self-Employed Directives,[216] and a report monitoring national progress towards the Barcelona childcare targets.[217]

The Communication is the most progressive part of the package: it reiterates the importance of extending forms of leave and in particular, it expressly mentions paternity leave, adoption leave and filial leave. Regrettably, however, these suggestions were not carried out in the

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[212] See the discussion in Introduction.

[213] Proposal to amend Council Directive 92/85/EEC, COM(2008) 600/4, explanatory memorandum, p. 3.

[214] Communication from the Commission, 'A Better Work-Life Balance: Stronger Support for Reconciling Professional, Private and Family Life', COM(2008) 635.

[215] 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.

[216] Proposal for a Directive on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Directive 86/613/EEC, COM(2008) 636.

[217] European Commission report, 'Implementation of the Barcelona Objectives Concerning Facilities for Pre-School-Age Children' COM (2008) 638.

proposal to amend the Pregnant Workers Directive. This introduces an extension of the duration of paid maternity leave from 14 to 18 weeks, a right for women coming back to ask for flexible working arrangements and it incorporates the case law developments concerning dismissals on grounds of pregnancy[218] The majority of the Member States already have a maternity leave period of at least 18 months. The right to *ask* for flexible working arrangements is not complemented by a right to *obtain* such flexible arrangements. Furthermore, this right is reserved exclusively for women. On the whole, the proposed amendments to the Pregnant Workers Directive do not include any sorts of specific entitlement for fathers. In particular, the proposal does not provide for even a few days of paternity leave justified on health and safety grounds. A further Directive which extends the protection during pregnancy to self-employed women has also been proposed. According to this proposed Directive, Member States will have to at least give self-employed women the choice to be covered by a social security scheme. At the same time, the Social Partners have initiated consultation with a view to assessing the achievement and failures of the Parental Leave Directive and to propose any necessary amendments. Finally, the report on the Progress of the Childcare Strategy was adopted on the assumption that affordable and good quality childcare are an essential aspect of reconciliation. However, it fails to acknowledge that provisions relating to adult care as well as other forms of care for school age children are necessary for achieving reconciliation.

Conclusions

This chapter's main aim has been to set a foundation for the analysis of the concept of reconciliation between work and family life within EU policy and legislation which is further developed in this book. For this purpose, this chapter started by addressing the theoretical concepts underpinning reconciliation. We have established that one of the main difficulties in trying to regulate this area is that reconciliation is shaped by considerations embedded in the cultural and traditional political history of each Member State. This explains, inter alia, the reasons why there were no specific EU competencies in this area. In turn, the lack of specific EU competencies can explain why reconciliation has

[218] In particular, see Case C-460/06 *Paquay* v. *Société d'architectes Hoet and Minne* [2007] ECR I-8511.

not been developed as a self-standing concept but has been ancillary to other policies such as gender equality and employment. Therefore, it has gradually gained strength as a consequence of the introduction of other elements, such as the legitimisation of the role of the Social Partners in the Treaty of Maastricht or the strengthening of the concept of equality and the introduction of the Employment Title in the Treaty of Amsterdam. To complicate things, this has happened as a result of a mixture, at times contradictory, of soft and hard law. This 'confused' approach appears to be confirmed by the case law of the Court which, however helpful, does not appear to have followed a cohesive 'reconciliation strategy'.

In an attempt to analyse the development of the reconciliation concept, we have identified four phases, each of them adding important elements to the debate. There is a distinction between the first three phases on the one hand, and the fourth phase on the other. Not only is the latter clearly based on human rights principles; whilst in the early phases reconciliation was furthered as part of other policies and remained underpinned by very traditional arguments, in the latter a new dynamic concept of reconciliation has begun to appear. However, as we have argued, the full potential of the fourth phase has not yet been unfolded.

2
The Leave Provisions

Introduction

This chapter explores the leave provisions, namely continuous periods of leave – weeks or even months – granted to working parents and, more generally, to workers with caring responsibilities. Leave provisions represent the traditional cornerstone of reconciliation policies, especially when young children are involved. Indeed, as they are currently structured, these provisions are geared towards, and are mostly used by, parents of very young children. However, the various national employment law systems provide further examples of leave for other reasons such as compassionate leave or career breaks which can be used by employees with more general family responsibilities. At the time of writing, the EU has a well-developed system of leave available to (mainly biological) working parents, but very scarce provisions to cater for the needs of employees with wider family responsibilities.[219] Indeed, as this book goes to press, the only binding provision which goes somewhat beyond addressing the need to care for young children is the form of emergency leave for 'force majeure' provided by the parental leave.[220] Thus employees with wider family needs might find it more useful to rely on the time provisions.[221]

The main focus of this chapter, therefore, inevitably remains the leave provisions for working parents. The analysis concentrates primarily on

[219] See further discussion in this chapter at p. 62, on the new Commission's proposal on the Work-Life Balance Package.

[220] Clause 3 of the Framework Agreement attached to Council Directive 96/34/EC, OJ [1996] L145/04.

[221] See further discussion in Chapter 3, 'The Time Provisions'.

the EU legal framework, however, examples from domestic jurisdictions are discussed, when relevant, to illustrate specific points. This chapter analyses different forms of leave with a view to assessing their contribution to the development of the reconciliation issue. For this purpose, it begins by examining the provisions for working parents and then focuses on the rights that employees with wider family responsibilities still lack.

Gender-specific leave provisions

Leave provisions can be organised into two categories whose features, at times, overlap: gender specific (maternity, extended maternity and paternity leave) and gender neutral (parental leave and leave for family reasons). When addressed to women, the gender specific provisions are mainly based on biological justifications with only limited social rationale; the main goal of maternity leave is to help women to recover from giving birth. In contrast, the provisions addressed specifically to fathers and those which are gender neutral are based on social rationales and as such they primarily reveal the social concerns inherent in society. Parental, paternity leave and leave for family reasons are all intended to help both parents, and more generally carers, to care for their children and dependants.

From a policy and legal perspective, historically, mothers and fathers have never been on an equal footing with regards to leave entitlements. This pattern is entrenched at EU level where, whilst provisions concerning mothers have developed considerably, the concepts of paternity and parenthood still occupy a secondary place.

Working mothers

Women are fundamentally different to men because only the former can become pregnant and give birth. Pregnancy has been the main justification for treating men and women differently and thus, pregnancy and maternity rights have been linked to issues of equality and discrimination in the workplace. These rights also represent the first steps towards a comprehensive policy of reconciliation.

Leave provisions for mothers developed at the beginning of the last century in the majority of EU Member States. Originally, they were structured in such a way as to guarantee women a (short) period of leave to rest prior to and immediately after birth. Thus, these provisions responded to a biological need to protect the health of the mother – rather than to a social concern to reconcile work and family life – and

were often granted as a choice for the mother, rather than as an obligation for the employer. Today this period of leave is called ordinary maternity leave: it has become compulsory and is (usually) paid. The main rationale behind this leave remains rooted in health and safety concerns: it aims primarily to protect the biological needs of the mother and the newborn child and secondly to retain women in the employment market.

On top of this type of maternity leave, the majority of European legal systems have gradually introduced a form of extended maternity leave. This corresponds to a further period of leave that mothers can take – although often only after having satisfied certain requirements, such as a particular length of service – in addition to their ordinary period of maternity leave. This measure differs from ordinary maternity leave as it responds more readily to a social need; namely, the need for mothers to care for and bond with their child in the early stages of life.

Although potentially a very important element of reconciliation policies, extended maternity leave, in order to be successful, needs to be incorporated into an overall structure addressed to both parents. Used in its present form, it presents dangerous drawbacks. Firstly, as extended maternity leave is addressed exclusively to mothers, it reinforces the traditional idea that women alone need to bound with the new born child and are responsible for child rearing. Secondly, this leave is often unpaid or paid at a very basic level. As such, it limits the number of women who can take advantage of it and, when taken, it reinforces the financial dependency of women on men and thus contributes to perpetuating stereotypes, which ultimately lead to gender inequalities and an increased chance of female poverty in old age. An illustration of the complexities inherent in the extended maternity leave can be seen in Portugal. Here mothers (and under certain conditions, fathers) can choose a 120-day maternity leave period with full pay or a 150-day period paid at 80 per cent of their salary.[222] Mothers who cannot afford to lose a month's pay might feel they are bad mothers for choosing to

[222] Article 35 of the Portuguese Labour Code (approved by Law n. 99/20053, from 27 August 2003), and Article 68 of the Portuguese Labour Regulation Act (approved by Law n. 35/2004, from 29 July 2004). This leave is paid by the public social security system, on the basis of 100 per cent of the average salary, or 80 per cent of the average salary, respectively for the 120 days leave and for the 150 days leave – Decree-Law n. 154/88, from 29 April 1988, article 9, with the changes introduced by Decree-Law n. 77/2005, from 13 April 2005 and by Decree-Law n. 105/2008, from 25 June 2008.

return earlier. However, employers tend to see those who choose the 150-day period as less committed and, in many cases, apply pressure for an earlier return. Professor Rosário Palma Ramalho notes that 'legal system aside, in practice women rarely choose the extended leave for two reasons: the family income may not allow it, the employers do not like it, and since fathers seldom take the leave (although they are also entitled to it) this is a difficult choice for the mothers.'[223] In addition, she explains that opting for the longest leave must be done at a very early stage (during the first week following childbirth) and, at that point, many mothers do not yet have any idea of whether extended leave would be useful. Finally, she points out that the extension of the leave was mostly a political gesture by the government. The previous four-month period of leave was considered too short, so the leave was extended in such a way that the amount of the public expenditure was de facto unaltered.[224]

Arguably, in reality, the EU provisions regarding maternity leave have not departed from the original aim of guaranteeing the mother's physical protection and therefore still emphasise the biological rather than the social element. However, on paper, their objectives are twofold. On the one hand, they aim to protect women's biological condition following pregnancy and childbirth. It is in connection with these health and safety requirements that the ECJ has added the protection of the special relationship between mothers and their children immediately following pregnancy and birth.[225] The protection of this 'special relationship' is limited to the period of ordinary maternity leave and is directly linked to the biological needs of the mother. Accordingly, traditionally EU pregnancy and maternity provisions afforded specific rights for *pregnant* rather than *working* mothers and in doing so, they reflected a conceptual distinction between pregnancy and motherhood. Yet, on the other hand, the Court

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[223] Interview with Professor Maria do Rosário Palma Ramalho, Professor of Labour Law at the Faculty of Law of Lisbon, member of the European Commission's Gender Equality Legal Network on 14 October 2008.

[224] A new Portuguese Labour Code is being discussed at the Parliament and it seems that some practical measures in this area dedicated only to the father are being discussed. Still, it is too soon to know the outcome of this discussion.

[225] For example, Case C-421/92 *Habermann-Beltermann* v. *Arbeiterwohlfahrt, Berzirksverband* [1994] ECR I-1657, at paragraph 21; Case C-32/93 *Webb* v. *EMO Air Cargo* [1994] ECR I-1963, at paragraph 20; Case C-136/95 *Caisse nationale* d'assurance *vieillesse des travailleurs salariés* v. *Thibault* [1998] ECR I-2011 at paragraph 25;.Case C-207/98 *Mahlburg* v. *Land Mecklenburg-Vorpommern* [2000] ECR I-549 at paragraph 21.

has on several occasions clarified that EU pregnancy and maternity provisions also aim to promote substantive gender equality.[226]

Working mothers and the concept of equality

Pregnancy and maternity rights in the EU were first addressed in 1976 by the Equal Treatment Directive[227] as part of the concept of equality. The Directive contained a paradox: maternity was considered both a part of and a derogation from the equal treatment principle. In this way, the Directive mirrored the Aristotelian concept of equality: when women are in the same situation as men, they must be treated equally but when they are not similarly situated, they can be treated differently. Essentially, as men cannot be pregnant, women could be treated differently and with this view came the need to *protect* women: '[t]his Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.'[228]

The protective aim of the Equal Treatment Directive was endorsed by the Court. In the infamous statement in *Hofmann*, the ECJ stated that the Directive aims at protecting women in two respects:

> [f]irst [...] to ensure the protection of woman's *biological condition* during pregnancy and thereafter until such time as her physiological and mental functions have returned to normal after childbirth; secondly [...] to protect *the special relationship between a women and her child* (emphasis added).[229]

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[226] Case C-136/95 *Thibault* [1998] ECR I-2011 at paragraph 26; Case C-207/98 *Mahlburg* [2000] ECR I-549 at paragraph 26; Case C-342/01 *Merino Gómez* v. *Continental Industrias del Caucho SA* [2004] ECR I-2601 at paragraph 37. Also see generally S. Koukoulis-Spiliotopoulos, 'The Amended Equal Treatment Directive (2002/73): An Expression of Constitutional Principles/Fundamental Rights', *Maastricht Journal of European and Comparative Law*, 12(4) (2005), 327–367 (p. 344).

[227] Council Directive 76/207/EEC, OJ [1976] L39/40.

[228] Article 2(3) Equal Treatment Directive 76/207; see further E. Caracciolo di Torella and A. Masselot, 'The ECJ Case Law on Issues Related to Pregnancy, Maternity and the Organisation of Family Life: An Attempt at Classification', *European Law Review*, 26 (2001), 239–260; C. Barnard, 'Gender Equality in the EU: A Balance Sheet', in Alston (ed.), *The EU and Human Rights* (Oxford: OxfordUniversity Press, 1999), 223–224.

[229] Case 184/83 *Hofmann* [1984] ECR 3047, at paragraph 24; emphasis added. See also Case 163/82 *Commission* v. *Italy* [1983] ECR 3273; Case 312/86 *Commission* v. *France* [1988] ECR 6315 and more recently see Case C-421/92 *Habermann-Beltermann* [1994] ECR I-1657, at paragraph 21; Case C-32/93 *Webb*

The use of this formula has proven disappointing because it has reiterated the idea that pregnancy and maternity rights were exceptions to, rather than a condition and a part of, the concept of equality. Seen in this light, the Equal Treatment Directive did not really encourage the establishment of the very aim of gender equality; rather, it entrenched the idea of the existence of two separate spheres, where women 'belong' to the domestic sphere, thus reinforcing sex inequalities.[230] Although the concept of reconciliation was already present in the EC policy discourse, the Equal Treatment Directive arguably did not promote a modern or dynamic understanding of this concept. This opaque formula, which has also led to confusion in the case law,[231] was re-employed when the Equal Treatment Directive was amended in 2002[232] and in the Goods and Services Directive.[233]

To a certain extent, the Recast Directive.[234] represents a turning point in approaching pregnancy and maternity rights within EU law. The Recast Directive aims to provide more easily accessible and readable gender equality law, by incorporating in particular the Equal Pay Directive and the Equal Treatment Directive into one modernised Directive.[235]

[1994] ECR I-3567 at paragraph 20; Case C-394/96 *Brown* v. *Rentokil* [1998] ECR I-4185 at paragraph 17; Case C-136/95 *Thibault* [1998] ECR I-2011, at paragraph 25; and Case 411/96 *Boyle and Others* v. *Equal Opportunities Commission* [1998] ECR I-6401, at paragraph 41.

[230] For example, H. Fenwick, 'Special Protection for Women in European Union Law', in T. Hervey and D. O'Keeffe (eds), *Sex Equality in the European Union* (Chichester: Wiley, 1996), p. 63.

[231] See the extensive national and European case law on pregnancy and maternity in E. Caracciolo di Torella and A. Masselot, 'The ECJ Case Law on Issues Related to Pregnancy, Maternity and the Organisation of Family Life: An Attempt at Classification', *European Law Review*, 26 (2001), 239–260.

[232] Article 2(7) Equal Treatment Directive 76/207/EEC as amended by Directive 2002/73/EC, OJ [2002] L269/15.

[233] Article 4(2) Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ [2004] L373/37; see further E. Caracciolo di Torella, 'The Goods and Services Directive: Limitations and Opportunities', *Feminist Legal Studies*, 13(3) (2005), 337–347.

[234] 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 [2006] L204/23. See also A. Masselot, 'The New Equal Treatment Directive: Plus Ça Change…', *Feminist Legal Studies*, 12(1) (2004), 93–104.

[235] A. Masselot, 'The State of Gender Equality Law in the European Union', *European Law Journal*, 13(2) (2007), 152–168 (160–165); N. Burrows and

This Directive partly clarifies the issue of pregnancy and maternity by stating that discrimination includes 'any less favourable treatment of a woman related to pregnancy or maternity leave'.[236] Furthermore, the Recast Directive, for the first time, provides guarantees for women returning from maternity and adoption leave.[237] Despite the fact that these provisions depart from the negative phrasing of the amended Equal Treatment Directive, they continue nevertheless to fall short of fully reflecting the ECJ case law, which explicitly acknowledges that pregnancy and maternity rights aim at promoting substantive gender equality.[238] Indeed, the Court has generously interpreted pregnancy and maternity rights, providing, in particular, that unfavourable treatment on the grounds of pregnancy or maternity is not only discrimination, but, more importantly, is direct sex discrimination.[239] This crucially important case law is only reflected in the soft provisions of the Recast Directive in the form of recitals 23–25 of the Preamble. In addition, the Goods and Services Directive is not part of the recast exercise. The result is that the provisions concerning pregnancy and maternity rights contained in both Directives lack coherence, which is, in turn, bound to lead to further legal confusion.

Working mothers and the Pregnant Workers Directive

Pregnancy and maternity rights have also been addressed from a different angle in the Pregnant Workers Directive.[240] Rather than being concerned with gender equality per se, this Directive instead aims

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M. Robinson, 'An Assessment of the Recast of Community Equality Laws', *European Law Journal*, 13(2) (2007), 186–203.

[236] Article 2(c) of Directive 2006/54/EC.

[237] Article 15 of Directive 2006/54/EC.

[238] Case C-136/95 *Thibault* [1998] ECR I-2011 at paragraph 26; see also more recently Case C-294/04 *Sarkatzis Herrero* v. *Instituto Madrileño de la Salud* [2006] ECR I-1513 at paragraph 37.

[239] Case C-177/88 *Dekker* [1990] ECR I-3941; Case C-32/93 *Webb* [1994] ECR I-1963; Case C-421/92 *Habermann-Beltermann* [1994] ECRI-1657. In Case C-506/06 *Mayr* [2008] ECR I-1017, the ECJ further held that the dismissal of a woman, if related to her IVF treatment, amounts to direct sex discrimination contrary to the Equal Treatment Directive, since only women can receive such treatment. It follows that any disadvantages related to IVF treatment amount to sex discrimination. The Court however, was clear in saying that although unfavourable treatment on the grounds of IVF treatment amounts to sex discrimination, the Pregnant Workers Directive was not applicable as a woman cannot be pregnant prior to the implantation of fertilised eggs.

[240] Council Directive 92/85/EEC, OJ [1992] L348/1.

specifically at raising health and safety standards in the workplace. The important difference between the two Directives is that, while the Equal Treatment Directive aims to prevent challenges to national legislation protecting pregnant women and women who have recently given birth, the Pregnant Workers Directive sets specific standards to protect these workers. As such, their aims are considerably different. The inherent problem is that pregnancy, maternity and parenthood cannot be artificially removed from the issue of gender equality. By recognising the unique position and needs of pregnant women and women who have recently given birth and by attempting to give women employment rights, the Directive moves away from the non-discriminatory/protectionist approach of the Equal Treatment Directive. The main advantage of the shift in focus lies in the fact that pregnancy and maternity issues are regulated independently from any male comparator, whether sick or not, which, by contrast, is implied in the gender equality principle. Here in fact, although the ECJ has on many occasions reiterated that this comparison must be removed,[241] it is still disturbingly present.[242] Prima facie, the Pregnant Workers Directive makes it easier, for example, to claim protection against dismissal during the period of maternity leave without having to prove the existence of discrimination.

The Pregnant Workers Directive was adopted following concerns over the declining European population and shortage of skilled workers, rather than as a step towards the achievement of gender equality. The Commission in fact 'felt that it had proposed the minimum requirements necessary to protect the health of pregnant women and their foetuses, without reducing women's employment opportunities'.[243] Its legal base is Article 118a EC (now 137 EC)[244] which focuses on specific employment rights/health and safety issues.[245] This approach undermines the social and human *status* of pregnancy and maternity, by

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[241] See in particular, Case C-177/88 *Dekker* v. *Stichting Vormingscentrum voor Jong Volwassenen* [1990] ECR I-3941 and Case C-179/88 *Webb* [1990] I-3979.

[242] For example, Case C-394/96 *Rentokil* [1998] ECR I-4185; see M. Wynn, 'Pregnancy Discrimination: Equality, Protection or Reconciliation?', *Modern Law Review*, 62 (1999), 435–447 (p. 439).

[243] H. Collins, *The EU Pregnancy Directive: A Guide for Human Resource Managers* (Oxford: Blackwell, 1994), p. 5. See also R. Guerrina, *Mothering the Union* (Manchester: University of Manchester Press, 2005), Chapter 3.

[244] Article 118a EC provides that the EC Council decides by a qualified majority on a proposal from the Commission, in co-operation with the Parliament and after consulting the Economic and Social Committee.

[245] Article 1 of Council Directive 92/85/EEC.

classifying these situations almost as medical conditions. Even worse, as these medical conditions are addressed to women only, the Pregnant Workers Directive reinforces the stereotype that pregnancy is a women's health issue. Seen in this light, the Pregnant Workers Directive seems to do little to dissipate the ambiguous protective approach of the Equal Treatment Directive and to move towards developing a reconciliation discourse.

Nevertheless, the Pregnant Workers Directive does introduce a certain degree of protection both ante-and post-confinement. However, it also contains several ambiguities, which may detract from these rights. For example, Article 2 specifies that a pregnant worker is a worker 'who informs her employer of her condition', prompting questions such as whether self-employed women are protected, or whether a visibly pregnant woman who has not informed her employer of her pregnancy is protected? Although there is an exclusive EU definition of 'worker'[246] the definitions of 'pregnant worker' and 'worker who has recently given birth' are left to the Member States. This can led to disparate treatment in different Member States and ultimately to a breach of the Directive.[247]

During the ante-confinement period, Articles 3 to 6 provide for specific minimum health and safety standards in the workplace. These include guidelines on the use of substances and processes hazardous or stressful to the protected workers; a requirement on employers to assess specific risks and the obligation to take appropriate action further to these assessments, for example, by adjusting working hours or working conditions, moving the workers to another job, or granting leave. A specific obligation requiring employers to keep employees informed of how to avoid these dangers, which was in the first draft of the Directive, however, is not included.[248] There is also a right for pregnant workers, where necessary, to take time off work without loss of pay to attend ante-natal examinations. During their pregnancy and for a period after the childbirth, women cannot be obliged to perform night work.[249]

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[246] Inter alia, Case 75/63 *Hoekstra (née Unger)* v. *Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten* [1964] ECR 177; Case 53/81 *Levin* [1982] ECR 1035.

[247] EC Commission Report on the Implementation of Council Directive 92/85, COM(1999) 100 final, Brussels, 15 March 1999.

[248] H. Fenwick, 'Special Protection for Women in European Union Law', in T. Hervey and D. O'Keeffe (eds), *Sex Equality in the European Union* (Chichester: Wiley, 1996), 63–80 (p. 76).

[249] Article 7 of Directive 92/85/EEC.

Finally, the most well known of the health and safety rights provided by the Directive is the entitlement to a continuous period of maternity leave of at least 14 weeks, two of which must be compulsory.[250]

In addition to these narrowly defined health and safety rights, the Pregnant Workers Directive provides a number of equality-based rights. Some of these complement, and sometimes reinforce, the provisions of the other equality Directives, in particular the Equal Treatment Directive. In some cases, however, the tension between equal and special rights is clear. For example, the dismissal of an employee from the beginning of her pregnancy to the end of her maternity leave 'save in particular cases not connected with their conditions' which the employers must cite in writing, is prohibited.[251] The Pregnant Workers Directive, however, does not specify whether unavailability for work during a specific period, such as the case for employees on a fixed-term contract, could be considered as one of these cases.[252] Furthermore, the Pregnant Workers Directive does not cover a ban on non-selection for a job because of pregnancy. In *Dekker*,[253] the Court held that the refusal to employ a candidate on the grounds of pregnancy is direct sex discrimination and, as such, prohibited. In this case which pre-dates the adoption of the Pregnant Workers Directive, the Court relied on the Equal Treatment Directive. Even after the adoption of the Pregnant Workers Directive, the Equal Treatment Directive continues to govern the rules relating to the selection for employment in the case of pregnancy. This highlights the potential conflicts that could arise between the two Directives, for example, which of the rules might apply if a pregnant employee applies for a job for which she is fully qualified, but which necessarily entails exposure to risks listed in the Pregnancy Workers Directive, and when no alternative work is available?[254]

The same problems arise in the case of dismissals on the grounds of pregnancy-related illness. Once again this issue has been tackled by the Court in numerous cases including *Hertz*,[255] *Larsson*[256] and *Rentokil*[257]

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[250] Article 8 of Directive 92/85/EEC.

[251] Article 10 of Directive 92/85/EEC.

[252] N. Burrows and M. Robison, 'An Assessment of the Recast of Community Equality Laws', *European Law Journal*, 13(2) (2007), 186–203.

[253] Case C-177/88 *Dekker* [1990] ECR I-3941.

[254] J. Jacqmain, 'Pregnancy as Grounds for Dismissal', *Industrial Law Journal*, 23 (1994), 355.

[255] Case C-421/88 *Hertz* [1990] ECR I-3979.

[256] Case C-400/95 *Larsson* v. *Føtex Supermarked* [1997] ECR I- 2757.

[257] Case C-394/96 *Rentokil* [1998] ECR I-4185.

by applying the Equal Treatment Directive.[258] While both the Equal Treatment Directive and the Pregnant Workers Directive prohibit, in quasi-absolute terms, the dismissal of a worker on the grounds of pregnancy or maternity,[259] the dismissal of a worker on the grounds of pregnancy-related illness outside the periods of pregnancy and maternity leave is in breach, if discriminatory by comparison to a (male) generically sick worker, of the Equal Treatment Directive alone.[260] The ECJ justifies its interpretation of the various applicable Directives on the basis that:

> protection against dismissal had to be accorded to women not only during maternity leave but also for the entire duration of their pregnancy, after stressing that the risk of dismissal may detrimentally affect the physical and mental state of female workers who are pregnant or have recently given birth, including the particularly serious risk that pregnant women may be prompted voluntarily to terminate their pregnancy. The Court held that dismissal of a female worker during pregnancy for absences due to incapacity for work resulting from her pregnancy is linked to the occurrence of risks inherent in pregnancy and must therefore be regarded as essentially based on the fact of pregnancy. From this the Court concluded that such a dismissal can affect only women and therefore constitutes direct discrimination on grounds of sex.[261]

This protection, however, applies exclusively to issues relating to dismissal and excludes pay related matters. The Court held in *McKenna*, that a female worker who is absent by reason of a pregnancy-related illness during her pregnancy or after her period of maternity leave is not entitled to maintenance of full pay, if other, male, workers absent

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[258] J. Shaw, 'Pregnancy Discrimination in Sex Discrimination', *European Law Review*, 16 (1991), p. 430.

[259] Article 10 of Directive 92/85/EC, as interpreted by the ECJ in various cases involving fixed term contract of employment. See for instance Case C-421/92 *Habermann-Beltermann* [1994] ECR I-1657 and Case C-32/93 *Webb* [1994] ECR I-3567.

[260] E. Caracciolo di Torella and A. Masselot, 'The ECJ Case Law on Issues Related to Pregnancy, Maternity and the Organisation of Family Life: An Attempt at Classification', *European Law Review*, 26 (2001), 239–260 (252–257).

[261] Case C-191/03 *North Western Health Board* v. *McKenna* [2005] ECR I-7631 at paragraph 47 citing Case C-394/96 *Rentokil* [1998] ECR I-4185 at paragraphs 18 and 24.

by reason of generic illnesses unrelated to pregnancy are treated in the same way.[262] The ECJ considers that the stress generated during pregnancy and maternity leave by a reduction of pay is not comparable to the stress resulting from being dismissed and therefore does not require the same level of protection. Despite stating that 'the condition of pregnancy is not comparable to a pathological illness and that the disorders and complications linked to pregnancy and causing incapacity for work form part of the risks inherent in the condition of pregnancy and are thus a specific feature of that condition',[263] the Court applies the non-discriminatory rules contained in the Equal Pay Directive for matters relating to the reduction of pay during pregnancy and maternity. We argue, on the contrary, that financial provisions are inherently important to effectively and efficiently guarantee pregnancy and maternity rights. Paradoxically, this argument is supported by the ECJ in *Del Cerro Alonso*, where it held that, despite the exception provided for in Article 137(5) EC, it is acceptable that EC law based on that Article regulates questions of pay 'otherwise some of the areas referred to in Article 137(1) EC would be deprived of much of their substance'.[264] Indeed, one of the main issues with the Pregnant Workers Directive is the absence of specific financial provisions relating to maternity leave.

A further gap identified in the Pregnant Workers Directive is the lack of provision guaranteeing the right of a woman on maternity leave to return to her job or to an equivalent position after the end of her maternity leave. The right to return to work, which is a corollary to the ban on dismissals, is provided by the amended Equal Treatment Directive.[265] Before the amendment of the Equal Treatment Directive, the right to return to the same or similar work was guaranteed only after parental leave[266] and not after maternity leave. However, here again, the Courts need to assess and to balance the rights laid down in the Pregnant Workers Directive with those of the Equal Treatment Directive. This tension is far from satisfactory in particular because of the necessity for clarity, transparency and legal certainty. Finally, the Pregnant Workers

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[262] Ibid. at paragraph 57 and 69.

[263] Ibid. at paragraph 56.

[264] Case C-307/05 *Del Cerro Alonso* v. *Osakidetza-Servicio Vasco de Salud* [2007] ECR I-7109 at paragraph 41.

[265] Article 2(7) of Directive 76/207/EEC as amended by Directive 2002/73/EC.

[266] Clause 2(5) of the Framework Agreement attached to Council Directive 96/34 EC, OJ [1996] L145/4–9.

Directive does not provide for time off for breastfeeding even though it is directly concerned with the 'worker who is breastfeeding'.[267]

The EC Commission proposal for amending the Pregnant Workers Directive

Our assessment of the Pregnant Workers Directive would be incomplete if we omitted to mention the legislative developments that have taken place recently. On 3 October 2008, the European Commission adopted a package of measures designed to improve work-life balance for women and men.[268] These proposed measures aim to update and improve existing EU legislation. In particular, the Commission adopted a proposal for a Directive amending the Pregnant Workers Directive[269] and a proposal for a Directive on Equal Treatment of the Self-Employed, repealing the existing legislation.[270]

Prima facie, the Commission proposal to amend the Pregnant Workers Directive addresses a number of the present legislation's shortcomings. In particular, it proposes an increase of the minimum period of leave from 14 to 18 weeks[271] and recommends that women should be paid 100 per cent of their salary beyond the current minimum of being paid an amount at least equivalent to sick pay.[272] Moreover, it is proposed that women will have a choice over when to take the non-compulsory portion of their leave (before or after childbirth) and, therefore, they will no longer be obliged to take a specific portion of the leave before childbirth, as is presently the case in some Member States. The Commission claims that a longer period of maternity leave will be beneficial for the mother (to protect her health), the child (increasing the ability of the mother to build a solid relationship with her baby), the employer (as women

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[267] Article 2(c) of Council Directive 92/85/EC.

[268] See the discussion in Chapter 1, 'The Development of the Reconciliation Principle in EU Discourse'.

[269] Proposal for a Directive of the European Parliament and of the Council 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) 600/4.

[270] Proposal for a Directive of the European Parliament and of the Council on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Directive 86/613/EEC, COM(2008) 636.

[271] Article 8 of Directive 92/52/EEC after the proposed amendments. This also corresponds to the ILO Maternity Protection Recommendations adopted in 2000.

[272] Article 11(3) of Directive 92/52/EEC after the proposed amendments.

will be less likely to have recourse to parental leave) and the economy as a whole (women will be more likely to return to work and to stay in employment).[273] Furthermore, the proposed Directive provides for stronger protections against dismissal.[274] In line with the *Paquay case*,[275] it provides that, in addition to the existing prohibition of dismissal which runs from the start of the pregnancy until the end of maternity leave, also steps leading to dismissal cannot be taken during her period of maternity leave, or, at least, must be duly substantiated by the employer. The right provided in the Recast Directive to return to the same job or an equivalent one after maternity leave and the right to benefit from any improvement in working conditions to which she would have been entitled during her absence, are also added to the proposal.[276] The proposed Directive includes a right to ask the employer, during or after the end of maternity leave, for flexible working patterns; the employer, however, retains the right to refuse this request.[277] Finally, the proposed Directive introduces a number of provisions common to all the equality Directives, including provisions on the reversal of the burden of proof,[278] protection against retaliation,[279] the prohibition of upper limits on compensation,[280] and the competences of national equality bodies on issues pertaining to equal treatment, but not health and safety.[281]

Despite being presented as an improvement, at best the proposed Directive hardly changes to any substantial degree the domestic position of many Member States and, at worst, leaves many question unanswered.[282] For example, the extension of leave is not only less than

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[273] Proposal to amend Council Directive 92/85/EEC, COM(2008) 600/4, explanatory memorandum, at p. 6.

[274] Article 10 of Directive 92/52/EEC after the proposed amendments.

[275] Case C-460/06 *Paquay* [2007] ECR I-8511.

[276] Article 11(2)(c) of Directive 92/52/EEC after the proposed amendments.

[277] Article 11(5) of Directive 92/52/EEC after the proposed amendments. However, 'A similar provision is included in Article 2b of the proposal to amend Directive 2003/88/EC on the organisation of working time. Should this Article be adopted, the amendment proposed here could refer to Article 2b of the proposal to amend Directive 2003/88/EC and no further change to Directive 92/85/EEC would be needed.' Proposal to amend Council Directive 92/85/EEC, COM(2008) 600/4, explanatory memorandum, p. 9.

[278] Article 12(a) of Directive 92/52/EEC after the proposed amendments.

[279] Article 12(b) of Directive 92/52/EEC after the proposed amendments.

[280] Article 12(c) of Directive 92/52/EEC after the proposed amendments.

[281] Article 12(d) of Directive 92/52/EEC after the proposed amendments.

[282] For an excellent analysis of the propose Directive see the European Women's Lobby document 'Proposal from the EWL in relation to the EU

the Member States' average, but is also insufficient. A leave period of 24 weeks, as proposed by the European Women's Lobby (EWL), is a better alternative. Indeed, as the Directive is specifically aimed at women who are breastfeeding, this is the period recommended by both the UNICEF and the World Health Organisation for breastfeeding. In addition, the Directive still leaves a considerable amount of discretion to the Member States[283] with regard to maternity pay. Furthermore, although it is based on Articles 137 *and* 141 EC, the proposed Directive remains silent in relation to the position of fathers. If anything, it could have proposed a few days leave for the father in order to help the mother with everyday tasks, such as domestic chores and care of other children if any, on health and safety grounds. As it is currently framed, the proposed Directive merely entrenches stereotypes. Moreover, the right granted to employees during or upon their return from maternity leave to ask for flexible working arrangements should be looked at very suspiciously. Firstly, this right is inherently flawed, as it provides a right to ask but not a right to obtain. Secondly, as this provision seems to be exclusively addressed to mothers, it inevitably reinforces stereotypes. As such, we ask whether this right would not be better included in another legal instrument such as the Part-Time Work Directive, where it could be provided for in gender neutral terms?

Overall, the main achievement of the proposed amended Directive is that it represents a clear departure from the current approach that pregnancy is an exclusive matter of health and safety. Indeed, it recognises that, while some pregnancy and maternity rights are essential for health and safety reasons,

> the rules pertaining to maternity leave, its length, remuneration and the rights and obligations of women taking maternity leave or returning from it are also intrinsically linked to the application of the principle of equal opportunities and equal treatment between women and men as established in Article 141(3).[284]

Commission's proposal for a Directive of the EU Parliament and of the Council 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 and breastfeeding' available at http://www.womenlobby.org.

[283] Article 3(3) of Directive 92/52/EEC after the proposed amendments.

[284] Proposal to amend Council Directive 92/85/EEC, COM(2008) 600/4, explanatory memorandum, p.6.

However, if the legal base makes it possible to broaden the material scope of application of the Directive, this continues to be addressed to women in an occupational capacity only. Finally, the proposed Directive is complemented by a further proposal[285] which aims to provide equivalent access to maternity leave and protection for self employed women, albeit on a voluntary basis.[286] At the same time, the so-called 'assisting spouses', namely spouses and life partners (as recognised by national law) who work on an informal basis in small family businesses such as a farm or a local doctor's practice will also have access to social security coverage on, at least an equal level, as self-employed workers.[287]

The relationship between the Pregnant Workers Directive and the Equality Directive

As it stands, the legal situation of pregnant and new mothers is left to the delicate interaction between the Equal Treatment Directive and the Pregnant Workers Directive. In order to be effective, these provisions should not be seen as separate and mutually exclusive instruments, but should be read toghether, as the Equal Treatment Directive remains crucial for clarifying the essence of the rights. In other words, the specific employment rights have to be interpreted in light of the gender equality principle; for example, women must have 14 weeks maternity leave in order to achieve equality. The need to clarify the relationship between the equality and the pregnancy Directives has been advocated for a long time by legal writers[288] and was anticipated by the Court in *Rentokil,*[289] where it became clear that the Pregnant Workers Directive does not 'replace' the Equal Treatment Directive. The relationship between the two Directives was further discussed in *Boyle*[290] and *Høy Pedersen*.[291]

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[285] Proposal of 3 October 2008 for a Directive of the European Parliament and of the Council on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Directive 86/613/EEC, COM(2008) 636.

[286] Article 8 of Directive 86/613 after the proposed amendments.

[287] Article 2 of Directive 86/613 after the proposed amendments.

[288] For example, C. Boch, 'Où s'arrête le principe d'égalité ou de l'importance d'être bien portante (à propos de l'arrêt *Larsson*)', *Les Cahiers de Droit Européen* (1998), 179; and see A.G. Ruiz-Jarabo Colomer's Opinion in Case C-394/96 *Rentokil* [1998] ECR I-4185 at paragraph 23.

[289] Case C-394/96 *Rentokil* [1998] ECR I-4185.

[290] Case 411/96 *Boyle* [1998] ECR I-6401.

[291] Case 66/96 *Høj Pedersen* v. *Fællesforeningen for Danmarks Brugsforeninger* [1998] ECR I-7327.

Following the principles established by these cases, pregnant employees can rely on both the Pregnant Workers Directive and the Equal Treatment Directive but, while on maternity leave, since their situation cannot be compared with that of a sick man, they can no longer rely on the equal treatment principle and therefore their situation is regulated by the Pregnant Workers Directive only. Although the relationship between the two Directives established in *Rentokil* must be welcomed, the line which the Court has drawn can be questioned. Why, if discriminated against on grounds of pregnancy, can an employee claim a breach of the Equal Treatment Directive as pregnancy is a situation unique to women, but when on maternity leave she cannot? A possible explanation could be that, as stated in *Gillespie*, a woman on maternity leave is no longer a 'worker' and thus is different from both a man at work or a man off work.[292] However, considering that the principle of equal treatment between men and women is expressly mentioned in the preamble, we argue that the Pregnant Workers Directive should, in any case, be interpreted in light of the Equal Treatment Directive. It is regrettable that the line drawn by the Court does not seem to achieve this purpose.[293]

The involvement of fathers

> Didn't you ever feel ridiculous being a father? There's nothing as comical as the sight of a father holding his child's hand as they walk down the street, or hearing a father talk about his children, 'my wife's children' is what he ought to say.[294]

Until very recently fathers have been excluded, or simply forgotten, from EU reconciliation policies and in particular leave provisions.[295] If and when provided, leave provisions for fathers take two forms: paternity and/or parental leave. The lack of specific provisions is hardly surprising given that, traditionally, EU law was moulded upon the public/private sphere.[296] Indeed, in previous sections of this book we have

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[292] Case C-342/93 *Gillespie and others* v. *Northern Health and Social Services Boards* [1996] ECR I-475, at paragraph 17.

[293] E. Caracciolo di Torella, 'Recent Developments in Pregnancy and Maternity Rights', *Industrial Law Journal*, 28 (1999), 276–282.

[294] A. Strindberg, 'The Father' in *Miss Julie and other Plays* (Oxford: Oxford University Press, 1998).

[295] Case 184/83 *Hofmann* [1984] ECR 3047.

[296] For example, U. Björnberg, 'Family Orientation among Men: A Process of Change in Sweden', in E. Drew, R. Emerek, and E. Mahon (eds), *Women, Work and*

argued that, for a variety of reasons, mainly cultural and financial, the regulation of fathers' rights has been more complex than that of mothers. In the words of Fineman:

> [w]hat has been missing from policy and reform discussions thus far is a debate about the nature of fatherhood and the transformation of the role of the father in response to changing expectations, norms and practices. How does the desire for gender neutrality and the ideal of egalitarianism play a role in the creation of a new set of norms for fatherhood?[297]

The result has been that the relevant legislation has placed a different emphasis on maternity and paternity. Whilst the role of mothers was traditionally associated with that of the main care provider, that of fathers was linked with that of the main/sole breadwinner and therefore little need was seen to facilitate the position of fathers as carers.[298] This different position was, despite its commitment to substantive equality,[299] endorsed by the Court of Justice. In *Commission* v. *Italy*,[300] it held that national legislation giving a right to leave to the adoptive mother but not to the adoptive father, was acceptable because of the 'special bond' between mother and child. In the case of *Hofmann* a German father failed to obtain benefits during a period of leave to care for his newborn child.[301] He challenged this refusal on the basis that, had he been the mother, he would have been entitled to such benefits. His argument was that the Equal Treatment Directive[302] permits derogation from the equal treatment principle only in order to protect women before and after childbirth; therefore if the provision of leave goes beyond that function and entails measures for the care of the child in the long term, it should be open to both men and women. The Court rejected this argument and held that it was outside

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the Family in Europe (London: Routledge, 1998), 200–207. See also our discussion in the Introduction.

[297] M. Fineman, *The Autonomy Myth* (New York: The New York Press, 2004), p. 195.

[298] S. Ruddick, 'The Idea of Fatherhood', in H. Lindemann Nelson (ed.), *Feminism and Families* (London: Routledge, 1997), p. 205.

[299] Inter alia, Case C-136/95 *Thibault* [1998] ECR I-2011.

[300] Case 163/82 *Commission* v. *Italy* [1983] ECR 3275.

[301] Case 184/83 *Hofmann* [1984] ECR 3047.

[302] European Parliament and Council Directive 76/207/EEC, OJ [1976] L39/40.

the scope of EC law to alter the division of responsibilities between parents. The aim of the Equal Treatment Directive was instead interpreted to protect women's biological condition during and after pregnancy and the special relationship between mother and child. This position was further articulated more than two decades later in *Hill*.[303] Here, the Court was asked to interpret whether job-sharing – a form of part-time employment – could amount to indirect discrimination. The Court obscurely referred to the need to protect 'both women and men within family life and in the course of their professional activities';[304] yet it went to some lengths to suggest that women's role within the family is the "traditional" one, without actually explaining what the role of men would entail. The silence of the Court in *Hill* can further be interpreted in light of its position in *Abdoulaye*,[305] decided a few years later. On this occasion, a group of men were refused the payment of child-care benefits related on the grounds that the benefits in question were designed to offset the occupational disadvantages inherent in maternity leave. By agreeing with the national legislation, the Court accepted that, within the family, the role of men is that of the traditional breadwinner.

However, the role that men play within the family is crucial for a successful equality agenda, and more specifically for the success of the reconciliation provisions. Furthermore, across Europe, men have growing expectations about their role within the family, in particular as fathers. If a few decades ago the father was perceived as a distant, authoritarian figure whose main value lay in his pay packet, today fathers want a closer relationship with their children and are willing, at least in principle, to reorder their priorities to achieve it.[306]

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[303] Case C-243/95 *Hill and Stapleton* [1998] ECR I-3739.

[304] Case C-243/95 *Hill and Stapleton* [1998] ECR I-3739 at paragraph 42: 'Community policy in this area is to encourage and, if possible, adapt working conditions to family responsibilities. Protection of women within family life and in the course of their professional activities is, in the same way as for men, a principle which is widely regarded in the legal systems of the Member States as being the natural corollary of the equality between men and women, and which is recognised by Community Law.' See further C. McGlynn and C. Farrelly, 'Equal Pay and the Protection of Women within Family Life', *European Law Review*, 24 (1999), 202–207.

[305] Case C-218/98 *Abdoulaye and Others* v. *Régie Nationale des Usines Renault SA* [1999] ECR I-5723; see further C. McGlynn, 'Pregnancy, Parenthood and the Court of Justice in Abdoulaye', *European Law Review*, 25 (2000), 654–662.

[306] E. Dermott, *Intimate Fatherhood* (London: Routledge, 2008).

This is now increasingly acknowledged in the policy discourse at both domestic[307] and EU level.[308] In the Member States, the underlying assumptions about the traditional role of men have been slowly but steadily challenged. Accordingly, while they remain patchy, throughout Europe specific rights for fathers in this area are emerging.[309] Although certain countries such as Italy still provide only very basic entitlements,[310] others have taken active steps to answer the growing challenges of modern society. This is the case in the Scandinavian countries, for example. In Sweden, fathers have been entitled to 10 days leave in connection with the birth of their children since the 1980s. In Norway, since the 1990s fathers have been permitted two weeks' leave. Furthermore, in both countries this right is reinforced by specifically granting fathers a 'quota' of the parental leave.[311]

If, on the whole, the climate is changing across Europe, when provided, paternity rights are still primarily a token gesture and usually range from between two days to two weeks off in connection to the birth of a child. These very short, and often poorly paid, periods are certainly not sufficient to care for and bond with a small child, nor to tilt the gender equality balance and promote a shift of social attitudes in the workplace and in the organisation of family roles, let alone the structure of society. As James comments in the specific context of paternity leave in the UK, which grants new fathers 'up to two weeks' paid at a flat rate:

> [i]f I am cynical, it provides just enough time for the father to smoke a pack of cigars, wet the baby's head, be appreciated as a 'good dad'

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[307] See for example E. Caracciolo di Torella, 'New Labour, New Dads – the Impact of Family Friendly Legislation on Fathers', *Industrial Law Journal*, 36 (2007), 316–326.

[308] See for example COFACE, 'Men and Families: Men's changing Family Roles in Europe', December 2006.

[309] EU Expert Group on Gender, Social Inclusion and Employment (EGGSIE), *Reconciliation of Work and Private Life: A Comparative Review of Thirty European Countries* (Brussels: European Commission, 2005).

[310] European Commission, *Reconciliation of Work and Private Life: A Comparative Review of Thirty European Countries* (Brussels: European Commission, 2005); European Commission, *Gender Mainstreaming of Employment Policies: A Comparative Review of Thirty European Countries* (Brussels: European Commission, 2007), in particular Chapter 5, 'Reconciliation Policies'; European Commission, European Legal Network of Legal Experts in the Field of Gender Equality, *Legal Approaches to some Aspects of the Reconciliation of Work, Private and Family Life in Thirty European Countries* (Brussels, European Commission, 2008).

[311] NOU 1995:27 *Pappa kom hjem*; NOU 1993:12 *Tid for Barna*.

> by the in-laws and slip back to work once the novelty of the moment has subsided, leaving the mother to cope with the monotony of continual crying and nappy changing for a further few months until money gets so tight that she too has to return to work. If I am more optimistic, it provides the father with a brief insight into the ecstasy of parenthood and an opportunity to adjust to his additional domestic responsibilities, only to be catapulted back into full-time work once he has begun to appreciate the demands and joys that a new life can bring.[312]

Thus, as currently structured in the majority of legal orders across Europe, the right to paternity leave is not as strong as maternity leave. At the EU level, the Commission first emphasised the importance of fathers to the equality debate in its submission in the case of *Commission* v. *France*:

> [t]he evolution of society is such that in many cases working men, if they are fathers, must share all the tasks previously performed by the wife as regards to the care and the organisation of the family.[313]

The Commission further voiced its concerns about the lack of policies to support fatherhood in 1994 during the celebration of the United Nation's International Year of the Family.[314] Furthermore, the Council Resolution on the Balanced Participation of Women and Men in Family and Working Life, encouraged Member States to consider the possibility to introduce in their legal orders provisions to grant working fathers an individual and non-transferable right to paternity leave, while maintaining their employment rights.[315] An early attempt to bring fathers into the reconciliation discourse was made in the first draft of the proposed Pregnant Workers Directive, which included two unpaid days of paternity leave in connection with the birth of a child. The proposal

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[312] G. James, 'All That Glitters is Not Gold: Labour's Latest Family-Friendly Offerings', *Web Journal of Current Legal Issues*, 3 (2003).

[313] Case 312/86 *Commission* v. *France* [1988] ECR 6315 at 6322.

[314] See United Nation General Assembly, Social Development, Including Questions Relating to the World Social Situation and to Youth, Ageing, Disabled Persons and The Family, 6 January 1997, A/52/57, E/1997/4; G. Van Bueren, 'The International Protection of Family Members' Rights as the 21st Century Approaches', *Human Rights Quarterly*, 17(4) (1995), 732–765.

[315] Resolution of the Council on 'The Balanced Participation of Women and Men in Family and Working Life', OJ [2000] C218/5.

was, however, rejected[316] The final version of the Pregnant Workers Directive never contemplated fathers: the justification given was that this Directive was a health and safety instrument.[317]

Against this background, it is now possible to appreciate the limited change which has occurred in recent years. The catalyst for such change was the adoption of the Treaty of Amsterdam which triggered a new, more proactive approach to gender equality. The legislation introduced following it seems to confirm this trend. The amended Equal Treatment Directive[318] and the Recast Directive[319] are the first EU measures that acknowledge fathers' presence, albeit not to the extent of conferring specific rights upon them. Article 2(7) of the amended Equal Treatment Directive states that 'it is (...) without prejudice to the right of Member States to recognise distinct rights to paternity and/or adoption leave'. Article 16 of the Recast Directive on paternity and adoption leave confirms the provisions of the amended Equal Treatment Directive for fathers in approximately the same terms.[320] The Directives do not grant positive rights to fathers, but they provide that the same level of protection as applies to maternity leave must be extended to paternity and adoption leaves, *if* Member States have already introduced such rules into national law. In other words, the employment rights of workers who take paternity leave are only protected under EU law if the Member States have introduced paternity leave provisions. Father's rights are therefore seen as an *option* for Member States

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[316] D. Muffat-Jandet, 'Protection of Pregnancy and Maternity', *Industrial Law Journal*, 20 (1991), 76–79.

[317] D. Muffat-Jandet, 'Protection of Pregnancy and Maternity', *Industrial Law Journal*, 20 (1991), 76–79.

[318] Directive 76/207 as amended by Directive 2002/73 on the implementation of the principle of equal treatment for men and women, OJ [2002] L269/15.

[319] 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 [2006] L204/23.

[320] 'This Directive is without prejudice to the right of Member States to recognise distinct rights to paternity and/or adoption leave. Those Member States which recognise such rights shall take the necessary measures to protect working men and women against dismissal due to exercising those rights and ensure that, at the end of such leave, they are entitled to return to their jobs or to equivalent posts on terms and conditions which are no less favourable to them, and to benefit from any improvement in working conditions to which they would have been entitled during their absence.'

to consider, rather than an enforceable individual right.[321] The measures have, however, prompted a policy debate and the Commission is at the moment investigating the possibility of introducing paternity leave defined as 'a short period of leave for fathers around the time of the birth of a child'.[322] However, as discussed above, the proposed amendments to the Pregnant Workers Directive are silent on the position of fathers. We have argued that a few days leave could have been suggested on health and safety grounds, if not also based on the principle of equality. Therefore, at the time of writing, it remains to be seen whether the existing provisions can really challenge the traditional understanding of reconciliation. Against this background, parental leave has been seen, at least at the EU level, as the only alternative to the lack of specific provisions for fathers.

The gender-neutral provisions

Changing the focus: Parental leave

Parental leave is the only form of leave addressed to *both* parents[323] and, as such, is a major component for promoting the concept of reconciliation. It serves both economic and social aims. By encouraging and supporting women's employment, it serves an economic objective. In this vein, the Commission has acknowledged that greater participation of women in employment is not only a question of social justice but is also in the EU's economic interests.[324] Accordingly, if adequate provisions are provided to enable men and women to reconcile their occupational and family obligations, women could take advantage of the new job opportunities created by the single market. Furthermore, parental leave also serves social aims as it encourages an equal division of unpaid work, namely the care of young children, between parents. In this way, it not only highlights awareness that family life (the private

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[321] See the Preamble paragraph 13 and Article 2(7) of the Directive 76/207 as amended by Directive 2002/73.

[322] Consultation documents SEC (2006) 1245 and SEC (2008) 571 as discussed in the Communication from the Commission, A Better Work-Life Balance: Stronger Support for Reconciling Professional, Private and Family Life, COM (2008) 635.

[323] Case 519/03, *Commission* v. *Luxembourg* [2005] ECR I-000.

[324] Communication from the Commission, *Employment and Social Policies: A Framework for Investing in Quality*, COM(2001) 313.

sphere) and employment (the public sphere) are explicitly linked,[325] it also promotes a just division of roles within the family, which is the pre-requisite for achieving gender equality and, more specifically, equal opportunities in the labour market.[326] By allowing both mothers and fathers to take relatively long periods off in order to care for their children, it challenges stereotypes linked to care. Thus, parental leave has the potential to re-conceptualise the relationships between the state, the market and the family in terms of extended leave arrangements. It shifts the emphasis, at least on paper, from the health and safety, non-discrimination and employment rights of the mother to embrace the social rights of both parents.

In the EU, parental leave was only introduced in 1996.[327] Its adoption was controversial and took a long time.[328] A first proposal was submitted in 1983,[329] but no agreement could be reached in the Council. The issue was then further discussed following the adoption of the 1989 Community Charter on the Fundamental Social Rights of Workers, which highlighted the need to develop measures 'enabling men and women to reconcile their occupational and family obligations',[330] but again with no real results. Eventually the impasse was overcome with the involvement of the Social Partners, who negotiated a framework agreement that later became the Parental Leave Directive. If, from an institutional perspective, the Parental Leave Directive is an important

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[325] Clause 2(6) Parental Leave Directive. On this point see Case C-333/97 *Lewen* v. *Denda* [1999] ECR I-7243; as noted by E. Caracciolo Torella, 'Childcare, Employment and Equality in the EC: First (False) Steps of the Court', *European Law Review*, 25(3) (2000), 310–316. Although this was the first time that the Court interpreted the Parental Leave Directive, it had already dealt with issues related to the impact of childcare on the employment market in other occasions. For recent decisions, see Case C-281/97 *Krüger* v. *Kreisskranner Eberberg* [1999] ECR I-5127; Case C-249/97 *Gruber* [1999] ECR I-5295.

[326] EC Commission, Report from the Commission on Equality between Women and Men 2005, COM(2005) 44 final.

[327] Council Directive 96/34/EC on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, OJ [1996] L145/4, amended by Council Directive 97/75/EC, OJ [1998] L10/24, Consolidated 16 January 1998.

[328] Draft Directive on Parental and Family Leave, OJ (1984) C 316/7; see J. McMullen, 'The New Proposals for Parental Leave and Leave for Family Reasons', *The Company Lawyer*, 7 (1986), 30; F. P. Davidson, 'Parental Leave – Time for Action?' *Journal of Social Welfare and Family Law*, 8(5) (1986), 281–289; E. Ellis, 'Parents and Employment: An Opportunity for Progress', *Industrial Law Journal*, 15(1) (1986), 97–109.

[329] COM(83) 686 final followed by COM (84) 631 final.

[330] COM(83) 686 final.

achievement, as it is the first outcome of the social dialogue,[331] from a substantive perspective it provides a very basic set of rights, which, depending on their practical implementation, can either be progressive or entrench stereotypes.

Success or rhetoric?

At a very early stage it emerged that to provide statutory entitlement is only one step in the right direction. It is *how* that right is implemented in practice that makes a difference. Depending on this implementation, parental leave can have different – if not opposite – outcomes: it can be a measure which effectively promotes a new conception of parenting, a measure to reinforce stereotypes and gender segregation in the workplace or even an empty provision. Its correct implementation is influenced by six crucial elements: the *structure* of the right, its *duration* and *time limit,* its *flexibility,* the attached *eligibility conditions*, the *level of employment protection* and last but by no means least, the *level of financial compensation*. These elements are all closely connected.

The Parental Leave Directive enables workers (men and women) with young families to share the care of young children and thus to reconcile their parental and professional responsibilities.[332] For this purpose, it is structured as an individual right, rather than as a family entitlement. This means that each parent is allocated a specific amount of time which cannot be transferred to the other parent: if a parent (in practice often the father) does not use his/her entitlement, this will be lost. The Scandinavian experience, where similar legislation has been in force since the early 1990s, suggests that this might prove a successful approach.[333] The Directive reinforces the concept that the right is

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[331] M. Schmidt, 'Parental Leave: Contested Procedure, Creditable Results', *International Journal of Comparative Labour Law and Industrial Relations*, 13 (1997), 113–126.

[332] Clause 1(2) of the Framework Agreement in Council Directive 96/34/EC.

[333] B. Brandth and E. Kvande, 'Care Politics for Fathers in a Flexible Time Culture', in D. Perrons, C. Fagan, L. McDowell, K. Ray and K. Ward (eds), *Gender Divisions and Working Time in the New Economy* (Cheltenham: Edward Elgar, 2006), p. 148; A. Leira, 'Combining Work and Family' in A. Leira and T. Boje (eds), *Gender, Welfare State and the Market* (London: Routledge, 2000), p. 157; A. Leira, *Working Parents and the Welfare State* (Cambridge: Cambridge University Press, 2002), in particular Chapter 4; G. Bruning and J. Plantenga, 'Parental Leave and Equal Opportunities: Experiences in Eight European Countries', *Journal of European Social Policy*, 9(3) (1999), 195–210. For a more critical approach see P. Kershaw, 'Carefair: Choice, Duty and the Distribution of Care', *Social Politics*, 13(3) (2006), 341–371.

individual by adding that it is, in principle, not transferable.[334] In practice, however, the wording 'in principle' allows Member States to construe the right as a family entitlement: it will be crucial to see whether and how the Court will ever be asked to interpret this wording. If interpreted as a family entitlement, it is left to the parents to decide who will use the leave and evidence suggests that, in this case, it is usually the mother.[335]

The duration and the time limit of the leave are also important in determining the success of the right. The Directive provides for unpaid parental leave to look after a child for at least three months 'until *a given age* up to eight years *to be defined by the Member States and/or Social Partners*'.[336] The short period of leave envisaged by the EU Parental Leave Directive (three months) coupled with it having to be taken when the child is still very young, leads almost systematically to the leave being taken by the mother. This promts us to question the very purpose of the leave. Does it aim to allow parents to spend more time with a child? Or is it intended as a right to deal with some sort of emergencies? The former is clearly the purpose of the legislation in Sweden where, following compulsory maternity leave, parents can share a further 15-month period of parental leave. The latter, in contrast, reflects the situation in the UK where the right was described as:

> a right for parents to take time off work to look after a child *or make arrangements for the child's welfare*. Parents *can* use it to spend more time with children and strike a better balance between their work and family commitments.[337]

Furthermore, the fact that the availability of the right is limited to parents of children below the age of eight, focuses on parents of very young children and ignores the needs of parents of older children,[338] and as such creates a two-tier parenthood.

Potentially, the most important feature of the Parental Leave Directive is that it can be flexible: parents, in theory, can choose whether to

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[334] Clause 2(2) of the Framework Agreement in Council Directive 96/34/EC.

[335] OECD Employment Outlook 2000.

[336] Clause 2(1) of the Framework Agreement in Council Directive 96/34/EC.

[337] Department for Trade and Industry, *Parental Leave: A Short Guide for Employers and Employees*, 2004. Emphasis added.

[338] See further G. James, *The Legal Regulation of Parenthood* (London: Routledge-Cavendish, 2009), p. 47.

arrange the leave full-time, part-time, fragmented or in the form of a time-credit system. In this case, parental leave can achieve the double aim of allowing parents to care for their children and simultaneously to remain active in the employment market. Indeed, as it stands, employees, in particular fathers, would arguably be more likely to use it, if they could retain some form of income. However, the choice of how to structure the parental leave at national level has been left to the Member States.[339] This has led to significant variations which, in turn, jeopardises the intention of the flexible arrangements envisaged at the outset.[340] At one end of the spectrum, the Scandinavian countries, in particular Sweden, provide that, after a compulsory four week period of maternity leave reserved for the mother, parents have access to over a year-long period of parental leave. The leave can be arranged in blocks, or with a range of 'fractioning' part-time options, until the child is eight. At the other end of the spectrum, the Czech Republic, Italy, Latvia and Poland, do not allow for any degree of flexibility.[341] A number of Member States provide a mid-level scenario. This is the case with the UK where, failing an arrangement between the employer and the employee on how to arrange the leave, a default scheme applies. This entitles parents to a maximum of four weeks' leave per year to be taken in blocks of at least one week. In practice, however, the scheme is inflexible and can lead to financial difficulties. In addition, it can discourage the use of the leave, in particular, for fathers.[342] This happened in the case of *Rodway*,[343] where a father was denied the possibility of using one day of (unpaid) parental leave, rather than the whole week prescribed by the default agreement. If, on the one hand, one day or one week is hardly enough to bond with/care for a child, on the other hand, one day might be all a parent needs to deal with a difficult situation. The issue of flexibility has recently been brought to the attention of the ECJ. In *Sari Kiiski*,[344] the applicant applied for, and was granted, a period of child-care leave,

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[339] Clause 2(3) of the Framework Agreement in Council Directive 96/34/EC.

[340] J. Plantenga and C. Remery, *Reconciliation of Work and Private Life. A Comparative Review of Thirty European Countries* (Brussels: European Commission, 2005).

[341] J. Plantenga and C. Remery, *Reconciliation of Work and Private Life. A Comparative Review of Thirty European Countries* (Brussels: European Commission, 2005).

[342] E. Caracciolo di Torella, 'New Labour, New Dads – the Impact of Family Friendly Legislation on Fathers', *Industrial Law Journal*, 36(3) (2007), 318–328.

[343] *Rodway* v. *South Central Trains Ltd*, Court of Appeal on 18 April 2005, reported at [2005] IRLR 583.

[344] Case C-116/06 *Sari Kiiski* v. *Tampereen kaupunki* [2007] ECR I-7643.

from 11 August 2004 to 4 June 2005, to care for her son born in 2003. As she discovered in July 2004 that she was pregnant again, she asked to terminate her child-care leave on 22 December 2004, to take advantage of maternity leave rights. Her application was rejected on the grounds that, according to domestic collective agreement, a new pregnancy did not constitute a justified grounds for altering the duration of child-care leave. The ECJ ruled that the employer's refusal to alter the duration of parental leave, thus de facto curtailing its flexibility, was in breach of the Equal Treatment Directive. The decision confirms that, at least in certain circumstances, flexibility is an important element of parental leave rights. It is, however, regrettable that the main argument of this ruling was that the discriminatory treatment resulting from the provisions at issue were capable of *affecting women only*.[345]

Furthermore, Member States are responsible for defining other practical details such as the eligibility conditions. In the majority of European Countries, parental leave is not, as is the case of maternity leave, an automatic entitlement, instead parents must meet certain *requirements*. For example, one such requirement can be to have worked for the same employer for a specified qualifying period.[346] This means that if one of the parents has recently changed job, he/she will be unable to use the right. In this situation, it appears that the conditions of eligibility might act as a barrier.

Employment protection is also crucial for the effectiveness of parental leave. Employees will not use the leave if it is to the detriment of their employment rights. For this purpose, they are protected against dismissal on account of the fact that they are using parental leave and maintain the rights acquired, or in the process of being acquired, during the period of the leave.[347] At the end of the parental leave, these rights, including any changes arising from national law, collective agreements or practice, shall apply.[348]

However, disappointingly, the Court gave a restrictive interpretation on this point. In *Lewen*,[349] it held that a policy provision refusing to

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[345] Para 14; emphasis added.

[346] Clause 2(3)(b) of the Framework Agreement in Council Directive 96/34/EC.

[347] Clause 2(4) of the Framework Agreement in Council Directive 96/34/EC.

[348] Clause 2(6) of the Framework Agreement in Council Directive 96/34/EC. Case C-249/97 *Gruber* [1999] ECR I-5295.

[349] Case C-333/97 *Lewen* [1999] ECR I-7243 as noted by E. Caracciolo Torella, 'Childcare, Employment and Equality in the EC: First (False) Steps of the Court', *European Law Review*, 25(3) (2000), 310–316.

pay a retroactive Christmas bonus to a woman who was not in 'active employment' at the time of the payment (although the bonus was linked to work that she had actually performed), as she was on parental leave, was not in breach of Article 119 EC, Article 11(2) of the Pregnant Workers Directive or Clause 2(6) of the Parental Leave Directive. The Court explained its reasoning on the basis that the main purpose of the bonus was to provide incentive for future work and loyalty to the undertaking. In addition, the bonus did not constitute a right within the meaning of Clause 2(6) of the Parental Leave Directive on the basis that it was *voluntary*. The Court went further to suggest that, had the bonus been a *retroactive payment,* the situation would have been of indirect discrimination on the grounds that 'female workers are likely (...) to be on parenting leave far more than male workers'.[350] This was the case in *Krüger*[351] where the plaintiff was working in 'minor employment' (less than 15 hours a week) because of childcare commitments. The defendant argued that, because Ms Krüger was in 'minor employment', she was not entitled to the Christmas bonus. The Court held that this provision was contrary to Article 119 of the Treaty (now 141) EC because it affected a considerably greater proportion of women than men.

The main difference between the two cases is that *Krüger* was decided under Article 119 EC and *Lewen* under the Parental Leave Directive. This seems to indicate, paradoxically, that that issues related to parental leave are better protected within the general framework of the gender equality principle, in particular the concept of indirect discrimination, rather than within the scope of specific provisions such as the Parental Leave Directive.

Finally, at the end of the parental leave, the Directive provides that parents have the right to return to the same job or, if this is not feasible, to an equivalent or similar job within the same undertaking.[352]

The weakest point of the Parental Leave Directive is, as in many domestic jurisdictions, the lack of financial compensation offered to parents. This can easily be regarded as a deterrent for many working parents, especially fathers. Indeed, when parental leave is unpaid it becomes a privilege of affluent families and is of little use to those with modest income. In the latter case, if is used at all, the low level of payment is likely to function by targeting the mother as the leave taker. In fact, there are few families who can afford a drop in their income and, when

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[350] Case C-333/97 *Lewen* [1999] ECR I-7243 at paragraph 40.
[351] Case C-281/97 *Krüger* [1999] ECR I-5127.
[352] Clause 2(5) of the Framework Agreement in Council Directive 96/34/EC.

they can, this is usually the (normally lower) income of the mother.[353] This leads, once again, to the reiteration of already entrenched stereotypes: 'when women take leave they drop out of employment, often for relatively long periods, and fathers drop out of sharing work in the home.'[354] Once mothers start undertaking the main share of childcare, they also start competing on an unequal footing in the employment market, thus reinforcing gender segregation and pay gaps.[355] To a certain extent, the difficulties which the lack of financial support creates were acknowledged by the first draft of the Parental Leave Directive in 1983, which suggested that 'during parental leave, workers may receive a parental leave allowance.' The proposal, however, was not taken any further. It follows that although the Parental Leave Directive may contain the necessary elements, these are not always implemented in such a way as to further its effective application.

Fathers and the use of paternity and parental leave

According to Devan,

> [Parental leave] erodes an employment system in which workers, especially male workers, are assumed to have no caring obligations. Parental leave legislation formally links the concepts of 'worker' and 'carer'.[356]

Along similar lines we have argued that, amongst all the leave measures, parental leave is the very one which has the potential to change the terms of the discussion on issues related to parenting which, until

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[353] Inter alia, G. Bruning and J. Plantenga, 'Parental Leave and Equal Opportunities; Experiences in Eight European Countries', *Journal of European Social Policy*, 9(3) (1999), 195–210 (195); see also EU Expert Group on Gender, Social Inclusion and Employment (EGGSIE), *Reconciliation of Work and Private Life: A Comparative Review of Thirty European Countries* (Brussels: European Commission, 2005).

[354] F. Deven, 'Assessing the Use of Parental Leave by Fathers; Towards a Conceptual Framework', in B. Peper, A. Doorne-Huiskes, and L. Dulk (eds), *Flexible Working and Organisational Change: The Organisation of Working and Personal Life* (Cheltenham: Edward Elgar Publishing Limited, 2005), p. 263.

[355] R. Reeves, *Dad's Army: The Case for Father-Friendly Workplaces* (London: The Work Foundation, 2003).

[356] See further F. Devan, 'Assessing the Use of Parental Leave by Fathers: Towards a Conceptual Framework', in B. Peper, A. Doorne-Huiskes, and L. Dulk (eds), *Flexible Working and Organisational Change: The Integration of Working and Personal Life* (Cheltenham: Edward Elgar Publishing, 2005), p. 258.

recently, has regarded caring for young children as almost exclusively a women's issue. It is in fact the first, and effectively only provision, which brings fathers into the EU reconciliation discourse and thus achieves full equality of opportunity between men and women. For this purpose, a few days paternity leave are simply not enough.

Yet, the scarce use of parental leave by fathers has cast doubts on the effectiveness and potential of the measure and emphasises that the EU discourse still fails to address the underlying issues related to the allocation of time and resources within the family. Since its introduction in the early 1990s it has been used almost exclusively by mothers,[357] and, in practice, it has became a form of 'extended maternity leave', thus reinforcing the idea that women are the primary carers. Arguably, in order to make it more appealing to men, parental leave should be promoted by government campaigns aimed at making it socially acceptable for fathers to use it. This would in turn also influence demands and opportunities in the individual workplace, which can have an impact on the take-up of leave. In fact, at the time of writing, fathers who take parental leave are often seen as being insufficiently committed to their job by their employer and fellow employees. This seems to be corroborated by research suggesting that the employment patterns of men remain the same, or even increase, with the presence of children in the household.[358]

Thus, paternity leave – a measure of arguably lesser potential than parental leave – might in practice prove more popular with fathers because, although it is shorter in duration, it has the potential of being

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[357] EC Childcare Network, Leave Arrangements for Workers with Children, *A Review of Leave Arrangements in the Member States of the European Union and Austria, Finland, Norway and Sweden* (Brussels European Commission, DGV Equal Opportunities Unit, 1994); EC Childcare Network, *A Review of Services for Young Children in the European Union 1990–1995* (Brussels European Commission, DGV Equal Opportunities Unit, 1996); OECD, Employment Outlook 2001, in particular Chapter 4; P. Moss and F. Deven, *Parental Leave: Progress or Pitfall?* (The Hague/Brussels: NIDI GBGS Publications, 1999). Eurobarometer, 'Europeans' Attitudes to Parental Leave', May 2004; S. Carlsen, 'Men's Utilisation of Paternity Leave and Parental Leave Schemes', in S. Carlsen and J.E. Larsen (eds), *The Equality Dilemma* (Copenhagen: The Danish Equal Status Council, 1999), 79–89.

[358] OECD, *Babies and Bosses, Reconciling Work and Family Life – A Synthesis of Findings for the OECD Countries* (Paris: OECD, 2007), p. 115; E. Dermott, 'Time and Labour: Fathers' Perceptions of Employment and Childcare', *The Sociological Review*, 53(2) (2005), 89–103; E. Dermott, 'What's Parenthood Got to Do With It?: Men's Hours of Paid Work', *The British Journal of Sociology*, 57(4) (2006), 619–634.

paid.[359] It follows that, the Parental Leave Directive, although representing a step in the right direction, does not offer an adequate answer to the needs of working parents and does little to encourage fathers to take it. When it is taken up, we have seen that it is often by the *mother*; this reinforces structural problems such as the gender pay gap and women's economic subordination. It ultimately entrenches the image of mothers and women as primary carers for children.

In July 2008, the Social Partners confirmed their intention to initiate the negotiation procedure provided for in Article 138 EC to address its shortcomings. It is hoped that an agreement will be reached during the course of 2009. In light of the above discussion, it is difficult to anticipate what the most pressing priorities will be in order to render the leave measures more effective on paper and in practice. However, consideration will need to be given to the creation of a cohesive system of leave not exclusively limited to the care of children.[360]

The leave provisions and the changing needs of changing families

To effectively care for a (young) family, a system of leave should cater for unforeseen situations, ranging from an ill child, or relative to the need to attend a funeral. Leave for emergencies, however, has not traditionally been part of either domestic or EU legal systems. At the time of writing the only EU provision contemplating such a situation is the right to take leave 'on grounds of force majeure for urgent family reasons in cases of sickness or accident making the immediate presence of the worker indispensable'.[361] This provision entitles employees to take unpaid time off for family reasons, for instance if a child is ill, irrespective of length of service. This provision is important for two reasons. Firstly, in the case of young families, it acknowledges that parents have needs and responsibilities which do not end after a few months of maternity, paternity or parental leave. Secondly, as there is an emphasis on *employees* rather than *parents*, the right is potentially open to a very wide interpretation, making it the only truly *family* (rather than *children*) friendly right. However, as in the case of the Parental Leave Directive, here too the interpretation of the Member States has largely influenced the potential of this provision. The best practice example is Sweden

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[359] M. Thompson, L. Vinter, and V. Young, 'Dads and Their Babies: Leave Arrangements in the First Year' (2005) EOC Working Paper N. 37.

[360] See the discussion in the following section.

[361] Clause 3 of the Framework Agreement in Council Directive 96/34/EC.

which provides 60 days leave at 80 per cent of salary per year but overall the interpretation has been restrictive.[362] The relevant UK legislation,[363] for example, theoretically makes it possible to interpret it very broadly. The interpretation of domestic courts,[364] however, has limited its scope of application: it has been interpreted as a right to make alternative arrangements rather than to deal with an emergency. In other words, it only aims to make it possible for the employee to make any necessary long-term arrangements for the care of the dependents. Such arrangements must be:

> [...] limited to the amount of time which is reasonable in the circumstances of a particular case. For example, if a child falls ill with chickenpox, the leave must be sufficient to enable the employee to cope with the crisis – to deal with the immediate care of the child and to make alternative longer-term care arrangements. The right will not enable a mother to take a fortnight off while her child is in quarantine.[365]

Essentially, this interpretation is based on a traditional view of the family where there are relatives or other means of informal support readily available. Arguably, it fails to take into account the reality of the modern family, or situations such as those faced by a single parent with no access to informal or formal support, thus leaving a considerable gap in the leave provisions. This gap has been identified and the Commission has expressed its intention to look into forms of 'family-related leave', inter alia, a specific filial leave to care for dependent family members. However, as the Social Partners may cover the same ground in their review of the Parental Leave Directive, the Commission is awaiting the result of their negotiation.[366] Although merely in the form of proposals and discussions, it is nevertheless remarkable that for the very first time the need for a system of leave for dependants other than children is expressly mentioned.

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[362] J. Plantenga and C. Remery, *Reconciliation of Work and Private Life: A Comparative Review of Thirty European Countries* (Brussels: European Commission, 2005).

[363] Section 57A Employment Relation Act 1996 as amended.

[364] See, for example, *Qua* v. *John Ford Morrison Solicitors* [2003] ICR 482 EAT; *Darlington* v. *Alders of Croydon* Case n° 2304217/01 unreported.

[365] Hansard, House of Lords, 8 July 1999, at cols 1084 and 1085.

[366] Communication from the Commission, 'A Better Work-Life Balance: Stronger Support for Reconciling Professional, Private and Family Life', COM(2008) 635.

At the same time, the issue of family related leave is also being addressed by the Court. Its recent decision in *Coleman*[367] will have important consequences for this area of law. Mrs Coleman argued that, after she gave birth to her disabled son, for whom she was the primary carer, she was unfavourably treated by her employer: she tried to take time off to care for him, but was branded as 'lazy' and accused of trying to use her son's condition to try to change her work conditions. She felt that she was forced to resign as she was treated less favourably than other employees with healthy children and claimed unfair constructive dismissal and disability discrimination in breach of the Framework Employment Directive.[368] Advocate General Maduro expressed the opinion that:

> the effect of the Directive is that it is impermissible for an employer to rely on religion, age, disability and sexual orientation in order to treat some employees less well than others (...) This fact does not change in cases where the employee who is the object of discrimination is not disabled herself. The ground which serves as the basis of the discrimination she suffers continues to be disability. *The Directive operates at the level of grounds of discrimination* [...][369]

The Court followed the Opinion of the Advocate General and reiterated that failure to allow a parent of a disabled child flexible working arrangements and *sufficient leave to care for the child when it was required*, when these flexible arrangements and leave are granted to parents of able-bodied children, was contrary to Articles 1 and 2(1) and (2) (a) of the Framework Employment Directive.

The decision in *Coleman* is not based on the Parental Leave Directive and the right to take time off for family reasons; nevertheless it strengthens the rights of carers. Therefore, this case has potentially broad implications for carers and for emergency leave. However, it is still too early to assess its full potential. Arguably, the main strength of the *Coleman* judgment lies more in the fact that it highlights the lack of effective remedies in this area rather than in providing protection. It effectively

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[367] Case C-303/06 *Coleman* [2008] ECR I-5603. For a background of this case, see S. Honeyball, 'Discrimination by Association', *Web Journal of Current Legal Issues*, 4 (2007), 43–52.

[368] Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, OJ [2000] L303/16.

[369] At Para 22 of the opinion.

extends its protection to disabled dependants,[370] however, there are many cases in which non-disabled children will catch recurrent infections (or simply chickenpox!) and will need extra care: clearly the provision of leave for family reasons would not be enough in this case but equally neither is the Coleman decision.

A final point to note is not only that there is a need for a more articulate system of leave, but also that the leave provisions must evolve and take into account the changing shape of the modern family. In *Baumbast* Advocate General Geelhoed noted that:

> [t]he traditional family of course continues to exist but has become much less dominant amongst the form of cohabitation in the Western world. Family relationships and forms of cohabitation have become less stable and more varied.[371]

Accordingly, leave provisions cannot be limited to the traditional heterosexual married couple with children. Admittedly, we have seen that at the time of writing, some EU provisions contemplate adoptive parents.[372] The free movement of persons is also, to a certain extent, articulated around an evolving notion of the family.[373] However, in practice, the EU at the moment does little to accommodate the needs of more diverse family units, such as same sex, re-constituted families or foster parents. This situation offers limited protection and reinforces stereotypes about the structure of the family. In a legal order prepared to present reconciliation between work and family life as a fundamental right,[374] reconciliation should have a wider scope of application.

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[370] This issue has been acknowledged by some Member States. In the UK, for example, in the Queen Speech in December 2008, there was the proposal to extend the leave for carers of disable. See also L. Smith., Flexible Working, House of Commons library SN/BT/1086, January 2009.

[371] Case C-413/99 *Baumbast*, opinion of the Advocate General paragraph 23.

[372] For example, Recast Directive 2006/54/EC.

[373] M. Bell, 'We are Family? Same-Sex Partners and EU Migration Law', *The Maastricht Journal of European and Comparative Labour Law*, 9 (2002), 335–355.

[374] See the Discussion in Chapter 1, 'The Development of the Reconciliation Principle in EU Discourse'.

The tension between the economic and the social rationales of the leave provisions

A system of leave, however sophisticated, needs to be coupled with a system of financial compensation. If not, at best, it sends the wrong message regarding the value of parenting or, at worse it is de facto redundant: the reality is that most people cannot afford to take unpaid leave.

At the time of writing there is a clear tension between the social rationales underpinning the leave provisions and economic reality. At the national level, the systems of leave and benefits are organised according to a two-tier system: leave and benefits are two distinct issues. Parents who are granted leave are not automatically entitled to benefits. This is normally the case for paternity and parental leave where such entitlements are often linked to specific eligibility conditions, mainly on the length of employment. When entitled to both, often the right to leave is longer than the period during which the employee receives benefits. In the majority of national systems, family related benefits take the form of 'welfare benefits' and offer compensation for the loss of wages, rather than the actual salary. This simply reinforces the idea that the parent taking care of the child (usually the mother) is 'supported' while 'not working' rather than being paid for the work which is actually being performed, namely caring.[375] This is an indication of the lack of value which is actually placed on parenthood and family responsibilities.

Similar considerations apply to the EU discourse. The Pregnant Workers Directive was adopted after considerable negotiation and compromise, which included, at the insistence of the UK, setting the minimum level of remuneration for workers on maternity leave equivalent to sick pay, despite the arguments against drawing any parallels between sickness and pregnancy. Indeed it merely provides that (after a qualification period of 12 months) *women* (not men) are entitled to 'maintenance of payment (...) and/or entitlement to an *adequate allowance*'.[376] An allowance is deemed adequate 'if it guarantees income at least equivalent to that which the worker concerned would receive in the event of

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[375] Although focusing on the Danish system, for an excellent discussion on this point see K. Ketscher, 'Fem prinsipper om lønarbejde og omsorgsarbejde', in *Liv, arbejde og forvaltning* (Copenhagen: Gad Jura, 1995), 291–301.

[376] Article 11 of Council Directive 92/85/EEC.

a break in her activities *on grounds connected with her state of health*, subject to any ceiling laid down under national legislation.'[377] Because it is left to the Member States and, in case of additional maternity leave, to individual employers, to determine the amount of the 'adequate allowance', women could be granted maternity leave without any obligation of economic benefits or with a loss of benefits. The ECJ has further held that it must be determined with the same criteria as 'other forms of social protection (...) in the case of justified absence from work'.[378] As the 'justified absence' refers to sick leave, this provision relies (yet again) on the male norm. We have already commented on how this issue is not properly addressed by the proposed amendments to the Pregnant Workers Directive, which continue to allow Member States considerable discretion.

The situation is no better for paternity and parental leave. For the former, the EU legislator leaves it to the Member States and it is often unpaid. The Parental Leave Directive provides for unpaid leave as does the right to leave for urgent family reasons. The consequences of this have already been discussed above.[379] It is hoped that such shortcomings are addressed by the Social Partners in their revision of the Parental Leave Directive. Overall, despite the rhetoric surrounding it, the system reinforces the low market importance which is attached to parenthood and the concept of reconciliation.[380]

Conclusions

This chapter has focused on the EU leave provisions. Despite this being the most developed part of the reconciliation provisions, its achievements primarily mirror the developments in the Member States and have only rarely built upon the existing status quo and prompted additional action. As such the EU system of leave entrenches Member States' limitations rather than promoting a dynamic concept of reconciliation.

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[377] Article 11(3) of Council Directive 92/85/EEC.

[378] Case C-342/93 *Gillespie* [1996] ECR I-475, at paragraph 20.

[379] Inter alia, Eurobarometer, Europeans' Attitudes to Parental Leave (Brussels: European Commission, May 2004); see also F. Devan, 'Assessing the use of Parental Leave by Fathers: Towards a Conceptual Framework' in B. Pepper, A. Doorne Huiskes, and L. Dulk (eds), *Flexible Working and Organisational Change: The Integration of Working and Personal Life* (Cheltenham: Edward Elgar, 2005).

[380] K. J. Morgan and K. Zippel, 'Paid to Care: The Origins and Effects of Care Leave Policies in Western Europe', *Social Politics: International Studies in Gender, State & Society*, 10 (2003), 49–85.

The legislation introduced following the entry into force of the Treaty of Amsterdam expanded the leave provisions' scope of application but these are still based on a traditional (and thus limited) understanding of reconciliation. The main drawback is that they continue to be geared towards mothers. By perceiving mothers as the primary carers,[381] they reinforce gender stereotypes, which in turns affects women's roles in the employment market and increases the gender (pay) gap.

A further limitation of the leave provisions is that they principally focus on parents with young children and a comprehensive system of leave which considers wider family responsibilities, such as adult care, is still lacking. Whilst acknowledging their importance for parents of young children, the availability of leave provisions should be extended to all employees with wider family responsibilities.

In addition, at present, policies and legislation in this area are still ill-equipped to address the challenges today's fast-changing society have brought to the structure of the family.[382] Indeed, they do not fully cover the so-called 'non-traditional' families such those formed by unmarried or same-sex couples, as well as reconstituted or foster families. Although at national level these changes are increasingly acknowledged and addressed, regrettably this does not seem to be the case at EU level where (biological) parents of young children remain in a stronger position than other types of carers.

Finally, although crucial, leave provisions are inherently limited in duration and thus can only offer a partial solution to the demands of reconciliation. The possibility of reorganising working patterns, discussed in the next chapter, might provide a solution and is therefore a complement to the leave provisions.

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[381] K. J. Morgan and K. Zippel, 'Paid to Care: The Origins and Effects of Care Leave Policies in Western Europe', *Social Politics: International Studies in Gender, State & Society*, 10 (2003), 49–85.

[382] See generally L. Hantrais, *Family Policy Matters – Responding to Family Change in Europe* (Bristol: Policy Press, 2004), in particular Chapter 3, 'The Times Provisions'.

3
The Time Provisions

Introduction

Having explored the role of the leave provisions in the previous chapter, this chapter focuses on *flexibility* and its implications for the reconciliation discourse. The term 'flexibility' was initially employed to describe working hours over and above normal ones.[383] Today the term has a more general connotation and indicates any job which does not conform to the standard 9-to-5 full-time work pattern and includes, for example, part-time work and fixed-term contracts.[384] Employees who are not performing open-ended and/or full-time contracts are often referred to as 'atypical workers'. Thus, for the purposes of this chapter, 'flexibility', 'flexible' and 'atypical working arrangements' are used interchangeably.

Flexible working arrangements are currently buzzwords in employment law. On the one hand, they enable employers to retain people, expand employment, combat unemployment and absenteeism, and they are also said to achieve 'the highest level of efficiency'.[385] Furthermore, such arrangements can contribute to meeting the demands of a

[383] K. Borg, 'Family Life and Flexible Working Hours', in S. Carlsen and J. Larsen (eds), *The Equality Dilemma* (Copenhagen: The Danish Equal Status Council, 1993), 67–78.

[384] H. Collins, 'The Right to Flexibility' in J. Conaghan and K. Rittich, *Labour Law, Work, and Family* (Oxford: Oxford University Press, 2005), pp. 99–124; see also I. La Valle, S. Arthur, C. Millward, J. Scott, and M. Clayden, *Happy Families – Atypical Work and its Influence on Family Life* (Bristol: The Policy Press and the Joseph Rowntree Foundation, 2002).

[385] H. Collins, 'Regulating the Employment Relation for Competitiveness', *Industrial Law Journal*, 30 (2001), 17–47.

fast-changing market and thus can ensure greater business competitiveness. On the other hand, flexible working arrangements also enable employees to participate in paid employment and at the same time balance a range of life activities and responsibilities. Of particular relevance to this book, flexible work has traditionally been used by working parents as an answer to the challenges of reconciling different needs.

Thus, prima facie, flexibility appears to be a win-win situation, benefiting employers and employees alike, and in particular working parents. It might not, however, be the panacea which was and still is, optimistically anticipated in the EU policies on flexible work.[386] A liberal approach to flexibility can, potentially, lead to the erosion or considerable reduction of the restrictions to the employers' discretion built up during more than a century of collective bargaining and legislation. Indeed, there is evidence that employees who make use of flexible working arrangements are likely to experience disadvantages, in particular in terms of subsequent promotion and career progression. Flexibility can also often be a source of precariousness.[387] The latter has four main features:[388] a degree of uncertainty of continuing employment; a reduced level of control over the labour process (including control over working conditions, wages, and pace of work), which in turn is linked to the lack of involvement of trade unions and the inability to bargain effectively; a low degree of regulatory protection and finally an inadequate level of income. All of these can be found more easily in flexible or atypical, rather than standard, forms of employment. For instance, part-time work might not provide sufficient income; whilst a fixed-term position does not provide certainty of employment and has less benefits.[389] Flexible working is also clearly associated with low

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[386] For example, Commission Communication 'Towards Common Principles of Flexicurity: More and Better Jobs Through Flexibility and Security', COM(2007) 359.

[387] See generally J. Fudge and R. Owens (eds), *Precarious Work, Women, and the New Economy: The Challenge to Legal Norms* (Oxford: Hart Publishing, 2006).

[388] J. Fudge and R. Owens (eds), *Precarious Work, Women, and the New Economy: The Challenge to Legal Norms* (Oxford: Hart Publishing, 2006), p. 11; G. Rogers and J. Rogers (eds), *Precarious Jobs in Labour Market Regulations: The Growth of Atypical Employment in Western Europe* (Brussels: International Institute for Labour Studies, 1989).

[389] See also European Study of Precarious Employment (ESOPE), 'Defining and Assessing Precarious Employment in Europe: A Review of Main Studies and Surveys. A Tentative Approach to Precarious Employment in France', in J.-C. Barbier, A. Brygoo, and F. Viguier (eds), *Precarious Employment in Europe: A*

pension income: time not spent in full-time work (such as the time spent caring for a young family), minimal or irregular private pension contributions, low earnings (such as those coming from part-time work) and early retirement (taken, for example, in order to care for an elderly family member) all impact on an employee's pension.[390] Moreover, flexible hours are usually determined by employers to suit the business, rather than employees' needs. Finally, it has been consistently proven that flexible working arrangements are traditionally used by women who are under pressure to generate an income, but who also retain the primary responsibility for domestic care; thus the detrimental implications of flexibility are heavily gendered.[391]

If these considerations hold true in general terms, they become even more of an issue when flexibility is used specifically to reconcile work and family life, where the element of choice typically disappears: carers and parents (mothers) do not choose to work in low paid part-time occupations but often feel there is no other option available.

In order to discuss these issues, this chapter is divided into two main sections. The first section considers the historical and conceptual perspectives of flexibility before assessing its role in the reconciliation discourse. The second section focuses on the relevant EU legislation and policy as well as its practical impact.

The flexible workplace

Historical and conceptual perspective on flexibility

> Oh I often got so tired, so tired. But it was great fun, though, sitting there working and earning money. It was almost like being a man.[392]

Comparative Study of Labour Market related Risks in Flexible Economies (Paris: Centre d'Etude de l'Emploi, 2002).

[390] Department for Work and Pensions (DWP) *Health*, Disability, Caring *and* Employment. Research Report No 461 (London: DWP, 2007), www.dwp.gov.uk; see also E. Caracciolo di Torella, 'The Principle of Gender Equality, the Goods and Services Directive and Insurance: A Conceptual Analysis', *Maastricht Journal of European and Comparative Law*, 13(3) (2006), 339–350.

[391] J. Rubery, D. Grimshaw, and H. Figueiredo, 'How to Close the Gender Pay Gap in Europe: Towards the Gender Mainstreaming of Pay Policy', *Industrial Relations Journal*, 36(3) (2005), 184–213.

[392] H. Ibsen, *'A Doll's House', Act I, A Doll's House and other Plays* (Penguin Classics, 1965), p. 162.

Traditionally, the employment contract set the terms and conditions of employment which provided a framework where the total hours of work, the timing and the location of the employment were clearly established.[393] In this way, the employer was able to maximise effectiveness. This standard model of employment goes back to the Industrial Revolution, when the productive family unit was replaced by the wage labourer. In this context, male labour moved out of the household; following the completion of their education, men were employed full-time, on a permanent contract of employment, typically with the same employer, until they retired. By contrast, female labour remained in (or returned to) the household. Women were employed temporarily, typically until marriage and/or the birth of their children. After that, they shouldered the bulk of the family responsibilities and disappeared from the public sphere. Alternatively, they retained minor employment designed to supplement the main breadwinner's salary.[394] This model was based on a traditional male breadwinner model and the influence of the public/private dichotomy is clear: although there is a direct link between production and reproduction, they seem to be treated separately, as if they belonged to different worlds.[395] Until relatively recently, across Europe, employment law and social protection law standards mostly reflected this work organisation model.[396] Accordingly, the work protection and organisation standard has been 'established around a wholly male reference point, defined in opposition to female reproductive time'.[397] At this stage employers were not only able to rely on one employee but on one employee with a wife dealing with any situation (ordinary and emergency) surrounding his

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[393] See, inter alia, S. Deakin, 'The Many Futures of the Contract of Employment', in J. Conaghan, M.R. Fischl, and K. Klare (eds) *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (Oxford: Oxford University Press, 2002), 177–196; H. Collins, 'The Right to Flexibility', in J. Conaghan and K. Rittich, *Labour Law, Work, and Family* (Oxford: Oxford University Press, 2005), 99–124, at p. 100.

[394] L. Craig, *Contemporary Motherhood: The Impact of Children on Adult Time* (Aldershot: Ashgate, 2007); J. Fudge and R. Owens, 'Precarious Work, Women, and the New Economy: The Challenge to Legal Norms' in J. Fudge and R. Owens (eds), *Precarious Work, Women, and the New Economy: The Challenge to Legal Norms* (Oxford: Hart 2006), p. 11.

[395] See the discussion in the Introduction.

[396] S. Fredman, 'Labour Law in Flux: The Changing Composition of the Workplace', *Industrial Law Journal*, 26 (1997), 333–352.

[397] A. Supiot et al., *Beyond Employment: Change in Work and the Future of Labour Law in Europe* (Oxford: Oxford University Press, 2001).

private life. This is what James calls the 'unencumbered worker'[398] and is an extension of the 'unencumbered citizen'[399] or 'breadwinner male'[400] already identified in the relevant literature. The main feature of the concept is the absence of care-giving responsibilities and the total reliance on others to facilitate this unencumbered status. The unencumbered worker is not necessarily a man but, in practice, men will be more easily 'unencumbered' and thus, de facto, better suited to operate in the public sphere. Several factors have, however, challenged the current status quo of the workplace organisation; we focus in particular on the globalisation and feminisation of work.

Globalisation results from the intensification of international economic and political integration. In the economic sphere, this has been characterised by increases in international trade and investment, as well as the internationalisation of methods of production and the liberalisation of the movement of capital. Political integration refers to the erosion of the nation State and a weakening of its traditional sovereign powers to the benefit of supranational and sub-national organisations.[401] Globalisation, together with the changing structures and demands of the market such as variations in the level of trade or extended opening hours, have had a profound impact on the market and have challenged the traditional organisation of the workplace. In particular, the interaction of these elements has meant a shift away from the manufacturing of goods to economies which produce mostly services. In 2000, the service sector was estimated to account for 63.5 per cent employment in the Organisation for Economic Co-operation and Development (OECD) countries; broadly, this meant that over two thirds of the working population was in the service industry.[402] In the EU25 in 2006, service employment accounted

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[398] G. James, *The Legal Regulation of Pregnancy and Parenting in the Labour Market* (London: Routledge-Cavendish 2009).

[399] S. Berns, *Women Going Backwards: Law and Change in a Family Unfriendly Society* (Alderhot: Ashgate, 2002).

[400] Ibid; J. Williams, *Unbending Gender: Why Family and Work Conflict and What to do about it* (New York: Oxford University Press, 2000); C. McGlynn, 'Work Family and Parenthood: The European Union Agenda', in J. Conaghan, R. Fischl, and K. Klare (eds), *Labour Law in an Era of Globalization: Transformations, Practices and Possibilities* (Oxford: Oxford University Press, 2005).

[401] S. McBride, Paradigm shift: Globalization and the Canadian State (Halifax: Fernwood, 2001), p. 21.

[402] OECD, *Employment Outlook* (Paris: OECD, 2000).

for more than half of all jobs.[403] The service economy has both created the highly skilled or knowledge worker with its emphasis on transferable portable skills, and it has emphasised the need for shift workers. The former is required to be highly mobile and is typically employed in managerial or technological positions: his/her employment is atypical but not necessarily precarious. At least half of existing jobs in the EU require a high level of cognitive and/or personal skills, and a quarter of all jobs demand advance qualification in Information Technology.[404] In contrast, the latter has no specialised knowledge and his/her position is highly precarious. This sector is female dominated which brings us to the so-called 'feminisation of work'; namely the growing participation of women in employment.[405] The potential for women's work was unveiled during World War II; it radically increased during the 1960s and has more recently been re-emphasised by the growing tendency towards a service-based economy.[406] Women have also become increasingly under pressure to contribute to the family income. However, in spite of their ever-increasing participation in the paid employment market, women (especially when they become mothers) continue to bear the main responsibility of the domestic unpaid work, in particular care for both children and dependent adults.[407]

The unequal burden of household responsibilities[408] has significant consequences for the ability of the individual to participate in paid

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[403] R. Liddle, and F. Lerais, 'Europe's Social Reality, A Consultation Paper from the Bureau of European Policy Advisers', Brussels, MEMO/07/83, 26 February 2007.

[404] R. Liddle, and F. Lerais, 'Europe's Social Reality, A Consultation Paper from the Bureau of European Policy Advisers', Brussels, MEMO/07/83, 26 February 2007.

[405] G. Standing, 'Global Feminisation through Flexible Labor: A Theme Revisited', *World Development*, 27 (1999), 583–602.

[406] In 2006, in the EU25, almost 56% women of working age had a paid job. R. Liddle, and F. Lerais, 'Europe's Social Reality, A Consultation Paper from the Bureau of European Policy Advisers', Brussels, MEMO/07/83, 26 February 2007.

[407] ILO, *Global Employment Trends for Women* (Geneva: International Labour Office, 2004). See also L. Craig, *Contemporary Motherhood: The Impact of Children on Adult Time* (Aldershot: Ashgate, 2007). However, Gershuny and Robinson have noted that in developed countries, the time spent by women on unpaid work in the house is slowly declining; J. Gershuny and J. Robinson, 'Historical Changes in the Household Division of Labor' in F. Ackerman, N. R. Goodwin, L. Dougherty, and K. Gallagher (eds), *The Changing Nature of Work* (Washington, DC: Island Press, 1998).

[408] P. Paoli and D. Merllié, *Third European Survey on Working Conditions 2000* (Luxembourg: Office for Official Publication of the European Communities, 2001).

employment. Indeed, because of these domestic commitments, women have been unable to conform to the standard model of employment and this has led to a demand for flexible working arrangements. The wide participation of women in flexible forms of employment is not because they 'are progressively overcoming their relative disadvantages in the labour market, but because of the continued existence of these disadvantages, which causes them to be an attractive source of labour supply to employers for particular types of jobs.'[409] Furthermore, in spite of, and because of, women's increased participation in the paid work market, they continue to rely partially on the income of their partner. When, for any reason, the second income disappears, the precariousness of women's employment position is further highlighted. In many cases, women's income as a result of their participation in the paid labour market is insufficient and they risk falling into poverty.

Flexible working arrangements

One of the main consequences of the above discussion is the need to reconceptualise the employment relationship and to create new flexible forms of employment, which deviate from the traditional employment arrangement, thus described as atypical. When discussing flexibility we need to be aware that it can operate at two different levels: functional or numerical.[410] Functional flexibility exists when the employer requires employees to adjust their skills to match the demands of changes in technology or workload; this might be the case of the knowledge worker. Here it is perhaps possible to paint a rather rosy picture, although there is a danger that flexibility might, in practice, equate to 'employee availability all the time' and result in unrealistic workloads, especially when considering the development of new technologies that allow people to be constantly online.[411] By contrast, things could

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[409] J. Rubery and R. Tarling, 'Britain', in J. Rubery (ed.), *Women and Recession* (London: Routledge, 1988).

[410] J. Atkinson, *Flexibility, Uncertainty and Manpower Management* (Brighton: Institute of Manpower Studies, 1984).

[411] D. Perrons, 'Flexible Working Patterns and Equal Opportunities in the European Union: Conflict or Compatibility?', *European Journal of Women's Studies*, 6(4) (1999), 391–418; D. Perrons, 'The New Economy and the Work-Life Balance: A Case Study of the New Media Sector in Brighton and Hove', *Gender, Work and Organisation*, 10 (2005), 65–93; M. Bäck-Wiklund and L. Plantin, 'The Workplace as an Arena for Negotiating the Work-Family Boundary: A Case Study of Two Swedish Social Services Agencies', in C. Crompton, S. Lewis, and C. Lyonette (eds), *Women, Men, Work and Family* (Basingstoke: Palgrave MacMillian, 2007), 171–189.

not be more different in the case of numerical flexibility. This type of flexibility involves adjusting labour inputs to meet fluctuations in the employer's needs, for example organising work in shifts. In this case, flexible working arrangements are likely to be connected with precariousness. These options are often cheaper than standard full-time jobs and the degree of employment protection accorded is, generally speaking, lower. Employees who use flexibility as a strategy for reconciling work and family life are often in numerically flexible jobs. This has led to a perception that these forms of work are peripheral, and, as the vast majority of part-timers were (and still are) women, has caused and maintained considerable job segregation. Indeed, by 1988, Rubery and Tarling had shown a clear link between the increasing participation of women in employment and forms of (numerically) flexible work.[412] In addition, flexible working arrangements have not only emphasised the segregated position of women, but have also emphasised that there are marked distinctions between different groups of women according to their economic situations and social status. There is, in fact, a clear difference between (highly) skilled women who choose to work part-time, and those women who cannot afford anything else except part-time work because of child-care commitments.

Across Europe, flexible working arrangements have become increasingly popular since the 1980s. For example, in 1992, 14.2 per cent of the total EU working population was working part-time. This figure had increased to 18.1 per cent by 2002.[413] This was further boosted in following years when the 2003 guidelines of the European Employment Strategy expressly introduced the idea of a diversity of job packages in order to promote inter alia a balance between work and private life.[414] It is difficult to provide a complete overview of all the possible flexible working arrangements across Europe, as relevant policy and legislation vary greatly between countries and also within the same country, different types of employees have access to different types of arrangements. Additionally, in most European countries, working time arrangements

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[412] J. Rubery and R. Tarling, 'Britain', in J. Rubery (ed.), *Women and Recession* (London: Routledge, 1988); Equal Opportunities Review, 'Flexible Working: The Impact on Women's Pay and Conditions', *EOR* (1996) 19.

[413] European Foundation for the Improvement of Living and Working Conditions, *Part-Time Work in Europe* (Dublin: The European Foundation for the Improvement of Living and Working Conditions, 2007).

[414] Council Decision of 22 July 2003 on guidelines for the employment policies of the Member States (2003/578/ EC) OJ [2003].

are settled at the level of the firm.[415] Broadly, however, it is possible to say that flexibility alters either the quantity of working hours, or the structure of the contract of employment. When the quantity of hours worked is altered, the job is performed on a part-time basis. This is the most common form of flexible or non-conventional working arrangement. In its simplest form, part-time employment involves working less than the standard weekly hours; it can be any fraction, for example 50 per cent or 80 per cent and can either be horizontal (finishing earlier) or vertical (working fewer days in the week) and can be permanent or temporary. There are also numerous variations on this traditional version. The most common of these are flexi-time, job sharing, and seasonal work. Flexi-time allows the employee to choose when to start and finish working during the day, on condition that he/she attends work for a specified number of hours on a daily, weekly, monthly or even, yearly basis. Job sharing is based on the same principle as part-time work but two or more people share one full-time job, the benefits associated with that post, and take joint responsibility for the duties involved. Seasonal working allows the employee to work only during certain periods of the year; a working parent for example might choose not to work during school holidays whist preserving continuity of employment. This arrangement might give the employer more stability and flexibility in staffing requirements.

Finally, when the contract of employment is not the standard one but is, for example, aimed at the achievement of a specific task the resulting positions are called fixed-term contracts. These contracts provide employers with flexibility, by allowing them to employ workers for short periods and under simpler conditions of employment. Workers engaged in these contracts often have, by definition, little or no job security, relatively low income, lack of access to vocational training and are excluded from occupational pension schemes. Fixed-term contracts are clearly useful for employers needing a flexible workforce and, on occasions, they have also proven to be beneficial for some workers, in particular if they are highly skilled.[416] A variation of the fixed-term contract is temporary agency work. This is a unique form of employment in that it involves a triangular relationship where the agency is normally

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[415] J. Plantenga and C. Remery, *Reconciliation of Work and Private Life: A Comparative Review of Thirty European Countries* (Brussels: European Commission, 2005).

[416] L. Oliver, 'Living Flexibly? How Europe's Science Researchers Manage Mobility, Fixed-Term Employment and Life Outside of Work', Conference paper presented at the Law and Society in the 21st Century, Berlin, 25–28 July 2007.

the legal employer of the temporary agency worker, who can hold a fixed-term or open-ended contract of employment. The work done by the worker and the workplaces to which he/she is assigned are, however, the responsibility of the person, or organisation, for whom the work is performed. Many companies make use of temporary agency workers in order to cut costs and increase flexibility by allowing them to adjust their staffing needs at short notice. Employers benefit from temporary agency workers because they can bring specific skills or fill in for staff absences at short notice, while avoiding recruitment and administration expenses. Some workers might find temporary agency work beneficial because it enables them to work flexibly when they want to; young workers and women returning to work following family-related absence might resort to temporary agency contracts to gain work experience or develop abilities in a specific sector.

The following section will seek to assess the impact of these contracts on working parents and carers.

Working parents, carers and flexibility

As mentioned earlier in this chapter, flexibility is used by a growing number of carers, in particular parents, across Europe as a tool for easing the tensions inherent in the reconciliation discourse. Indeed, the needs of young children do not end after the first few months but are likely to remain significant for a number of years. Thus, although crucial, a system of leave during the first months of a child's life, no matter how sophisticated, in practice means little if is not complemented by the possibility of re-arranging working hours on a more long-term basis. Prima facie, flexible working arrangements could meet the need, for example of a working parent (often a mother) who needs to start working later in the morning because the children must be dropped off at school or who needs to work from home because of a lack of, or breakdown in, childcare arrangements. This is equally the case for wider family responsibilities: flexibility can also be essential to an employee who needs to arrange his/her working day around the needs of elderly or disabled members of the family. The concept of flexibility also appears to fill the gap left open by the leave system. Indeed, it was seen in the discussion in the previous chapter, that there are four main shortfalls inherent in the leave provisions. Firstly, leave provisions are mainly addressed to *mothers*, thus reinforcing stereotypes. Secondly, they focus on the needs of (*biological*) *working parents*, thus failing to acknowledge the changing nature of the family. Thirdly, they are very much child-oriented: only very recently and to a limited extent have

they started to cover more general responsibilities. Finally, their limited time duration makes them ill equipped for addressing the lifelong commitment of parenthood or the long-term responsibility of caring for frailer family members.

By contrast, the rearrangement of working patterns can potentially overcome these limitations. Flexible working arrangements are formulated in gender neutral terms, so that on paper, *both* parents can use them; they can be used by *any* workers (they are not necessarily limited to biological parents) and as such they recognise the changing nature of the family unit and, at the same time, they can be used to address a vast range of responsibilities. Their theoretically unlimited duration makes them suitable to cater for different responsibilities. Finally, their distinct economic flavour makes them an ideal business case.[417] The fact that the terms 'flexible' and 'family-friendly' are often used interchangeably seems to confirm that a strategy might exist. There is, in fact, an increasing political and legislative trend across Europe to present flexibility as part of a such strategy.[418] This strategy can be viewed as part of a more generic 'household strategy' theorised by Hakim[419] where both parents are presented with a set of 'genuine choices'.[420] Hakim argues that structural changes in the economy and legislation and ready access to contraception have enabled women to choose between a full-time career, a primarily domestic life or a combination of the two. However, such an assumption is questionable and a more realistic approach views such decisions more as part of an ad hoc response to changing life events.

Although in theory flexibility can be an essential part of the reconciliation discourse, in practice its implementation casts doubts on the

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[417] Inter alia OECD *Babies and Bosses – Reconciling Work and Family Life* (Paris: OECD, 2007).

[418] This is particularly the case in Austria, the Czech Republic, Greece, Finland, Portugal, Slovenia, the UK and Norway. Sweden has a flexible way to implement a substantially long period of parental leave which, although strictly speaking is not a flexible working arrangement, has a similar result; see the discussion in Chapter 2, 'The Leave Provisions'.

[419] C. Hakim, *Work-Lifestyle Choices in the 21st Century: Preference Theory* (Oxford: Oxford University Press, 2000), further discussed in J. Hyman, D. Scholarios, and C. Baldry, 'Getting on or Getting by? Employee Flexibility and Coping Strategies for Home and Work', *Work, Employment and Society*, 19 (2005), 705–724.

[420] C Hakim, 'Lifestyle Preferences as Determinants of Women's Differentiated Labor Market Careers', *Work and Occupations*, 29(4) (2002), 428–459.

significance of its role.[421] We argue that there are three main structural obstacles. Firstly, and most traditionally, flexibility was not introduced as an instrument to meet the demands of overburdened parents but instead was primarily developed as a device to tackle specific aspects of the employment market, such as its changing structure (for example variations in the level of trade or extended opening hours), or to tackle unemployment. Therefore, as such arrangements were not – at least originally – designed to meet the needs of working parents, they appear deficient in addressing the issue which underpin the reconciliation debate. The flexibility that carers and parents need covers two dimensions: the length and the rhythm of time worked.[422] The length of time that an individual spends in paid employment clearly has an impact on family life but, in order to be a reconciliation tool, the rhythm of work needs to be regular and predictable.[423] Predictability is important in relation to when the work is supposed to be done and in terms of the possibility of taking leave to attend to family needs. Indeed as currently structured, flexible working arrangements can often have a negative impact on the family.[424] For example, the pressure of night shifts or working during weekends or at unsociable hours can actually add strain to the family.[425] In addition, the (numerical) flexibility inherent in atypical working arrangements such as part-time employment, might not offer the financial stability that a family needs; also the precariousness inherent in fixed-term working arrangement does not sit easily with family friendly policies.

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[421] J. Lewis, 'Work-Family Reconciliation and the Law: Intrusion or Empowerment?', in S. Lewis and J. Lewis (eds), *The Work and Family Challenge – Rethinking Employment* (Thousand Oaks: Sage, 1996), 34–47.

[422] M.T. Lanquetin, M.T. Lethablier, 'Concilier Famille et travail en France: Droit et Pratiques', in AFEM (ed.), *Concilier Famille et Travail pour les Hommes et les Femmes: Droit et Pratiques* (Athens: Sakkoulas; Brussels: Bruylant, 2005), 47–108 (86–87).

[423] European Foundation for the Improvement of Living and Working Conditions, *Combining Family and Full-Time Work* (Dublin: European Foundation for the Improvement of Living and Working Conditions (2007), p. 9.

[424] On this point see also S. Fredman, 'Discrimination Law in the EU: Labour Market Regulation of Fundamental Rights?', in H. Collins, P. Davies, and R. Rideout (eds), *Legal Regulation of the Employment Relation* (London: Kluwer Law International, 2000), 183–201.

[425] K. Borg, 'Family Life and Flexible Working Hours', in S. Carlsen and J. Larsen (eds), *The Equality Dilemma* (Copenhagen: The Danish Equal Status Council, 1993), 67–78

Secondly, even if flexibility is offered as part of a package of reconciliation measures, working parents and carers have very limited control over this: they might have a right to *request* it, but not an automatic right to *obtain* it. Furthermore, should personal circumstances change, a carer does not have an automatic right to re-negotiate his/her arrangements. It follows that, even if flexibility is increasingly connected with reconciliation policies, it is still far from truly being a parent's or a carer's right.

Thirdly, the impact that flexible working arrangements have on parents and on carers are profoundly gendered. In 2004 across Europe, 34 per cent of women employees worked part-time, but only 7 per cent of men.[426] Although men are overall reported to have more access to flexible working arrangements compared to women,[427] the presence of children has a more dramatic impact on mothers' than father's employment patterns.[428] For example in the mid-1990s, women accounted for 70 per cent of the part-time workers in 12 of the 15 EU Member States and for more than 60 per cent in the other three (Portugal, Greece and Finland).[429] A UK study showed that, whilst male part-timers are under 25 or over 55, reflecting the fact that in this case part-time work is used as a transitional phase, many women work part-time throughout their lives.[430] Moreover, when men use flexible working arrangements, they do not necessarily use it as a way of contributing to the household

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[426] First Annual Report: Progress towards Gender Mainstreaming in the EU (2004). See also I. Daugareilh and P. Iriart, 'La Conciliazione dei Tempi nelle Riforme dell'Orario di Lavoro in Europa (Francia, Germania, Gran Bretagna, Olanda)', 2 *Lavoro e Diritto*, (2005), 223–244.

[427] European Foundation for the Improvement of Living and Working Conditions, *Combining Family and Full-Time Work* (Dublin: European Foundation for the Improvement of Living and Working Conditions, 2007).

[428] OECD, *Babies and Bosses – Reconciling Work and family Life* (Paris: OECD, 2007); J. Stevenson, J. Brown, and C. Lee, 'The Second Work-life Balance Study: Results from the Employee's Survey', *DTI Employment Relations Research Report* n. 27 (2004); E. Dermott, 'What's Parenthood Got to Do with it?: Men's Hours of Paid Work', *The British Journal of Sociology*, 57(4) (2006), 619–634.

[429] J. O'Reilly and C. Fagan *Part-Time Prospects: An International Comparison of Part-Time Work in Europe, North America and the Pacific Rim* (London: Routledge, 1998), as discussed in I. Bleijenbergh, J. de Bruijn, and J. Bussemaker, 'European Social Citizenship and Gender: The Part-Time Work Directive', *European Journal of Industrial Relations*, 10 (2004), 309–328.

[430] Equal Opportunities Commission, *Facts about Men and Women in Great Britain* (London: Equal Opportunity Commission, 2004) discussed in S. Fredman, 'The Broken Promise of Flexicurity', *Industrial Law Journal*, 33(4) (2004), 299–319.

duties. By contrast, despite the limited access to flexibility, women work around household responsibilities such as taking children to and from school and household shopping.[431]

The legal framework of flexible working arrangements and atypical work in the EU

Despite their growing popularity, in the EU flexible working arrangements have only recently begun to be regulated. Initially, changes in working patterns were reached by private arrangement and therefore there was, at both national and EU level, a distinct lack of relevant legislation. The complexities related to non-standard forms of employment, in particular part-time work, have been regularly brought to the attention of the ECJ since the 1970s. As it is often mothers who resort to these forms of employment, flexible working arrangements have raised gender-equality concerns. The Court initially dealt with these cases with the only legal tool available at the time – the concept of indirect discrimination as encapsulated in the Equal Treatment Directive.[432] Through this medium, the Court has questioned the assumption that part-time workers are peripheral workers.[433]

The ECJ approach to flexible work

The case law of the Court has successfully explained the reason why the majority of part-timers are women. Advocate General Darmon in *Bilka* pointed out that women, 'because of the constraints they are under, make up all or most of the part-time work force'.[434] Along the same line, a few years later, referring to 'women whose leisure time is still often taken up by childcare-rearing and household tasks', he argued that

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[431] L. Lausten, and K. Sjørup, *Hvad kvinder og mænd bruger tiden til – om tidsmessig ligestilling idanske familier* [Men and women's time use – on gender equal time use in Danish families], ISF-rapport 08 (Copenhagen, Denmark: Social Research Institute, 2003).

[432] Article 2(2) of Council Directive 76/207/EEC as amended by Council Directive 2002/73/EC, OJ [2002] L269/15.

[433] J. Lewis, 'Work Family Reconciliation and the Law: Intrusion or Empowerment?', in S. Lewis and J. Lewis (eds), *The Work-Family Challenge* (Thousand Oaks: Sage, 1996), 34–47.

[434] Per AG Darmon in Case C-170/84 *Bilka – Kaufhaus GmbH* v. *Karin Weber von Hartz* [1986] ECR 1607. See also the Opinion of AG Warner in Case 96/80 *Jenkins* v. *Kingsgate* [1981] ECR 911.

women's 'spare time activities' prevent them from working full-time.[435] In *Nolte* the Court held that 'part of the population – notably for family reasons – is available on the employment market only for a very few hours a week'.[436] Again, in *Laperre*, AG Lenz commented that:

> [t]his is because we know from experience that women's employment histories have gaps significantly more often than men's because of their having to fulfil family obligations. To require a more or less uninterrupted employment record, particularly between the age of around 20 and 45, as a condition for achieving a 'full benefit period' would certainly discriminate against women.[437]

A few years later, in *Kalanke*[438] the Court acknowledged that women and men are in different positions in relation to caring responsibilities and similar conclusions were reached in *Hill*. In this case, after noting that the vast majority of jobsharers 'do so to combine family and work responsibilities', the Court continued by saying that Community law aims to protect 'women within family life [and to] encourage and if possible to adapt working conditions to family responsibilities'.[439] In this instance, the ECJ made specific reference to the need to reconcile work with family life for *women*, hence entrenching the gendered dimension of reconciliation.[440]

By using the principle of indirect discrimination, the Court has therefore *acknowledged* the fact that many women are employed in atypical jobs. Indeed, as discussed earlier, a considerably higher number of women than men work part-time. The Court has, however, done very

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[435] Per AG Darmon in Case C-360/90 *Arbeiterwohlfahrt der Stadt Berlin e.V.* v. *Monika Bötel* [1992] ECR I-3589.

[436] Per AG Leger in Case C-317/93 *Nolte* v. *Landesversicherungsanstalt Hannover* [1995] ECR I-4625.

[437] Per AG Lenz Case C-8/94 *Laperre* v. *Bestuurscommissie beroepszaken in de provincie Zuid-Holland* [1996] ECR I-273.

[438] CASE C-450/93, E. Kalanke v. Freie Hansestadt Bremen [1995] ECR I-3051

[439] Case C-243/95, *Hill and Stapleton*, [1998] ECR I-3779 paragraphs 41 and 42; Case C-405/95 *Hellmut Marschall v Land Nordrhein-Westfalen* [1997]ECR.I-6363. see also C. McGlynn and C. Farrelly, 'Equal Pay and the Protection of Women within Family Life', *European Law Review*, 24 (1999), 202; see also Case C-411/96 *Boyle* [1998] ECR I-6401.

[440] See also more recently Case C-279/93 *Finanzamt Köln-Altstadt* v. *Roland Schumacker* [1995] ECR I-250; Case C-342/93 *Gillespie* [1996] ECR I-475 and Case C-411/96 *Boyle* [1998] ECR I-6401; Case C-1/95 *Gerster* [1997] ECR I-5253; Case C-100/95 *Kording* v. *Senator für Finanzen* [1997] ECR I-5286.

little to *address* the causes of this situation. A number of reasons might explain why indirect discrimination is not the most apt legal tool to tackle the less favourable treatment of part-time workers, in particular when these are carers.[441] Firstly, a claim based on sex discrimination (especially indirect discrimination) must prove the existence of a disparate impact and a detrimental effect, which is often based on numerical or statistical evidence. Although in *Seymour-Smith*[442] the ECJ held that numerical or statistical evidence is not necessary, the reality is that most indirect discrimination cases do necessarily rely on such evidence and unfortunately, numerical evidence of this nature is not always easily accessible. Secondly, indirect discrimination has proven to be a useful legal tool for mothers and, to some extent, has contributed to the improvement of their conditions of work, as more women than men suffer from indirect discrimination for bearing most of the dual burden of domestic and paid work. However, numerous carers, not exclusively women or mothers, also face (indirect) discrimination and unfavourable treatment as a result of their responsibilities. To rely only on indirect sex equality legislation might improve the condition of working *mothers* but may exclude *fathers*. The use of sex equality legislation to improve the position of working *parents* and carers is thus inherently limited. Thirdly, the rules of indirect discrimination are still relatively uncertain from a legal standpoint, and are far from harmonised at EU level. This is especially true with regards the permitted objective justifications as these are left to the national court to decide on the facts of each given case.[443] Indeed, indirect discrimination, under certain circumstances, can be justified. Some of these circumstances were established in *Jenkins*[444] where the Court held that, if objectively justified, different rates of pay depending on hours of work were not in themselves con-

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[441] E. Traversa, 'Protection of Part-time Workers in the Case Law of the Court of Justice of the European Communities', *International Journal of Comparative Labour Law and Industrial Relations*, 19 (2003), 219–241.

[442] Case C-167/97 *R.* v. *Secretary of State for Employment ex parte Seymour-Smith and Perez* [1999] ECR I-623; see C. Barnard and B. Hepple, 'Indirect Discrimination: Interpreting *Seymour-Smith*', *Cambridge Law Journal*, 58 (1999), 399–412; and S. Moore, 'Case Note on *Seymour-Smith*', *Common Market Law Review*, 37 (2000), 157.

[443] T. Hervey, 'Justification for Indirect Sex Discrimination in Employment: European Community and United Kingdom Law Compared', *The International and Comparative Law Quarterly*, 40(4) (1991), 807–826.

[444] Case 96/80 *Jenkins* [1981] ECR 911, paragraphs 11 and 12; see also Case C-127/92 *Enderby* v. *Frenchay Health Authority and Secretary of State for Health* [1993] ECR I-5535.

trary to the principle of equal pay. This principle was further developed in *Bilka*[445] where three conditions were established, namely that, 'the means chosen for achieving [the] objective correspond to a real need on the part of the undertaking [and] are appropriate with a view to achieving the objective in question and are necessary to that end'.[446] Moreover, since it is up to the national courts to decide whether a justification is objective, this has led to different justifications on similar issues.[447] Finally, the enthusiasm of the ECJ in sex discrimination cases has gone a long way towards defending the rights of part-timers and more generally of atypical workers. The Court has thus succeeded in challenging the organisation of the workplace. However, when turning to the specific issue of flexibility, the ECJ has failed to find, or even suggest, a clear solution.

With that said, the work of the Court has paved the way for a more coherent approach. The policy strategy and legislative measures recently adopted *outside* the gender equality framework of sex equality have offered some alternatives.

Flexible work in the EU: first steps towards regulation

In view of the increase in the forms of atypical work across the EU in the last decades, the European Commission has been keen to regulate the rights of atypical workers, even if only to help generate jobs in the internal market and to increase the flexibility of employers.[448] The need to protect atypical workers on social and economic grounds as well as for health and safety reasons, was for the first time expressly acknowledged in the 1989 Community Charter of the Fundament Social Rights of Workers (the 1989 Social Charter) which identified and laid down early principles in this area. Articles 7 and 8 of the Charter highlighted the need for Community action to ensure the increase in the standard

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[445] For example, Case 170/84 *Bilka* [1989] ECR 1607.

[446] Case 170/84 *Bilka* [1986] ECR 1607 at paragraph 37.

[447] C. McGlynn and C. Farrelly, 'Equal Pay and the Protection of Women in Family Life', *European Law Review*, 24 (1999), 202–207. The ECJ has, however, on several occasions given some guidance. It has regarded as indirect discrimination rules based on 'flexibility' (Case 109/88 *Handels-og Kontorfunktionærernes Forbund i Danmark* v. *Dansk Arbejdsgiverforening, acting on behalf of Danfoss* [1989] ECR 3199), 'seniority' (Case C-184/89 *Nimz* v. *Freie und Hansestadt Hamburg* [1991] ECR I-297) or 'physical strength' (Case 237/85 *Rummler* v. *Dato-Druck* [1986] ECR 2101).

[448] M. Jeffery, 'The Commission's Proposals on Atypical Work', *Industrial Law Journal*, 24 (1995), 269.

of living and working conditions of atypical workers. However, it was clear at this stage that far from being concerned with reconciliation, the Social Charter was mainly concerned with the fact that unregulated forms of atypical contracts of employment could lead to social dumping and ultimately to the distortion of competition. In order to promote atypical and flexible forms of employment, the Commission has argued that atypical workers must be broadly treated in the same way as workers with standard contracts of employment.[449] Against this background, the Community adopted three proposals for Directives designed to protect atypical workers and regulate these forms of employment[450] of which only one was adopted.[451] This Directive represents the first step towards the recognition and protection of atypical workers. It requires that atypical workers are to be given the same standards of health and safety protection as other workers in any given undertakings[452] and that the minimum standards required by the Framework Directive on Health and Safety[453] (and all individual daughter Directives) are also to be applied to atypical workers. Shortly after, the EU adopted the Working Time Directive,[454] one of the main instruments for improving workers' conditions. This Directive lays down minimum safety and health requirements for the organisation of working time. Accordingly, it requires minimum periods of daily rests, weekly and annual leave, regulates breaks and limits the weekly maximum working time as

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[449] COM(1994) 333, p. 30.

[450] Proposal for a Council Directive on certain employment relationships with regards to working conditions, COM(1990) 228-1 final; Proposal for a European Parliament and Council Directive on certain employment relationships with regard to distortions of competition, COM(1990) 228-2 final; and Proposal for a Council Directive Supplementing the Measures to Encourage Improvements in the Safety and Health at Work of Temporary Workers, COM(1990) 228-3 final, OJ [1990] C224/90, as discussed by C. Barnard, *EC Employment Law* (Oxford: Oxford University Press, 2006), 469–471.

[451] Directive 91/383/EEC supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship, OJ [1991] L206/19.

[452] Article 2(1) of Directive 91/383/EEC.

[453] Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work, OJ [1989] L183/1. It was adopted on the basis of Article 118a (now Article 137 EC after amendments).

[454] Directive 93/104/EEC, OJ [1993] L307/18, now Directive 2003/88/EC, OJ [2003] L299/9 is a health and safety measure adopted on the basis of Article 118a EC (now Article 137 EC after amendments).

well as certain aspects of night work, shift work and patterns of works. Although it is addressed to all workers and does not specifically cater for atypical workers, it is in practice a very important instrument for workers with caring responsibilities, as it establishes some basic principles.

In the 1990s the debate on reconciliation left the Community agenda and was taken up by the Social Partners (CEEP, ETUC and UNICE).[455] We have argued that at this stage, possibly in order to be more effective, the debate acquired a more 'economic' dimension.[456] Thus, although potentially very important measures were adopted, they did not have the impact on carers and parents that they could have otherwise had. The measures in question were the Part-Time Work Directive and the Fixed-Term Work Directive,[457] which apply the principle of non-discrimination in matters related to terms and conditions of employment, to these two types of atypical workers.

The Part-Time Work Directive

The previous sections have highlighted the fact that part-time work across Europe, despite its inherent problems, is a very popular option for those seeking to reconcile work and family life,[458] and this has been confirmed by the abundant ECJ case law in this area. For this purpose, paragraph 5 of the General Considerations of the Framework Agreement on Part-Time Work annexed to the Part-Time Work Directive expressly mentions the necessity of introducing measures to facilitate 'access to part-time work for men and women in order to (...) reconcile professional and family life'. But is this really the case?

The Social Partners began negotiations under Article 3 (new Article 138) of the Social Policy Agreement in June 1996. The European Framework Agreement on Part-Time Work was agreed a year later and was then

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[455] Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, OJ [1999] L175/43; corrigendum at OJ [1999] L244/64.

[456] See the discussion in Chapter 1, 'The Development of the Reconciliation Principle in EU Discourse'.

[457] Respectively, Council Directive 97/81 OJ [1998] L 14/9 and Council Directive 99/70, OJ [1999] L175/143.

[458] See, inter alia, European Foundation for the Improvement of Living and Working Conditions, *Part-Time in Europe* (Dublin: European Foundation for the Improvement of Living and Working Conditions, 2007); see also H. Blossfeld and C. Hakim, *Between Equalization and Marginalization: Women Working Part Time in Europe and in the United States of America* (Oxford: Oxford University Press, 1997).

implemented by the Part-Time Work Directive.[459] The objectives of the Part-Time Work Directive are twofold: to eliminate discrimination against part-time workers and improve the quality of part-time work,[460] and to promote the development of part-time work on a voluntary basis.[461] It is necessary to investigate how effective these provisions are.[462]

The principle of non-discrimination is limited in its practical impact as it applies exclusively to the conditions of the contract of employment and it does not extend to other issues such as social security.[463] Moreover, it is also subject to numerous conditions of application which seriously undermine its scope, and to discriminate can be justified if 'on objective grounds.' Therefore although on the one hand, part-time workers no longer have to rely on the complex and heavily burdened concept of indirect discrimination in order to claim unfavourable treatment, on the other hand direct discrimination against part-time workers is now open to the possibility of being objectively justified.[464] For example, differential treatment can be justified by considerations such as seniority, qualification or skills.[465] It is easy to see how these can have an adverse impact on carers and mothers, who have taken several breaks in employment because of care commitments. It is therefore crucial to interpret the Part-Time Work Directive in conjunction with the relevant ECJ case law.[466]

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[459] OJ [1998] L14/9. The Directive was later extended by Directive 98/23/EC to the United Kingdom, which had originally opted out of the Community legislation on part-time work.

[460] Clause 1(a) of the Framework Agreement attached to the Part-Time Work Directive 97/81/EC.

[461] Clause 1(2) of the Framework Agreement attached to the Part-Time Work Directive 97/81/EC.

[462] M. Jeffery, 'Not Really Going to Work? Of the Directive on Part-Time Work, "Atypical Work" and Attempts to Regulate It', *Industrial Law Journal*, 27 (1998), 193; see also I. Bleijenbergh, J. de Bruijn, and J. Bussemaker, 'European Social Citizenship and Gender: The Part-Time Work Directive', *European Journal of Industrial Relations*, 10 (2004), 309–328.

[463] See the preamble of Part-Time Work Directive 97/81/EC.

[464] Clause 4(1) of the Framework Agreement attached to the Part-Time Work Directive 97/81/EC.

[465] Clause 4(4) of the Framework Agreement attached to the Part-Time Work Directive 97/81/EC.

[466] Inter alia, Case 96/80 *Jenkins* [1981] ECR 911; Case 170/84 *Bilka* [1986] ECR 1607; Case C-102/88 *Ruzius-Wilbrink* v. *Bestuur van de Bedrijfsvereniging voor Overheidsdiensten* [1989] ECR 4311; Case C-171/88 *Rinner Künh* v. *FWW Spezial-Gebäudereinigung GmbH & Co. KG* [1989] ECR 2743; Case C-33/89 *Kowalska* v. *Freie und Hansestadt Hamburg* [1990] ECR I-2591; Case C-246/96 *Magorrian and*

Furthermore, the personal scope of the Directive is limited as it only refers to 'part-timers who have an employment *contract* or employment *relationship* as defined by the law, collective agreement or practice in force.'[467] This restricted notion of 'workers' is limited to those who are employed under a contract of service. Consequently, a large number of atypical workers will be disqualified from the application of the non-discrimination rights because they do not hold a contract of employment and are qualified as self-employed. Employers can therefore circumvent the application of the Part-Time Work Directive relatively easily, by describing the worker as self-employed. In addition, Clause 2(1) gives Member States the power to restrict the meaning of 'workers' for the purposes of applying the rights contained within the Part-Time Work Directive. Moreover, Clause 2(2) of the Framework Agreement expressly gives Member States the option of excluding 'part-time workers who work on a casual basis' for objective reasons. This constitutes a dangerous departure from the traditionally broad Community approach to anti-discrimination legislation, where the concept of 'worker' has consistently been given a broad interpretation.[468]

The Part-Time Work Directive also aims to encourage the 'the development of part-time work on a voluntary basis and to contribute to the flexible organisation of working time in a manner which takes into account the *needs of employers and workers*'. The Directive is therefore presented as a clear instrument of the EU agenda on flexibility[469] aiming to encourage business adaptability to the global market economy and

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Cunningham v. *Eastern Health and Social Services Board and Department of Health and Social Services* [1997] ECR I-7153; Case C-184/89 *Nimz* [1991] ECR I-297 and Case C-243/95 *Hill and Stapleton* [1998] ECR I-3779; see also S. Scarponi, 'Luci ed Ombre dell'Accordo Europeo in Materia di Lavoro a Tempo Parziale', *Rivista Giuridica del Lavoro – Note e Commenti*, 2 (1999), 399–427,

[467] Clause 2(1) of the Framework Agreement attached to the Part-Time Work Directive 97/81/EC; emphasis added.

[468] See for example Case 66/85 *Lawrie-Blum* v. *Land Baden-Würtemberg* [1986] ECR 2121 at paragraph 12 where the ECJ held that the essential feature of an employment relationship 'is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration'; see generally P. Craig and G. de Burca, *EU Law. Text, Cases and Materials*, 3rd ed. (Oxford: Oxford University Press, 2007), Chapter 17.

[469] C. Barnard, *EC Employment Law* (Oxford; Oxford University Press, 2006), p. 475.

to modernise the organisation of work. Yet, despite its rhetoric,[470] the Directive fails to explain how to reconcile the acknowledged tensions between 'the needs of employers and workers.'[471]

Clause 5 of the Framework Agreement on Part-Time Work addresses the issue of promoting the adoption of flexible work. Member States and Social Partners, within the scope of their competence, should identify, review and, where appropriate, eliminate legal or administrative obstacles to the opportunities for part-time work. For example, a worker's refusal to transfer from part-time to full-time work or vice versa cannot justify his/her dismissal. Although employers are requested 'as far as possible' to consider workers' request to transfer from full-time to part-time work and vice versa,[472] they are not under an obligation to accede to the worker's request. Once again, it is easy to see how this can limit the impact of the Directive in terms of reconciliation. Indeed, in practice, the employee has little control over the possibility of changing his/her working arrangements. The ECJ, however, has given a broad interpretation on this point. In *Hill*, it held that job sharers who returned to full-time work and are placed at a lower paid level than they would have been if they had been working full-time, are indirectly discriminated against.[473] This case was decided on the basis of Article 141 EC, rather than the Part-Time Work Directive; nevertheless it indicates that the Court is willing to take seriously the principle of non-discrimination for part-time workers.

Employers should also, again 'as far as possible', provide information on the organisation's opportunities for transferring from full-time to part-time work;[474] and on the existing bodies representing workers in relation to part-time working.[475] Finally, employers are requested to give consideration to measures aiming to 'facilitate access to part-time work at all levels of the enterprise, including skilled and managerial

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[470] See also Point 5 of the preamble of the Part-Time Work Directive 97/81/EC.

[471] This tension has been addressed by the debate on flexicurity. See further discussion on p. 115.

[472] Clause 5(3)(a) and (b) of the Framework Agreement attached to the Part-Time Work Directive 97/81/EC.

[473] Case C-243/95 *Hill and Stapleton* [1998] ECR I-3779.

[474] Clause 5(3)(c) of the Framework Agreement attached to the Part-Time Work Directive 97/81/EC.

[475] Clause 5(3)(d) of the Framework Agreement attached to the Part-Time Work Directive 97/81/EC.

positions' and vocational training 'to enhance career opportunities and occupational mobility.' This provision is drafted in very soft terms and does not place employers under any obligation, and as such employees cannot rely on the application of direct effect.

Overall, the Part-Time Work Directive might have increased labour market flexibility but it has not succeeded in advancing the reconciliation of work and family life. It prohibits discrimination on grounds of unfavourable treatment, but in certain cases, introduces dangerous justifications. It promotes part-time work, but does not give employees any real control over their choices. It guarantees the same hourly wages for part-timers and full-timers but cannot guarantee enough income to live on. It aims to improve the quality of part-time work but this is generally not associated with high quality jobs, and until this is the case, any improvement in the quality of part-time work will remain an illusion.

The Fixed-Term Work Directive

Fixed-term contracts of employment are not as common as part-time jobs but remain a significant minority. In 2005 in the EU, almost 15 per cent of women and 14 per cent of men were on fixed-term contracts.[476] Around half of these people were in such jobs involuntarily.[477] Despite the adoption of the Fixed-Term Directive, the proportion of men and women employed on fixed-term contracts continues to be extremely high in some Member States. In Spain, for instance, in 2005 it amounted to over 35 per cent of all female and to 32 per cent of male employees.[478]

The Fixed-Term Work Directive was also negotiated by the European Social Partners. Regrettably, as with the Part-Time Work Directive, the Fixed-Term Work Directive has a limited scope of application as it applies only to workers who have a fixed-term contract of employment or an employment relationship as defined in the law, collective agreements or practice in the Member States.[479] Thus, self-employed and temporary[480]

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[476] EUROSTAT, *The Life of Women and Men in Europe – A Statistical Portrait* (Brussels: European Commission, 2008).

[477] EUROSTAT, *The Life of Women and Men in Europe – A Statistical Portrait* (Brussels: European Commission, 2008).

[478] EUROSTAT, *The Life of Women and Men in Europe – A Statistical Portrait* (Brussels: European Commission, 2008).

[479] Clause 2(1) of the Framework Agreement attached to the Fixed-Term Work Directive 99/70/EC.

[480] See further discussion on p. 113 for the definition of temporary agency workers.

workers are excluded from the application of the Directive. The main aim of the Directive is to 'improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination [and to] establish a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships'.[481] In particular, the protection against the abusive use of fixed-term contracts was inserted in order to limit their misuse in sectors such as the media or academia, where in a number of Member States no limits were established as to how many times and/or under what circumstances a contract could be renewed. The Framework Agreement on Fixed-Term Work furthermore provides general rights of information for fixed-term workers, including the right to be informed about opportunities of permanent employment in the establishment.[482] The employer has an obligation to make permanent positions known to fixed-term workers, by way of suitable public display or general announcement, so that they can apply. Moreover, employers should facilitate access to training opportunities for fixed-term workers so that they can enhance their skills, career development and occupational mobility.[483] Finally, fixed-term workers must be adequately represented[484] and employers should, as far as possible, give consideration to the provision of appropriate information to existing workers' representational bodies on the issues of fixed term work in the establishment.[485]

These rights show clearly that the Social Partners intended to carefully balance the need for employer flexibility with a certain level of employment security for employees. This balance has further been highlighted by both the EU legislator and the ECJ albeit with different emphasis. The European Union legislator's strategy appears 'to promote, on the one hand, flexibility in the labour market, the organisation of the labour and employment relationships, and on the other to increase, not job security but employment security and social security

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[481] Clause 1, reiterated in Clauses 4 and 5 of the Framework Agreement attached to the Fixed-Term Work Directive 99/70/EC.

[482] Clause 6(1) of the Framework Agreement attached to the Fixed-Term Work Directive 99/70/EC.

[483] Clause 6(2) of the Framework Agreement attached to the Fixed-Term Work Directive 99/70/EC.

[484] Clause 7(1) of the Framework Agreement attached to the Fixed-Term Work Directive 99/70/EC.

[485] Clause 7(2) of the Framework Agreement attached to the Fixed-Term Work Directive 99/70/EC.

for workers in the labour market'.[486] Against this background, the Fixed-Term Work Directive becomes a means of facilitating the achievement of the employment objectives of adaptability and flexibility for the purpose of enhancing the EU's competition position on the global market, rather than job security for the individual workers.[487] This is in stark contrast with the interpretation of the ECJ, which has been more concerned with the protection of individual employment rights. It appears therefore that, while the EU legislator favours the idea of flexibility in employment in order to achieve full employment,[488] the European Court of Justice, by contrast, has decided to give more weight to 'the benefit of stable employment.'[489] Of particular relevance for this book, the ECJ emphasised this position when interpreting fixed-term contracts of employment in the context of pregnancy and maternity rights. In *Webb*,[490] *Mahlburg*,[491] *Melgar*[492] and *Brandt-Nielsen*,[493] the Court clearly established that, regardless of the type of contract of employment (fixed-term or indefinite), the employee is eligible for the same level of pregnancy rights and protection.[494] The ECJ further reiterated this position in *Mangold*[495] when it decided to protect 'the benefit of stable employment'[496] based on the principle of non-discrimination

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[486] L. Zappala, 'Abuse of Fixed-Term Employment Contracts and Sanctions in the Recent ECJ's Jurisprudence', *Industrial Law Journal*, 35(4) (2006), 439–444 (p. 441).

[487] Ibid. See also T. Wilthagen and R. Rogowski, 'Legal Regulation of Transitional Labour Markets', in G. Schmid and B. Gazier,(eds), *The Dynamic of Full Employment: Social Integration Through Transitional Labour Markets* (Cheltenham: Edward Elgar, 2002), p. 250; A. Supiot, *Au delà de l'emploi* (Paris: Flamarion, 1999).

[488] See in particular the various guidelines adopted within the framework of the European Employment Strategy.

[489] L. Zappala, 'Abuse of Fixed-Term Employment Contracts and Sanctions in the Recent ECJ's Jurisprudence', *Industrial Law Journal*, 35(4) (2006), 439–444.

[490] Case C-32/93 *Webb* [1994] ECR I-3567.

[491] Case C-207/98 *Mahlburg* [2000] ECR I-549.

[492] Case C-438/99 *Jiménez Melgar* v. *Ayuntamiento de Los Barrios* [2001] ECR I-6915.

[493] Case C-109/00 *Tele Danmark A/S* v. *Handels- og Kontorfunktionærernes Forbund i Danmark on behalf of Marianne Brandt-Nielsen* [2001] ECR 1-6993.

[494] A. Masselot, 'The ECJ Links Pregnancy and Maternity Protection to Fixed-Term Contract of Employment', *Maastricht Journal of European and Comparative Law*, 9(1) (2002), 57–66.

[495] Case C-144/04 *Mangold* v. *Helm* [2005] ECR I-9981.

[496] Case C-144/04 *Mangold* [2005] ECR I-9981 at paragraph 64.

laid down in the Employment Framework Directive.[497] Moreover, in *Adeneler*,[498] the ECJ affirmed that the aim of the Directive is primarily to protect the 'benefit of stable employment' and to reduce the risks linked to instability of employment.

Nevertheless, as for part-timers, the right to non-discrimination for fixed-term workers is subject to various conditions and differential treatment can be objectively justified by employers. One of the difficulties already highlighted in the discussion regarding the Part-Time Work Directive, is that only workers employed in the same establishment or under the same applicable collective agreement or the same national legislation, collective agreement or practice, are able to claim unfavourable treatment. The problem is that in an increasingly flexible work environment, not all employment relationships can be easily traced to a unique source.[499]

The Temporary Agency Work Directive

In 2000, temporary agency workers represented about 2 per cent (circa 6 million people) of the EU15 workers.[500] The European Trade Union Confederation has reported that, as in the case for other forms of flexible working arrangements, 'a higher proportion of temporary agency workers are unhappy with their jobs and conditions than permanent

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[497] L. Zappala, 'Abuse of Fixed-Term Employment Contracts and Sanctions in the Recent ECJ's Jurisprudence', *Industrial Law Journal*, 35(4) (2006), 439–444. See also B. Bercusson and N. Bruun, 'The Agreement on Fixed-Term Work: A First Analysis' in C. Vigneau et al., *Fixed-Term Work in the EU* (Stockholm: Arbetslivsinstitutet, 1999), 51–131, and D. Schiek, 'The ECJ Decision in *Mangold*: A Further Twist on Effects of Directives and Constitutional Relevance of Community Equality Legislation', *Industrial Law Journal*, 35(3) (2006), 329–341.

[498] Case C-212/04 *Adeneler and Others* v. *Ellinikos Organismos Galaktos (ELOG)* [2006] ECR I-6057. See also with regards to sanction Cases C-53/04, *Marrosu and Sardino* v. *Azienda Ospedaliera Ospedale San Martino di Genova e Cliniche Universitarie Convenzionate* [2006] ECR I-7213, and C-180/04, *Andrea Vassallo* v. *Azienda Ospedaliera Ospedale San Martino di Genova e Cliniche Universitarie Convenzionate* [2006] ECR I-7251.

[499] See Case C-320/00 *A.G. Lawrence and Others* v. *Regent Office Care Ltd, Commercial Catering Group, Mitie Secure Services Ltd* [2002] ECR I-1275 and Case C-256/01 *Allonby* v. *Accrington & Rossendale College, Education Lecturing Services* [2004] ECR I-8349.

[500] European Foundation for the Improvement of Living and Working Conditions, *Third European Survey on Working Conditions* 2000 (Dublin: European Foundation for the Improvement of Living and Working Conditions, 2000).

staff. Many do not choose this way of working, but would prefer secure employment.'[501]

Despite the apparent similarities with fixed-term work, this is a different form of employment and therefore the Fixed-Term Work Directive explicitly excludes it from its scope of application. In the preamble, however, the Commission expresses the intention to regulate this form of employment in a specific Directive. The employment relationship of temporary workers is based on a triangular structure. Temporary agency workers, also known as temps or agency workers, are typically employed by a temping agency, which offers their services to a user-undertaking. The user-undertaking controls the temporary worker in their daily activities. The Social Partners started negotiations on the regulation of temporary work in the late 1990s but could not come to an agreement and eventually talks broke down. The Commission put forward a proposed Directive on temporary agency workers in 2002,[502] citing the Lisbon objective of achieving more and better jobs,. However, once again, no agreement was reached. Finally, after a stalemate of over five years, the Council, supported by the Social Partners, agreed a common position by qualified majority at the employment Council of June 2008. The Directive on Temporary Agency Work was finally adopted on 19 November 2008.[503]

The Directive endorses the principle of equal treatment between temporary agency workers and permanent workers in the user-undertaking, subject to certain limitations and exemptions. The non-discrimination principle must apply as regards to issues such as pay, maternity leave[504] and leave entitlements. Because of the unique triangular structure of agency work,[505] the issue of equal treatment between temporary and permanent staff has been particularly difficult to regulate.[506] Not surprisingly, the main difficulty has been on the comparability and

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[501] See ETUC, *Temporary Agency Workers in the European Union*, available at http://www.etuc.org/a/501

[502] COM(2002) 149 final amended by COM(2002) 701.

[503] Directive 2008/104/EC on Temporary Agency Work, OJ [2008] L327/9.

[504] Article 1(a) of the Temporary Agency Work Directive provides for a wide right to equal treatment in relation to maternity rights including 'the protection of pregnant women and nursing mothers and protections of children and young people'.

[505] See discussion before.

[506] It has been especially difficult for the Court to determine the position of the employers (agency and user undertaking) when workers have been placed for a long term. See for instance the situations which arose in this context in

equality of terms and conditions of employment, particularly pay, between agency workers and direct employees in the client firm, and the qualification period required for temporary agency workers to benefit from such equal treatment.

In its preamble, the Temporary Agency Work Directive highlights its aim of contributing to the Lisbon Strategy and in particular to the need for flexibility and flexicurity.[507] Interestingly, the preamble also states that it aims not only to meet the undertakings' needs for flexibility but also the needs for employees to reconcile their working and private lives.'[508] This is significant as it is the first (legally binding) EU provision which makes the connection between work and 'private lives'. The Temporary Agency Work Directive further mentions a number of rights specifically connected to reconciliation between work and family life. It provides, in particular, that temporary agency workers are entitled to benefit from equal access to collective facilities, including childcare provisions.[509] This right is further reinforced by the inclusion of a right to improved access to training and childcare facilities in periods between assignments in order to increase the employability of the worker.[510]

The European Employment Strategy and flexicurity

Further impetus to the flexibility discourse was provided by the adoption of the Amsterdam Treaty on the European Union, in particular the Employment Chapter.[511] This can be seen as a response to high unemployment levels across the Europe during the 1990s, which shifted the focus from the reduction of unemployment to regaining the conditions for *full* employment rather than *high* employment as laid down in Article 2 EC. The European Employment Strategy (EES)[512] launched

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the United Kingdom: *Dacas* v. *Brooks Street Bureau* [2004] IRLR 140; *Cable and Wireless Plc*. v. *Muscat* [2006] IRLR 354.

[507] Points 8–10 of the Preamble of the Temporary Agency Work Directive 2008/104/EC.

[508] Point 11 of the Preamble of the Temporary Agency Work Directive 2008/104/EC.

[509] Article 6(4) of the Temporary Agency Work Directive 2008/104/EC.

[510] Article 6(5)(a) of the Temporary Agency Work Directive 2008/104/EC.

[511] Now Title VIII on Employment of the EC Treaty. See also the discussion in Chapter 1, 'The Development of the Reconciliation Principle in EU Discourse'.

[512] Extraordinary meeting of the European Council in Luxembourg (the 'Job Summit') in November 1997. See further D. Ashiagbor, *The European Employment Strategy: Labour Market Regulation and New Governance* (Oxford; Oxford University Press, 2005).

at the 1997 Luxembourg Job Summit, represented a pivotal element of this discourse. The EES was originally organised around four pillars: employability, entrepreneurship, adaptability and equal opportunity. The latter pillar included tackling the gender (pay) gap, facilitating the reconciliation between work and family life and encouraging the return to work after absence. At the same summit, the EC expressly acknowledged that flexible working arrangements benefit both undertakings and the many workers who need or want to work flexible hours. Under the EES, atypical jobs are perceived as opportunities for the creation of new employment in response to the need of employers for greater flexibility, as well as the desire for employees to reconcile their work with their family life, while at the same time retaining employment security.

The connection between reconciling work and family life and flexible working arrangements was reiterated in the Lisbon Strategy in March 2000[513] where the European Union set itself a new strategic goal to be achieved by 2010, namely 'to become the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion.'[514] In order to do so, the Lisbon Strategy aims to modernise the EU social model, to invest in people and to combat social exclusion. The ultimate aim of these measures is to raise the overall EU employment rate to 70 per cent and, in particular, to increase the number of women in employment to more than 60 per cent.

The promotion of the EES was accompanied by the so-called 'flexicurity' approach, namely the idea that flexibility is to be combined with security for employers. Flexicurity has become a popular catchword, which aims at balancing flexibility with security in the job market. On the one hand, flexibility is perceived to be necessary so that European economies can adjust to the demands of globalisation which requires that skills are rapidly matched to the changing needs of the market. On the other hand, there is a need for individuals exposed to these processes of change to be adequately protected, in particular with regard to their income. This means increasingly providing employment security, rather than job security.[515] The idea is that if protection from dismissal is relatively limited, the social protection from unemployment

[513] Lisbon Presidency Conclusions, 23–24 March 2000.

[514] Lisbon Presidency Conclusions, 23–24 March 2000, paragraph5.

[515] Vladimir Špidla, EU Commissioner for Employment, Social Affairs and Equal Opportunities.

should be high in order to make the transition from one job to another less difficult for individuals. In other words, flexicurity promotes a life-cycle approach to work. It does so by balancing the protection of employees with the possibility for undertakings to hire and fire easily. It also means that companies should be able to rely easily on overtime, part-time work, temporary work and changing working hours in order to respond to the demands of the globalised market. As these types of working arrangements potentially bring risks for the employees, regulation is needed to provide security for them. As such, flexicurity is said to be 'family friendly', because it allows workers with family responsibilities to engage in atypical, paid employment whilst retaining some degree of security.[516] However, encouraging flexibility in employment with a high level of social security can only be done if employees are given a real chance to stay in the job market and to progress in their work and if some specific obligations are placed on employers.

The terms 'flexibility' and 'flexicurity' first appeared in Commission Documents[517] and in the Employment Guidelines and they have been steadily used since.[518] In 2006, the Spring European Council invited the Commission, together with the Member States and the Social Partners, to consider the establishment of common principles on flexicurity. At the 2007 Spring Council, the Member States were asked to consider various approaches to flexicurity and to decide on the best combination of policies, to fit their individual needs. In June 2007, the Commission adopted a Communication 'Towards Common Principles of Flexicurity'.[519] The Council further adopted a set of common principles on flexicurity on 5–6 December 2007.[520] In February 2008, the Commission launched a public initiative, in close cooperation with the European Social Partners,

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[516] However, see S. Fredman, 'The Broken Promise of Flexicurity', *Industrial Law Journal*, 33(4) (2004), 299–319.

[517] Inter alia, Commission's Green Paper, 'Partnership for a New Organisation at Work', COM(97) 127 final; European Commission, 'Modernising and Improving Social Protection in the European Union' COM(97) 102 final; Commission Communication, 'Modernising the Organisation of Work', COM(98) 592 all discussed in C. Bernard, *EC Employment Law* (Oxford: Oxford University Press, 2006).

[518] European Commission and European Council Joint Employment Report, 22 February 2007 and the Council Common Principles on Flexicurity (5/6 December 2007).

[519] Commission Communication, 'Towards Common Principles of Flexicurity: More and better Jobs through Flexibility and Security', COM(2007) 359.

[520] Endorsed by the European Council on 12 December 2007, Presidency conclusions on 14 February 2008, 16616/1/07, REV 1, CONCL3.

in the form of a 'Mission for Flexicurity',[521] which aims to help Member States to integrate the common principles into their national contexts. The Mission for Flexicurity takes the form of voluntary discussion and exchanges of best practice between willing Member States.[522]

The Commission recommends, in particular, that Member States reform their employment legislation in relation to contracts, to allow easier job transition and to provide more opportunities for workers to progress.[523] Although surveys show that most Europeans welcome the flexicurity approach, the Commission's efforts in this area appear to be resisted by many Member States. A Eurobarometer report of autumn 2006 showed that 76 per cent of European citizens believed that a 'job for life' is a thing of the past; 72 per cent wanted contracts of employment to be made more flexible so as to create more jobs; and 88 per cent agreed that lifelong learning increases the chance of finding a job more quickly. However, many are questioning the well-founded approach of flexicurity in general and, in particular, in relation to reconciliation.[524]

Flexible working arrangements for full-time workers

Although atypical forms of employment, in particular part-time work, are commonly used by parents and carers in order to reconcile work with family life, a recent survey of the European Foundation for the Improvement of Living and Working Conditions has shown that 'the

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[521] Mission for Flexicurity: Terms of Reference, EMPL/D/XPM/DD D(2008) 2899.

[522] A final report on the results of the Mission for Flexicurity was presented to the European Council in December 2008 (not yet published) and an agreement on a follow-up to the report of the Mission for Flexicurity is to be discussed early 2009.

[523] Vladimir Špidla, EU Commissioner for Employment, Social Affairs and Equal Opportunities.

[524] See in particular S. Fredman, 'The Broken Promise of Flexicurity', *Industrial Law Journal*, 33(4) (2004), 299–319; F. Teking and W. Wessels, 'Flexibility within the Lisbon Treaty: Trademark or Empty Promises?', 1 *EPAISCOPE* (2008); L. Calmfors, 'Flexicurity – An Answer of a Question?', *Swedish Institute of European Policy Studies*, 6 (2007), 1–5; R. Huiskamp and K. Vos, 'Felxibilization, Modernization and the Lisbon Strategy', *The International Journal of Comparative Labour Law and Industrial Relations*, 23(4) (2007), 587–599; K. Rittich, 'Rights, Risk, and Reward: Governance Norms in the International Order and the Problem of Precarious Work' in J. Fudge and R. Owens (eds), *Precarious Work, Women, and the New Economy: The Challenge to Legal Norms* (Oxford: Hart Publishing, 2006), 31–52.

most prevalent form of working time in the EU is full-time work, both among men and women.'[525] These results are surprising because, prima facie, full-time work does not appear to be compatible with family life. Indeed, an average 40-hour working week can present a real challenge for people (often mothers) with caring responsibilities. So why does full-time work remain the preferred option? From the discussion in this chapter, we can attempt two educated guesses. Firstly, atypical working arrangements are associated with disadvantageous conditions whereas full-time employment often leads to better opportunities. Secondly, employees need the financial security of a full salary. These are possibly the reasons why, if at all feasible, carers and parents (and in particular mothers) choose to work flexibly on a full-time basis, rather than being in atypical working arrangements.[526] Certain employees have the opportunity to organise, formally or informally, their full time employment in ways that are compatible with their family life. This is mainly the case for educated and skilled workers in the education or medical sectors.[527] An option, for example, is to work longer days and shorter weeks. A variation of this model is to work annualised hours, this is when a specific number of working hours per year are contracted in advance. The latter is used in variety of situations, such as continuous processes of manufacturing where seasonal variations of patterns of work would otherwise require increased use of causal labour or short time and/or overtime working. Other forms of employment can be performed from home. This possibility has grown with the development of new technologies such as teleworking. Teleworking is an innovative way of working, and is increasingly common in sectors such as telecommunications and commerce, which allows individuals to work from home by using a computer, either for the whole duration of the contract or for part of it. It is estimated that 6 per cent of European workers telework for at least 10 per cent of

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[525] European Foundation for the Improvement of Living and Working Conditions, *Combining Family and Full-Time Work* (Dublin: European Foundation for the Improvement of Living and Working Conditions, 2007), p. 2.

[526] M. Salmi and J. Lammi-Taskula (eds), *Puhelin, mummo vai joustava työaika?* [Telephone, Granny or Flexible Working Time?] (Helsinki: Stakes, 2004) as cited in European Foundation for the Improvement of Living and Working Conditions, *Combining Family and Full-Time Work* (Dublin: European Foundation for the Improvement of Living and Working Conditions, 2007), p. 3.

[527] European Foundation for the Improvement of Living and Working Conditions, *Combining Family and Full-Time Work* (Dublin: European Foundation for the Improvement of Living and Working Conditions, 2007), p. 3.

their working time,[528] and over 66 per cent of people of working age have expressed interest in this form of work.[529] Indeed, further investigation of the potential use of information technologies to facilitate reconciliation was an option suggested in the Second-Stage Consultation.[530]

Teleworking, in particular if freely chosen, can be an attractive option for carers, especially women who find it a useful way of managing their paid employment and their care responsibilities. It can also be an effective way of combining job security with greater flexibility, in line with the EU's flexicurity approach, as well as encouraging a knowledge-based economy and society, thus facilitating the objectives of the Lisbon Strategy. This potential was highlighted by the Social Partners who, on 16 July 2002, signed a Framework Agreement on the regulation of teleworking.[531] The Framework Agreement was not transformed into a Directive, but is to be transposed in accordance with procedures and practices specific to management and labour in the Member States.[532] It defines telework as 'a form of organising and/or performing work, using information technology, where work, which could also be performed at the employers premises, is carried out away from those premises on a regular basis.'[533] It aims to provide a general framework to facilitate the use of telework in enterprises in a way that meets the needs of both workers and employers. Its twofold goals, namely to contribute to the modernisation of the workplace and to serve 'as a way for workers to reconcile work and social life', are firmly set within the Lisbon objectives.[534]

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[528] European Commission, 'Turning European Social Dialogue into National Action – Workers and Employers Implement Telework Agreement', Press Release 11 October 2006, IP/06/1351.

[529] European Commission, 'Turning European Social Dialogue into National Action – Workers and Employers Implement Telework Agreement', Press Release 11 October 2006, IP/06/1351.

[530] European Commission, 'Turning European Social Dialogue into National Action – Workers and Employers Implement Telework Agreement', Press Release 11 October 2006, IP/06/1351, p.4.

[531] The Framework Agreement on Telework is available at http://ec.europa.eu/employment_social/news/2002/oct/teleworking_agreement_en.pdf; see in particular Point 1 of the Framework Agreement.

[532] The European Social Partners reported on the implementation of the Framework Agreement on Telework in a reports adopted by the Social Dialogue Committee on 28 June 2006 (published in September 2006).

[533] Point 2 of the Framework Agreement on Telework 2002.

[534] Point 1 of the Framework Agreement on Telework 2002.

The Agreement concerns teleworkers with a contract of employment and excludes self-employed telework or employees of call centres who are performing their work at the premises of the call centre employing them. The Framework Agreement deals both with workers who are directly recruited as teleworkers and those who wish to opt for this form of work organisation during the course of their employment relationship, and emphasises that when telework is not part of the initial job description, the passage to telework has to be voluntary for both for the employer and the employee. An employee's refusal to opt for telework cannot justify his/her dismissal. The Framework Agreement then goes on to provide a number of basic rights for teleworkers, including health and safety, data protection and privacy, equipment and general conditions of employment.[535]

Against this background, as for atypical working arrangements, in this case too, the ability to introduce some degree of flexibility into a full time contract does not necessarily lead to reconciliation. A study has emphasised that often well-educated (female) employees, who hold posts with demanding responsibilities and who have chosen to work flexibly, work 'self-inflicted' longer hours, which conflict with their caring responsibilities because they have a sense of commitment and responsibility to their job.[536] It appears that there is a clear link between flexibility and unpredictable and long working hours, which are incompatible with reconciliation. Furthermore, when flexibility is reached with arrangements such as teleworking, they are effective only if an alternative form of care is in place, such as the school or nursery, or alternative arrangements have been made for dependent adults. The parent/care-giver can then work flexibly around school and care facility runs.

Finally, an analysis of flexible working arrangements across Europe cannot omit the fact that some Member States have developed, or are in the process of developing, innovative schemes which might support reconciliation between work and family life. This is the case, for example, in Belgium where a career break scheme has been in place since 1985. This scheme allows employees to stop working or to reduce

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[535] Points 4 to 11 of the Framework Agreement on Telework 2002.

[536] R. Julkunen and J. Nätti, *The Modernisation of Working Times* (Jyväskylä: SoPhi, 1999) as cited in European Foundation for the Improvement of Living and Working Conditions, *Combining Family and Full-Time Work* (Dublin: European Foundation for the Improvement of Living and Working Conditions, 2007), p. 27.

their working hours for a certain period of time. Italy[537] and France[538] have introduced policies of 'city time' where different kinds of times are harmonised within a geographical area. This means that in a certain area, services will be offered in hours that are better adapted to users' needs. Although very promising, the practical impact of these schemes on reconciliation does not appear substantial.[539]

Conclusions

New and flexible forms of organising work are necessary for achieving the Lisbon objectives, including an increase in the rate and quality of employment for *all*: men and women, parents and carers.[540] For this purpose, flexible working arrangements have been heralded as the key to an effective reconciliation of work and family life and this has been confirmed, to some extent, by the fact that many working parents use the arrangements when they are available. In this chapter, we have focused on flexible working arrangements with a view to assessing this claim. The results have been discomforting. Flexibility may indeed be an effective labour market tool and its regulation at both national and EU level is to be welcomed for combating discrimination; whether it can improve the position of working parents and carers, however, is another issue. We have divided the flexible working arrangements into two broad categories: those where the structure of the contract changes

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[537] Legge 8.3.2000 n° 53, in particular the Capo VII, Tempi delle Citta', Articles 22 to 28. See C. Saraceno, 'Politiche del Lavoro e Politiche della Famiglia:un'Alleanza Lunga e Problematica', *Lavoro e Diritto* 1 (2001), 37–54; A. Del Re and G. de Simone, 'Concilier Travail et Famille en Italie Droit et Pratiques', in AFEM (ed.), *Concilier Famille et Travail pour les Hommes et les Femmes: Droit et Pratiques* (Athens: Sakkoulas; Brussels: Bruylant, 2005), 145–189.

[538] For a general overview of the city time's application in France, see D. Méda, *Le Temps des Femmes: Pour un Nouveau Partage des Rôles* (Paris: Flammarion, 2001).

[539] D. Méda, Le Temps des Femmes: Pour un Nouveau Partage des Rôles (Paris: Flammarion, 2001). See also AFEM, *Concilier Famille et Travail pour les Hommes et les Femmes: Droit et Pratiques* (Athens: Sakkoulas; Brussels: Bruylant, 2005); V. Berthet, 'Villes: le temps des femmes', *Economie and Humanisme*, 373 (2005), 7–68; D. Perrons, C. Fagan, L. McDowell, K. Ray, and K. Ward, *Gender Division and Working Time in the New Economy: Changing Patterns of Work, Care and Public Policy in Europe and North America* (Cheltenham: Edward Elgard Publishing, 2006).

[540] Commission Communication, 'Towards Common Principles of Flexicurity: More and Better Jobs through Flexibility and Security', COM(2007) 359.

such as part-time or fixed-term work and those where the way to perform a job is altered, such as teleworking. In the latter, workers continue to perform full-time work but, formally or informally, in a flexible way. In both cases, there is evidence that flexibility cannot be automatically equated to reconciliation.

This chapter has sought to identify the reasons explaining the disconnection between reconciliation and flexible work. One of the most common reasons cited by the relevant literature is that flexible working arrangements are often confined to poorly skilled and paid jobs, whose inherent precariousness has a negative impact on reconciliation.[541] Even more often, those jobs remain heavily gendered,[542] thus reinforcing either women's poverty or financial dependency on their partners. Furthermore, flexible jobs are not always the result of a genuine choice but are rather the result of an ad hoc response to unavoidable circumstances. We have argued that the situation is further aggravated by the fact that, possibly because they have only recently become regulated, the conceptual framework of flexible working arrangements is still, in practice, detached from the reconciliation concept.[543] The Part-Time Work Directive and the Fixed-Term Work Directive merely acknowledge in their preambles the role of flexibility in order to achieve reconciliation.[544] The Tele-work Framework Agreement mentions the general aim of facilitating 'social life'.[545] Only the more recent text of the Temporary Agency Work Directive makes a specific reference to reconciliation.[546] Arguably, these instruments should reformulate the generic protection against sex discrimination to focus more on a gender-neutral concept

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[541] See generally J. Fudge and R. Owens (ed.), *Precarious Work, Women, and the New Economy: The Challenge to Legal Norms* (Oxford: Hart Publishing, 2006).

[542] Inter alia, G. James, *The Legal Regulation of Pregnancy and Parenting in the Labour Market* (London: Routledge Cavendish, 2009) R. Crompton., S. Lewis, and C. Lyonette (eds), *Women, Men, Work and Family in Europe* (Basingstoke: Palgrave McMillian, 2007).

[543] As discussed in Chapter 1, 'The Development of the Reconciliation Principle in EU Discourse'.

[544] Point 5 of the preamble of the Part-Time Work Directive 97/81/EC and points 5–7 of the preamble of the Fixed-Term Work Directive 99/70/EC.

[545] In its preamble, the Framework Agreement on the regulation of tele-working states that 'Social Partners see telework both as a way for companies and public service organisations to modernise work organisation, and as a way for workers to reconcile work and social life and giving them greater autonomy in the accomplishment of their tasks.'

[546] See point 11 of the preamble and Article 6 of the Temporary Agency Work Directive 2008/104/EC.

of protection against discrimination based on caring responsibilities. Furthermore, as currently structured, the concept of flexibility is not in keeping with the fact that reconciliation is a concept which is constantly evolving over an individual's life span. Parents might need to work three days a week to meet the needs of a baby or a toddler; but they might need to change their working hours when the children are of school age in order to provide after-school care. If they are caring for a frail relative, individuals might again have very different needs. In addition and rather paradoxically, at the time of writing, flexible working arrangements are very inflexible. Carers have little control over them: in certain countries, such as the UK, employees have a right to *ask* to introduce flexibility into their working patterns in order to fulfil their care responsibilities but not a right to *obtain* it. More often however, workers do not have such a right as it is not guaranteed by the EU. Here, however, amongst the proposed amendments to the Pregnant Workers Directive, there is a proposal to include the right for women (but not for parents) who return to work after their maternity leave to ask for flexible working arrangements.[547] This would be only a partial improvement: apart from excluding a large number of carers and entrenching stereotypes of women as primary carers, this entitlement would only grant the right for employees to make the request. Therefore, it will reaffirm a practice already existing in many States and will not promote change. Whilst we recognise that to grant the possibility of altering flexible working arrangement so as to fit parents' needs will create business concerns, a study examining this area is certainly necessary and long overdue. Finally, flexible working arrangements need to be coordinated with formal care support. This is the focus of next chapter. Here suffice to say that care provisions for both adults and children need to be tailored to a flexible market, where parents might need to work, for example, during school holidays or in the evening.

If the EU is serious about achieving the Lisbon targets and encouraging women into and back to employment, it will need to reassess its position on the use of flexibility as a tool for parents and carers to reconcile paid work and domestic responsibilities.

[547] New Article 11(5) of the proposed amendment to the Pregnant Worker Directive, COM(2008) 600/4.

4
The Care Strategy

Introduction

An analysis of the reconciliation principle would not be complete without exploring both the situation which arises once the period of leave following the birth of a child ends and the consequences of long-term adult care; this chapter will focus on these issues. Broadly speaking, the concept of care includes:

> the *activities* and *relations* involved in meeting the physical and emotional requirements of dependent adults and children, and the *normative economic and social frameworks* within which these are assigned and carried out.[548]

Compared to the other elements of reconciliation, namely, leave and the organisation of working time, the concept of care and care work are relatively under explored. Only recently they have gained a place in mainstream welfare and sociological literature[549] but they remain largely absent from EU legal research. Yet care, rather than a system of leave or the possibility of rearranging working hours, has traditionally

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[548] M. Daly and J. Lewis 'The Concept of Care and the Analysis of Contemporary Welfare States', *British Journal of Sociology*, 51(2) (2000), 281–298; emphasis added; see also T. Kröger, *Comparative Research on Social Care: The State of the Art*, SOCCARE Project Report 1, RTD – 2001–00211, 4.

[549] See J. Lewis, in particular, *Children, Changing Families and Welfare States* (Cheltenham: Edward Elgar, 2006) and *Work – Family Balance, Gender and Policy* (Cheltenham: Edward Elgar, 2009); see also T. Rostgaard, 'Caring for Children and Older People in Europe – A Comparison of European Policies and Practice', *Policy Studies*, 23(1) (2002), 51–68.

been the very solution for looking after young children and frailer adult members of the family: how has society addressed such an important issue? Why has legislation overlooked it? Until recently, care has largely been provided informally by women within the family (the private sphere)[550] and has been regarded as a spontaneous occupation based on 'feelings' and 'affiliation'[551] where the emotional relationship between the cared for and the carer has played a pivotal role.[552] In Europe, this pattern has gone unchallenged for centuries. Being confined to the private sphere, it becomes invisible and as a result, the need to regulate it was never felt. The invisibility of informal care arrangements was supported by the fact that they were perceived as equally efficient in economic terms;[553] a further argument for leaving care within the realm of the private sphere was that, 'should the vast volume of informal care disappear and be substituted with paid care, the cost could be enormous.'[554]

The process of demographic transition and changes in the workplace have challenged this arrangement.[555] In particular, the new fluid model of families and the mass presence of women in paid employment have resulted in an increase in the number of people who need to be cared for, whilst there are fewer people able to provide informal care. Such a trend seems to be confirmed in the vast majority of EU Member States where, although with substantial differences, caring work is fast leaving the private sphere to acquire a public dimension.[556] A comprehensive care strategy, both across Europe and in the EU, however, is still lacking.

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[550] J. Lewis, *Gender, Family and the Study of Welfare Regimes* (Ålborg: FREIA, 1995).

[551] M. Bulmer, *The Social Basis of Community Care* (London: Allen & Unwin, 1987).

[552] J. Finch and D. Groves (eds), *A Labour of Love: Women, Work and Caring* (London: Routledge, 1983).

[553] See the discussion in J. Plantenga, 'Investing in Childcare. The Barcelona Childcare Targets and the European Social Model', key note speech presented at the conference Childcare in a Changing World, 21–23 October 2004, Groningen.

[554] J. Wiener, 'The Role of Informal Support in Long Term Care', in J. Brodsky, J. Habib, and M. Hirshfeld (eds), *Key Policy Issues in Long Term Care* (Geneva: World Health Organisation, 2003), 3–24.

[555] See the discussion in the Introduction and Chapter 1, 'The Development of the Reconciliation Principle in EU Discourse'.

[556] J. Lewis, 'Men, Women, Work, Care and Policies', *Journal of European Social Policy*, 16(4) (2006), 387–392; B. Pfau-Effinger and B. Geissler (eds), *Care and Social Integration in European Societies* (Bristol: Policy Press, 2005).

We argue that a structured approach is not only desirable but is also both required and long awaited.

Care policies, for both children and adults, are important for several independent, yet interconnected, reasons. The primary reason for supporting them is that, as care remains mainly a gendered activity,[557] provisions on care are directly linked with supporting the entry and re-entry of women into paid work so as to minimise 'the loss of human capital due to labour market withdrawal'.[558] The difficulties linked to care are not limited to specific parts of women's lives but are a continuum that affects, in different ways and with different priorities and necessities, different stages of their lives: the care provided to school-age children (before and after school hours), is different but no less demanding than the care provided to disabled dependants and partners.[559]

There has been consistent evidence over the years that in countries where extensive care facilities, in particular childcare, are provided, parents, (mothers), have a stronger link with the employment market.[560] Over six millions women aged between 25 and 49 in the EU are forced out of paid work or can only work part-time in order to meet their family responsibilities.[561] For over 25 per cent of these women, availability, cost and access to childcare represent the main problems.[562] Therefore,

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[557] Inter alia, K. Ketscher, *Offentlig børnepasing i retling belysning* (Copenhagen, 1990); T. Hervey and J. Shaw, 'Women, Work and Care: Women's Dual Role and Double Burden in EC Sex Equality Law', *Journal of European Social Policy*, 8(1) (1998), 43–63. It might be worth noting, that although care for children and other dependants is generally provided by women, spousal care (one partner looking after one another) is much less gendered; see L. Ackers, A. Balch, S. Scott, S. Currie, and D. Millard, *The Gender Dimension of Geographic Labour Mobility in the European Union*, Report prepared for Directorate C Citizens' Rights and Constitutional Affairs (European Parliament), January 2009.

[558] OECD *Babies and Bosses: Reconciling Work and Family Life*, vol. 3 (Paris: OECD, 2004), p. 90.

[559] L. Ackers, A. Balch, S. Scott, S. Currie, and D. Millard, *The Gender Dimension of Geographic Labour Mobility in the European Union*, Report prepared for Directorate C Citizens' Rights and Constitutional Affairs (European Parliament), January 2009.

[560] H. Joshi and H. Davies, *Childcare and Mothers' Lifetime Earnings: Some European Contrasts*, Centre for Economic Policy Research, Discussion Paper N. 600 (1992); see also F. Jaumotte, *Female Labour Force Participation: Past Trends and Main Determinants in OECD Countries* (Paris: OECD, 2003).

[561] Eurostat, Labour Force Survey 2006.

[562] Eurostat, Labour Force Survey 2006. See also The European Network of Legal Experts in the Field of Gender Equality, *Legal Approaches to Some Aspects*

at EU level, care facilities are to be understood as part of both equal opportunity and economic strategies.

In terms of early childhood, care provisions are also desirable for reasons related to child welfare and education. There is evidence that quality care and education outside the household lead to children's social and cognitive development and this helps to prepare them for later integration into the education system.[563] Arguably, providing children with the proper social and educational environment contributes to forming well-balanced individuals who will then be capable of participating actively in society as citizens. The European Commission has indeed highlighted the need to invest in pre-primary education in order to establish a sound basis for 'further learning, preventing school dropout, increasing equity of outcomes and raising overall skill levels'.[564] Therefore, childcare contributes to enhancing society's future human capital.[565] Another reason for investment in this area is the need to reverse the declining trend in fertility rates as families will be more likely to have children if adequately supported.[566] This is necessary for facing the challenges of the so-called demographic time bomb and for producing a generation able to support the present insurance and pension system. Additionally, if childcare facilities are in place, parents (women) can work and thus reduce the risk of poverty for themselves and their children.[567]

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of the Reconciliation of Work, Private and Family Life in Thirty European Countries (Brussels: European Commission, 2008).

[563] OECD, *Starting Strong: Early Childhood Education and Care* (Paris: OECD, 2001); S. Kamerman, M. Neuman, J. Waldfogel, and J. Brooks-Gunn, 'Social Policies, Family Types and Child Outcomes in Selected OECD Countries', n°6, *Social Employment and Migration Working Papers* (Paris: OECD, 2003), 1–54.

[564] European Commission report, 'Implementation of the Barcelona Objectives Concerning Facilities for Pre-School-Age Children', COM(2008) 638, p. 4, citing its Communication on 'Efficiency and Equity in European Education and Training Systems', COM(2006) 481.

[565] OECD, Babies and Bosses: Reconciling Work and Family Life, vol. 3 (Paris: OECD, 2004), p. 99; B. Keeley, OECD *Insights, Human Capital – How What You Know Shapes Your Life* (Paris: OECD, 2007).

[566] Communication from the European Commission, 'A Better Work-Life Balance: Stronger Support for Reconciling Professional, Private and Family Life', COM(2008)635, p. 3.

[567] This has been highlighted in the 2008 Joint Report on Social Protection and Social Inclusion (Brussels; European Commission, 2008), http://ec.europa.eu/employment_social/spsi/publications_en.htm.

Care facilities for adults are also fast becoming a priority. Data confirms a trend towards fewer children and a growing elderly population[568] and this trend is accelerating. The European Commission's Green Paper on Demographic Change predicts that the demographic dependency ratio (the ratio of the population aged between 0 and 14 and over 65 years) will rise from 49 per cent in 2005 to 66 per cent in 2030. This will have a major impact on the overall picture of individuals who need care. Whilst traditionally reconciliation measures address the needs of mothers with young children, they now need to be reshaped in order to include the needs of older people.

However, in spite of its well-acknowledged importance, 'care' is not traditionally constructed as a social right. At national level, excluding a few isolated exceptions from the Scandinavian Countries (Denmark, for instance, provides for a right to access to care facilities and childcare guarantee),[569] in the majority of EU Member States individuals – even as employees – do not have a right to access care facilities. This also holds true for the EU legal system which, for the time being, in this area is contemplating neither binding legislation nor a clear policy. It is therefore more appropriate to refer to an emerging EU care 'strategy' (as the EU itself does, albeit only referring to childcare) rather than 'provisions'.

This chapter explores the development of the EU care strategy with a view to assessing the opportunity or feasibility of building a coherent set of care provisions as part of the reconciliation principle. In order to do so, it first analyses the theoretical issues underlying this area; thereby providing a foundation for both the current debate and potential future developments. The chapter then provides an analysis of the relevant EU policy strategy on care for both young children and adults. Part of the EU care strategy entails qualitative and quantitative studies of the situation in the EU Member States. This chapter, therefore, where appropriate, refers to the law of individual Member States.

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[568] Communication from the European Commission, Green Paper 'Confronting Demographic Change: A New Solidarity between the Generations', COM(2005) 94 final; Communication from the Commission 'Promoting Solidarity between Generations', COM(2007) 244 final.

[569] D. Rauch, 'Is there Really a Scandinavian Social Service Model?: A Comparison of Childcare and Elderly Care in Six European Countries', *Acta Sociologica*, 50(3) (2007), 249–268; see also A. Leira, *Working Parents and the Welfare State* (Cambridge: Cambridge University Press, 2002), in particular Chapter 6, 'Childcare as a Social Right: Family Change and Policy Reform'.

Conceptualising care

The concept of care is arguably complex and multifaceted: it involves many different situations such as the right to be cared for, both for children and adults, the duties and rights of caregivers and entitlements to financial support for care and/or for care facilities. All of these issues raise conceptual concerns, that, in turn, point strongly to the fundamental lack of a coherent conceptual framework underpinning this area. This lack explains, at least in part, why care measures are underdeveloped and under-explored. In particular, we focus on three issues: the structure, the value and the role of care.

Firstly, we need to address the fundamental question of how to structure care work and how best to organise it. It could be provided in cash, namely via social security benefits, pensions, tax credits or by providing payment to enable individuals to purchase or otherwise fund their own arrangements. Alternatively, it could be provided in the form of services in kind, or could be a mixture of both.[570] This reflects the so-called cash versus care divide which lies at the very heart of the policy decisions of a State: who will be responsible for the children? What kind of families do we want to support? Ultimately, this implies various considerations on how a State arranges its welfare dimension.[571] Whilst the main argument behind cash is that it would allow more choice, care facilities are believed to help parents (in particular, mothers) to enter and remain in employment.[572] The majority of EU Member States have introduced, in some form or another and with different motivations, a set of (often means-tested) benefits to facilitate care, whilst a few of them provide a comprehensive set of state-sponsored care facilities.

To decide the most appropriate structure for care is a complex decision as it involves different considerations depending on whether it is childcare or adult care. With regard to childcare, arguably cash payments might not have a clear link with maternal employment. Indeed, even when intended as gender neutral, these payments carry a strong

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[570] M. Daly and J. Lewis, 'The Concept of Social Care and the Analysis of Contemporary Welfare States', *British Journal of Sociology*, 51(2) (2000), 281–298.

[571] J. Lewis, 'Care and Gender: Have the Arguments for Recognising Care Work Now Been Won?', in C. Glendinning and P. Kemp (eds), *Cash and Care. Policy Challenges in the Welfare State* (Bristol: Policy Press, 2006), 11–20.

[572] Report of the Commission, 'Implementation of the Barcelona Objectives Concerning Facilities for Pre-School-Age Children', COM(2008) 638.

connotation of 'maternal benefit'[573] and thus can reinforce the two spheres' structure with negative consequences for unpaid or poorly paid carers. Benefits can therefore limit, rather than enhance, the element of choice. However, many parents (mothers) do need, want or prefer to pay for forms of childcare such as childminders, babysitters or family help and, in these cases, cash payment offers a better choice. This confirms the fact that care issues are multifaceted and solutions need to offer carers both flexibility and choice. EU policy, however, appears to favour the solution of providing care facilities. This aim was already apparent in 1992, in the Childcare Recommendation[574] in which the Commission referred exclusively to facilities by aiming at making them more affordable, improving their quality and raising their capacity level. This was more recently reiterated in the proposed Communication on Work-Life Balance.[575] Having said that, if this remains principally valid for childcare, it may not apply to adult care. There is evidence that it is in the interests of older and frail people to be cared for in familiar surroundings.[576] Adults tend to require very different forms of care which vary from one person to another. Therefore, financial support which allows them to choose the most suitable type of care might be preferable to the provision of facilities. Thus, flexible forms of care support are also necessary in order to allow people to choose freely the best possible option in their particular circumstances.

Secondly, the value that society and legislation are prepared to place on care needs to be scrutinised; regrettably and despite the ongoing policy[577] and academic debate,[578] this remains low. Care work is generally

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[573] A. Leira, *Working Parents and the State* (Cambridge: Cambridge University Press, 2002), in particular Chapter 5, 'From Mother's Wage to Parental Choice: Cash Benefits for Childcare', Vigerust, E., Arbeid, barn og likestilling – Rettslig tilpasning av arbeidsmarket (Oslo: Tano Aschehoug, 1998).

[574] Recommendation of the European Commission 92/241/EEC on Child Care, OJ (1992) L 123/16.

[575] Communication from the Commission, *A Better Work-Life Balance: Stronger Support for Reconciling Professional, Private and Family life*, COM(2008) 635.

[576] For example, HM Government, Department of Health, *The Case for Change – Why England Needs a New Care and Support System* (London: DoH, 2008).

[577] For an overview on the policy debate on care across Europe see C. Glendinning and P. A. Kemp (eds), *Cash and Care – Policy Challenges in the Welfare State* (Bristol: The Policy Press, 2006)

[578] See the work of J. Lewis in general; see also L. Ackers and K. Coldron, '(Ab)Using European Citizenship? Retirement Migrants and the Management of Healthcare Rights', *Maastricht Journal of European and Comparative Law: Special*

viewed as a secondary occupation, regardless of the sphere in which it is provided.[579] When provided informally, within the family and often by women, care work is unpaid and is not considered 'work'.[580] It thus remains invisible and contributes to reinforcing gender segregation within the family (the private sphere) which in turn perpetuates inequality in the market (the public sphere). When provided formally, although care might become visible, its value typically remains low. Indirectly, the limited value of care was confirmed by the ECJ in the case of *Gruber*, where it held that to resign because of a lack of childcare facilities was not a 'serious reason' for the purpose of the payment of an entitlement.[581] Similarly, when commodified, care work is primarily provided by women and this contributes to gender segregation in the employment market. Arguably, there is in fact a clear relationship between the low value attributed to care work and its gendered dimension. Such a link has been explained by the lack of prestige and opportunities for advancement, or more simply, because care work has historically been seen as 'women's work'[582] and as a natural extension of their perceived gender abilities.[583] The EU's approach to this issue has been mixed. On the one hand, from the early 'encouragement' of the European Commission Childcare Network exhorting men to work as carers,[584] to more explicit measures such as the Pregnant Workers and the Parental Leave Directives, encouraging parents to share the care of

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Issue on the Impact of Migration on Health Care in the European Union, 14(3) (2007), 287–302.

[579] M. Daly and J. Lewis 'The Concept of Social Care and the Analysis of Contemporary Welfare States', *British Journal of Sociology*, 51(2) (2000), 281–298.

[580] I. Moebius and E. Szyszczak, 'Of Raising Pigs and Children', 18 *Yearbook of European Law* (Cambridge: Cambridge University Press, 1998), 125–144. See also some of the early ECJ case law where the Court emphasised the economic element, inter alia, Case 53/81 *Levin* [1982] ECR 1035, 'the concepts of "worker" [...] must be interpreted as meaning [...] persons who pursue or wish to pursue an activity as an employed person [... to] cover only the pursuit of effective and genuine activities' at paragraphs 16 and 17.

[581] Case C-249/97 *Gruber* [1999] ECR I-5295.

[582] See the discussion in J. Peeters, 'Including Men in Early Childhood Education: Insights from the European Experience', *NZ Research in Early Childhood Education*, 10 (2007), 15–24.

[583] C. Bovis and C. Cnossen, 'Part I: Stereotyped Assumption versus Sex Equality: A Socio Legal Analysis of Equality Laws in the European Law', *International Journal of Comparative Labour Law and Industrial Relations*, 12 (1996), p. 7.

[584] See for example, EC Commission, Rete di esperti per l'infanzia e la Conciliazione delle Responsabilita' Familiari e Professionali, Uomini e Lavoro di Cura (1993)

young children, there has been a gradual attempt to rebut the presumption of care as 'women's work'. On the other hand, judicial decisions such as *Lommers*[585] continue to send a clear message that care is a women's responsibility. In this case, the Court was asked to rule on the compatibility of the Dutch Ministry of Agriculture's childcare policy with the Equal Treatment Directive. The domestic policy restricted access to childcare facilities primarily to its female employees. Male employees were only granted access to nursery placement in case of emergencies such as the case of a single father who was the sole care-giver. The Ministry justified its position as the only way:

> [...]to tackle inequalities existing between male and female officials, as regard both the number of women working at the Ministry and their representation across the grades. The creation of subsidised nursery places *is precisely the kind of measure needed to help to eliminate this de facto inequality.*[586]

The Court concluded that there was no breach of the Equal Treatment Directive because, when men were fulfilling the primary caring role, they were not excluded from the policy. Yet, this decision contributes to reinforcing the idea that *normally* care work is for women and men enter the picture only in exceptional circumstances. Interestingly, at the same time, the Court has addressed the issue of the position and rights of carers and here its contribution has been of a completely different nature. From upholding the market link, and thus undermining both the value of care and role of the carer, the ECJ has now gradually moved away from this market-linked position and has interpreted the value of care work in a more dynamic fashion, where the concept of citizenship plays a central role. The turning point can be found in *Martinez Sala*[587] where the Court expressly disconnected the notion of citizenship from market participation.[588] Ms Martinez Sala, a Spanish national who had been resident in Germany for over 25 years and had

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[585] Case C-476/99 *Lommers* [2002] ECR I-2891

[586] Case C-476/99 *Lommers* [2002] ECR I-2891, at paragraph 21; emphasis added.

[587] Case C-85/96 *Martinez Sala* [1998] ECR-I 2691, as noted by S. Fries and J. Shaw, 'Citizenship of the Union: First Steps of the European Court of Justice', *European Public Law*, 4 (1998), 533.

[588] S. Millns, 'Mainstreaming Gender Equality in the EU's Constitutional Future', Working Paper (2005).

intermittently worked there, applied for a child-raising allowance. At that time she was not working but received social assistance benefits. The German authorities refused to grant the allowance on the basis that she was neither a German national nor did she hold a valid residence permit. The ECJ held that the requirement to hold a residence permit in order to qualify for a child-raising benefit was discriminatory and contrary to Article 6 EC,[589] as the Member State's nationals were not subjected to the same conditions. It went further by saying that that a child-raising allowance was within the material scope of the EU Treaty. The ECJ therefore linked the right not to be discriminated against on the grounds of nationality with the status of EU citizen. It was not necessary for Ms Martinez Sala to be economically active in order to qualify for the right. This case shows that a child-raising benefit can be connected to EU citizenship rather than to an economic activity.[590] It also highlights the way in which cases of family breakdown can trigger and further aggravate existing care issues.

The importance of the carer and the link between carer and citizenship is further confirmed in cases such as *Grzelczyk*,[591] *Carpenter*[592] and *Baumbast*[593], which emphasises the value of the carer's contribution. *Carpenter* and *Baumbast* involve two non-EU citizens whose permits to reside in the UK and Germany respectively, had expired. The Court took a very generous approach to both cases and one of the decisive points of the decisions was that both Mrs Carpenter and Mrs Baumbast were the 'primary carer' of the children of the family.[594] This position is taken to the extreme in *Chen*.[595] In this case, a Chinese national gave birth to a baby in Ireland. The baby was automatically entitled to Irish nationality and EU citizenship by birth. Later the mother wanted to move to England with the child but a residence permit was refused on the basis that, under British law, she did not have a right to reside permanently

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[589] Now Article 12 EC.

[590] J. Shaw, 'Citizenship of the Union: Towards Post-National Membership', in Academy of European Law (ed.), *Collected Course of the Academy of European Law*, vol. VI, Book I (De Hague: Kluwer International Law, 1998), 237–387.

[591] Case C-184/99 *Grzelczyk* v. *Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193.

[592] Case C-60/00 *Carpenter* [2002] ECR I-6272.

[593] Case C-413/99 *Baumbast* [2002] ECR I-791.

[594] N. Reich and S. Harbacevica, 'Citizenship and Family on Trial: A Fairly Optimistic Overview of Recent Court Practice with Regard to Free Movement of Persons', *Common Market Law Review*, 40 (2003), 615–638.

[595] Case C-200/02 *Zhu and Chen* [2004] ECR I-9925.

in the UK. However, the ECJ held that the child had a right to reside in the UK because she was an EU citizen; to deny the right of residence to the carer of an EU citizen is equivalent to depriving the EU citizen of the right of residence.[596] The Court thus recognises the importance of the role of carer as linked to the exercise of the rights of the EU citizen. Although the care work performed by parents does not generally fall within the scope of the EU market orientation, the ECJ has here taken an important step in recognising and valuing it. The most recent ECJ decision strengthening the position of carers is *Coleman*, which we have already discussed in the context of the leave provisions.[597] In this case, the Court held that to deny specific forms of leave to parents of disabled children when these are granted to parents of able-bodied children, is discriminatory and in breach of the Framework Employment Directive.[598] This case will potentially have very important, although still unclear, consequences for the position of carers. One thing seems certain: the concept of (child) care and the rights of carers have been placed on the agenda of the court.

However, it appears that the majority of the ECJ cases on the development of the position of carers involve women: does this reiterate the message that care is women's work and as such needs to be protected? These cases also seem to have been triggered, inter alia, by the increasing concern over the position of children in EU law.[599] Indeed, the cases discussed above were primarily about children: their right to move as EU citizens[600] and their right to be educated without disruption.[601] Such a development is disconnected from the traditional economic rights under Community law and is a part of the concept of citizenship and of the increasing EU commitment to human and fundamental rights.[602]

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[596] Case C-200/02 *Zhu and Chen* [2004] ECR I-9925 at paragraph 45.

[597] C-303/06 *Coleman* [2008] ECR I-5603. See further discussion in Chapter 2, 'The Time Provisions'.

[598] Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, OJ [2000] L303/16.

[599] Communication from the European Commission, *Towards an EU Strategy on the Rights of the Child* COM(2006) 367.

[600] Case C-200/02 Zhu and Chen [2004] ECR I-9925; See further H. Stalford, 'The Relevance of EU Citizenship to Children', in A. Invernizzi and J. Williams (eds), Children and Citizenship (London: Sage, 2008).

[601] Case C-413/99 Baumbast [2002] ECR I-791.

[602] S. Koukoulis-Spiliotopoulos, 'What Future for Fundamental Rights in the European Union? A Few Thoughts', in S.Koukoulis-Spiliotopoulos (ed.), *Problèmes d'Interprétation à la Mémoire de Constantinos N. Kakouris* (Athens: Sakkoulas; Brussels: Bruylant, 2003), 223–258.

Finally, we need to explore the role of care within the reconciliation principle. Although, as discussed in the previous section, care work underpins the principle of reconciliation,[603] somewhat paradoxically, it has developed separately from the other aspects of this debate. Care is perceived as an alternative rather than a complement to the leave and time measures.[604] Yet, to view the issues separately can only reinforce the two-sphere structure. Indeed, in cases where care work remains (invisible) in the private sphere, it is easy to see how this can perpetuate gender inequality. However, this applies also when care work becomes formal. Care facilities can indeed assist women's employment, but their benefits to the establishment of (gender) equality are not self-evident. In order to support women's position in the employment market, care facilities must be tailored to the workplace. Additionally, they must be structured in such a way as to meet the needs of full-time employed parents. For example, care facilities might not be structured to match full-time employment, or they might not be flexible enough. As a result, one parent (normally the mother) can be forced to remain unemployed or take up part-time work in order to be available to provide complementary periods of care. The same applies if care facilities are expensive[605] or not of good quality. Access to care facilities, should also be available to both parents.[606] Furthermore, to delegate the care of children or adults to a third person does not necessarily increase the involvement of fathers, and more generally men, in caring activities. In other words, unless incorporated into the general principle of reconciliation, care facilities on their own do not provide an adequate solution to the wider issue of restructuring the employment market and, more generally, of altering the gendered organisation of the family and society. At the same time, they do not necessarily contribute to challenging societal assumptions and stereotypes that women are primarily responsible for caring activities.

The concept of care and care work needs to be reconceptualised in order to fit in with an evolving reality. Until these underlying issues are addressed, a comprehensive framework cannot be successfully established.

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[603] Commission Communication, *A Better Work-Life Balance: Stronger Support for Reconciling Professional, Private and Family Life*, COM(2008)635, p. 3.

[604] See the discussion in the Introduction.

[605] Case C-249/97 *Gruber* [1999] ECR I-5295.

[606] Case C-476/99 *Lommers* [2002] ECR I-2891.

The EU position: care work as an ancillary policy

At the time of writing, there is no uniform set of provisions at EU level on care for either young children or adults. This reflects, and at the same time determines, the lack of uniform standards in the Member States themselves. Care arrangements are provided across the European States in different ways, reflecting different priorities, cultural situations, political choices and resources available.[607] In some Member States, notably the Southern European countries,[608] care is still provided mainly within the family or by, often unpaid, friends and neighbours and therefore remains outside the public sphere. In other Member States, the State intervenes, although to different degrees. National governments have allocated different budgets for families and children, which vary from 0.7 per cent to 3.9 per cent of GDP.[609] In addition, the structure of care can differ: the German government, for example, has made the policy decision to support carers mainly through cash benefits, while France[610] and Sweden invest in formal public care arrangements. When provided, the availability of childcare facilities varies greatly within the Member States ranging from 8 per cent in Germany and 2 per cent in the Czech Republic to 36 per cent in the Netherlands and 22 per cent in Sweden.[611] Furthermore, the provision of adult care also varies considerably amongst the EU Member States. At one end of the spectrum are the Nordic countries where adult care has always been recognised as a responsibility of the State, in particular of the local authorities. At the other end are the southern European countries where the care of frailer member of the family is construed as a legal obligation on relatives.

Such a disparate array of provisions explains the difficulty in agreeing on a common EU framework. However, this is not the only problem: care work and the relative policies are the element of the reconciliation

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[607] AFEM, *Concilier Famille et Travail pour les Hommes et les Femmes : Droit et Pratiques* (Athens, Brussels: Sakkoulas, Bruylant, 2005).

[608] Communication from the European Commission, *Promoting Solidarity between the Generations*, COM(2007) 244 final. See also AFEM, *Concilier Vie Familiale et Vie Professionnelle Pour les Femmes et les Hommes: Du Droit à la Pratique* (Athens: Sakkoulas; Brussels: Bruylant, 2005).

[609] Communication from the Commission, *Promoting Solidarity Between the Generations*, COM(2007) 244 final.

[610] M.-T. Lanquetin, M.-T. Letablier, 'Concilier Travail et Famille en France: Approches Socio-Juridiques', *Rapport de Recherche CEE no. 22* (2005), p. 17.

[611] European Commission Report, *Implementation of the Barcelona Objectives Concerning Facilities for Pre-School-Age Children*, COM(2008) 638.

principle where the limitations of the EU competencies appear most clearly. Care is in fact, even more than the leave and time provisions, very much part of Member States' family policies, an area where the EU, at the time of writing, has little power.[612] For that reason, the EU legislator, and the Court, have traditionally only indirectly addressed the concept of care, namely only when ancillary to market objectives, in particular to furthering the employment of women to ensure economic growth.[613] This is the case, for example, in relation to job-related social security benefits, such as those in the Social Security Directive[614] which requires the Member States to adjust their fiscal measures and amend their social security systems based upon outdated notions of family structure with a 'male breadwinner, head of the household' structure. The Directive:

> applies to the *working* population – including self-employed persons, workers and self-employed persons whose activity is interrupted by illness, accident or involuntary unemployment and persons seeking employment – and to retired or invalided workers and self-employed persons.[615]

The ECJ has generally been committed to a substantive equality approach by broadly interpreting 'working population' as inclusive of those individuals (mainly women) who are in minor and unconventional forms of employment in order to be able to also care for their children and/or family dependants.[616] In particular, Article 3(1) requires the implementation of the principle of equal treatment, as laid down in the Equal Treatment Directive,[617] in matters of social security and other areas of social protection such as protection against sickness, invalidity, old-age, accidents at work and occupational diseases

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[612] See the discussion in the Introduction.

[613] G. Esping Andersen, D. Gallie, A. Hermerijck, and J. Myles, *A New Welfare Architecture for Europe?*, Report submitted to the Belgian Presidency of the EU in September 2001.

[614] Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security, OJ [1979] L 6/24.

[615] Article 2 of Directive 79/7/EEC.

[616] However, in Case C-317/93 *Nolte* [1995] ECR I-4625 the ECJ allowed Germany to justify the exclusion of minor workers from the national social security scheme on the basis that their inclusion would jeopardize the entire scheme.

[617] Directive 76/207/EEC as amended by Directive 2002/73/EC.

and unemployment. However, the Equal Treatment Directive does not always include benefits aimed at facilitating *access* to employment, which is particularly significant for mothers looking for employment.[618] In one instance, 'the method of calculating the claimant's actual earnings [...] might affect sole mothers' ability to access to vocational training or part-time work was not found to be sufficient to bring such schemes within the scope of Equal Treatment Directive.'[619]

A further limitation inherent in the Directive is that it lists risks which are 'masculine' in nature and favour the traditional approach of social insurance.[620] They reflect a very narrow construction of the notion of employment, which is not always consistent with the interpretation of the term given by the European Court of Justice in other areas of law, for example, the free movement of persons. This interpretation is also unfavourable to people (mostly women) who must, or choose, because of their caring responsibility, to work in minor, atypical paid employment. The ECJ has been reluctant to extend the list of risks to more accurately reflect women's participation in the paid work market, changing family structures or the changing nature of social insurance.[621] The Court of Justice has also, on several occasions, been asked to interpret the compatibility of national schemes such as family benefits, child-raising allowances,[622] pensions and benefits related to old age,[623] with EU legislation.

Another example of indirect EU intervention in this area is the Council Recommendation on the convergence of social protection objectives and policies, which recommends that Member States adapt their social protection schemes by developing benefits for those families who experience financial difficulties related to the upbringing of their children.[624] It recommends fostering integration through the training of parents who wish to (re)enter the labour market. Besides family

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[618] Case C-116/94 *Meyers* v. *Chief Adjudication Officer* [1995] ECR I-2131.

[619] Case C-63/91 *Jackson and Cresswell* v. *Chief Adjudication Officer* [1992] ECR I-4737 at paragraph 30; See also T. Hervey and J. Shaw, 'Women, Work and Care: Women's Dual Role and Double Burden in EC Sex Equality Law', *Journal of European Social Policy*, 8(1) (1998), 43–63.

[620] J. Sohrab, *Sexing the Benefit: Women, Social Security and Financial Independence in EC Sex Equality Law* (Aldershot: Dartmouth, 1996).

[621] M. Cousins, 'Equal Treatment and Social Security', *European Law Review*, 19(2) (1994), p. 123.

[622] For example, Case C-245/94 and C-312/94 *Hoever and Zachow* [1996] ECR I-4895.

[623] Case 150/85 *Drake* [1986] ECR 5061995.

[624] OJ [1992] L245/49.

responsibilities, it also focuses on maternity issues. Albeit indirectly, the Recommendation positively influences reconciliation: through financial support, parents may afford childcare services whereas they would be unable to do so if they were not given any benefits. Educating a child is expensive and with a benefit system, parents might have easier access (when provided) to flexible work arrangements.

Article 33 of the Charter of Fundamental Rights[625] can potentially confer the status of primary legislation upon the general principle of reconciliation. A very pro-active interpretation of this provision could even develop into a legal base for reconciliation.[626] However, as discussed in Chapter 1, Article 33 fails to mention care as an element of reconciliation. In turn, the lack of EU competence in this area explains the absence of binding provisions. For the time being, in the absence of specific legislation, the EU has developed its own strategy, which will be examined in the following sections.

Child care provisions

The establishment of childcare provisions is not only important because it goes to the very heart of the inequalities in the employment market, but it also plays a crucial role in child development. Studies suggest that participation by a child aged from 12–18 months in good quality childcare increases that child's chances later in life.[627] In certain Member States, early childcare is seen as an integral part of the education system and represents the first stage in the learning process. In these countries, childcare is seen as an element of welfare policy. Childcare has been on the Community agenda since at least the 1980s, when it was actively promoted by the Second Action Program (1986–1989). However, at the time of writing, EU intervention in this area remains extremely limited and is still confined to (non-binding) soft law and policy initiatives. Indeed, in its recent Communication on Work-Life Balance, the Commission states its commitment to *monitor* the Member States' progress towards achieving the childcare targets; to *analyse* the development of childcare

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[625] OJ [2000] C364/1.

[626] However, see the discussion in Chapter 1, 'The Development of the Reconciliation Principle in the EU'.

[627] J. Brooks-Gunn, 'Do You Believe in Magic? What we can Expect from Early Childhood Intervention Programs', *Social Policy Report*, Vol. XVII:1 (2003) Society for Research in Child Development, Washington DC.; K. Sylva, E. Melhuish, P. Sammons, I. Sirja-Blatchford, and B. Taggart, 'The Effective Provisions of Pre-School Education Project: Final report Results', DfES, 2004, London.

services; to *promote* the exchange of good practices and to *promote* the development of affordable quality childcare services.[628]

The importance of childcare was first directly addressed by the EC Commission Childcare Network, which ran between 1986 and 1996.[629] Its aim was to produce studies and raise awareness of the importance of the quantity and quality of care services; overall it developed a blueprint for a European Childcare Strategy. In particular, it focused on three areas, namely, services for children,[630] leave for parents, and men as carers.[631] The EC Commission Childcare Network suggested the adoption of a Directive, which emphasised the need for State support in childcare and was largely inspired to the Scandinavian model.[632] However, the Member States could not agree and instead the non-binding Recommendation on Child-Care[633] was adopted. At that time, the Recommendation was described as a formal recognition of the domestic division of labour[634] and as an important 'symbolic achievement (...) highly significant in terms of the development of the EU policy',[635] yet its overall impact is

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[628] Communication from the Commission, A Better Work-Life Balance: Stronger Support for Reconciling Professional, Private and Family Life, COM(2008) 635, p. 8; emphasis added.

[629] The European Childcare Network was renamed Network on Childcare and other Measures to Reconcile Work and Family Responsibilities of Women and Men in 1991. See also M. Stratigaki, The European Union and the Equal Opportunities Process, in L. Hantrais *Gendered Policies in Europe: Reconciling Employment and Family Life* (London: Macmillan; New York: St. Martin's Press, 2000), 27–48.

[630] European Commission Childcare Network, *A Review of Services for Young Children in the European Union 1990–1995* (Brussels: European Commission – Equal Opportunities Unit, 1996); European Commission Childcare Network, *Reconciling Employment and Caring for Children: What Information is Needed for an Effective Policy?* (Brussels: European Commission – DG V, 1996).

[631] European Commission Childcare Network, *Men as Carers: Report of an International Seminar* (Ravenna, Italy 1993).

[632] European Council 92/241, 31.3.1992.

[633] OJ [1992] L123/16. On the potential role of childcare see also A. Borchost, 'Working Lives and Family Lives in Western Europe', in S. Carlsen and J. E. Larsen (eds), *The Equality Dilemma* (Copenhagen: The Danish Equal Status Council, 1999), p. 167.

[634] P. Moss, 'Childcare and Equality of Opportunity – Consolidated Report to the European Commission' (CEC v/746/88 1988).

[635] C. McGlynn, 'Reclaiming a Feminist Vision: The Reconciliation of Paid Work and Family Life in European Union Law and Policy', *Columbia Journal of European Law*, 7(2) (2001), 241–272; see also G. Ross, 'Europe: An Actor without a Role', in J. Jenson and M. Sineau (eds), *Who Cares? Women's Work, Childcare, and Welfare State Redesign* (Toronto: University of Toronto Press, 2001).

limited. Firstly, it is still very much underpinned by economic concerns rather than a real concern over reconciliation between work and family life; its main preoccupation seems to be to guarantee women's access to the market, rather than men's role as fathers. Indeed, it reiterated the economic-orientated focus by fine-tuning the objectives previously established by the Childcare Network. The organisation of working time was added to the provision of services and the special leave available to parents; the aim of encouraging men to work as carers was replaced by the balanced sharing of parental responsibilities: arguably a similar, but less forceful, objective.[636] This economic flavour was justified by the increased acknowledgement during the 1990s that women were essential to the long-term success of the Single Market. By using childcare provisions as a means of decreasing family responsibilities, this instrument aimed at increasing the employment rate for women. The Recommendations' main preoccupation did not, therefore, necessarily aim at lightening the burden of family responsibilities for women.

Secondly, the Recommendation fails to place enough emphasis on the role of the public sector; it merely 'advises' and 'recommends' Member States to 'encourage' initiatives on childcare and 'recommends' that Member States promote an increased participation by men in family responsibilities. Ultimately, the Recommendation failed to generate substantial change in domestic policies.

Paradoxically, in the aftermath of the Treaty of Maastricht, which broadened the Community competences, reconciliation between work and family life suffered a setback.[637] Reconciliation slowly disappeared from the Community agenda and became a topic of interest for Social Partners' negotiation. Here, whilst action was taken in respect of parental leave and part-time work, childcare was not seen as a priority.[638] The Treaty of Amsterdam brought new impetus to the issue of reconciliation. The Treaty strengthened the position of gender

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[636] Article 6 of Recommendation 92/241/EEC on Child Care, OJ [1992] L123/16 provides: 'As regards responsibilities arising from the care and upbringing of children, it is recommended that Member States should promote and encourage, with due respect for freedom of the individual, increased participation by men, in order to a achieve a more equal sharing of parental responsibilities between men and women and to enable women to have a more effective role in the labour market.'

[637] See the discussion in Chapter 1, 'The Development of the Reconciliation Principle in EU Discourse'.

[638] See the discussion in Chapter 1, 'The Development of the Reconciliation Principle in EU Discourse'.

equality and employment. Gender was included as a positive commitment and the new Employment Title (Art. 125–130 EC) increased the EU's responsibilities for coordinating employment policies; generally, it provided for the opportunity to go beyond equal pay and equal opportunities. As a result, reconciliation, and in particular childcare, reappeared on the agenda.

The European Childcare Strategy

The Treaty of Amsterdam did not become binding until 1999, but the Title on Employment was brought into force in 1997. Later, in the 1998 Employment Guidelines adopted at the Luxembourg European Council, Member States were asked 'to strive to raise levels of access to care services where some needs are not met.'[639] Childcare was again discussed in the 1999 European Council:

> In order to strengthen equal opportunities, Member States and the Social Partners will (...) design, implement and promote family friendly policies, including *affordable, accessible and high quality care services for children and other dependants*, as well as other leave schemes.[640]

In order to further its commitment towards full employment, the 2000 Lisbon Council of Europe set the objective of reaching at least a 60 per cent employment rate among women, a target lower than the overall aim of 70 per cent for men, by 2010. The acknowledgement of gender imbalance in the employment rate emphasises even more that childcare facilities are clearly an important part of reconciliation.

The Lisbon Council also extended a new form of governance, namely the Open Method of Coordination (OMC), to social policy. OMC is an interactive process which relies on and promotes interaction between different levels of power and spheres of action and has proven crucial in the area of care. It highlights the need to proceed via a widely meshed interactive process, in which the actors – ranging from those at the European level to the local level – have to work together and

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[639] Council Resolution of 15 December 1997, The 1998 Employment Guidelineshttp://ec.europa.eu/employment_social/employment_strategy/98_guidelines_en.htm.

[640] European Council (1999), Council Resolution of 22 February 1999 on 1999 Employment Guidelines, OJ [999] C69/2; emphasis added.

articulate their strategy.[641] This has proven crucial for the establishment of reconciliation and in particular childcare, where there is no institutional framework.

The Lisbon Council's aim was reiterated two years later at the 2002 Barcelona Council of Europe.[642] This time the principles and targets were more precisely formulated and a clear focus on childcare facilities became evident. It also distinguished between the age groups of under three years and between three years old and school age. Children under the age of three primarily require access to crèches or other childcare services. These services are typically private and only three Member States, namely Finland, Denmark and Sweden, offer guaranteed access to such facilities.[643] Children over the age of three often make use of pre-school education in the form of nursery schools. These care facilities are usually partly subsidised by the Member States but are seldom free. For this purpose, it was decided at the Barcelona Council that, in light of the commitment to achieve full employment as expressed in the Treaty of Amsterdam and reiterated in the Lisbon Strategy on Growth and Employment:

> Member States should remove disincentives to women's employment and strive to provide childcare facilities by 2010 to at least 90 per cent of children between 3 years old and mandatory school age and at least 33 per cent of children under 3 years of age.[644]

These objectives constitute an integral part of the European Strategy for Growth and Employment. They aim to increase the level of employment for young parents and particularly women, and ultimately they should help to achieve greater gender equality. Although these targets have been reiterated and emphasised on several occasions,[645] including

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[641] C. de La Porte and P. Pochet, *The OMC Intertwined with the Debates on Governance, Democracy and Social Europe: Research on the Open Method of Co-ordination and European Integration*, Observatoire Sociale Européen/European Trade Union Institute, Brussels, report prepared for Frank Vandenbroucke, Belgian Minister for Social Affairs and Pensions, June 2003.

[642] European Council of Barcelona, 15–16 March 2002, document SN 100/1/02 REV 1.

[643] European Commission Report, 'Implementation of the Barcelona Objectives Concerning Facilities for Pre-School-Age Children', COM(2008) 638, p. 5.

[644] European Council of Barcelona, 15–16 March 2002, document SN 100/1/02 REV 1.

[645] See for example the Employment Guidelines for 2003, OJ [2003] L197/13.

at the re-launch of the Lisbon Strategy in 2005,[646] it is questionable whether they represent a suitable way forward.[647] There is, arguably, an inappropriate emphasis on OMC. This, in fact, should not prescribe targets but should essentially facilitate discussion.[648] In prescribing specific targets, the Barcelona objective seems more a Directive in disguise. Moreover, Barcelona places an emphasis on quantity but does not refer to quality. We have already discussed earlier in this chapter how important quality is to the success of the care strategy. Despite these perplexities, however, the Barcelona Council has succeeded in placing childcare on the EU agenda.

The importance of this issue was recently reiterated in the Social Agenda 2005–2010.[649] Expressing its commitment to full employment and to the removal of any barriers to it, the EU acknowledged that childcare is essential to achieving this goal. The EU commitment was confirmed in the Communication on Promoting Solidarity between the Generations[650] and again in the European Pact for Gender Equality (March 2006),[651] the Commission's Roadmap for Equality between Women and Men (2006–2010)[652] and the Integrated Guidelines for Growth and Jobs (2005–2008).[653] Even more recently, the European Commission re-stated its commitment to the achievement of the childcare targets and the development of quality, affordable and compatible opening hours of childcare facilities in its Communication on Work-Life Balance.[654] Despite the rhetoric towards commitments for accessible, affordable and high quality childcare, the results in practice remain very disappointing: targets are far from achieved and the disparities between Member States are extremely wide.[655] The Joint Employment

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[646] COM(2005) 24.

[647] J. Plantenga, 'Investing in Childcare: The Barcelona Targets and the European Social Model', key note speech presented at the conference 'Child Care in a Changing World' October 2004, Groningen.

[648] See discussion in Chapter 1, 'The Development of the Reconciliation Principle in the EU Discourse'.

[649] Communication from the Commission on 'the Social Agenda 2005–2010', COM(2005) 33 final.

[650] Communication from the European Commission, *Promoting Solidarity between the Generations*, COM(2007) 244 final.

[651] Presidency conclusions, 7775/1/06/REV 1.

[652] COM(2006) 92.

[653] COM(2005) 141.

[654] COM(2008) 635, p. 8.

[655] Report on the 2007 Cambridge Review of the National Reform Programmes, MCO/27/141107/EN-Final-rev1. These results were emphatically confirmed by

Report 2007/2008 found that 'progress in the field of gender equality has been mixed' and 'many Member States are far from reaching the childcare targets and most do not even refer to them in their national strategies.'[656] As a response to these disappointing results, the EU has recently renewed its commitment to reconciliation between work and family life and has stepped up its actions in the area. Despite its low-level competences in matters related to (child) care, the EU has found ways to support and influence access for families to childcare facilities via a number of financial mechanisms.[657] In particular, the Structural Funds have been utilised to provide co-financing for the construction of childcare facilities, training of personnel and the provision of childcare services for parents seeking employment. In total over the period 2007–2013, the EU has committed half a billion euros from the Structural Funds and the Agricultural Fund for Rural Development to the development of childcare facilities.[658] In addition, 2.4 billion euros have been made available during the same period for funding measures aimed ot helping women access employment and the reconciliation of working and family life, which includes access to childcare.[659] These financial measures are a direct reflection of the fact that reconciliation, and specifically the development of childcare services, are essentially elements in achieving the objectives of the European Strategy on Growth and Employment.[660]

Care for the elderly and long-term dependants

The challenge of care, however, is not limited to children. A greater life expectancy, combined with declining birth rates, has meant that the number of older (55–64), elderly (65–79) and very elderly (80+) people has grown to an unprecedented level. It is not unusual to see four surviving generations of the same family. However, at the same time, the structure and the organisation of the family has changed.[661] Family

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the European Commission Report, *Implementation of the Barcelona Objectives Concerning Facilities for Pre-school-Age Children*, COM(2008) 638.

[656] Joint Employment Report 2007/2008 adopted by the Council on 29.2.2008.

[657] Communication from the Commission, *Promoting Solidarity between The Generations*, COM(2007) 244.

[658] Commission report, *Implementing the Barcelona Objectives Concerning Childcare Facilities for Pre-School-Age Children*, COM(2008)638 at p.3.

[659] Commission report, *Implementing the Barcelona Objectives Concerning Childcare Facilities for Pre-School-Age Children*, COM(2008)638.

[660] As highlighted in the Employment Guidelines 18.

[661] See our discussion in the Introduction.

members are generally no longer living together nor even geographically close and, therefore, they are unable to provide an informal network of care. In addition, dual earning families and/or reconstituted families have led to a general decrease in the provision of informal care within the family and an increase in outsourced commodified care giving.

If the link between childcare and maternal employment has been highlighted since the 1980s, the importance of long-term care originally received scant attention from both academics and policy-makers. However, for the purpose of reconciliation, as for childcare, long-term care represents a substantial obstacle to full employment (in particular of women).[662] It presents different and possibly more complex challenges than childcare.[663] Whilst the care of a (healthy) young child is limited to a certain number of years, the same cannot be said in the case of an older and dependent member of the family. The Organisation for Economic Co-operation and Development (OECD) defines long-term adult care as:

> a cross-cutting policy issue that brings together a range of services for persons who are dependent on help with basic activities of daily living over an extended period of time.[664]

It is typically provided to persons who have physical or mental disabilities, the frail and the elderly, and to specific groups who require help in conducting activities in their daily life. In almost all EU Member States, long-term care means the 'need for assistance by a third person including both medical and non-medical assistance'.[665]

The majority of European countries have already faced the problems arising from an ageing population for some time and are now addressing it as a political priority. Similarly, the EU has followed suit.[666]

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[662] Centre for European Social and Economic Policy, 'Exploring the Synergy between Promoting Active Participation in Work and in Society and Social, Health and Long-Term Care Strategies', February 2008.

[663] L. Ackers and P. Dwyer, *Senior Citizenship? Retirement, Migration and Welfare in the European Union* (Bristol: Policy Press, 2002); I. Carpenter, J. Hirdes, and N. Ikegami, 'Long-Term Care: A Complex Challenge' *OECD Observer* (2007), 27.

[664] OECD, *Long-Term Care for Older People* (Paris: OECD, 2005).

[665] H. Engel and F. Kessler, 'Long-Term Care in Europe', *MISSOC-INFO*, 2 (2006), p. 5.

[666] Communication from the European Commission, *Towards a Europe for All Ages: Promoting Prosperity and Intergenerational Solidarity*, COM(1999) 221; Communication from the European Commission, *Europe's Response to World*

EU competences in this area, however, are indirect and this limits the scope of the EU measures. Article 2 EC provides that:

> [t]he Community shall have as its task, by establishing a *common market* and an economic and monetary union and by implementing common policies ... to promote throughout the Community ... a *high level of employment* and of *social protection*.[667]

This provision mainly enables the EU to address the issue from the perspective of a shortage of workers and pension issues.[668] Furthermore, in the 1999 Communication *A Concerted Strategy for Modernising Social Protection*,[669] the Commission guaranteed a high level of health protection as a priority objective of European cooperation in the field of social protection.

Despite these first steps, the link between long-term adult care and the principle of reconciliation remains unclear. Adult care was somewhat associated with women's unemployment in the Luxembourg Employment Guidelines where, under the headline of 'Reconciling Work and Family Life', the Council acknowledged that:

> [p]olicies on career breaks, parental leave and part-time work are of particular importance to women and men. Implementation of the various Directives and Social-Partner agreements in this area should be accelerated and monitored regularly. There must be an adequate provision of good quality care for children and *other dependants* in order to support women's and men's entry and continued participation in the labour market.[670]

From this point onwards, long-term adult care has been on the agenda for closer co-operation among the Member States. The 2000 Lisbon European Council called for the reform of the European Social Model

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Ageing: Promoting Economic and Social Progress in an Ageing world, COM(2002) 143.

[667] Emphasis added.

[668] For a concise but excellent overview see L. Hantrais, *Social Policy in the European Union* (Basingstoke: Palgrave-McMillian, 2007), in particular Chapter 7, 'Policy for Older and Disabled People'.

[669] COM(99) 347 final.

[670] Council Resolution of 15 December 1997 on the 1998 Employment Guidelines, OJ [1998] C30/1, as amended by Council resolution of 22 February 1999 on the 1999 Employment Guidelines, OJ [1999] C69/2; emphasis added.

and it particularly emphasised that social protection systems need to be reformed in order to be able to provide high-quality health care services. Consequently, the Commission issued three Communications, which highlighted the need for high quality and financial sustainability, accessibility to adult care services and *recommended* that Member States take urgent action to guarantee a suitable level of care provision for dependants other than children. First, in its Communication on 'The future of Health Care and Care for the Elderly, Guaranteeing Accessibility, Quality and Financial Viability',[671] the Commission identified three objectives, which should be pursued by national systems: accessibility of care, quality of care and the financial viability of the care system. This Communication was mainly motivated by the impact of demographic changes on the future of national health systems. Secondly, the Communication from the Commission on a proposal for a 'Joint Report: Health Care and Care for the Elderly: Supporting National Strategies for Ensuring a High Level of Social Protection'[672] reinforced the idea of cooperation between the Member States in matters of long-term care. Finally, the Communication on 'Modernising Social Protection for the Development of High-quality, Accessible and Sustainable Health Care and Long-Term Care: Support for the National Strategies Using the Open Method of Coordination'[673] proposed extending the OMC to the areas of health care and long-term care in order to establish a common framework to support Member States in the modernisation of their health systems. This Communication was endorsed by the Council in October 2004.

In the Joint Report 2007 the Council reiterated the need for developing long term care systems to meet rising demand as:

> [t]he current provision is often insufficient, resulting in high personal costs and long waiting times. The changing structure of families, increased geographical mobility and increased female

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[671] Communication from the Commission, *The Future of Health Care and Care for the Elderly: Guaranteeing Accessibility, Quality and Financial Viability*, COM(2001) 723.

[672] Communication from the Commission, *Proposal for a Joint Report: Health Care and Care for the Elderly: Supporting National Strategies for Ensuring a High Level of Social Protection*, COM(2002) 774.

[673] Communication from the Commission, *Modernising Social Protection for the Development of High-quality, Accessible and Sustainable Health Care and Long-term Care: Support for the National Strategies Using the Open Method of Coordination*, COM(2004) 304.

> labour market participation require more formalised care for the elderly and disabled. There is a consensus on giving priority to home care services and introducing new technology (e.g. independent living systems) which can help to enable people to live in their own home for as long as possible. Member States also stress the importance of rehabilitation, helping dependants return to an active life. There is growing recognition of the need to create a solid basis for financing long-term care and some Member States are moving in this direction.[674]

However, unlike childcare, care for adult dependants has not been clearly linked to the Lisbon Strategy on Growth and Employment. Despite the fact that the Commission highlighted that 'the issue of improving care for other dependants has (…) received very little attention,'[675] in 2007, it the intention to merely:

> *give thought* to the quality of services for elderly dependent people and protection against ill-treatment, as well as measures which could be taken at EU level, in cooperation with the Member States, to speed up the development and modernisation of infrastructures and services needed to contend with demographic ageing.[676]

Even more regrettably, in its recent Communication on Work-Life Balance, the Commission refers to the need to support the development of better and more affordable childcare but makes only a vague reference to 'policies [that] can support women and men who care for older dependants'.[677] Yet in the same Communication, the Commission identified that care for dependent family members in the form of 'filial leave' represents an option for better reconciliation of the working, private and family life of workers.[678]

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[674] European Commission, *Joint Report on Social Protection and Social Inclusion* (Brussels: European Commission, 2007).

[675] Communication from the Commission, *Streamlining the Annual Economic and Employment Policy Co-ordination Cycles*, COM(2002) 487 final.

[676] Communication from the Commission, *Promoting Solidarity between Generations*, COM(2007) 244 final; emphasis added.

[677] COM(2008) 635, p. 3.

[678] COM(2008) 635, p. 5.

Conclusions

This chapter has focused on the concept of care and care work. It has argued that care work is an essential element of the reconciliation principle: without it, a system of leave and the re-arranging of working time cannot be effective. However, care remains the Cinderella of the reconciliation policies. It has not enjoyed the same high status and has been developed at a different speed from the leave and time provisions. In this chapter we aimed at investigating the reasons behind this.

Firstly, it was found that the legal regulation of care provisions is hampered by the lack of a clear conceptual framework underpinning it, and this is particularly true at EU level. There remain doubt as to the best structure for care provisions, their inherent value and finally their role in the reconciliation principle. Secondly, and arguably as a consequence of the lack of a clear conceptual framework, care has been developed not as a concept per se, but as part of diverse agendas, be these gender equality concerns, the need to support the entry of women into the employment market, the increasing awareness of children's rights, demographic concerns or pension sustainability. In addition, the EU had, and still has, only limited competencies in this specific area. This reflects the domestic situation where considerable disparities between the Member States can be seen.[679]

Finally, care is a complex concept to address as it is strongly influenced by various considerations, ranging from cultural and family traditions to socio-legal elements such as the length, financial compensation and flexibility of maternity and parental leaves. Nevertheless, at the time of writing, improvements are noticeable. Although an institutional framework in this area remains difficult to achieve, a strategy is emerging. This strategy, however, is developing at two speeds: whilst inadequate childcare has been identified as a major obstacle to reconciling work and family life, the same has not happened in relation to adult care, which has witnessed a much slower development with no real involvement of

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[679] See for example European Commission, 'Development of a methodology for the collection of harmonised statistics on childcare', Eurostat, Working Papers and Studies, 2004; J. Plantenga and C. Remery, *Reconciliation of Work and Private Life – A Comparative Review of Thirty European Countries* (Brussels: European Commission,2005); The European Network of Legal Experts in the Field of Gender Equality, *Legal Approaches to Some Aspects of the Reconciliation of Work, Private and Family Life in Thirty European Countries* (Brussels: European Commission, 2008).

the Court. It is unfortunate that the EU has not seen long-term care as a key element of the reconciliation principle.

This chapter has also argued that, because of the difficulties underlying this area and the disparities discussed above, the way forward is through soft law, and in particular the Open Method of Coordination, where general principles are established and Member States build upon these, rather than through binding legislation.

Conclusions: The Way Forward

> There are two kinds of moral laws, two kinds of conscience, one for men and one, quite different for women. They don't understand each other; but in practical life woman is judged by masculine law, as though she weren't a woman but a man.[680]

The story so far

This book has analysed the development of the concept of reconciliation between work and family life in the context of EU law and policy. Ultimately, we aimed to demonstrate the tensions inherent in this concept with a view to assessing the way forward. At an individual level, specific measures in this area are necessary because reconciliation often does not involve choices:[681] care for children or frailer member of the family *must* be provided; individuals can only choose how to organise or who will provide it. At the same time, reconciliation is also a core concept of EU and domestic policy initiatives and law: it is the backbone of several policies inter alia gender equality,[682] employment and growth,[683]

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[680] *Ibsen's Notes for a Modern Tragedy,* October 1878.

[681] M. Glucksmann, 'Why work? Gender and the Total Social Organisation of Labour', *Gender Work and Organisation*, 2 (1995), 63–75; see also the discussion in the Introduction.

[682] Communication from the European Commission, 'A Roadmap for Equality between Women and Men, 2006–2010', COM(2006) 92 final; Communication from the European Commission on 'The EU Social Agenda 2005–2010', COM(2005) 33 final; Case C-243/95 *Hill and Stapleton* [1998] ECR I-3739, at paragraph 42.

[683] Lisbon Presidency Conclusions, 23–24 March 2000; Commission Communication, 'Towards Common Principles of Flexicurity: More and Better

children's rights[684] and the fight against an ageing population, none of which can successfully be implemented without it. If women cannot be part of the employment market because of care constraints, the Lisbon Strategy goal of achieving full employment will not be met. Indeed, raising the employment level of women (and mothers in particular) can have a job multiplier effect, particularly in the service sector, because of the need for cleaning, care and other auxiliary services. A calculation estimates that there are ten jobs created for every extra 100 women at work.[685] However, for many women the reality is that they are only able to hold low skilled and low paid part-time jobs. If this situation continues, equality will not be achieved. Equally, if fathers cannot spend as much time with their children as mothers can, they are discriminated against. Furthermore, if the EU is serious about furthering children's position in society[686] and granting them specific rights such as education,[687] carers must also be protected so as to enable children to exercise their rights. In addition, if reconciliation policies are in place, individuals might be more likely to have children, which would enhance birth rates and would, in turn, contribute to the sustainability of pension schemes. Above all, the success of reconciliation measures is based on the effectiveness of the principle of equal pay between men and women: without it reconciliation will inevitably be frustrated. It is frustrating too, that despite having been an aim of the European Community since the very beginning, equal pay between men and women has still not been

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Jobs through Flexibility and Security', COM(2007) 359.

[684] Communication from the European Commission, 'Towards an EU Strategy on the Rights of the Child', COM(2006) 367.

[685] G. Esping-Andersen, 'Women' s Labour Supply and Opportunity Costs – The New Challenge for Family Policy', Universitat Popeu Fabra as quoted in N. Richardt, *European Employment Strategy, Childcare and the Redesign of Welfare States – Germany and the United Kingdom Compared*, 14th International Conference of Europeanists, Chicago, Illinois, March 11–13, 2004.

[686] In particular, Article 24 of the European Social Charter which specifically refers to the principle of the best interest of the child.

[687] In particular, Article 14 of the EU Charter of Fundamental Right provides that: '1. Everyone has the right to education and to have access to vocational and continuing training. 2. This right includes the possibility to receive free compulsory education. 3. The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right.' See also Case C-413/99 *Baumbast* [2002] ECR I-791.

completely achieved. And as long as the gender pay gap remains open,[688] men and women may be entitled to the same period of leave but if they are not guaranteed the same level of pay, the equal division of leave will remain purely academic. Achieving equal pay is a key factor to unlocking the effectiveness of reconciliation.

The fact that these important policies are intertwined has resulted in a double-edged sword. On the one hand, it has meant that reconciliation has (perhaps inadvertently) been furthered. On the other hand, it has also meant that reconciliation has developed as a mere ancillary issue. Indeed, it has only recently become a fully-fledged self-standing concept described by the Court as a fundamental right,[689] and which now appears in the Charter of Fundamental Rights annexed to the Lisbon Treaty.[690]

In this book, we have organised the policy and legal measures on reconciliation around three themes: leave and time provisions and the care strategy. These have developed at different speed: whilst leave and time are relatively established, the care strategy still lags behind. If a set of principles for a childcare strategy have begun to emerge, principles in adult care remain minimal. Also within the leave provisions, we have shown that in some areas such as pregnancy and maternity leave, substantial progress has been achieved but that others, such as paternity and parental leave, have been neglected. Despite the rhetoric, the time provisions are structured in such a way as to be effectively geared towards the market rather than parents' needs. As a result, reconciliation provisions are made up of a patchwork of measures and half-baked solutions, which ultimately have failed to create a comprehensive framework. Our aim has been to deconstruct these three sets of measures with a view to assessing their limitations, as well as their potential to contribute to the establishment of a cohesive reconciliation principle. In doing so, this book has sought to contribute to the already

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[688] Communication from the Commission, 'Tackling the Pay Gap between Women and Men' COM(2007) 424. See generally J. Glover and G. Kirton, *Women, Employment and Organisations* (London: Routledge, 2006).

[689] Inter alia, Case C-243/95 *Hill and Stapleton* [1998] ECR I-3739, at paragraph 42.

[690] S. Koukoulis-Spiliotopoulos, 'The Lisbon Treaty and the Charter of Fundamental rights: Maintaining and Developing the *aquis* in Gender Equality', *European Gender Equality Law Review*, 1 (2008), 15–24. However, see our critical assessment of the relevant provisions of the EU Charter of Fundamental Rights in Chapter 1, 'The Development of the Reconciliation Principle in EU Discourse'.

conspicuous debate on reconciliation between work and family life in the EU.[691] Although such a debate has now been part of national policies for some time and has been on the EU agenda from as early as the 1970s, the achievements are still very limited. A recent research in the UK has emphasised that, although gender equality might have improved considerably in the last few decades and women can now compete with men in the workplace, all this comes to an abrupt end once children, or any other family responsibility, enters the equation.[692] The situation is similar across Europe.

Part of the problem can, of course, be pinpointed to the fact, discussed elsewhere in this book, that reconciliation has not, until recently, been part of the explicit EU competencies, but has instead developed as part of other policies. In Chapter 1, in trying to map the historical development of this principle in EU law, we have organised it in four phases. We have seen that over the latest phase, and in particular since the adoption of the Treaty of Amsterdam and the Lisbon Strategy, the policy climate has quickly and drastically been changing. Consequently, a number of pro-active measures[693] have been enacted in this area. It appears that there is a real effort at EU level to provide genuine solutions to these issues. Sociological and economic factors are influencing these changes. Indeed the evolution of the family structure, the mass entry of women into the workforce, the mutation of the workplace organisation, and the demographic crisis are all contributing to the need for a redefinition of the place of women *and* men in society. In addition, concerns over human rights and especially gender equality have grown and they continue to influence the way the EU Treaty is being understood. Moving away from its traditional economic roots, the EU now aims to guarantee all citizens social and human rights. This is acknowledged, to some degree, by Article 33 of the Charter of Fundamental Rights annexed to the Treaty of Lisbon. Although the Charter does not confer new competencies, it specifically gives the concept of reconciliation between work and family life the same status as Treaty provisions and will enable the

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[691] See our extensive bibliography.

[692] G. Paull and M. Brewer, 'Newborns and New Schools: Critical Times for Women's Employment' (London: Department for Work and Pensions Research Report n. 308, 2006); the findings of the report were expanded in G. Paull, 'Children and Women's Hours of Work', *The Economic Journal*, 118 (2008) F8–F27.

[693] See for example the European Commission's Package on Work-Life Balance presented in October 2008 (MEMO/08/603).

Court to use it.[694] However, even when the EU has more specific legislative competencies, its impact will still be inherently limited. Many factors which differ across Member States and vary over time, ranging from sociological and economic to legal and cultural, contribute to the realisation (or non-realisation) of reconciliation between work and family life. It is true that legislation alone cannot alter stereotypes, cannot change society and cultural aspects of family life or society's organisation, cannot dictate to people how they should organise their lives, nor can it address issues related to resources. However, as the experience of indirect discrimination shows, challenging stereotypes and accepted socially constructed realities is not completely beyond the grasp of the law.[695] Ultimately, the law can, and should, address such issues and prompt a dialogue.

As we are at a crossroads, it is crucial to continue investigating the reasons for the failure to achieve reconciliation thus far and to explore new ways of addressing the tensions inherent in the balance between work and family life. They need to be investigated in order to inform EU policy makers as best as possible so that they can, ultimately, ensure that citizens can truly reconcile their work and private lives. Ultimately, the aim is to allow all EU citizens to fully realise all their potential, both professional and personal.

What next?

Against this background and in light of the discussion carried out in this book, we can now highlight the areas which require further consideration.

Firstly, despite the fact that reconciliation issues are part of Member States' family policies and are therefore inspired by different principles, beliefs and assumptions, these policies all share one rather striking common feature: women, and mothers in particular, continue to be perceived as the main carers in society. Therefore, to unveil the full potential of reconciliation measures, it is first of all necessary to deconstruct stereotypes. We have acknowledged that, to a reasonable extent, this is already happening. Across Europe the male-breadwinner

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[694] However, see the discussion in Chapter 1, 'The Development of the Reconciliation Principle in EU Discourse', where we have highlighted the limitation of these provisions.

[695] See our discussion on indirect discrimination in Chapter 3, 'The Time Provisions'.

model, which underpinned early reconciliation measures, has begun to be questioned and unravelled.[696] Women have been part of the workforce for a considerable time now but what has changed recently in the debate is the fact that fathers are increasingly willing to be more involved in their children's lives.[697] If this is correct, equally true is that, at the time of writing, policies and legislation in this area continue to fail men's expectations. Chapter 2, for example, has shown that the leave provisions are still unbalanced. EU provisions guarantee mothers nearly six months leave (14 weeks maternity leave and three months parental leave) whist fathers are entitled to only half of that time. This imbalanced trend is continued by the recent Commission proposal to amend the Pregnant Workers Directive.[698] Despite the fact that the proposed Directive is based on Article 141 EC as well as Article 137 EC, fathers' rights are not included.[699] The situation is not dissimilar in the Member States where fathers can only have access to a fraction of the leave to which mothers are entitled.[700] Indeed, as we have argued in this book, reconciliation cannot be achieved if it is considered to be a women-only issue. On the contrary, the concept of reconciliation is an inherent part of the concept of equality for both men and women. Even though pregnancy and maternity rights generally aim to protect and guarantee females' biological specificities, some of these rights also proceed from sociologically constructed structures. Certainly, some rights, such as leave, should be extended to fathers, in order to render the reconciliation between work and family life more effective and to dissipate the perception that the mother is the primary carer.[701]

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[696] See generally L. Dulk, B. Peper, and A. Doorne-Huiskes, 'Work and Family in Europe: Employment Patterns of Working Parents across Welfare States', in L Dulk, B. Peper, and A. Doorne-Huiskes (eds), *Flexible Working and Organisational Change: The Integration of Working and Personal Life* (Chelterman: Edward Elgar, 2005), 13–38; R. Crompton, S. Lewis, and C. Lyonette (eds), *Women, Men, Work and Family* (Basingstoke: Palgrave MacMillian, 2007).

[697] See for example E. Dermott, *Intimate Fatherhood* (London: Routledge, 2008). This, however, is not necessarily true with respect to other, less exciting, aspects of family life.

[698] 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) 600/4.

[699] See the discussion in Chapter 2, 'The Leave Provisions'.

[700] With the exception of the Scandinavian Countries; see further discussion in Chapter 2, 'The Leave Provisions'.

[701] K. J. Morgan and K. Zippel, 'Paid to Care: The Origins and Effects of Care Leave Policies in Western Europe', *Social Politics* (2003), 49–85.

The discussion in Chapter 3 has reached similar conclusions in relation to the time provisions. In this instance, the issue is not the availability of the rights but rather the way in which these rights are exercised in practice. Although *parents* might be entitled to reorganise their working hours, in reality it is *mothers* who do so. As flexible working patterns are often associated with poorly skilled and low paid jobs, it follows that it is women who bear the long-term financial consequences of 'flexibility'. Even in Scandinavia, where reconciliation policies have long been in force, the bulk of caring responsibility in a wider sense (that is, from housework to child and elderly care) remains almost exclusively mothers' tasks and this adds to the detriment of their position in the workplace. Indeed, this was also recently pointed out by the European Commission: few men take parental leave or work part-time (7.4 per cent compared to 32.6 per cent of women) and measures to change this trend are necessary.[702] Although policies and legislation in the area of reconciliation, might aim to encourage and promote a greater involvement of fathers with children *and* with family responsibilities at large, they have not yet had a real impact on the re-distribution of domestic responsibilities. Arguably, the EU's measures have not always provided the adequate incentive or means to effectively achieve reconciliation.

Secondly, we have argued that reconciliation is an evolving concept and, therefore, policy makers and the legislators should acknowledge the need to adapt it to the reality of a fast changing society. At the time of writing, the EU framework in this area is still ill-equipped for addressing the challenges resulting from the mutation in family structures.

To start with, the EU framework does not fully cover 'non-traditional' families, such as those formed by unmarried couples, same-sex couples or the so-called reconstituted families.[703] Although at national level these changes are increasingly acknowledged and addressed, regrettably this does not seem to be the case in the EU, where (biological) parents remain in a stronger position than other types of carers.

Furthermore, at the time of writing the vast majority, if not all, of reconciliation measures are geared towards the needs of children, in particular very young ones. For example, leave provisions are addressed to *parents*, and although, in theory, everybody has a right to request to

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[702] Communication from the European Commission, 'A Roadmap for Equality between Women and Men 2006–2010', COM(2006) 92 final.

[703] See generally L. Hantrais, *Family Policy Matters – Responding to Family Change in Europe* (Bristol: Policy Press, 2004), in particular Chapter 3; see also our discussion in the Introduction.

work on a flexible basis, at EU level there are proposals to grant *mothers*, not *carers*, a specific right in this respect. We have argued that the care of children represents only one part of the reconciliation concept which affects only a relatively short period of an individual's life's course. On the contrary, a dynamic understanding of the concept of reconciliation should also cater for family responsibilities in a wider sense, such as the care for an elderly parent, an ill spouse or partner or other frail members of the family. For the time being, only some timid progress has been achieved to widen the concept of reconciliation. Indeed, the challenges posed by the lack of provisions for school-age children and vulnerable adults is still merely 'acknowledged'[704] and effective solutions have been neither discussed nor proposed. Yet, these responsibilities impact on the lives of carers (who are often women) just as much as the care of young children. The EU legislator needs to embrace all the issues related to reconciliation in order to expand them to carers rather than just parents.

It follows from this that caring responsibilities create very different needs during an individual's life course. For instance, the period of leave that a parent needs in relation to a new born child, differs from the needs of a parent of a toddler or a teenager. Thus, reconciliation measures should be modulated on the basis of these needs. This is clearly not the case at the moment. There are plans, for example to enable mothers to request flexible working arrangements but there are no plans for re-evaluating and altering these arrangements further down the line. With that said, although a variety of solutions is required to address different needs, some basic principles, in particular gender equality, must apply uniformly across all situations.

Thirdly, reconciliation measures need to be complemented by a strong care strategy able to address the needs of both children *and* adults. Indeed any changes to the leave and time provisions would be largely frustrated if not supported by a comprehensive, high quality and affordable care strategy. Chapter 4 has discussed how, at the time of writing, binding provisions in the area of care remain, lamentably

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[704] See for instance European Commission, Communication from the Commission on *The Demographic Future of Europe – from Challenge to Opportunity* COM(2006) 571; European Commission, *Joint Report on Social Protection and Social Inclusion* (Brussels: European Commission, 2007); see also Case C-303/06 *Coleman* (ECJ 17 July 2008) (not yet reported) discussed in Chapter 2, 'The Leave Provisions'.

lacking. Furthermore, the EU strategy in this area continues to focus on children and only pays lip service to the needs of adult care.

Fourthly, this book has highlighted that the three elements of reconciliation – namely leave and time provisions and care strategy – are strictly inter-related. Therefore, in order to be effective, a comprehensive EU reconciliation strategy needs to construe these three elements as complementary and not mutually exclusive. It is also crucial that they are developed at the same speed.

Although, as discussed in the Introduction and Chapter 1, EU competencies in this area are admittedly limited, they are not completely out of the Union's reach either. The recent changes in the Treaty and the increasing acknowledgement of the challenges of reconciliation in the case law of the Court of Justice, have created the right climate for expanding in a dynamic way the scope of reconciliation. It is also important to stress that appreciable results do not need to be achieved solely with binding legislation, as this is inherently difficult. Forms of soft measures, in particular the open method of coordination, have successfully addressed issues such as childcare and have contributed to developing a dialogue. If the EU is serious about reconciliation (and about achieving the full employment goal of the Lisbon Strategy), it has the means to influence and contribute effectively to the debate in diverse and innovative ways.

Finally, we acknowledge that any changes to the reconciliation debate will need to be assessed against national policy decisions, economic constraints and limited welfare resources. These factors, however, do not necessarily impede the development of a dialogue aimed at highlighting the problems discussed in this book. Only when these issues are addressed will carers, men and women be given the real possibility of making genuine choices, rather than simply reiterating traditional household models.[705]

[705] G. James, *The Legal Regulation of Pregnancy and Maternity in the Labour Market* (London: Routledge-Cavendish, 2009).

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