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Promoting substantive gender equality through the law on pregnancy discrimination, maternity and parental leave

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Introduction

EU sex discrimination law has long recognised the link between sex and pregnancy discrimination. It considers pregnancy discrimination under the scope of direct sex discrimination and recognises the need for special protection in relation to pregnancy/maternity. Article 33(2) of the Charter of Fundamental Rights of the European Union recognises a general right to reconcile family and professional life. It also envisages protection while on maternity leave, a right to paid maternity leave and to parental leave in addition to the non-discrimination and gender equality provisions in Article 21 and 23. Paternity leave is not mentioned and the Article's focus on maternity leave does not recognise other less detrimental ways that could enable families and mothers to reconcile family and work life.¹ The Pregnancy Directive provides minimum special protections to pregnant women and women who have recently given birth.² Additionally, EU law also provides minimum parental-leave rights available to both parents and the recently proposed Directive on the work-life balance aims to extend these rights and encourage fathers to take longer periods of leave.³ Member States often go beyond these minimum protections and provide further rights. Nevertheless, pregnancy discrimination continues to be one of the most common and well-reported forms of discrimination within Member States.⁴ Women who are pregnant or have recently given birth experience detrimental treatment, loss of opportunities and demotion.

The causes for this are complex and multifaceted. Inter alia, gender expectations and stereotypes may motivate employers to consider pregnant women and women who have recently given birth as less attractive employees, as they are expected to prioritise childcare over work responsibilities and to be less flexible than other employees, once they return from their (often relatively short) maternity leave. Such gender expectations in relation to pregnancy and childcare disadvantage all women, even if they are not or will never be pregnant or give birth because they are either expected to become mothers or have the typical traits of a carer. This article argues that rights that exclusively focus on pregnancy and maternity fail to tackle these gender expectations and stereotypes. They

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¹ Schiek, D. (2014), 'Article 23: Equality between women and men' in: Peers, S., Hervey, T, Kenner, K. and Ward, A. (eds.), *The EU Charter of Fundamental Rights: A Commentary*, Oxford, Hart Publishing, pp. 633, 639.

² Court of Justice of the European Union (CJEU), 177/88, *Dekker v Stichting Vormingscentrum voor Jong Volwassenen*, 8 November 1990; 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 (*Pregnancy Directive*), OJ L 348, 28.11.1992, pp. 1-7 as amended by Directive 2007/30/EC, OJ L 161, 27.06.2007, pp. 21-24.

³ 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 (*Parental Leave Directive*), OJ L 68, 18.03.2010, pp. 13-20; Proposal for a Directive on work-life balance for parents and carers and repealing council Directive 2010/18/EC, COM(2017) 253 final, 26.4.2017, 2017/085 (COD).

⁴ See for example Equality and Human Rights Commission (2017), *Pregnancy and maternity discrimination research findings*, available at: <https://www.equalityhumanrights.com/en/managing-pregnancy-and-maternity-workplace/pregnancy-and-maternity-discrimination-research-findings>, accessed 02 May 2018; College voor de Rechten van de mens (2016), *Is het nu beter bevallen?*, available at: [file:///C:/Users/jm15834/Chrome%20Local%20Downloads/Onderzoeksrapport%20-%20Is%20het%20nu%20beter%20bevallen .pdf](file:///C:/Users/jm15834/Chrome%20Local%20Downloads/Onderzoeksrapport%20-%20Is%20het%20nu%20beter%20bevallen.pdf).

are thus unlikely to prevent pregnancy and maternity discrimination and struggle to advance gender equality. Accordingly, this article analyses how broader rights to parental leave can effectively support substantive gender equality and tackle pregnancy discrimination within the European legal framework. It does so by drawing on recent developments within the CJEU case law and two Member States, the UK and Germany, that signal a shift of paradigm by focusing more directly on fathers' involvement in childcare and paternity leave. These laws potentially take a more holistic approach towards challenging gender expectations and fostering substantive gender equality.

To explore how family-oriented provisions can support substantive gender equality, this article is structured in three parts. Firstly, it will discuss how the concept of substantive gender equality can help theorising pregnancy and maternity discrimination. It will then consider the EU legal framework and the CJEU approach towards sex discrimination in relation to pregnancy and rights associated with maternity leave and parental leave. Finally, it will discuss recent developments in the UK and Germany to illustrate the progressive potential and pitfalls of different leave provisions in the light of substantive gender equality and the EU legal framework. This article will conclude by identifying how the EU legal framework could support Member States' leave provisions that tackle gender expectations in relation to pregnancy and maternity more effectively.

Substantive gender equality

The CJEU has repeatedly held that EU non-discrimination law aims at fostering substantive rather than formal gender equality.⁵ Substantive equality goes beyond procedural equal treatment and focuses on outcomes, equal opportunities, and structural or social inequality that places formally equal people in different situations within society and may hinder them to compete on an equal footing. Accordingly, it focuses on the effects of treatment and suggests a group-sensitive and asymmetrical approach.⁶ The multi-dimensional nature of the concept of equality means that its precise scope is difficult to ascertain. Fredman identifies four overlapping dimensions: the redistributive, the transformative, the participative, and the recognition dimension.⁷ Most important for the discussion below is that the redistribution dimension targets disadvantages of certain groups, whether material or structural. This may include positive actions but also the general removal of obstacles. The transformative dimension aims at abolishing structural disadvantages and providing accommodation of different needs.⁸

Within the feminist critique, the 'male norm' has often been referred to as a standard that structurally disadvantages women within employment. While male and female workers are often confronted with the same set of expectations in terms of flexibility, availability and commitment, these expectations are not always gender-neutral but rather based on the traditional male gender role as breadwinner with a domestic support system that takes care of children and household. Men are often more able to comply with these expectations if traditional gender roles persist within society. Formal equality ignores that women will only have the right to equal treatment once they behave and organise their life like men,⁹ which is something that most women will struggle to do as long as they continue to carry the majority of domestic or childcare responsibilities. There is thus a need to link inequality and difference, by recognising diversity, dismissing the comparison approach, and

⁵ See for example, Court of Justice of the European Union (CJEU), C-284/02 *Land Brandenburg v Ursula Sass*, 18 November 2004, paragraph 34; Mulder, J. (2017) *EU Non-Discrimination Law in the Courts*, Oxford, Hart Publishing, Chapter 2.

⁶ Schiek, D. (2002), 'Elements of a New Framework for the Principle of Equal Treatment of Persons in EC Law' *European Law Journal*, vol. 8, issue 2, pp. 290-314.

⁷ Fredman, S. (2011), *Discrimination Law*, Oxford, OUP, 2nd edn, pp. 25-33.

⁸ *Ibid*, 11, 30.

⁹ MacKinnon, C. (1987), *Feminism Unmodified*, London, Harvard University Press, pp. 72-73.

highlighting existing social, economic, and biological differences and structural inequality.¹⁰

Women's reproductive capacities and their medical needs before and after they give birth makes it extremely difficult for women to comply with the male standard as pregnancy will include absences and potential temporary incapacity to work. Women are thus in a different situation while pregnant. EU law has responded to this in several ways. It has banned pregnancy discrimination but also provided special rights to pregnant workers and those who have recently given birth. Finding the right balance has been a challenge, as laws recognising women's biological reproductive difference have arguably turned them into less attractive employees and job applicants. Moreover, pregnancy can trigger socially constructed gender differences in addition to the biological and reproductive ones. After all, pregnancies do not produce disadvantages simply because of the relatively short period of time women will be absent from work, but also because it is often assumed or observed that women are more likely to carry the primary burden of childcare, to reduce their working time and to become less committed employees as they prioritise domestic and childcare responsibilities.¹¹ Women's common experiences of detrimental treatment once they return from maternity leave and the rather stubborn 'motherhood penalty' demonstrate that disadvantages often are not simply linked to maternity but to motherhood in more general terms.¹² Protective measures can maintain, further, or establish such stereotypes about women and female gender roles that go beyond the medical needs before and after birth, especially if they encourage women to organise their life according to traditional gender roles. Once accepted, such stereotypes disadvantage all women as they all carry the same risk of motherhood and female gender roles, even if they are not and will never be pregnant. To separate the burdens of parenthood from pregnancy thus seems crucial for the fostering of substantive gender equality, as it tackles an influential gender stereotype that disadvantages women at the workplace.¹³

A stereotype is 'a generalized view or preconception of attributes or characteristics possessed by, or the roles that should be performed by, members of a particular group'.¹⁴ It can be negative or positive albeit patronising.¹⁵ While stereotypes often impose certain behaviour upon people by indicating what they should do, how they should look, and what their role should be (prescriptive), stereotypes can also describe facts in a sense that there is often some statistical or empirical truth to them (descriptive).¹⁶ This means that there is a circular link between the different dimensions of the stereotype. The prescriptive nature of stereotypes may mean that there are social, cultural and economic pressures for women to accept most caring responsibilities. However, women also de facto take up more of these responsibilities and choose to do so despite the professional disadvantages associated with that choice. There is thus a descriptive basis for the motherhood

¹⁰ MacKinnon, C. (1991), 'Difference and Dominance' in: Bartlett, K. and Kennedy, R. (eds.), *Feminist Legal Theory*, Oxford, Westview, pp. 81-93.

¹¹ Ridgeway, C. and Correll, S. (2004), 'Unpacking the Gender System' (2004) 18(4) *Gender Society*, vol 18, issue 4, pp. 510, 524-526.

¹² Kahn, J., García-Manglano, J. and Bianchi, S. (2014), 'The Motherhood Penalty at Midlife: Long-Term Effects of Children on Women's Careers' *Journal of Marriage and Family*, vol. 76, issue 1, pp. 56-72.

¹³ Fredman, S. (2014), 'Reversing roles: bringing men into the frame' *International Journal of Law in Context* vol. 10, issue 4, pp. 442-459.

¹⁴ Cook, R. and Cusack, S. (2010), *Gender Stereotypes: Transnational Legal Perspectives*, Philadelphia, University of Pennsylvania Press, p. 9.

¹⁵ Brems, E. and Timmer, A. (2016), 'Introduction' in: Brems, E. and Timmer, A (eds) *Stereotypes and Human Rights Law*, Cambridge, Intersentia, pp. 1, 3.

¹⁶ Timmer, A (2011), 'Toward an Anti-Stereotyping Approach for the European Court of Human Rights' *Human Rights Law Review*, vol 11, issue 2, pp. 707-738; Timmer, A (2015), 'Judging Stereotypes' *The American Journal of Comparative Law* vol 63, issue 1, 239-284; Peroni, L and Timmer, A (2016), 'Gender Stereotyping in Domestic Violence Cases' in: Brems, E and Timmer, A (eds.) *Stereotypes and Human Rights Law*, Cambridge, Intersentia, p. 39, 41.

stereotype.¹⁷ Leave provisions can affect both aspects. They may encourage women to self-select into a less competitive environment, so they can prioritise childcare (supply) and employers may conceive them as less desirable employees (demand).¹⁸ While emancipation seems impossible without autonomy,¹⁹ the choices made need to be understood in this context. Women may choose to take long-term parental leave or to work part-time. However, they make these choices within a specific economic, cultural and social context of structural inequality. Disadvantages connected to these choices thus need to be tackled even if the women choose these circumstances.²⁰ Similarly, fathers may have more freedom arranging their involvement with the children's upbringing as they wish. However, they may also face additional social and economic pressures to forgo any rights available to them. Compulsory types of leave may counteract these social pressures that limit fathers' and mothers' choices, despite their potential paternalistic nature.²¹

To foster substantive equality, law prohibiting sex discrimination and providing special rights to young parents thus need to be a multi-edged sword. It needs to protect women from discrimination based on pregnancy. It needs to provide accommodation to enable absences due to pregnancy and subsequent leave. It needs to provide further protection from disadvantages that are linked to choices made in the existing circumstances. Finally, it needs to challenge these circumstances and prevent re-enforcement of descriptive stereotypes. The challenge is to simultaneously tackle the prescriptive nature of some motherhood stereotypes, while also recognising the descriptive reality that disadvantages women within the labour market.

EU legal framework

The CJEU's approach towards pregnancy discrimination often serves as an example to highlight the substantive value of EU non-discrimination law. Since only biological females can become pregnant,²² the CJEU held in *Dekker* that pregnancy discrimination constitutes direct sex discrimination.²³ Women shall thus not be disadvantaged because of their pregnancy, even if there is no comparator and they are in a different situation than men and women who are not or will never be pregnant. The Court thus recognises the link between pregnancy and the biological female sex, although it has not taken its finding to its logical conclusion, as it has excluded women who suffer pregnancy-related illnesses after maternity leave from the protection although only biological females can have pregnancy-related illnesses prior or post pregnancy.²⁴ Nevertheless, the Court has

¹⁷ Cook, R. and Cusack, S. (2010), *Gender Stereotypes: Transnational Legal Perspectives*, Philadelphia, University of Pennsylvania Press, p. 14.

¹⁸ Gornick, J (2015), 'Leaves policies in challenging times: what have we learned? What lies ahead?' *Community, Work & Family*, vol 18, no. 2, p. 242.

¹⁹ Benhabib, S. (1992), *Situating the Self*, Cambridge, Political Press, p. 16; Mullally, S. (2006), *Gender, Culture and Human Rights*, Oxford, Hart Publishing, p. 20.

²⁰ Fredman, S. (2011), *Discrimination Law*, Oxford, OUP, 2nd edn, p. 28.

²¹ Fredman, S. (2014), 'Reversing roles: bringing men into the frame' *International Journal of Law in Context* vol. 10, issue 4, p. 442, 451; Suk, J. (2012), 'From Antidiscrimination to Equality: Stereotypes and the Life Cycle in the United States and Europe' *American Journal of Comparative Law* vol. 60, issue 1, pp. 75, 79.

²² In the original ruling the CJEU refers to 'women' rather than 'biological females'. It is possible for transmen to become pregnant if they have changed their legal sex from female to male without prior sterilisation. However, they still need to be biologically female, i.e. they need to have female reproductive organs. Subsequent case law on surrogacies (e.g. C-363/12 *Z. v A Government department*, 18 March 2014) has clarified that the CJEU indeed focuses on the reproductive capacity rather than legal sex or female gender identity in relation to pregnancy discrimination.

²³ Court of Justice of the European Union (CJEU), 177/88, *Dekker v Stichting Vormingscentrum voor Jong Volwassenen*, 8 November 1990.

²⁴ Court of Justice of the European Union (CJEU), C-191/03, *North Western Health Board v Margaret McKenna*, 8 September 2005; Mulder, J. (2015), 'Pregnancy Discrimination in the National Courts: Is There a Common EU Framework?' *International Journal of Comparative Labour Law*, vol 31, pp. 67-90.

generally rejected detrimental treatment that is based on the worker's pregnancy and viewed comparisons with men who were ill with scepticism.²⁵

Today, Article 2(2)(c) Recast Directive also prohibits less favourable treatment of women in relation to pregnancy and maternity, and Article 15 Recast Directive protects women's right to return to their job or an equivalent post at the end of their maternity leave.²⁶ Article 16 provides similar protection to those who are entitled to paternity or adoption leave. Additionally, the Pregnancy Directive provides protections and entitlements for pregnant workers and those that have recently given birth. Most notably, women are entitled to at least 14 weeks of maternity leave, two of which are compulsory (Article 8); women are protected from dismissal during pregnancy leave and maternity leave, save exceptional circumstances (Article 10);²⁷ and women are entitled to a payment during the leave (Article 11) that is at least comparable to statutory sickness payments.²⁸ Additionally, the Parental Leave Directive provides minimum rights of leave to fathers and mothers with at least one month of leave being provided on a non-transferable basis. Clause 2(2) explicitly aims to encourage a more equal take-up of the leave by both parents. The Commission's proposal on work-life balance for parents and carers suggests implementing measures that further encourage fathers to take up leave. The proposal *inter alia* suggests a right to ten days of paternity leave (Article 4), a right to individual non-transferable parental leave of four months that can be taken on a flexible (e.g. part-time) basis (Article 5), and a right to adequate payment for the duration of the leave (Article 8).

EU law thus takes a tri-layered approach. It prohibits pregnancy discrimination, it provides special protection in relation to pregnancy and maternity, and it provides leave for both parents. Unfortunately, it seems that the special rights often overshadow the equal access approach. The CJEU consistently justifies the right to maternity leave with reference to the women's biological condition and their special relationship with the child.²⁹ While there may be a special relationship linked with women's biological conditions in relation to breastfeeding, such general statement reinforces stereotypes as it prioritises women's caring responsibility and draws a direct distinction between her role as mother and the father's role.³⁰ Moreover, while the CJEU subsumes pregnancy under sex discrimination, it has often refused to challenge the traditional division of labour.³¹ Despite focusing on disadvantages, EU case law on pregnancy thus often comes across as special protection provided to women in a fragile state. Protection that can be withdrawn once she returns to work.³²

It has been suggested that recent case law, in addition to changed policy aims, is more sensitive to gender stereotypes and rejects the traditional division of labour as a

²⁵ Court of Justice of the European Union (CJEU), C-32/93, *Webb v EMO Air Cargo*, 14 July 1994.

²⁶ Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (*Recast Directive*), OJ L 204, 26.7.2006, pp. 23-36.

²⁷ Court of Justice of the European Union (CJEU), *Jessica Porras Guisado v Bankia SA and Others*, 22 February 2018.

²⁸ Court of Justice of the European Union (CJEU), C-411/96, *Margaret Boyle and Others v Equal Opportunities Commission*, 27 October 1998.

²⁹ Court of Justice of the European Union (CJEU), 184/83, *Hofmann v Barmer Ersatzkasse*, 12 July 1984, paragraph 25; C-116/06, *Sari Kiiski v Tampereen kaupunki*, 20 September 2007, paragraph 46; C-5/12, *Marc Betriu Montull v Instituto Nacional de la Seguridad Social*, 19 September 2013, paragraph 50.

³⁰ Timmer, A. (2016), 'Gender Stereotypes in the Case Law of the EU Court of Justice' *European Equality Law Review*, issue 1, pp. 37, 40; McGlynn, C., 'Work, Family, and Parenthood' in: Conaghan, J. and Rittich, K. (eds.), *Labour Law, Work, and Family*, Oxford, OUP, pp. 217-236.

³¹ Court of Justice of the European Union (CJEU), 170/84, *Bilka v Weber von Hartz*, 13 May 1986, paragraph 43.

³² Court of Justice of the European Union (CJEU), C-191/03, *North Western Health Board v Margaret McKenna*, 8 September 2005.

justification for excluding fathers from certain benefits in relation to childcare.³³ *Roca Álvarez* can serve as an example of this development. The CJEU held that the so-called breastfeeding leave was sufficiently separated from the women's biological ability to breastfeed and primarily focused on childcare. Since fathers and mothers are equally able to take care of their children, they had to have equal access to the leave. The scheme was discriminatory because fathers had no independent right to the leave but depended on a maternal transfer. Explicitly, the CJEU recognised that the exclusion of men from the leave may perpetuate traditional gender roles.³⁴ Just as in the decision in *Griesmar*,³⁵ the Court drew a distinction between special protections related to the women's biological state (including disadvantages linked to maternity leave) and measures that are designed to protect women in their role as parents. Since fathers are parents too, the latter constitutes sex discrimination. The reasoning has been confirmed in subsequent case law.³⁶

Equal access to parental leave can challenge gender stereotypes as it encourages fathers to take up equal parental responsibilities and thus separates the risks related to parenthood from the female sex.³⁷ However, the approach also bears some dangers. Firstly, the anti-stereotyping approach shows limited awareness of the de facto situation of women, as it partly remains within the logic of formal equality. Predominantly, it challenges distinctions between men and women based on stereotypical assumptions regarding their living arrangements. In the same vein, the CJEU has challenged limited access to survivor pensions for men unless their wives were the main breadwinner,³⁸ looser age requirements to enter the civil service for unmarried widows,³⁹ and flexible retirement schemes for women whose husbands have become disabled.⁴⁰ However, it does not consider the potential descriptive truth within the stereotype and the pressures that create it.⁴¹ Thus, it opens access to these benefits to men who are, at least statistically, likely to be in a much better position than women and thus benefits them further. This may not be too problematic as long as it does not mean a reduction of rights for women. However, in the long run, there is a risk that their entitlements are reduced or means-tested. In that light, it may not be too surprising that some women's groups in the UK rejected legal proposals to allow fathers equal access to shared parental leave.⁴² The argument would be that mothers carry out most of the childcare responsibilities, whether fathers have access to leave or not. A reduction of their rights to leave for the benefit of the father thus potentially leaves women worse off, as they lose their hard-won rights and face difficulties to remain employed. The CJEU's assessment of motherhood via surrogacy arrangements demonstrates this conundrum. Formally, the Court is correct to consider the comparability

³³ Caracciolo di Torella, E. (2014), 'Brave New Fathers for a Brave New World? Fathers as Caregivers in an Evolving European Union' *European Law Journal*, vol. 20, issue 1, pp. 88–106.

³⁴ Court of Justice of the European Union (CJEU), C-104/09, *Pedro Manuel Roca Álvarez v Sesa Start España ETT SA*, 30 September 2010, paragraph 36.

³⁵ Court of Justice of the European Union (CJEU), C-266/99, *Joseph Griesmar v Ministre de l'Économie, des Finances et de l'Industrie*, 29 November 2001, paragraph 44. Masselot, A. (2001), 'Pregnancy, maternity and the organisation of family life: an attempt to classify the case law of the Court of Justice' *European Law Review*, vol. 26, issue 3, pp. 239, 245.

³⁶ Court of Justice of the European Union (CJEU), C-222/14, *Konstantinos Maïstrellis v Ypourgos Dikaiosynis*, 16 July 2015.

³⁷ Timmer, A (2016), 'Gender Stereotyping in the Case Law of the EU Court of Justice' *European Equality Law Review*, issue 1, pp. 37-46.

³⁸ Court of Justice of the European Union (CJEU), C- 379/99, *Barmer Ersatzkasse v Hans Menauer*, 9 October 2001.

³⁹ Court of Justice of the European Union (CJEU), C-319/03, *Serge Briheche v Ministre de l'Intérieur*, 30 September 2004.

⁴⁰ Court of Justice of the European Union (CJEU), C-206/00, *Henri Mouflin v Recteur de l'académie de Reims*, 13 December 2001.

⁴¹ Court of Justice of the European Union (CJEU), C-220/02, *Österreichischer Gewerkschaftsbund v Wirtschaftskammer Österreich*, 8 June 2004, where the court dismissed comparability of absence due to military service and parental leave and held that the former constituted a civic obligation while the latter was a voluntary act. It therefore did not matter that almost only women took parental leave.

⁴² Baird, M and O'Brien, M (2015), 'Dynamics of parental leave in Anglophone countries' *Community, Work & Family*, vol. 18, no. 2, pp. 198, 210-211.

of fathers and mothers who become parents via a surrogacy arrangement. After all, neither give birth to the child.⁴³ However, the absence of any paid leave entitlements is likely to affect mothers more severely than fathers. Rights to maternity leave can help women to stay in employment and thus advance gender equality. If fathers are less likely to take leave, it is not an accident that the above-discussed cases, in which the fathers seek access to leave, all deal with situations in which, due to the mother's lack of employment, the leave would have been lost without an independent right to leave for the father. It does not necessarily follow that the fathers picked up the role as primary carer for the duration of that leave. Not granting the leave to fathers at all may mean however that they are never able to take up that role, which will also disadvantage their female partners.⁴⁴

Secondly, the distinction between maternity leave and parental leave is not always clear. In *Sass*, the CJEU held that a leave must be categorised based on its purpose, not its length. If it aims at protecting 'the woman's biological condition and the special relationship between the woman and her child', it constitutes maternity leave and cannot result in less favourable treatment.⁴⁵ Following these guidelines, the German Federal Labour Court held that the 20 weeks of leave available in the former German Democratic Republic (Eastern Germany) did not constitute maternity leave because it was not granted to all birth mothers, but only if the child lived with the mother. It thus aimed at general childcare.⁴⁶ *Sass*' leave was thus retroactively reclassified as parental leave, which affected her seniority and consequently her pay.⁴⁷ However, in *Betriu Montull* the CJEU did consider a leave to fall within the notion of maternity leave because it fell within the 14-week period guaranteed by the Pregnancy Directive.⁴⁸ It did not matter that some of the leave was transferable to the father if both parents were employed and thus predominantly focused on childcare rather than the woman's biological condition or special relationship. Such uncertainty within the approach leaves great flexibility to the Member States regarding the available leaves and allows for the continued existence of leave provisions and measures that are based on stereotypical assumptions about mothers, fathers and gender roles.

National leave provisions encouraging fathers to care

The national approaches to leave have been the focus of much political and academic debate. Member States' approaches range from welfare systems that are based on the traditional breadwinner/housemaker distinction, to systems that aim at changing gender relations and actively encourage mothers to return to work.⁴⁹ This article is not the place to discuss these different approaches in detail. Instead, it will focus on two recent developments in the UK and Germany to illustrate the progressive potential and pitfalls of different leave provisions in the light of substantive gender equality and the EU legal framework.

⁴³ Court of Justice of the European Union (CJEU), C-167/12, *C. D. v S. T.*, 18 March 2014.

⁴⁴ See for example the discussion around C-476/99, *H. Lommers v Minister van Landbouw*, 19 March 2002; Fredman, S. (2014), 'Reversing roles: bringing men into the frame' *International Journal of Law in Context* vol. 10, issue 4, pp. 442, 452.

⁴⁵ Court of Justice of the European Union (CJEU), C-284/02 *Land Brandenburg v Ursula Sass*, 18 November 2004, paragraphs 34-39; C-294/04, *Carmen Sarkatzis Herrero v Instituto Madrileño de la Salud*, 16 February 2006.

⁴⁶ Germany, Federal Labour Court (*Bundesarbeitsgericht*), 6 AZR 108/01-B, 16 June 2005, paragraphs 20-24.

⁴⁷ Mulder, J. (2017) *EU Non-Discrimination Law in the Courts*, Oxford, Hart Publishing, pp. 183-185.

⁴⁸ Court of Justice of the European Union (CJEU), C-5/12, *Marc Betriu Montull v Instituto Nacional de la Seguridad Social*, 19 September 2013.

⁴⁹ Moss, P. and Deven, F. (eds.) (2015) 'Leave policies in challenging times (special issue)' *Community, Work & Family*, vol. 18, no. 2; Kamerman, S. and Moss, P. (eds.) (2009), *The Politics of Parental Leave Policies: Children, Parenting, Gender and the Labour Market*, Bristol, Policy Press.

The UK Shared Parental Leave

Section 17-18 of the UK Equality Act 2010 explicitly prohibits unfavourable treatment because of pregnancy without requiring a comparator and the maternity leave is generous compared to the EU minimum requirements, after it was extended to 12 months in 2003. Additionally, paternity leave (2 weeks), shared parental leave and parental leave provisions potentially enable fathers to be directly involved in the early upbringing of their children.⁵⁰ However, none of these types of leave are compulsory. This means that fathers have great flexibility regarding the way they organise their childcare involvement. The *shared parental leave* provisions introduced in 2015 allow parents to share 50 of the 52 weeks of maternity leave between them, depending on their choice.⁵¹ In principle, it thus enables some flexibility between parents and long and slow-term involvement of fathers.⁵² Fathers are therefore able to take up responsibilities related to everyday childcare that is long-term and slow instead of only being able to reserve some free time to ensure quality time with their children (e.g. during the weekend). However, fathers are not equally entitled to the leave. Rather, the *shared parental leave*, as well as its predecessor the 2010 *additional parental leave*, are based on maternal transfer.⁵³ Fathers' leave therefore depends on the mother's discretion and her formal entitlement.⁵⁴ Moreover, statutory pay is very low during the first 39 weeks of leave (£145.18 a week or 90% of your average weekly earnings). While statutory maternity pay is also low, the first six weeks are paid at a rate of 90 % of whatever is earned. The last 13 weeks are unpaid.⁵⁵ Employers may choose to top-up the statutory pay. However, according to the guidelines published by the Department for Business Innovation and Skills (the 'BIS guidelines'), the pay during shared parental leave 'may or may not be the same as the employer offers mothers on maternity leave'.⁵⁶ As opposed to maternity leave, the shared parental leave is also not a day-one right but requires 26 weeks of employment with the same employer by the fifteenth week before the expected day of birth.⁵⁷

Despite the positive recognition of fathers' role in children's upbringing and the need for equal parenting to tackle sex discrimination and the gender pay gap in the legislative process, the estimated uptake was small.⁵⁸ De facto, only 1 % of new parents took advantage of the scheme between 2015 and 2017.⁵⁹ The scheme therefore has limited impact on the traditional division of labour within families. The reasons for this are easily identifiable. Leaves based on maternal transfer are badly equipped to encourage fathers to take long-term leave, as the primary childcare responsibility remains with the mother.⁶⁰ Fathers have great flexibility. Consequently, they often view taking leave as *their choice*

⁵⁰ Part VIII Employment Rights Act 1996.

⁵¹ Shared Parental Leave Regulations 2014, 3(1).

⁵² Mitchell, G. (2015), 'Encouraging Fathers to Care: The Children and Family Act 2014 and Shared Parental Leave' *Industrial Law Journal*, vol. 44, issue 1, pp. 123, 126-128.

⁵³ Moss, P. and Deven, F. (2006), 'Leave Policies and Research' *Marriage & Family Review*, vol. 39, issue 3-4, pp. 255-285.

⁵⁴ The Maternity and Adoption Leave (Curtailment of Statutory Rights of Leave) Regulations 2014, 6(2); Shared Parental Leave Regulations 2014, 8(3)(iii).

⁵⁵ Statutory Shared Parental Pay Regulations 2014, 10(1).

⁵⁶ BIS guidance (2014), available online: <https://www.gov.uk/government/publications/shared-parental-leave-and-pay-employers-technical-guide>, paragraph 77.

⁵⁷ Shared Parental Leave Regulations 2014, 33(1).

⁵⁸ HM Government (2012), *Modern Workplaces - Government Response on Flexible Parental Leave and Impact Assessment*, available online: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/82969/12-1267-modern-workplaces-response-flexible-parental-leave.pdf.

⁵⁹ Financial Times (2017), *Few families opt for shared parental leave*, available online: <https://www.ft.com/content/2c4e539c-9a0d-11e7-a652-cde3f882dd7b>.

⁶⁰ Mitchell, G. (2015), 'Encouraging Fathers to Care: The Children and Family Act 2014 and Shared Parental Leave' *Industrial Law Journal*, vol. 44, issue 1, pp. 123, 129-131.

rather than their parental obligation.⁶¹ Flexibility can also impose additional external pressures not to take leave as it is not considered the norm.⁶² Fathers whose partners are not eligible for maternity leave are altogether excluded from the scheme and the eligibility requirement of 26 weeks of employment distinguishes the leave from the day-one right to maternity leave. The scheme thus risks legitimising discrimination of women of childbearing age.⁶³ The low statutory pay can serve as a further obstacle. While most of the maternity pay is at the same low rate, the gender pay gap makes it more likely for families to depend on the father's income. This may dissuade fathers.⁶⁴ Apart from the 2-week paternity leave, none of the leaves available to fathers are provided on a 'use-it-or-lose-it' basis and the paternity leave is not compulsory. The leave provisions thus fail to incentivise fathers to take long-term leave and do not create any legal expectations.

From a European perspective, the leaves also conflate maternity leave and parental leave. They do not sufficiently distinguish between the mother's biological condition after birth and the fathers' and mothers' role as parents. The UK shared parental leave would be contrary to EU law if it were deemed to constitute parental leave, since fathers and mothers do not have equal access to the leave. To prevent this, it has to fall under the scope of the Pregnancy Directive. While CJEU case law has not been entirely consistent on this point, the classification of the leave depends on the purpose not the name of the leave. It is highly questionable whether a full-year leave can be justified by the mother's biological condition after birth or the special relationship with the child. The transferable nature of the leave further suggests that it is primarily concerned with childcare. While similar arguments were not accepted in *Betriu Montull*, the case was concerned with timeframes that fell within the minimum requirements set out by the Pregnancy Directive while the full-year shared parental leave exceeds that timeframe.

The comparability between maternity leave and shared parental leave has also been the subject of recent case law. The question was whether a difference in pay as accepted by Paragraph 77 of the BIS guidelines constituted direct or indirect sex discrimination. While the Employment Tribunal (ET) confirmed this,⁶⁵ the Employment Appeal Tribunal (EAT) in *Capita Customer Management v Ali* distinguished between the different purposes of maternity leave and shared parental leave.⁶⁶ According to the EAT, the correct comparator of a father on shared parental leave is a mother on shared parental leave, as this leave focuses on childcare alone. It thus upheld a provision that provided 14 weeks of full pay to mothers on maternity leave but only 2 weeks of full pay to fathers on paternity leave. It could do so with reference to *Betriu Montull*, because the pay fell within the 14 weeks of maternity leave provided for by the Pregnancy Directive. The ET has also accepted differences between maternity pay and additional paternity leave pay (the predecessor of shared parental leave pay). While the tribunal identified potential indirect discrimination, it considered it justified, if the employer could show that the policy was aimed at recruiting and retaining women.⁶⁷ This means that the introduction of the various types of leave has not led to a different assessment of the maternity leave taken in the weeks after the birth. This seems to be in line with current EU law. However, it is questionable whether the EAT's assessment could be upheld regarding leave later in the period. The longer the leave, the more difficult it seems to argue that its purpose focuses on the woman's biological condition. *Capita Customer Management* also demonstrates that it is not always in the

⁶¹ O'Brien, M. and Twamley, K. (2017), 'Fathers Taking Leave alone in the UK – A Gift Exchange Between Mother and Father?', in: O'Brien, M. and Wall, K. (eds), *Comparative Perspectives on Work-Life Balance and Gender Equality*, pp. 163-181.

⁶² Fredman, S. (2014), 'Reversing roles: bringing men into the frame' *International Journal of Law in Context* vol. 10, issue 4, pp. 442, 451.

⁶³ Mitchell, G. (2015), 'Encouraging Fathers to Care: The Children and Family Act 2014 and Shared Parental Leave' *Industrial Law Journal*, vol. 44, issue 1, pp. 123, 129.

⁶⁴ *Ibid*, 130-131.

⁶⁵ *Ali v Capita Customer Management*, 1800990/2016, 2 June 2017; *Hextall v Chief Constable of Leicestershire Police*, 2601223/2015.

⁶⁶ UKEAT/0161/17/BA, 11 April 2018.

⁶⁷ *Shuter v Ford Motor Company*, ET/3203504/2013, 30 July 2014.

medical interest of young mothers to have long leave periods after their birth. In that case, the mother was encouraged to return to work early to assist her recovery from post-natal depression.

The German Parental Leave (*Elternzeit*)

German Law on parental leave changed significantly in 2007. Traditionally, the Western welfare system based its entitlements on the breadwinner model and encouraged mothers to stay at home for three years after the child's birth. However, the new parental-leave provisions aim at reducing the opportunity costs associated with leave and at enabling mothers to return to work within or after the first year of leave.⁶⁸ Inter alia, it was hoped that the new scheme aimed at employment and gender equality would increase the birth rate.⁶⁹ The current system distinguishes between maternity leave and parental leave. Pregnant women may not be engaged by their employer to do work for six weeks before the due date unless they explicitly consent, and they are on a compulsory leave of 8 weeks after they give birth. During that time, they receive EUR 13 in maternity pay per day from their health insurance and an employer supplement that covers the gap between the maternity pay and the net regular pay.⁷⁰ Additionally, both parents have access to parental leave. The parental-leave provisions introduced several innovations regarding pay. Firstly, rather than a low monthly flat-rate benefit with an income ceiling for the first 6 months, parents on leave receive 67 % of their previous income; with an absolute minimum of EUR 300 and a cap at EUR 1,800 per month.⁷¹ Secondly, the pay is available for 12 months minus the received maternity pay. This is a reduction of time compared to the previous 24 months of pay at a flat rate. However, parents can spread the pay over 24 months and will then receive 33.5 % of their pay.⁷² Finally, the new provisions provide for two 'father months' that are allocated at a 'take it or lose it' basis. If fathers take at least two months of leave the overall pay period is extended to 14 months.⁷³ Unpaid leave can be taken subsequently.⁷⁴ Parents can also work part-time during their leave. That income will be taken into account in the calculation of the parental-leave pay.

The number of fathers taking leave has increased every year since the introduction of the new parental-leave provisions. For example, in 2014, 34 % of fathers took some parental leave including part-time leave. However, only 21 % of these fathers took more than the 2 additional 'father months' and mothers continue to dedicate more of their time to childcare.⁷⁵ Nevertheless, there is some evidence that fathers reduce their working time after the paid leave.⁷⁶ The income-dependent pay during leave is less interesting for those parents whose overall income is low and unequally distributed. Thus, if the father's income is significantly higher than the mother's income but not high enough to be sufficient at a rate of 67%, fathers will be unable to take the leave and have to forgo the two 'father months'. This has been the subject of a Constitutional complaint that challenged the alleged unfavourable treatment of low-income families. While the Federal Constitutional Court acknowledged that the provisions interfere with the free choice of parents to organise their family life (Article 6 German Constitution), it considered this interference justified as it aligned with the State's duty to 'promote the actual implementation of equal

⁶⁸ Parliamentary Protocol, BT-Drucks 16/1889, pp. 23-24.

⁶⁹ Erler, D. (2009) 'Germany: taking a Nordic turn?' in: Kamerman, S. and Moss, P. (eds), *The Politics of Parental Leave Policies*, Bristol, Policy Press, pp. 119-134.

⁷⁰ Germany, Maternity Protection Law (*Mutterschutzgesetz*, MuSchG), paragraphs 19-20.

⁷¹ Law on Parental Pay and Leave (*Gesetz zum Elterngeld und zur Elternzeit*, BEEG), paragraph 2.

⁷² Paragraph 4(3) BEEG.

⁷³ Paragraph 4(5) BEEG.

⁷⁴ Paragraphs 15-16 BEEG.

⁷⁵ Germany, Ministry for Family, Seniors, Women and Youth (*Bundesministerium für Familie Senioren Frauen und Jugend*) (2016), *Väterreport*, available online: <https://www.bmfsfj.de/blob/112720/2d7af062c2bc70c8166f5bca1b2a331e/vaeterreport-2016-data.pdf>, pp. 16-18.

⁷⁶ *Ibid*, 20-21.

rights for women and men and take steps to eliminate disadvantages' (Article 3(2) German Constitution) and was also proportionate.⁷⁷

Overall, leave provisions in German law are more in line with the system envisioned by EU law than the UK law on leave. A relatively short maternity leave (8 weeks after birth) reserved for the mother is supplemented with longer parental leave that is available to fathers and mothers. However, only the recent changes regarding pay have encouraged fathers to take up leave and most fathers only take the two months reserved for them. In comparison, the newly introduced UK shared parental leave scheme offers some pay to fathers but at a much lower rate and has not significantly increased the number of fathers who take leave. This suggests that a meaningful reduction of opportunity costs significantly reduces the pressure for fathers to stay in employment because they can afford to go on leave. At the same time, the German law increases the opportunity cost of not taking the two 'father months' because the leave then only includes 12 months, which results in an earlier need for external childcare or unpaid care by the mother. The German law regarding part-time parental leave is more ambiguous. The possibility to take 24 months of leave is clearly contrary to the aim of the legislation as it does not necessarily encourage mothers to return early to the labour market because the part-time leave can be taken without being in part-time employment.⁷⁸ This means that it fails to address the costs associated with long-term leave and is not likely to reduce the motherhood penalty. However, the flexibility to take part-time leave as envisaged by Article 5(6) of the Commission's proposal on work-life balance may also have its benefits. Namely, it enables parents to stay connected with their employment and receive part-time pay. It thus reduced the financial sacrifice associated with long-time leave and enables parents to advance their career while on leave. However, research suggests that fathers having flexibility regarding their leave arrangements often choose leaves that allow them to have quality time with their children (e.g. one day of leave per week), rather than opting for 'slow-time leave' that deals with everyday childcare.⁷⁹ The part-time leave provides fathers with this opportunity and thus entails the risk that mothers remain the primary carer unless they also work part-time. However, this is much less likely, given that gender roles as well as the full-time maternity leave gears mothers towards providing full-time care.

Conclusion

This article has evaluated recent developments in the EU legal framework and recent leave provisions introduced in two Member States, the UK and Germany, in the light of substantive gender equality. To ensure substantive gender equality in the context of pregnancy and maternity, women's biological condition related to pregnancy and birth and the parents' childcare responsibilities need to be acknowledged. Currently, both these aspects burden women in the employment market. Women are more likely to accept these responsibilities beyond maternity and birth and are assumed to take them even if they do not have and will never have children. To challenge these prescriptive stereotypes while simultaneously acknowledging their descriptive reality, EU law needs to distinguish carefully between maternity leave and parental leave and ensure that the latter is de facto equally accessible to fathers and mothers. It is submitted that this means that long-term maternity leave that focuses on childcare should not be accepted. There is therefore a need to develop and apply stringent criteria to identify national leave provisions as either maternity leave or parental leave, irrespectively of their name. Transferability of the leave to the father should be a clear indicator regarding its focus on childcare, even if it falls within the timeframe provided by the Pregnancy Directive. Needs related to the biological

⁷⁷ Germany, Federal Constitutional Law (Bundesverfassungsgericht), 1 BvL 15/11, 19 August 2011; 1 BvR 2075/11, 26 October 2011; Mulder, J. (2017) *EU Non-Discrimination Law in the Courts*, Oxford, Hart Publishing, p. 89.

⁷⁸ Erler, D. (2009) 'Germany: taking a Nordic turn?' in: Kamerman, S. and Moss, P. (eds), *The Politics of Parental Leave Policies*, Bristol, Policy Press, p.128.

⁷⁹ Brandth, B. and Kvande, E. (2016), 'Fathers and flexible parental leave' *Work, Employment and Society*, vol. 30, issue 2, pp. 275-290.

condition after birth differ, and protection in the context of long-term pregnancy-related illnesses may be more effectively addressed by a consistent application of the prohibition against pregnancy discrimination within the scope of direct sex discrimination. Pregnancy does not always require long post-natal leave and in some cases may even be harmful to the woman's physical or mental health.

Moreover, rules on parental leave need to do more than pay lip service regarding their equal access. While they may encourage fathers to take the leave that is reserved for them, there is clear evidence that the opportunity costs of taking leave primarily relate to pay, not to the availability of the leave itself. Where fathers' income is higher than the mothers', it can be too costly for the household to take up fathers' leave regardless of its availability. The Commission's proposal to guarantee an adequate income during parental leave (Article 8) takes a step in the right direction. However, given the persistence of the gender-pay gap, parental leave pay will have to make a meaningful contribution to the household income to enable fathers to take leave. In the same vein, a non-transferable leave will only encourage fathers to take it where it is adequately remunerated, so that not taking the fathers' leave represents a larger loss of benefit than the cost for the mother to take unpaid leave for an equivalent period. This is particularly important in households with lower combined incomes, or for households where there is a large difference in the earnings of both parents. The proposed flexible part-time parental leave (Article 5) addresses some of the financial concerns (mainly, a similar difficulty linked to low pay during leave) and also has the benefit that it keeps mothers and fathers connected to their employment. However, in view of the author it may not effectively challenge gender roles because it enables fathers to take short-term part-time leave focused on quality time with their children rather than sharing the burden of everyday childcare. While mothers are enabled to take up part-time leave too, persisting gender roles makes it less likely that they will take up such opportunities.

There are two components that deserve further consideration. The usefulness of compulsory (paternity) leaves for fathers in reducing flexibilities that make it unlikely for fathers to take up long-term leave focus on everyday childcare (either because of lack of interest or social pressures) and on the financial support needed to accommodate such leave. Both would 'level up'⁸⁰ the fathers' role as parents and the associated leave. Beyond that, there are many other measures that can enable families and mothers to reconcile paid work and unpaid family obligations without creating the same disadvantages than are associated with long-term leave. This include measures that effectively regulate working time or provide affordable childcare.

⁸⁰ Fredman, S. (2014), 'Reversing roles: bringing men into the frame' *International Journal of Law in Context* vol. 10, issue 4, pp. 442-459.