

## A DUTY OF BOTH

### REVISING EU'S LEGAL FRAMEWORK ON MATERNITY, PATERNITY AND PARENTAL LEAVE FOR EFFECTIVE GENDER EQUALITY IN EMPLOYMENT

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#### *Abstract*

The European Union has been one of the main propellants for gender equality, and has contributed to build awareness amongst its Member States of the difficulties that combining work and family life is for working women. Even in its efforts to come up with a legal framework to battle for women's equality, in 2015, the European average employment rate of women was eleven points lower than men's rate, which was especially accentuated when women had children under the age of six. Estimations of the EU are that the gender employment gap will still be of nine points difference between the sexes by 2055, which is extremely worrying. The present thesis will first analyse the current EU's family leave policies, concretely the Maternity Leave, Recast and Parental Leave Directive, which will serve as a basis to understand the new European Commission's Proposal for a Directive on work-life balance for parents. Such in-depth analysis will help us identify the reasons why the current legal framework on family leave have failed to ensure gender equality in the labour market, and if the new proposal on introduction of paternity leave and improvements on parental leave would help solve or reduce women's misrepresentation and less favourable treatment in employment.

*La Unión Europea ha sido uno de los mayores propulsores de la igualdad de género en los últimos tiempos, y ha contribuido a tomar consciencia entre sus Estados Miembros sobre las dificultades que significan para las mujeres combinar su trabajo y su vida familiar. A pesar de los muchos esfuerzos realizados para propiciar un marco legal adecuado para combatir la desigualdad que sufren las mujeres, en el 2015, la media europea de personas activas en el sector laboral variaba once puntos entre hombres y mujeres, que se acentúa especialmente cuando las mujeres tienen hijos menores de seis años. Las estimaciones de futuro realizadas en el seno de la UE tampoco son muy esperanzadoras, pues se prevé que en el 2055 la diferencia de la tasa laboral entre hombres y mujeres todavía sea de nueve puntos, lo que es extremadamente preocupante. En la presente tesis, primero expondremos cuál es el actual marco legal europeo en cuanto a las políticas de balance familiar-laboral, en concreto las*

*Directivas de la baja por maternidad de 1995, el texto refundido de la igualdad de género en el trabajo de 2006, y la Directiva de la baja parental de 2010, que nos servirán como base para entender y analizar la nueva propuesta de Directiva de la Comisión Europea para un balance de la vida familiar y laboral de los padres. Con dicho examen, pretendemos identificar por qué el anterior marco legal no ha servido para asegurar la igualdad de género en el mercado laboral, y si la nueva propuesta de Directiva será suficiente para abarcar la gravedad del problema.*

*Título: Una labor de dos: Revisión del marco legal europeo sobre las bajas por maternidad, paternidad y parental para una efectiva igualdad de sexos en el ámbito laboral*

Key words: parental leave, maternity leave, paternity leave, gender policy, gender equality, EU legal framework, employment law, non-discrimination, parenthood.

*Palabras clave: permiso paternidad, permiso maternidad, política de género, igualdad de género, marco legal UE, derecho laboral, no discriminación.*

IUSLabor 3/2017, ISSN 1699-2938, p. 249-276

### *Summary*

1. Introduction
2. Current EU legal framework
  - 2.1. Introduction
  - 2.2. Pregnancy Directive
    - 2.2.1. Coming up with the Directive and its purpose
    - 2.2.2. Defining concepts: ‘pregnant worker’ and ‘pregnancy’
    - 2.2.3. Article 8 and Article 10: the highlights of the Pregnancy Directive
  - 2.3. Recast Directive
    - 2.3.1. Compilation of previous Directives in a single text, legal basis and purpose
    - 2.3.2. Direct discrimination on grounds of sex: when Pregnancy Directive is not applicable
  - 2.4. Parental Leave Directive
    - 2.4.1. Introducing the revised Framework Agreement on Parental Leave
    - 2.4.2. Differentiating maternity leave from parental leave
    - 2.4.3. A key point: non-transferability of the leave
    - 2.4.4. Rights conferred by the Parental Leave Directive and the case-law
    - 2.4.5. Conclusions

3. Updating EU legal framework and introducing paternity leave
  - 3.1. Commission's Proposal for a Directive on work-life balance for parents and carers and repealing Council Directive 2010/18/EU
    - 3.1.1. Introduction: raison d'être, legal basis and legislative procedure
    - 3.1.2. New rights
  - 3.2. Facing the Member States' critiques
  - 3.3. Potential issues derived from the new Proposal
    - 3.3.1. Remuneration of the leave
    - 3.3.2. Paternity leave: optional or mandatory?
    - 3.3.3. Self-employed parents
    - 3.3.4. Retaining the worker status
    - 3.3.5. Brexit
4. Conclusions

## 1. Introduction

*Mater semper certa est*, is a Roman law principle that constituted a legal presumption, currently adopted by various legal systems. Such principle declares that “the mother is always certain”, since maternity is biologically obvious and it cannot be disputed. This Latin phrase can also be found written as *mater semper certa est, pater numquam*, meaning that the mother is always certain, but the father is not. From this last presumption, Roman jurists created different legal ways to recognize the filiation of the children for the father, for example, recognizing the parentage of a child under the wing of marriage. Nowadays, fatherhood is legally proven via birth certificate, and thanks to science, there are paternity DNA tests that dissipate the need for a legal way to demonstrate who is the father of a newborn.

To a certain degree, this principle resonates in society: the mother is always certain; therefore, she has to take care of the children, whether the father has to prove, which automatically unattaches him from that care. As one of the most graphic depictions of such social reality, laws have displayed during centuries the social roles of both men and women. Later, when women were introduced to working outside the household, things started to change in society’s mind-set, and especially in women’s mind-set, who started seeking for equality. Nowadays, a resulting train of legal reforms has emerged: both parents have to be responsible for taking care of the children and the household, as both also work; hence, legislators have to approve measures that allow parents to combine their work and family lives, such as maternity, paternity and parental leave.

The European Union has been one of the main propellants for gender equality, and has contributed to build awareness amongst its Member States of the difficulties that combining work and family life is for working women. Even in its efforts to come up with a legal framework to battle for women’s equality, in 2015, the European average employment rate of women was eleven points lower than men’s rate, which was especially accentuated when women had children under the age of six. Also, because of family and caring responsibilities, women are more likely to take part-time jobs. Those reasons provoke a gender pay gap amounting to twenty-eight per cent difference with male workers. The gender pay gap also results into a gender pension gap, which goes up to forty per cent difference in relation to men. Estimations of the EU are that the gender employment gap will still be of nine points difference between the sexes by 2055. All in all, these data are extremely worrying; and the EU has taken action to try to solve this unfair situation.

The present thesis will firstly, analyse the current EU’s family leave policies, concretely the Maternity Leave, Recast and Parental Leave Directives, so that afterwards, we can

examine the new Proposal for a Directive on work-life balance for parents. Such outlines will help us identify the reasons why the current legal framework on family leave have failed to ensure gender equality in the labour market, and if the new proposal on introduction of paternity leave and improvements on parental leave would help solve or reduce women's misrepresentation and less favourable treatment in employment.

## 2. Current EU legal framework

### 2.1. Introduction

The employment rates differences between men and women are alarming. In 2015, the EU average of men who were employed was of a 75.9%, whereas women's rate was 64.3%<sup>1</sup>. The issue of gender inequality with regard to labour market can be explained by various factors: fertility rates, ageing of the population, etc. But one of those facts resonates as a major legislative concern: dealing with the unequal division of family responsibilities between the sexes. The burden of taking care of the family falls predominantly on women, and even when there are significant legal systems' differences between Member States since some of them offer better conditions to balance work and family life than others, the EU is far from coming up with a definitive solution to end up with this dramatic 'gender gap' in employment<sup>2</sup>.

The intention of this chapter is to settle an analysis of the current EU framework, which is mainly composed by three Directives: the Pregnancy Directive, the Recast Directive and the Parental Leave Directive, in this order. It is important to bear in mind that such Directives do not apply only in cross-border situations, but need to be implemented in national law, since they affect every working parent in the EU regardless of their nationality or them working in their home member state.

Nevertheless, the transposition of such Directives has not been as strict as with other Directives, since a majority of Member States, before the approval of both legal texts, already had provisions or a system of working leave for the birth of a child; hence, they just had to adjust their own laws superficially. In addition, some articles as Article 10 of the Pregnancy Directive have been found to have direct effect by the Court of Justice of the European Union, which therefore, did not need to be transposed into national law because of their self-executing nature.

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<sup>1</sup> European Parliament, Briefing on Maternity, paternity and parental leave in the EU [March 2017], figure 1.

<sup>2</sup> Ibidem, p. 2-3.

Finally, this chapter reviews some case law on the matter to give a more in-depth understanding analysis of some concepts brought up before the Court of Justice, which helps with the interpretation of the main provisions in the Directives.

## 2.2. *Pregnancy Directive*

### 2.2.1. Coming up with the Directive and its purpose

Since 1985, after the Commission presented its White Paper to create a Single European Market<sup>3</sup>, the EU has been focused on eliminating all the market barriers between Member States, including those technical barriers that impeded the free movement of workers. On 9 December 1989, the European Council meeting in Strasbourg adopted the Community Charter of the fundamental social rights of workers<sup>4</sup>, hereinafter the Community Charter<sup>5</sup>, which included Article 19, that served as the first legal basis on the protection of pregnant women who have recently given birth and breastfeeding workers.

Point 19 of the Community Charter reads as follows: *“Every worker must enjoy satisfactory health and safety conditions in his working environment. Appropriate measures must be taken in order to achieve further harmonization of conditions in this area while maintaining the improvements made”*.

This social right was further developed in the Council Directive 89/391/EEC<sup>6</sup>, providing in its Article 15 that those workers considered being a ‘sensitive risk group’ must be protected against the dangers which specifically affect them in the workplace. However, it is in the eighth recital of the Council Directive 92/85/EEC<sup>7</sup>, hereinafter the Pregnancy Directive, that pregnant workers, workers who have recently given birth or who are breastfeeding are declared a specific risk group<sup>8</sup>; hence, it is the Pregnancy Directive that introduces for the first time expressly special protection for this risk group.

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<sup>3</sup> Commission of the European Communities, Completing the Internal Market: White Paper from the Commission to the European Council, COM (85) 310 Final, Brussels (14 June 1985).

<sup>4</sup> Community Charter of the Fundamental Social Rights of Workers, May 1990, OJ C 6/90.

<sup>5</sup> The fundamental social rights declared in such Charter were developed later on in the Charter of Fundamental Rights of the European Union.

<sup>6</sup> Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, OJ L 183, 29. 6. 1989, p. 1.

<sup>7</sup> Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of the Directive 89/391/EEC), OJ N. L 348/1.

<sup>8</sup> C.D. v S.T., Case C-167/12, [2014] ECLI:EU:C:2014:169, p. 30.

Whereas the purpose of the Pregnancy Directive is therefore introducing measures to encourage improvements in the safety and health at work to the collective that forms this specific risk group, as displayed in Article 1, it is highlighted in the second recital that this Directive does not pretend to reduce those measures that were already taken by Member States; the present Directive pretends to harmonize the minimum requirements and to introduce new improvements. The highlights of such measures are, firstly, the introduction of a harmonized maternity leave period<sup>9</sup>, and secondly, the protection against dismissal<sup>10</sup>.

The Pregnancy Directive was approved taking into consideration Article 118a TEC as its legal basis, now Article 141 TFEU. Such article imposes the Council to adopt, by means of directives, minimum requirements for encouraging improvements in the working environment to protect the safety and health of workers<sup>11</sup>.

### 2.2.2. Defining concepts: ‘pregnant worker’ and ‘pregnancy’

Article 2 of the Pregnancy Directive gives a definition of the concepts ‘pregnant worker’, ‘worker who has recently given birth’ and ‘worker who is breastfeeding’. Whereas the two latter concepts have to be determined by national law, the ‘pregnant worker’ definition, Article 2 (a), is constrained to the “*pregnant worker who informs her employer of her condition, in accordance with national legislation and/or national practices*”. However, the actual concept of pregnancy lacks a definition in the Pregnancy Directive, which aroused several legal issues and consequently has been dealt in the case law of the Court of Justice of the European Union<sup>12</sup>, hereinafter the CJEU.

In the *Kiiski* case<sup>13</sup>, a worker woman was denied maternity leave on the grounds that she was already on leave when she announced her pregnancy in her work institution. The referred question was whether Ms. Kiiski fell within the scope of the Pregnancy Directive, since she was not working at the time, and working at the time was a condition under national law to receive maternity leave. The CJEU stated that the Pregnancy Directive aim was to improve the protection of pregnant workers, hence it could not be justified to exclude a worker from the enjoyment of maternity leave when

<sup>9</sup> Id: Council Directive 92/85/EEC, fourteenth recital.

<sup>10</sup> Ibidem, fifteenth recital.

<sup>11</sup> Ibidem, first recital.

<sup>12</sup> ELLIS, Evelyn and WATSON, Philippa, “Discrimination on the grounds of pregnancy and maternity”, *EU Anti-Discrimination Law*, Oxford Scholarship Online, January 2013, p. 2; MASSELOT, Annick, CARACCILO DI TORELLA, Eugenia and BURRI, Susanne, “Fighting Discrimination on the Grounds of Pregnancy, Maternity and Parenthood: the application of EU and national law in practice in 33 European countries”, *European Network of Legal Experts in the Field of Gender Equality*, August 20, 2012, p. 6.

<sup>13</sup> *Sari Kiiski v Tampereen Kaupunki*, Case C-116/06 [2007] ECR I-7643.

she already left her work position for a temporary period because she is enjoying another leave<sup>14</sup>.

Moreover, the CJEU in *Danosa*<sup>15</sup> analysed the obligation of the worker to inform her employer of her pregnancy. There are cases where the employee does not want to inform of her situation, but this is not a reason that could justify her dismissal. The Court stated that without having formally informed her employer about her pregnancy, if the latter learns about her situation and still dismisses her, there is a violation of Article 10 of the Pregnancy Directive, which indicates that Article 2(a) must be interpreted narrowly<sup>16</sup>. In other words, if an employer learns, by whatever means, that a worker is pregnant, he or she cannot dismiss her<sup>17</sup>. Nevertheless, this interpretation could open potential cases of employees disregarding their obligations written in the Directive, and ultimately, not protecting their risk group status, for example, when they do not inform their employer of their pregnancy, and keep working in a high-risk job<sup>18</sup>.

Lastly, the CJEU in *Mayr*<sup>19</sup>, discussed what constitutes pregnancy and when does the pregnancy begin. Ms. Mayr was in the process of an *in vitro* fertilization, and the same day where her ova was being fertilized in vitro, hence she claimed she was pregnant the day she was dismissed, and therefore that her dismissal was unlawful on the grounds of the Pregnancy Directive. The fertilized ova was going to be transferred three days after the dismissal. By the time, Ms. Mayr had a sickness certificate, starting two days before of her dismissal. The referred question was whether a worker is a ‘pregnant worker’ at the time her ova was fertilized in vitro, but those embryos have not been yet implanted in her.

The Advocate-General Ruiz-Jarabo was of the opinion that the Pregnancy Directive is meant to protect women who are already pregnant because of the vulnerability of their situation rather than to protect the woman who wishes to become pregnant, which the CJEU agreed on. Furthermore, the Court found that the Pregnancy Directive was not applicable since the in vitro fertilized ova had not been transferred into Ms. Mayr’s uterus<sup>20</sup>. However, the Court ruled that there had been a direct discrimination on the grounds of sex when dismissing Ms. Mayr<sup>21</sup>, violating Council Directive 76/207/EEC<sup>22</sup>, now substituted by Directive 2006/54/EC<sup>23</sup>.

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<sup>14</sup> Ibidem, para. 31.

<sup>15</sup> Dita Danosa v LKB Lizings SIA, Case C-323/09 [2010] ECR I-11405.

<sup>16</sup> Ibidem, para. 55.

<sup>17</sup> ELLIS, Evelyn and WATSON, Philippa, EU Anti-Discrimination Law, *op. cit.*, p. 5.

<sup>18</sup> Ibidem.

<sup>19</sup> Sabine Mayr v Bäckerei und Konditorei Gerhard Flöckner OHG, Case C-506/06 [2008] ECR I-1017.

<sup>20</sup> Ibidem: p. 41.

<sup>21</sup> Id: Mayr case, para.50.

### 2.2.3. Article 8 and Article 10: the highlights of the Pregnancy Directive

The most important measures that the Pregnancy Directive introduced were the introduction of a mandatory maternity leave, and the explicit prohibition of dismissal of workers within the meaning of Article 2. The two measures are to be found in Article 8 and 10, respectively.

On the maternity leave provision, Article 8 of the Pregnancy Directive mandates Member States to take the necessary measures to ensure that pregnant workers can take, at least, fourteen weeks of leave, on a continuous basis, and to be taken before or after confinement. In addition, a period of two weeks from the fourteen-weeks period must be compulsory. However, this Article does not indicate how much salary should pregnant workers receive for maternity leave, neither does set a specific period, but a minimum time; as a result, there were many differences between Member States by the time the Pregnancy Directive was implemented<sup>24</sup>.

On the prohibition of dismissal provision, Article 10 declares unlawful the dismissal of a pregnant worker. Member States shall take measures so that it is forbidden to dismiss a worker, in the meaning of Article 2 of the Pregnancy Directive, “*from the beginning of their pregnancy to the end of the maternity leave*”<sup>25</sup>. However, the Article continues: “[s]ave in the exceptional cases not connected with their condition which are permitted under national legislation and/or practice and, where applicable, provided that the competent authority has given its consent”.

To this extent, the only ‘exception’ that has been further developed by the CJEU is the cases where an illness provoked by the pregnancy persisted after maternity leave was over and there was a dismissal based on absence to work. After different approaches in the *Aldi*<sup>26</sup> and *Larsson*<sup>27</sup> cases, the Court in *Brown*<sup>28</sup> established that the dismissal of a female worker during pregnancy provision is also precluding her dismissal when the

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<sup>22</sup> Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ L 39, 14.2.1976, p. 40-42.

<sup>23</sup> Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 2004/23.

<sup>24</sup> Eurofound, “Commission reviews implementation of pregnant workers Directive”, 27 April 1999.

<sup>25</sup> Article 10 (1) Pregnancy Directive.

<sup>26</sup> Handels- og Kontorfunktionærernes Forbund i Danmark v Dansk Arbejdsgiverforening ‘Aldi’, Case C-179/88 [1990] ECR I-3979.

<sup>27</sup> Handels- og Kontorfunktionærernes Forbund i Danmark, acting on behalf of Helle Elisabeth Larsson v Dansk Handel & Service, acting on behalf of Føtex Supermarked A/S ‘Larsson’, Case C-400/95 [1997] ECR I-02757.

<sup>28</sup> Mary Brown v Rentokil Ltd., Case C-394/96 [1998] ECR I-04185.

pregnant worker is absent from work because of an illness provoked from pregnancy. Moreover, absences provoked by a pregnancy-related illness during her pregnancy or maternity leave cannot be counted as a normal absence from work.<sup>29</sup>

Nevertheless, when that illness provoked by pregnancy persists after maternity leave, her absence will be taken into account under the same conditions as a man's absence, of the same duration, through the rules of incapacity for work.<sup>30</sup> However, some have criticised the Court's approach in *Brown*<sup>31</sup>, by saying that other case law established principles as not comparing pregnancy to illness, or the special position of pregnant workers, which entitle them to have a special protection that could never be comparable to a man or a woman who are at work<sup>32</sup>.

### 2.3. Recast Directive

#### 2.3.1. Compilation of previous Directives in a single text, legal basis and purpose

Directive 2006/54/EC, hereinafter the Recast Directive, regulates the principle of equal treatment between men and women in matters of employment and occupation. The Recast Directive is the consolidation of earlier Directives<sup>33</sup>, which brings together in a single text and amends the main provisions existing in those Directives: the implementation of the principle of equal treatment between men and women in the access to employment, and in occupational security schemes, equal pay, and the inversion of the burden of proof in cases of discrimination based on sex. It also collates certain developments arising out of the case law of the CJEU<sup>34</sup>.

The Recast Directive's main aim is to develop the fundamental principle of equality between men and women provided in Article 2 and 3(2) of the TEU, which is a task and an objective of the EU and it imposes a positive obligation to promote it in all its activities<sup>35</sup>.

<sup>29</sup> The Court in *Aldi* ruled otherwise.

<sup>30</sup> This last approach contradicts the Court's previous judgment in *Larsson*.

<sup>31</sup> ELLIS, Evelyn and WATSON, Philippa, EU Anti-Discrimination Law, *op. cit.*, p. 10-11.

<sup>32</sup> Joan Gillespie and Others v Northern Health and Social Services Board and Others, Case C-342/93 [1996] ECR I-492.

<sup>33</sup> Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions; Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes; Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women; Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex.

<sup>34</sup> Recast Directive, first recital.

<sup>35</sup> *Ibidem*, second recital.

The legal basis for the Recast Directive to be adopted was Article 141(3) TEC, now Article 157(3) TFEU, which gives competence to the European Parliament and the Council, after consulting the Economic and Social Committee to co-legislate<sup>36</sup> “to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation”.

As contained in Article 1, the Recast Directive intends that Member States implement the principle of equality between men and women in employment and occupation, broadening equality not just for the protection against discrimination during the working period, but also that the discrimination is not made during the access to employment, promotion or vocational training. Moreover, employment equality must be ensured within the working conditions and pay, as well as social security schemes. Finally, such provisions must be effective; hence Member States should take appropriate procedures to render them so.

### 2.3.2. Direct discrimination on grounds of sex: when Pregnancy Directive is not applicable

Whereas the Recast Directive introduced the concepts of ‘direct discrimination’, ‘indirect discrimination’ and ‘harassment’ on the grounds of sex, we will only focus now on case law concerning ‘direct discrimination’. The CJEU developed a case law doctrine by virtue of which discrimination based on pregnancy constitutes a direct discrimination on the grounds of the Recast Directive when the Pregnancy Directive results inapplicable, as in, for example, the *Mayr* case<sup>37</sup>. Therefore, the importance of the Recast Directive for the purpose of the present thesis is its legal gap-filling role via EU case law.

The concept of ‘direct discrimination’ is to be found in Article 2(1)(a) of the Recast Directive and it is the result of one person being treated less favourably on grounds of sex compared to another situation. Moreover, Article 2(2)(c) adds that it will also constitute discrimination any less favourable treatment of a woman related to pregnancy leave within the meaning of the Pregnancy Directive. Such protection was formulated in *Dekker*<sup>38</sup>, where the CJEU held that it was forbidden to refuse to employ a pregnant woman when she would have been hired if she had not been pregnant at the moment,

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<sup>36</sup> TEC did not contemplate the current system of co-legislation between the EP and the Council; therefore the legislator was the Council, which had to nonetheless consult the Economic and Social Committee alone.

<sup>37</sup> Id: *Mayr* case, para. 50.

<sup>38</sup> *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV Centrum) Plus*, Case C-177/88 [1990] ECR I-3969.

and thus it constituted direct discrimination on the ground of sex<sup>39</sup>. Later, the Court in *Aldi* held that the ‘Dekker principle’ holds good throughout the relevant period of maternity leave<sup>40</sup>, and Article 14 of the Recast Directive now devises such protection.

To this extend, it was clear from *Mayr* that even though the Court considered that an *in vitro* was not equivalent to pregnancy, Ms. Mayr’s dismissal was an act of direct discrimination on the grounds of sex, based on Articles 2(1)(a) and 4 of the Recast Directive. Therefore, Article 2(2)(c) is not applicable in this case, since the concept of pregnancy on the Recast Directive depends on the Pregnancy Directive, and Ms. Mayr was not considered ‘pregnant’ at the moment of her dismissal.

Furthermore, direct discrimination at work not only entail cases of dismissal or access to work; in *CNAVTS*<sup>41</sup>, the Court faced a case in which a woman was deprived from an established promotion because of a rule in a collective agreement that only gave such right to those who had been at work for six months of the year. The woman had been away for maternity leave. The outcome of the case was that this constituted direct discrimination, since if it had not been for the maternity leave, which she was entitled to take, she would have been assessed for the year and could have qualified for the promotion.<sup>42</sup> This case led to the formulation of Article 15 of the Recast Directive.

## 2.4. Parental Leave Directive

### 2.4.1. Introducing the revised Framework Agreement on Parental Leave

Returning to the Community Charter on the Fundamental Social Rights of Workers: in its third paragraph of its Point 16 it was established that measures should be taken to enable men and women reconcile their family life with their work obligations. Although in 1983, regarding such provision, the Commission drew up a proposal for a Directive<sup>43</sup>; it was not until the entry into force of the Maastricht Treaty that the European Social Partners<sup>44</sup> reached an agreement on parental leave. Now, Directive 2010/18<sup>45</sup>, which

<sup>39</sup> HONEYBALL, S., “Pregnancy and Sex Discrimination”, *Industrial Law Journal*, volume 29, issue 1, 2000, p. 43-52.

<sup>40</sup> Id: *Aldi* case, para. 11-13.

<sup>41</sup> *CNAVTS v Evelyne Thibault*, Case C-136/95 [1998] ECR I-2011.

<sup>42</sup> Although this case is previous to the Recast Directive, it helped determined *ratione materiae* the scope of ‘protection in employment’, which includes promotion, amongst others, and now is specified in Article 1.

<sup>43</sup> Commission Proposal for a Directive on parental rights [1983] OJ C 333/6.

<sup>44</sup> ETUC as representative of EU workers; BUSINESSEUROPE, private firms; UEAPME, small and medium businesses; CEEP, public employers.

<sup>45</sup> Council Directive 2010/18/EU implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC.

repealed the previous legal framework<sup>46</sup>, revises the Framework Agreement on Parental Leave, hereinafter the Framework Agreement, that is currently in force in the EU.

The need to reform the previous agreement came because in many Member States the results of the Directive were insufficient. Therefore, the current Framework Agreement sets up some minimums that Member States have to implement, and introduces more effective measures to encourage a more equal sharing of family responsibilities between men and women<sup>47</sup>, in the form of parental leave, to be differentiated from maternity leave<sup>48</sup>. The effects of the Framework Agreement, in its Clause 1, are extended to both men and women that are in an employment contract or relationship, and its scope includes part-time and fixed-term workers, as well as workers employed via a temporary agency.

#### 2.4.2. Differentiating maternity leave from parental leave

Whereas maternity leave is directed to female workers for reason of pregnancy and has to be taken immediately before and after the birth of the child, parental leave is directed to both parents who have to care for the newborn baby and can, consequently, leave for a certain period of time to do so. Furthermore, in *Kiiski*, the Court declared that maternity and parental leave are distinct<sup>49</sup>, meaning that they are mutually exclusive<sup>50</sup>.

However, to be a parent is not enough to be entitled of parental leave. In the *Chatzi* case, the CJEU established that the beneficiaries of parental leave have to be working under an employment contract or within an employment relationship as defined by national law or practice or collective agreement either in the public or private sector<sup>51</sup>. Nevertheless, Advocate-General Ruiz-Jarabo Colomer in *Busch*, stated that the individual right to parental leave is not restricted “to those employees with an employment relationship for an indefinite term”<sup>52</sup>.

Another difference between maternity and parental leave is that the Framework Agreement, apart from laying down some leave requirements for the general purpose of bringing up children, it also provides for time off from work where urgent family

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<sup>46</sup> Framework Agreement on parental leave concluded by ETUC, UNICE and CEEP on 14 December 1995, given legal effect by Council Directive 96/34/EC of 2 June 1996, and amended and extended to the United Kingdom by Council Directive 97/75/EC.

<sup>47</sup> *Ibidem*, recital twelve.

<sup>48</sup> *Ibidem*, recital fifteen.

<sup>49</sup> *Id*: *Kiiski* case, para. 7.

<sup>50</sup> ELLIS, Evelyn and WATSON, Philippa, *EU Anti-Discrimination Law*, *op. cit.*, p. 25.

<sup>51</sup> *Zoi Chatzi v Ypourgos Oikonomikon*, Case C-149/10 [2010] ECR I-8489, p. 27 – 30.

<sup>52</sup> Opinion of Mr. Ruiz-Jarabo Colomer, *Wiebke Busch v. Klinikum Neustadt GmbH & Co. Betriebs-KG*, Case C-320/01 [2003] ECR I-02041, p. 20.

reasons in cases of sickness or accident make the immediate presence of the worker indispensable<sup>53</sup>. This, of course, is of a complete different nature from maternity leave, which does not include a provision as such.

Likewise, Clause 2 of the Framework Agreement states that parental leave shall be granted for a minimum period of four months, and can be taken on the grounds of the birth or adoption of a child until a given age up to eight years old, but it has to be defined by the Member States, which may decide to extent the child's age. On the contrary, maternity leave is a fourteen-week period and it has to take place directly after or before giving birth.

Finally, in the event of a multiple birth, a number of periods of parental leave equal to the number of children born must be granted<sup>54</sup>. In the case of maternity leave, however, it is up to the Member States to decide on giving an extension of the leave in such situation<sup>55</sup>.

#### 2.4.3. A key point: non-transferability of the leave

Parental leave is an individual right of both working fathers and mothers that has to be provided, in principle, on a non-transferable basis, as set out in Clause 2(2). This means that once a parent has taken his or her right to parental leave, it cannot transfer it to the other parent; in other words, it is a 'use it or lose it' right<sup>56</sup>, also called 'mommy or daddy quotas', which encourages a more equal take-up of leave by both parents.

The importance of making parental leave a non-transferable right now comes from the practice with the previous Framework Agreement; even when parental leave is offered to both parents, fathers have been reluctant to take up the leave. This reality stems from various factors: from a legal perspective, Recital 20 of the current Framework Agreement acknowledges that the level of income during parental leave is a factor that influences the take up by parents, especially fathers. Member States are the ones to decide to which extent is parental leave covered, and up to employers to compensate the rest. Some other reasons are the availability of affordable childcare, the flexibility of

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<sup>53</sup> ELLIS, Evelyn and WATSON, Philippa, EU Anti-Discrimination Law, *op. cit.*, p. 24.

<sup>54</sup> Id: Chatzi case, para. 50; Commission of the European Communities v Grand Duchy of Luxembourg, Case V-519/03 [2005] ECR I-3086.

<sup>55</sup> Eurofound, Maternity Leave Provisions in the EU Member States: Duration and Allowances [2015] Cornell University ILR School, International Publications, p. 11 – 19.

<sup>56</sup> OECD, Background brief on fathers' leave and its use [March 2016] Social Policy Division, rfor Employment, Labour and Social Affairs.

leave arrangements, etc.<sup>57</sup> From a non-legal perspective, there is still a preponderant stigma based on gender norms, cultural expectations and masculinity roles; fathers' leave it is not regarded as male-like behaviour<sup>58</sup>.

However, not all parental leave regulated in the present Framework Agreement is on a non-transferable basis. Clause 2(2) of the Framework Agreement specifies that from the 4-months leave, Member States have to ensure that at least one month is on a non-transferable basis, sort of contradicting the principle of non-transferability announced by the legislator.

Moreover, it is up for the Member States to decide 'the modalities of the application' of this non-transferable period, via legislation or collective agreements, which is also highlighted in Clause 3(1). This implies that the differences between Member States' leave regulations could be abysmal from one state to the other since there is a wide margin of discretion left; specifically in establishing their leave system regarding its transferability, but also when implementing the Framework Agreement as a whole.

#### 2.4.4. Rights conferred by the Parental Leave Directive and the case-law

As previously mentioned, Member States have a fundamental saying on the conditions under of which parental leave has to be regulated. However, this does not mean that the Court of Justice has been exempted from adding clarifications to the conferred rights that the Framework Agreement brought up. Hereafter, we will analyse some relevant case law that has constrained some concepts of EU parental leave.

First, in the *Chatzi* case, the national court brought up whether Article 24 of the Charter of Fundamental Rights conferred the individual right to children of their parents to use parental leave, since Article 24 states that children have the right to protection and care. The CJEU made it clear that parental leave is a right which is only conferred to parents, since they are the ones who have to decide what is the best way to raise their children and perform their parental responsibilities, and that can be done without parental leave anyways<sup>59</sup>. This issue was brought up because of twins' birth, which the CJEU stated that, even if Clause 2(1) does not automatically recognize a period of parental leave equal to the number of children born, it did required to Member States to contemplate the birth of twins as a special situation requiring particular measures<sup>60</sup>.

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<sup>57</sup> VAN BELLE, Janna, *Paternity and parental leave policies across the European Union*, RAND Europe, 2016.

<sup>58</sup> WILLIAMS, Martin "40% of fathers do not take paternity leave", *The Guardian*, 7 January 2013, (available at: <https://www.theguardian.com/careers/fathers-choose-not-to-take-paternity-leave>).

<sup>59</sup> Id: *Chatzi* case, para. 39.

<sup>60</sup> *Ibidem*: para. 72.

Second, the *Kiiski* case revolved around the possibility of changing the dates of parental leave when they were already established between the employer and the employee. Ms Kiiski decided to advance her end-date because she was pregnant again and take maternity leave. The Finnish government argued that the new pregnancy was not a justification for altering parental leave, which consequently meant that Ms Kiiski was deprived from taking maternity leave. The CJEU ruled that a granted leave by EU law could not justify not providing another granted leave by EU law<sup>61</sup>; hence, the worker could change her parental leave dates. Nevertheless, the Court acknowledged that because parental leave involves a change in the organisation of the company, altering dates of parental leave should be subjected to strict conditions.<sup>62</sup>

Third, Clause 5(2) from the Framework Agreement establishes that “*rights acquired [...] by the worker on the date on which parental leave starts shall be maintained as they stand until the end of parental leave. At the end of parental leave, these rights [...] shall apply*”. However, this Clause does not provide a definition of ‘rights acquired’, thus the CJEU clarified in *Sánchez-Camacho*<sup>63</sup> that the purpose of the legal provision was to avoid the loss of or reduction in rights of the worker in his or her employment relationship, and to ensure that at the end of the leave he or she will be in the same position as at the start of the leave<sup>64</sup>.

As an example of ‘rights acquired’ by the meaning of Clause 5(2), the *Meerts* case<sup>65</sup> concerned a dismissal compensation sum. Ms Meerts had been six months working part-time because of parental leave, and the offered compensation sum was equivalent to ten months of the part-time salary. The question raised was whether if this sum should have been calculated on her actual salary, since this would have been her actual compensation if it were not for her parental leave. The CJEU found that this case constituted a lost right to have compensation. Also, the Court highlighted that Ms Meerts was employed on a full-time basis, hence her situation on a part-time parental leave was not equivalent to a part-time worker, and she had full-time worker’s rights.

Finally, as another example of ‘right acquired’, in *Lewen*<sup>66</sup>, the CJEU faced a case on which a woman on parental leave was not paid a Christmas bonus. For the matter, such bonus was considered by the Court to be part of the ‘pay’, since it fell within the scope

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<sup>61</sup> Id: *Kiiski* case, para. 57.

<sup>62</sup> However, such ‘strict conditions’ could not be applied since a restriction in the present case would consequently have denied maternity leave’s right of Mrs. Kiiski.

<sup>63</sup> *Evangalina Gómez-Limón Sánchez-Camacho v Instituto Nacional de la Seguridad Social (INSS) and others*, Case C-537/07 [2009] ECR I-6525.

<sup>64</sup> ELLIS, Evelyn and WATSON, Philippa, *EU Anti-Discrimination Law*, *op. cit.*, p. 28.

<sup>65</sup> *Christel Meerts v Proost NV*, Case C-116/08 [2009] ECR I-10063.

<sup>66</sup> *Susanne Lewen v Lothar Denda*, Case C-333/97 [1999] ECR I-7243.

of Article 119 TEC, now 157 TFEU<sup>67</sup>. Such bonus was not paid to any mother or father on parental leave at the time; therefore the measure was not directly discriminatory. However, the Court held that it might constitute indirect discrimination, since far more women than men take parental leave, and such fact was also applicable in the case's undertaking<sup>68</sup>. The Court also established that if such bonus had been simply an incentive, it would not have constituted discrimination<sup>69</sup>.

#### 2.4.5. Conclusions

Although the revised Framework Agreement intended to improve the reconciliation of work, private and family life for working parents and equality between men and women with regard to labour market opportunities and treatment at work across the Union<sup>70</sup>, as well as adding more time off-work for family duties apart from the maternity leave regulated in the Pregnancy Directive, it has failed to reach such purpose<sup>71</sup>, since there is still an eleven-point difference between men and women's employment rates, which acute for parents and people with other caring responsibilities<sup>72</sup>.

One of the main causes for this problem is an inadequate work-life balance policy that does not engage more fathers to take parental leave<sup>73</sup>. Indeed, the intended 'neutrality' of the Framework Agreement when it comes to providing parental leave right to both the mother and the father vanishes because it is still the mother who actually takes the leave<sup>74</sup>. For this purpose, the Agreement failed in not regulating properly the non-transferability of the parental leave right, as well as not ensuring a system of obligatory leave. The Commission also blames not having provided sufficient possibilities to make use of flexible working arrangements in the Framework Agreement and economic disincentives<sup>75</sup>.

All in all, current EU legislation body has failed to fight, on last instance, inequality of women in the access and conditions of employment: current Directives are not enough

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<sup>67</sup> Ibidem, para. 1.

<sup>68</sup> ELLIS, Evelyn and WATSON, Philippa, *EU Anti-Discrimination Law, op. cit.*, p. 25.

<sup>69</sup> Id: Lewen case, para. 40.

<sup>70</sup> Council Directive 2010/18/EU, eight recital.

<sup>71</sup> BRUNING, Gwennaële and PLANTENGA, Janneke, "Parental Leave and Equal Opportunities: Experiences in Eight European Countries", *Journal of European Social Policy*, August 1, 1999.

<sup>72</sup> Explanatory Memorandum, point 1, of the Proposal for a Directive of the European Parliament and of the Council on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, COM (2017) 253 final, Brussels [26.4.2017], 2017/0085 (COD).

<sup>73</sup> Ibidem.

<sup>74</sup> DI TORELLA, E. C., "Childcare, employment and equality in the European Community: first (false) steps of the Court", *European Law Review*, n° 3, 2000.

<sup>75</sup> Ibidem.

to face the gender employment gap, and fathers are still not taking enough responsibility on raising their children. Consequently, the Union has presented a new proposal for a work-life balance Directive.

### 3. Updating EU legal framework and introducing paternity leave

#### 3.1. *Commission's Proposal for a Directive on work-life balance for parents and carers and repealing Council Directive 2010/18/EU*

##### 3.1.1. Introduction: *raison d'être*, legal basis and legislative procedure

Back in 2008, the European Commission proposed to revise the Maternity Leave Directive, but failed to do so after various years of legislative blockage. However, in 2015, the Commission prepared a new initiative that would undertake a broader approach from the 2008 plan taking into account the developments in society in the past decade.<sup>76</sup> This proposal contains a package of measures that aim to address “*women's under-representation in employment and support their career progression through improved conditions to reconcile their working and private duties*”<sup>77</sup>.

The need for a revision was clearly needed after analysing the European employment data of 2015. Its most compounded differential factor was that, on average, the employment rate of women with one child under six years old is nearly nine per cent less than women without children as average, getting up to thirty per cent in some Member States<sup>78</sup>. Women are far more likely to work part-time due to caring responsibilities, and also assume more often the role of carers for elderly or dependent relatives than men<sup>79</sup>. All of these factors were conclusive for the Commission to present a working-life new Directive so that all employment-related gender gaps are reduced<sup>80</sup>.

The Commission assumed that one of the main reasons that this gap persists is that the EU has not provided, until now, an adequate work-life balance policy, since the current legal framework results insufficient. The EU has failed to encourage men to assume an equal share of caring responsibilities, and therefore, the new Directive aims, generally, to ensure the principle of equality between men and women with regard to labour market opportunities and treatment at work, and specifically, to provide some flexible

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<sup>76</sup> The Commission officially withdrew its proposal in July 1st 2015.

<sup>77</sup> European Commission, Explanatory Memorandum of the Proposal for a Directive of the European Parliament and of the Council on work-life balance for parents and carers and repealing Council Directive 2010/18/EU. Brussels, 26.4.2017, COM (2017) 253 final 2017/0085 (COD), p. 1.

<sup>78</sup> *Ibidem*.

<sup>79</sup> OECD (2013) Closing the Gender Gap.

<sup>80</sup> *Id*: Explanatory Memorandum, p. 1.

working arrangements and, subsequently, increase the take-up by fathers of such amenities<sup>81</sup>.

As for its legal basis, the proposal is based on Article 153(1)(i) and 153(2)(b) TFEU, and it respects the principles of proportionality and subsidiarity<sup>82</sup>. The Commission justifies subsidiarity by declaring that since there is already a EU legislative framework in place on work-life policies, including Council Directive 2010/18/EU, which the present proposal intends to repeal, there is already a common agreement that EU-level action in this area is necessary<sup>83</sup>. Because of the differences between Member States, there are uneven rights, unequal protection of EU citizens and differences in the functioning of labour market; therefore, the modernisation of the existing legal framework can only be achieved at EU level, hence the principle of subsidiarity is fulfilled<sup>84</sup>. As for proportionality, the Commission reminds that the chosen legal instrument, a minimum-standards Directive, ensures that the legal intervention will be kept to the minimum, ensuring that those Member States who have more favourable provisions can keep them<sup>85</sup>.

The Commission also ensures that the proposal will establish minimum requirements to be gradually implemented by Member States<sup>86</sup>. The new Directive will repeal the 2010's Parental Leave Directive in its totality, replacing it with new provisions, but preserving the acquired rights and obligations, since the proposal does not intend to diminish previously existing rights in the EU's system<sup>87</sup>. As for the rest of Directives, the present proposal will work alongside with them, but will not repeal them.

The legislative procedure in use to adopt the present proposal is the co-decision procedure. The proposal is currently being discussed in the Council of the European Union; on 7<sup>th</sup> July 2017, Denmark submitted its opinion to the Council, with a rather critical approach to the Directive<sup>88</sup>.

### 3.1.3. New rights

First, this proposal does not intend to diminish the level of protection already accomplished in the EU *acquis*, but wants to preserve the existing rights granted under

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<sup>81</sup> Ibidem: p. 1-2.

<sup>82</sup> Ibidem: p. 5.

<sup>83</sup> Ibidem: p. 5-6.

<sup>84</sup> Ibidem: p. 6.

<sup>85</sup> Ibidem.

<sup>86</sup> Ibidem: p. 5-7.

<sup>87</sup> Ibidem: p. 4.

<sup>88</sup> Council of the European Union, Interinstitutional File 2017/0085 (COD), Brussels, 7 July 2017 (OR. en, da) 11105/17.

European Law with an improved new level of protection. Also, it introduces new rights for both men and women, thus non-discrimination and gender equality are promoted<sup>89</sup>. Therefore, in this sub-point, we will go through the new rights additions to the ‘European family leave legal system’.

The first and by far the most important inclusion to the EU legal framework on the matter is the inclusion of a provision on paternity leave. Article 4 of the Proposal compels the Member States to provide in their laws with a minimum of ten days paternity leave, irrespective of marital status or family status as defined in national law. Therefore, the conditions to take paternity leave are the birth of a child, and recognize the child as their own. The Commission considers that “*such provision will help address the problem of unequal possibilities for women and men to take leave around the time of birth, and to encourage men to bear a more equal share of caring responsibilities for the early creation of a bond between fathers and their children*”<sup>90</sup>. In addition, to avoid any discrimination between married and unmarried couples and between heterosexual and homosexual couples, the new provision does not refer to national law to establish the personal conditions to get paternity leave, but prevents possible issues on the matter by writing the second part of the Article.

As for parental leave, the new Directive would revoke the Framework Agreement on Parental Leave. Therefore, Article 5 of the proposal would be the only specific legal provision on the matter. This article provides that parental leave is a four-months leave right to be taken before the child reaches at least twelve years old; in this sense, it has not changed from the previous legislation. However, these four months should always be on a non-transferable basis; thus, Member States could render transferable leave, but the minimum of four months of such leave should always be on a non-transferable basis. Moreover, this new article provides with flexibility arrangements to fulfil parental leave: having different flexible scenarios, such as part-time work, leave in blocks separated by periods of work, or others, are likely to encourage more parents, especially fathers, to take it. Such flexible arrangements are broadly developed in Article 9 of the proposal.

When it comes to Member States, Article 5 leaves them to decide on the length of the notice period to be given by the worker, on whether or not the right to parental leave may be subject to a period of work qualification of time qualification, not exceeding one year of service, and defining the circumstances in which the employer may be allowed to postpone the granting of parental leave by a reasonable time<sup>91</sup>. Such issues were

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<sup>89</sup> Explanatory Memorandum, p. 1.

<sup>90</sup> Ibidem, p. 11.

<sup>91</sup> Ibidem, p. 12.

addressed in the case law, and the Court of Justice filtered the issues with the proportionality test, with the result that now such issues will be codified. Finally, Member States can also assess the conditions to access and detail arrangements of parental leave in specific situations such as disability, long-term sickness or adoption of the child.

Articles 8 and 9 add other important provisions, which were nowhere to be found in the previous legal framework. First, Article 8 binds Member States to ensure that workers that take paternity or parental leave receive a payment or an adequate allowance at least equivalent to what the worker concerned would receive in case of sick leave. There are many Member States that do not pay the leave; therefore, it has been a discouragement for parents to take it, hence, a provision that ensures a minimum pay equivalent to sick leave, may have a reversal positive impact. On the other hand, Article 9 presents the conditions to take flexible working arrangements. Thereof, the Commission in its Memorandum introduces the reduction in working hours, flexible work schedules and remote working possibilities, as means to carry out parental leave.

Finally, the proposal keeps protecting the employment rights, on Article 10, and the protection from dismissal and burden of proof, in Article 12, which now is extended to paternity leave and parental leave's users. Also, Article 11 on non-discrimination is added to this proposal in order to transfer the protection against discrimination provided in the Recast Directive so that there is no need to refer to the latter Directive.<sup>92</sup>

### 3.2. *Facing the Member States' critiques*

Equality between men and women is a fundamental principle of the Union, and Article 3 of the TEU mandates the EU to promote it in its laws. Work-life balance policies are considered by the EU as one of the instruments to pursue this gender equality aim<sup>93</sup>. Nevertheless, these policies, which translate into Directives, set only a certain amount of minimum requirements that could be later enlarge by Member States in their national law but at their own discretion.

A major clash between the EU legislator and Member States comes when the Directive of minimums requires stricter measures to be taken, especially when such measures have a considerable economic impact, since the latter may see a conflict on the principle of subsidiarity. Many Member States,<sup>94</sup> as well as employers' organisations<sup>95</sup>, believe

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<sup>92</sup> Other additions to the framework, such as the carers' leave, have been omitted of analysis for the purpose of cohesion of the present thesis, but nonetheless are great improvements for its users.

<sup>93</sup> Work-life balance proposal, fifth recital.

<sup>94</sup> For example, Denmark in the Council has expressed its discrepancy with the proposal, but is willing to initiate negotiations. The Danish Parliament before the President of the Council of the European Union,

that the EU is too intrusive when trying to legislate on parental leave, as they may even consider it a national matter. However, it cannot be denied that the EU's action "*has had a strong added value*"<sup>96</sup> in addressing women's rights at the European level, as well as many other employment issues. The EU has inspired for legal change in its Member States, as well as it has accomplished that every Member State guarantees a framework on maternity and parental leave<sup>97</sup>. Needless to say, adding paternity leave to the mix, even when Member States could firstly implement it with rejection, may cause a positive change of mind in national legislators on the matter.

Furthermore, without a European legal standard, variations between Member States with regard to length and the generosity of the conditions could result in an unbalanced level of rights, an unequal protection for EU citizens across the EU and differences in the functioning of the internal market<sup>98</sup>. For instance, cross-border workers may be inclined to take a job in a certain country because they offer better conditions for parental leave than in another, whereas with a European framework, such risk would not exist. Also, it is only the EU who has the means to ensure the sufficient equivalent progress in all Member States, since Member States on their own may hesitate to correct small and medium businesses that do not provide their workers with leaves, since legislating on it may put them in a worse position than other Member States that do not provide parental leave at all in its legislation. The EU's intervention would also help internal EU trade between companies of Member States if it mitigates such concerns<sup>99</sup>.

Finally, it is fundamental to highlight the importance of the aim of the EU to protect women's rights and gender equality in the labour market. As a result of the recent crisis, some Member States have opted to not prioritize for social rights such as parental leave. With a consistent EU legal framework, the underrepresentation of women in the labour market has a chance to be reduced, which in the long term has a better economical outcome to all European market; and of course, a low labour market participation of women hinders the EU's goals in relation to gender equality, which implies failing, in the last instance, to Member States and its citizens.

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Opinion on the application of the principles of subsidiarity and proportionality. Interinstitutional File: 2017/0085 (COD), Brussels, 7 July 2017, 11105/17.

<sup>95</sup> Commission staff working document, Executive summary of the impact assessment accompanying the document of the Proposal for a Directive on work-life balance for parents and carers. Brussels, 26.4.2017, SWD(2017) 203 final. COM(2017) 253 final, SWD(2017) 202 final, p. 4; BRUNSDEN, Jim for Financial Times: Employers attack EU's parental leave reforms. [April 26, 2017]; COOPER, Harry for POLITICO: Parental leave plan divides business and trade unions [April 25, 2017].

<sup>96</sup> *Ibidem*, p. 3.

<sup>97</sup> *Ibidem*.

<sup>98</sup> *Ibidem*.

<sup>99</sup> *Id*: Impact assessment, p. 3.

### 3.3. *Potential issues derived from the new Proposal*

#### 3.3.1. Remuneration of the leave

One of the main introductions in the new Directive proposal is the fair payment of parental leave, which at least should equal to the one of sick leave.<sup>100</sup> It has been proven that the lack of paid paternity and parental leave in many Member States contributes to the low take-up of such leave by fathers, hence it reinforces gender differences between work and care, and perpetuates the gender pay gap and the impending complete drop out of many working mothers<sup>101</sup>. Therefore, a pay is in need.

Article 8 does not provide who should pay for this leave, whatsoever. Payment of the leave varies from one Member State to the other, for instance, there are Member States, which the remuneration depends completely on Social Security or other public funds, whereas some countries it is paid by the companies, or companies combined with the State, or simply the leave is not remunerated. Member States do not seem to approve this new addition to the previous legal framework.

To this extent, the Commission states that some options may have higher impacts on national budgets than others; when the Member State chooses that it has to be the central or federal administrations that take care of it, the new obligation of retribution will cause some costs for the administrations. However, because paid parental leave will have a positive impact in female employment, consequently there will be an increase in the tax revenue, real incomes and consumption, and in the overall GDP<sup>102</sup>; hence, on the long term, administrations will not see paid leave as a financial burden, but as an investment.

On the other hand, the Commission does not provide with an exemption to small, medium and micro enterprises to pay parental leave, since it does not consider that there would be a disproportionate effect on the performance of such companies because of it<sup>103</sup>.

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<sup>100</sup> There is a risk on equating the position of pregnant women, as discussed in the *Webb* case, and by analogy to parental and paternity leaves users, to sick workers, since risks making these workers, mostly women, look weaker; to this extent, BEVERIDGE, and Nott, "Women, Wealth and the Single Market", *Making Ourselves Heard*, Feminist Legal Research Unit, Faculty of Law, University of Liverpool, WP no. 3 [1995].

<sup>101</sup> Id: Work-life balance proposal, recitals seven and eight.

<sup>102</sup> Id: Impact assessment, p. 5.

<sup>103</sup> Ibidem.

### 3.3.2. Paternity leave: optional or mandatory?

If the Proposal is finally approved, remuneration of paternity and parental leave will have to be granted. However, nothing is said about the leaves being binding or not. On parental leave, it is up to the parents to decide going off from work for a while in order to raise their kids. Although it has been proven that more contact with the dad, newborns will have better learning abilities<sup>104</sup>, it does not entail that there are other ways to build up their family; therefore, it should be left to the choice of the parents to take it or not.

Paternity leave differs with parental leave in its essence. Paternity leave is granted for reason of birth, and has to be taken around the due date. Its main goal is to encourage a more equal sharing of caring responsibilities between women and men, and to boost women's careers consequently; therefore, paternity leave does not revolve around the child, but the mother<sup>105</sup>. It is needed to share responsibilities with the mother, and do not perpetuate seeing women as the only carer of children and family. For this reason, paternity leave should be mandatory to make its effects.

Nonetheless, there is a debate whether if a ten days leave is enough to fulfil its aim. Objectively, if we compare the mandatory fourteen weeks of leave of the mother with a mandatory ten days leave of the father, bearing in mind that those days are meant to fulfil their responsibilities with the child, it still appears an unequal share of responsibilities. Indeed, the mother needs recovery after birth; hence, it would be understandable that, for physical constraints, mothers had a longer leave than fathers. But this would not serve as a justification in case of adoption, for example. Also, many women do not need such a long recovery period.

To my mind, this difference in the leave period is unjustified: ten days are not comparable to fourteen weeks; it is not sharing responsibilities to a long term. Therefore, I conclude that the ten days period provided in the new proposal is not enough to fulfil the aim of the Commission to guarantee an equal share of responsibilities between the parents, since it still perpetuates mothers to take care of the newborn mostly.

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<sup>104</sup> COOLS, Sara, Jon H. Fiva and Lars J. Kirkeboen, "The Effects of Paternity Leave on Parents and Children", *Centre of Equality, Social Organization and Performance at the Department of Economics*, University of Oslo, December 25, 2010.

<sup>105</sup> ALBRECHT, Clara, Anita Fichtl and Peter Redler, "Fathers in Charge? Parental Leave Policies for Fathers in Europe", *Institute DICE Report*, Volume 15, March 2017.

### 3.3.3. Self-employed parents

As a part of the EU legal framework on family leave, it was omitted from the first part of the present thesis the Self-employed Equality Directive<sup>106</sup>, for the purpose of briefing. Nevertheless, this Directive ensures in its Article 8 maternity leave for self-employed workers and female spouses depending on the self-employed worker, on a basis of sufficient maternity allowance, which would enable them to interrupt their occupational activity owing to pregnancy and motherhood for at least 14 weeks<sup>107</sup>. For the purpose of the new proposal, this benefit to the self-employed should be extended to paternity leave and parental leave users that are in the same position as the benefits of the Self-Employed Directive. However, it has not been said in its text, and could potentially develop into conflicts to be dealt in the Court of Justice.

### 3.3.4. Retaining the worker status

When it comes to cross-border workers, the issue of retaining the worker status has been addressed by the Court of Justice innumerable times. As for when the cross-border worker is pregnant, the core case of reference is the *Saint Prix* case<sup>108</sup>. The CJEU ruled that a EU migrant who gives up work or seeking work because of physical constraints of the late stages of pregnancy and the aftermath of childbirth could retain the status of ‘worker’, as long as they return to work or find another job within a reasonable time after the birth of the child<sup>109</sup>.

Even if it has been omitted or forgotten in the proposal’s text, the ‘*Saint Prix* rule’ should also be extended to paternity and parental leave users in my opinion. In the proposal, the legislators have enlarged protection against dismissal to fathers in paternity and parental leave, which before was only granted to pregnant workers. By analogy, although the Court in *Saint Prix* only referred to pregnant women, if the proposal is approved, users of paternity or parental leave should also be able to retain the worker status.

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<sup>106</sup> Directive 2010/41/EU of the European Parliament and of the Council, of 7 July 2010, on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC, OJ L 180 of 15.07.2010, p. 1.

<sup>107</sup> BURRI, Susanne and AUNE, Helga, “Discrimination in Relation to Part-Time and Fixed-term work”, *European Gender Equality Law Review*, no. 1, European Network of Legal Experts in the field of Gender Equality, 2014.

<sup>108</sup> *Jessy Saint Prix v Secretary of State for Work and Pensions*, Case C-507/12 [2014] ECLI:EU:C:2014:2007.

<sup>109</sup> European Developments, “Crumbs of Comfort: pregnancy and the status of ‘worker’ under EU Law’s free movement provisions”, *Industrial Law Journal*, Vol. 44, no. 1, March 2015, p. 134.

### 3.3.5. Brexit

Last 30<sup>th</sup> March 2017, UK's Government made public its White Paper<sup>110</sup> on exiting the European Union, where they officially presented the future content of the Great Repeal Bill. In point 1.13 on the document, the British government announces their intention into converting EU law into domestic law at the same time as repealing the European Communities Act from 1972, with which they acceded the EU. Point 2.4 reads that the Great Repeal Bill will convert directly applicable EU laws into UK Law, and point 2.5 announces that other types of EU law, such as Directives, will be preserved in the UK laws where they were transposed.

The UK admits in its White Paper that they will still apply EU law, converted into UK law, because there would be significant legislative gaps otherwise, and to fairness to businesses and individuals. However, in point 1.24.b it is stated that the UK Parliament will have competence to amend, repeal or improve any piece of EU law, once it has been brought into UK law, meaning that Directives such as the ones analysed could potentially be removed or reduced their effect and protection. About the proposal, if it is approved before the Great Repeal Act enters into force, it will count as *acquis communautaire*, hence the UK will have to transform it into British law<sup>111</sup>. As a whole, *Brexit* puts citizens' rights at risk, since in a hypothetical exit of the UK its Parliament could undo any Directives and eliminate conferred rights to working parents<sup>112</sup>.

## 4. Conclusions

Combining professional and family life seems to be permanently in the EU's agenda. Although for more than twenty years, the European institutions have come up with various Directives to address the gender employment gap, it has proven to be insufficient to solve the magnitude of the problem; hence, the Commission considered crucial to come up with a revision, especially concerning parental leave, and with the very need of introducing paternity leave, which had never been brought up until the new Proposal of a Directive on work-life balance.

The 2008's attempt to revise all family leave system got blocked for many years until the current proposal was presented. Again, the new proposal is facing many opponents, Member States and associations of employers amongst them. There is a considerable

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<sup>110</sup> United Kingdom. Legislating for the United Kingdom's withdrawal from the European Union, presented to Parliament by the Secretary for Exiting the European Union by Command of Her Majesty, [March 2017].

<sup>111</sup> GORDON, Richard Q. C. and MOFFAT, Rowena, "Brexit: The Immediate Legal Consequences", *The Constitution Society*, 2016, p. 48.

<sup>112</sup> WINTEMUTE, Robert, "Goodbye EU Anti-Discrimination Law? Hello Repeal of the Equality Act 2010?", *King's Law Journal*, vol. 27, n° 3, 2016, p. 387-397.

chance that, regarding its precedents, this proposal ends up being dismissed; alternatively, it could be that the proposal ends up approved but with its conferred rights could be reduced after Member States' deliberation in the Council<sup>113</sup>. Both of these possibilities are discouraging for the sake of a failing system such as the current European family leave policies.

It cannot be denied that the Proposal focuses on achieving work-life balance and has a clear intention to promote women's equality in the employment sector. It intends to introduce consistent changes in the current legal framework, such as paternity leave, which finally has a provision on itself; some flexibility work arrangements have been proposed; and parental leave will be non-transferable. Therefore there is an undeniably intention to promote fathers' involvement in the care of their children, which represents a considerable step forward from the previous Parental Leave Directive, and "*pretends to rebalance care responsibilities, which are disproportionately placed on women's shoulders*"<sup>114</sup>.

Nevertheless, its measures are not enough to achieve women's equality yet. For instance, it is really positive that the EU introduces paternity leave, since there are many Member States that do not offer it; however, its length is not yet comparable to maternity leave, and there is no reference to whether fathers are obliged to take it or not. Furthermore, whereas it is positive to introduce a clause that prompts Member States to fairly remunerate paternity and parental leave users, the article is still unclear, and may result into accentuating differences between Member States on the matter. Finally, maternity leave provisions are not amended, even when some demanded that the period of protection from dismissal should be extended, as well as pay<sup>115</sup>, and regardless such changes were contemplated in the 2008 withdrew Commission's proposal.

The impending risk that the proposal is dismissed or cut, or that it ends up not fulfilling its aim, makes me wonder whether harmonisation would not be a better solution. Although the willingness of the Member States to collaborate is currently at stake, perhaps the fact that all EU family leave rules have always been expressed in Directives of minimums has consequently provoke that each Member State develops different systems that nowadays look irreconcilable. Indeed, there are many political and financial matters that differ from one country to another; yet, the internal market and the free movement of workers provisions need to offer rules on maternity, paternity and parental leave to pursue equality between working parents and between women and men

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<sup>113</sup> JANTA, Barbara, "Why Europe's Work-Life Balance Proposal Could Be in Limbo for Years", *RAND Corporation*, 2017.

<sup>114</sup> European Women's Lobby statement on the Commission's Work-Life-Balance Directive, April 26, 2017.

<sup>115</sup> *Ibidem*.

all around the EU, since it is an important part of the work if a person wants to leave to take care of his or her family. Differences between Member States should be off the table for the purpose of the European market.

As in all, having women being deprived from work and not helping them to access the labour market with the same conditions as men is actually harming the European market, since this generates unemployment. If we battle against the gender employment gap, we are actually favouring the labour market, and that only translates to a better European economy. Moreover, defying the gender gap does not have to be seen as a purely economical matter: it is also a fundamental rights issue. Gender equality is a EU objective, as well as a constitutional right in every single Member State. Therefore, gender equality has to be achieved: why not starting by sharing household responsibilities?