EU DIRECTIVES ON MATERNITY LEAVE: A MISLEADING SOCIAL RISK APPROACH AND ITS UNSATISFACTORY EFFECTS ON BOTH MOTHERS AND FATHERS

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Abstract

The EU Directives on maternity leave adopt a single social risk approach, focusing primarily on the protection of the delivering worker's incapacity to work during pregnancy and after giving birth. They justify maternity leave on the basis of these workers' vulnerability and provide for a leave of at least 14 weeks. However, recent case law of the CJEU questions whether maternity leave is consistent with this approach and respects the principle of non-discrimination on grounds of sex.

This article challenges the EU Directives on maternity leave and seeks to find out to what extent they are based on a coherent single social risk approach, by examining not only EU and national legal sources but also medical literature. It concludes that the approach adopted by these Directives is not sufficiently consistent because for most women the period of incapacity for work will not last longer than 6 weeks after childbirth (puerperium), much shorter than the minimum 14 week period. The fact that maternity leave is a right of mothers and that in most instances a substantial part of the leave is only devoted to the care of the newborn is creating unsatisfactory effects on both mothers and fathers.

Keywords: EU Directives on maternity leave; social risk approach; incapacity to work of the delivering mother; care of the newborn; barriers for mothers in the labour market; discrimination against fathers.

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1. INTRODUCTION

Social security can be defined as “the body of arrangements shaping the solidarity with people facing (the threat of) a lack of earnings (i.e. income replacement from paid labour) or particular costs”¹. This working definition is linked with the concept of social risk, which is the contingency or eventuality that calls for social protection. The number of recognised social risks is open, which allows the development, within social security, of new responses to any new problems that may arise². The social risks distinguished by Pieters are divided into two main categories (below between brackets see the social risks). The first one includes income replacement schemes which try to alleviate the lack of earnings affecting workers who are temporarily or permanently unable to work (incapacity for work), jobless (unemployment) or retired (old age), and affecting surviving relatives who depend upon the income of the deceased person (decease). The second category comprises cost compensation schemes which cover the special costs relating to health care (health care) and to the raising of and care for children and other dependant family members (family burden)³. However, as acknowledged by Pieters, rather than cost-covering benefits for the family, some social security schemes award instead an income replacement to the parent staying at home during a certain period to take care of the upbringing of small children⁴.

Maternity leave is the period off work granted to working mothers around the time of childbirth, during pregnancy and after delivery. During this period of time, following Pieters’ classification of social risks, three social risks can be identified:

- Incapacity to work of the delivering mother: the lack of earnings affecting the working mother unable to work during pregnancy and after giving birth.
- Care of the newborn: the lack of earnings for the working mother staying at home to take care of the newborn.
- Health care: the special costs of healthcare, affecting both the delivering mother and the newborn.

At the same time, long standing case law of the Court of Justice of the European Union (CJEU), the Hofmann case law, recognises the Member States’ legitimacy of protecting via

¹ Pieters (2006: 2).

² Ibid (2006: 31 and 36).

³ Ibid (2006: 31).

⁴ Ibid (2006: 82-83).

their national maternity leave systems a woman's needs in two respects: the delivering mother's biological condition during pregnancy and after giving birth (incapacity for work) and the protection of the special relationship between the mother and her newborn after childbirth (care of the newborn)⁵. However, the specific weight given to these two social risks can vary from system to system. In order to frame the discussion, two social risk approaches to maternity leave will be considered: a single approach, which gives preponderance to the work incapacity element, and a blended or mixed approach, which gives similar importance to the work incapacity and the care elements⁶.

The European Union (EU) Directives on maternity leave focus primarily on the protection of the first social risk. They justify maternity leave on the basis of the delivering workers' vulnerability and provide protection for these workers during their period of incapacity to work by guaranteeing a right to maternity leave of at least 14 weeks. It has to be noted that during the post-birth period of maternity leave, the mother, while recovering from childbirth, is also looking after, and possibly also breastfeeding, the newborn. However, in these Directives the main rationale to provide leave is the protection of the delivering worker's incapacity to work during pregnancy and after giving birth.

Recent case law of the CJEU questions whether the single approach followed by the EU Directives on maternity leave is consistent (the *C.D.* and *Z.* cases about surrogate motherhood⁷) and respects the principle of non-discrimination on grounds of sex (the *Roca Álvarez* and *Betriu Montull* cases⁸). This case law triggers a fundamental question: do these Directives deviate in practice from their original purpose –the protection of the delivering mother– and include periods of leave purely devoted to the care of the newborn? If so, at least two problems might ensue. These problems have to do with the perpetuation of the traditional distribution of roles between men and women in relation to work and childcare. First, the recognition of a maternity leave only for delivering mothers, which may partly be dedicated only to the care of the newborn, puts the burden of childcare on them, which in turn

⁵ The most important judgments are: Court of Justice 12 July 1984, case C-184/83 *Hofmann v Barmer Ersatzkasse*, ECLI:EU:C:1984:273; and Court of Justice 19 September 2013, case C-5/12 *Betriu Montull*, ECLI:EU:C:2013:571.

⁶ The special costs of healthcare, affecting both the delivering mother and the newborn, will not be discussed in this article, as this social risk is not connected to the maternity leave time distribution question.

⁷ Court of Justice 18 March 2014, case C-167/12 *C.D.*, ECLI:EU:C:2014:169; and Court of Justice 18 March 2014, case C-363/12 *Z.*, ECLI:EU:C:2014:159.

⁸ Court of Justice 30 September 2010, case C-104/09 *Roca Álvarez*, ECLI:EU:C:2010:561; and Court of Justice 19 September 2013, case C-5/12 *Betriu Montull*, ECLI:EU:C:2013:571.

could have an impact on their careers prospects and wages. Second, there may be problems of discrimination against fathers with regard to the care period of maternity leave. Fathers may also want to look after their children and be entitled to a period of leave similar to the one not justified by the delivering mother's incapacity to work and therefore only devoted to the care of the newborn.

The aim of this article is to challenge the EU Directives on maternity leave to find out to what extent they follow a coherent social risk approach. To attain this goal, the article will be divided into four main sections. First of all, the current EU Directives on maternity leave will be briefly described. Secondly, the article will explain the social risk approach adopted by the EU Directives on maternity leave. Thirdly, whether the social risk approach followed is consistent will be evaluated by examining not only EU and national legal sources but also medical literature. Finally, the problems highlighted above related to the perpetuation of the traditional distribution of roles between men and women in relation to work and childcare will be outlined.

2. EU DIRECTIVES ON MATERNITY LEAVE: AN EU STANDARD OF 14 WEEKS

There are two EU Directives on maternity leave, namely the Pregnant Workers Directive (PrWD) 92/85⁹, applicable to employees, and the Self-Employment Directive (SED) 2010/41¹⁰, relevant for independent workers. These Directives harmonise national maternity leave systems by setting minimum requirements, such as the duration of the leave or the amount of maternity benefits. The PrWD entitles female employees to a statutory continuous period of maternity leave of at least 14 weeks allocated before and/or after confinement, which must also include a compulsory period of at least 2 weeks allocated around the time of confinement. This right is safeguarded by several measures, such as the maintenance of an income at least equivalent to the national sickness allowance and the maintenance of other employment rights during maternity leave, and the prohibition of dismissal from the beginning of pregnancy to the end of maternity leave. For its part, the SED entitles female

⁹ 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 and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/ 391 / EEC), OJ L 348, 28 November 1992, 1.

¹⁰ 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, 15 July 2010, 1.

self-employed workers to a sufficient maternity allowance enabling interruptions in their occupational activity owing to pregnancy or motherhood for at least 14 weeks. It should be observed that self-employed workers make their own work arrangements and can choose when to take time off work. Consequently, self-employed workers are not entitled to maternity leave *stricto sensu* but rather to interruptions in their occupational activity accompanied by maternity benefits.

Maternity leave should not be mistaken for other child-related leaves regulated by EU law, namely paternity leave, adoption leave and parental leave. Paternity leave is the male counterpart of maternity leave, that is to say a right of the working father to be exercised around the time of childbirth. However, whereas maternity leave has a consolidated EU standard of 14 weeks, paternity leave is not an EU right yet (though the recent proposal for a Directive on work-life balance¹¹ has proposed a standard of 2 weeks). Adoption leave is a right of both working parents to be exercised after the adoption of a child. The Recast Directive 2006/54¹² does not create EU rights to paternity and adoption leave, since the recognition of these rights is up to the Member States. However, those Member States which recognise such rights shall protect working men and women against dismissal due to exercising those rights and shall also ensure that, at the end of paternity and adoption leave, workers are entitled to return to the same job. Unlike paternity and adoption leave, there is already an EU right to parental leave under Directive 2010/18¹³. This is a right of both working parents entitling them to at least 4 months' leave until the child reaches a certain age (up to 8 years old) with a view to ensuring the care of natural and adopted children while they are young. This leave is often taken once the maternity/paternity/adoption leave period has expired (where paternity and adoption leave is provided at national level). This right is safeguarded by several measures, such as the maintenance of rights acquired or in the process of being acquired on the date on which parental leave starts until the end of parental leave, protection against less favourable treatment or dismissal on the grounds of an application for, or the taking of, parental leave and the right to return to the same job. Yet, currently Member

¹¹ Proposal for a Directive of the European Parliament and of the Council on work-life balance for parents and workers and repealing Council Directive 2010/18/UE, Brussels, 26.04.2017, COM(2017) 253 final.

¹² 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 204, 26 July 2006, 23.

¹³ Council Directive 2010/18/EU of 8 March 2010, implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC, OJ L 68, 18 March 2010, 13.

States are free to decide whether and to what extent income is maintained during parental leave.

All in all, the EU system of child-related leave interacts as follows: maternity leave and paternity leave apply in the case of natural children and are rights allocated to the working mother and father respectively to be taken around the time of childbirth. Adoption leave is a right of both working parents applicable in the case of adopted children and is to be used after the adoption of the child. The time frame to enjoy these three kinds of leave is relatively limited since they have to be taken around the birth or the adoption of a child. In contrast, parental leave, which is a right of both working parents that applies to both natural and adopted children, can be used during a much longer period of time, namely until the natural or adopted child reaches a certain age (up to 8 years old). While the four categories of child-related leave are connected with the care of the child, only maternity leave is also related to the delivering mother's biological condition during pregnancy and after giving birth. Therefore, the question of different social risk approaches is only relevant for maternity leave.

3. SOCIAL RISK APPROACH ADOPTED BY THE EU DIRECTIVES ON MATERNITY LEAVE

The social risk question examined here has been tackled by some legal scholars. Garrigues Giménez, Núñez Cortés-Contreras and Cebrián Carrillo seem to explicitly recognise a single social risk approach when, in referring to the PrWD, they claim that “the legal perspective adopted by this Directive corresponds [...] to the strictly physiological or biological profile of maternity”¹⁴. Likewise, Caracciolo di Torella and Foubert acknowledge that the PrWD “focuses on the mere physical aspects of *maternity*”¹⁵, but at the same time argue that in reality only 6 to 8 weeks are necessary for the biological/gestational mother to physically recover from childbirth^{16 17}. Additionally, other authors seem to implicitly recognise a single social risk approach by criticising the (minimum) duration of maternity leave. Dupate affirms “that the minimum length of maternity leave under EC law is 14 weeks, while doctors present

¹⁴ Garrigues Giménez, Núñez Cortés-Contreras and Cebrián Carrillo (2007: 246).

¹⁵ Caracciolo di Torella and Foubert (2015: 6). See also Foubert (2017: 251).

¹⁶ Caracciolo di Torella and Foubert (2015: 12). See also Foubert (2017: 252).

¹⁷ Please note that there may be periods of incapacity to work also during pregnancy, which may be covered under maternity leave (it is up to the Member States to determine the date on which maternity leave is to commence).

the opinion that a woman after birth only needs 6 to 8 weeks for physical recovery”¹⁸. Some legal scholars go further in their criticism and reveal a hidden second social risk approach. Foubert and Imamović argue that the fact that only 6 to 8 weeks are necessary to recover physically from a normal delivery “implies that the remaining weeks are aimed at looking after and bonding with the baby”¹⁹. Put another way by Foubert, “maternity leave surpassing six to eight weeks after delivery is, in reality, disguised parental leave”²⁰. Castro Argüelles states when reviewing the PrWD that “one instrument has tried to give an answer to two different needs, the mother’s health and childcare”²¹. Finally, Prechal defends that the PrWD “has gone beyond the biological differences” based on the assumption that periods of childcare after childbirth should only be allocated to the mother²². Despite the explicit and implicit recognition of a single social risk approach by some authors, the legal scholarship lacks an in-depth study of the social risk approach adopted by the EU Directives on maternity leave.

As the PrWD and the SED make no explicit reference to their social risk approach, we seek to reveal this in an analysis of some of the criteria on which they are based. These criteria include some important maternity leave features, but also cover a broader setting that includes the context in which maternity leave is established and its justification. The five criteria studied are: the context in which maternity leave is regulated to better comprehend its nature, namely the legal base and purpose of the Directives; the justification of maternity leave, which is crucial to be able to understand the underlying reasons for providing this leave; the entitlement to maternity leave to see what persons can benefit from it; the use of the leave to see whether it is rigid or flexible, which in turn could provide some idea of the interests protected by maternity leave; and finally, the variations in leave duration, which may disclose purposes other than the protection of the delivering mother. These five criteria, taken as a whole, will help discern the social risk approach adopted in the PrWD and the SED. It should be made clear that this analysis tries to reveal the logic of the text of the Directives and not how these Directives function in practice (the latter will be studied in next section).

¹⁸ Dupate (2006: 14).

¹⁹ Foubert and Imamović (2015: 4). See also Caracciolo di Torella and Foubert (2015: 12).

²⁰ Foubert (2017: 252).

²¹ Castro Argüelles in García Murcia (2005: 387).

²² Prechal (2004: 539).

CRITERION 1: CONTEXT OF MATERNITY LEAVE

The legal base of the PrWD is Article 118a of the Treaty establishing the European Economic Community (EECT)²³, which allowed the Council to adopt (by qualified majority) Directives on minimum requirements for encouraging improvements, especially in the working environment, to protect the safety and health of workers. Regarding the purpose of the PrWD, it is worth remembering that this Directive derives directly from the framework Directive 89/391, on the introduction of measures to encourage improvements in the safety and health of workers at work²⁴. More precisely, the PrWD is the tenth individual Directive whose purpose is to protect a particularly sensitive risk group: pregnant workers and workers who have recently given birth or who are breastfeeding [Article 1(1)]. Moreover, as recently clarified by the European Court of Justice (ECJ) in the *C.D. and Z.* cases, maternity leave targets the same worker who goes through different stages: the delivering mother. In sum, the focus of maternity leave is the protection of the safety and health of delivering workers.

The legal base of the SED is Article 157(3) of the Treaty on the Functioning of the European Union (TFEU), on the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, and its purpose to lay down a framework for putting into effect in the Member States the principle of equal treatment between men and women engaged in an activity in a self-employed capacity, or contributing to the pursuit of such an activity [Article 1(1)]. As it can be seen, even if the minimum period of maternity benefits in the SED is also 14 weeks, the basic principle, equal treatment, is very different from that of the PrWD (safety and health at work). Here the legal base and purpose are much broader and therefore do not lead directly to a social risk approach.

CRITERION 2: JUSTIFICATION OF MATERNITY LEAVE

The justification of maternity leave in the PrWD is not very well developed. Article 8 does not mention the special risks which might endanger a worker's safety or health during maternity leave. The only reference is in recital 14, which justifies maternity leave by *the vulnerability of pregnant workers, workers who have recently given birth or who are breastfeeding*. To understand better the motivation of the legislature, it is advisable to have a look at the legislative background of the PrWD. The original proposal by the Commission²⁵ established an uninterrupted period of at least 14 weeks leave from work justified in general by *the fatigue associated with the condition of pregnant women*

²³ Current Article 153 of the Treaty on the Functioning of the European Union (TFEU).

²⁴ 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 June 1989, 1.

²⁵ Proposal for a Council Directive concerning the protection at work of pregnant women or women who have recently given birth, OJ C 281, 9 November 1990, 3.

and those who have recently given birth (recital 10). More specifically, the removal from the workplace for a suitable period prior to giving birth was reasoned on *the ergonomic difficulties faced at the workplace by women workers in late pregnancy and their particular needs arising from their condition* (recital 11), and the removal from the workplace for a suitable period after giving birth was justified by declaring that *the delicate condition of women workers immediately after giving birth renders them vulnerable to risks at the workplace* (recital 12). All the reasons and expressions mentioned (vulnerability, fatigue, ergonomic difficulties and delicate condition) show to what extent the maternity leave regulated in the PrWD is justified by the incapacity to work of the delivering mother.

The same can be said about the SED. Recital 18 justifies the right to maternity benefits on *the economic and physical vulnerability of pregnant self-employed workers*. The same justification was given in the Commission's original proposal²⁶. The reference made to the *physical vulnerability* points to the protection of the mother during her incapacity to work. The allusion in recital 18 to *pregnant workers* indicates that both the physical and economic vulnerability affects the delivering mother.

CRITERION 3: ENTITLEMENT TO MATERNITY LEAVE

Maternity leave is conceived both in the PrWD and the SED as an individual right of the delivering mother. In and of itself, this does not necessarily lead to a single social risk approach since the legislature can simply take for granted that the mother is the best suitable parent to take care of the newborn. If so, part of maternity leave may perfectly well be intended to provide protection to the delivering mother during her incapacity to work while another part of the leave aims to ensure that the delivering mother can care for her newborn. However, a systematic study of the Directives seems to lead to an entirely different conclusion. If the entitlement to the right is combined with the context (the protection of the safety and health of delivering workers in the PrWD) and the justification of maternity leave (the vulnerability of the delivering worker), it could be assumed that the right is intended for the delivering mother precisely because it aims to provide her with protection during her incapacity to work.

CRITERION 4: USE OF MATERNITY LEAVE

²⁶ Proposal for a Directive of the European Parliament and of the Council, on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Directive 86/613/EEC, Brussels, 3.10.2008, COM(2008) 636 final, recital 14.

According to Article 8(1) of the PrWD, maternity leave must be a continuous period of at least 14 weeks allocated before and/or after confinement in accordance with national legislation and/or practice. From this Article it seems clear that the period of maternity leave has to be continuous and therefore cannot be interrupted. This has already been confirmed by the ECJ in the *Boyle* case, in which the Court declared that a woman cannot interrupt or be required to interrupt her maternity leave and return to work to complete the remaining period of maternity leave later²⁷. Furthermore, it could be argued that the idea behind Article 8 is not only a continuous period, but moreover a full-time continuous period during which the delivering mother is not supposed to return to work, neither full-time (if the leave is interrupted) nor part-time (if the leave is used part-time). If so, the full-time continuous feature could support a single social risk approach: as the delivering mother is not meant to work at all during maternity leave (neither full-time nor part-time), it could be thought that the period of maternity leave is a period during which she is protected against incapacity to work.

The SED gives the Member States a great margin of manoeuvre to regulate maternity benefits. According to its recital 18, the Member States remain competent to organise them, including establishing the level of contributions and all the arrangements concerning benefits and payments. *In particular, they may determine in which period before and/or after confinement the right to maternity benefits is granted.* The reference to “a period” and not to “several periods” could also mean a “full-time continuous period”.

CRITERION 5: VARIATIONS IN MATERNITY LEAVE DURATION

Neither the PrWD nor the SED provide for any variations in maternity leave duration whatsoever. As it will be seen later on, some increases in duration established by the Member States, such as in the case of children hospitalised at birth, children with disabilities or multiple births, seem to be connected with the care of the newborn. Although the Directives only set minimum requirements and Member States can always adopt more generous measures, the lack of these extensions of leave related to the child in the Directives reinforces the idea of a focus on the protection of the delivering mother.

In conclusion, there is some evidence that the EU Directives on maternity leave follow a single social risk approach. All criteria considered, it could be said that the main purpose of the maternity leave regulated by the PrWD and the SED is the protection of vulnerable delivering workers during their incapacity to work around childbirth. This protection is

²⁷ Court of Justice 27 October 1998, Case C-411/96 *Boyle and Others*, ECLI:EU:C:1998:506, paragraph 59.

designed as a right for delivering workers to be off work for a full-time continuous period of at least 14 weeks. The adoption of this approach may be explained by an historical tactical choice. In the early 90's, the only legal base which allowed the Council to approve the PrWD by qualified majority was Article 118a EECT, on the protection of the safety and health of workers. This model focused on the protection of the worker was later on replicated in the SED, even if this Directive used a different legal base.

Despite the formal adherence of the Directives to the single approach, due probably to the historical tactical choice mentioned, it could be argued that their (hidden) true purpose is also the care of the newborn. In this sense, Ellis believes that in reality the PrWD seeks to improve the health and safety of workers' offspring as well, "but this aim is not formally within the authority conferred by Article 118A"²⁸. According to this interpretation, the Directives support the stereotypical idea that it is the (delivering) mother's responsibility to look after the newborn. However, this article will assume that the main and true intention of the EU legislature was the protection of the delivering mother.

4. A TRIPLE COHERENCE ANALYSIS: A MISLEADING SOCIAL RISK APPROACH?

The fact that the two Directives on maternity leave adopt a single social risk approach does not necessarily mean that reality reflects this approach. The next sub-sections address its consistency from a triple point of view: internal legal consistency (sub-section one), external legal consistency (sub-section two) and medical consistency (sub-section three). For the purpose of this triple consistency analysis, the following definition of consistency will be used: *the agreement or logical coherence among things or parts*²⁹.

4.1. INTERNAL LEGAL CONSISTENCY ANALYSIS

Internal legal consistency here is defined as the logical coherence among the different legislative elements of maternity leave, taking into consideration EU law and the case law of the CJEU exclusively. The ECJ has brought to the foreground some issues which reflect the possible inconsistency of the single social risk approach: the divergences between the

²⁸ Ellis (1993: 65).

²⁹ Retrieved February 2017 from <http://www.thefreedictionary.com/consistency>.

Advocates General (AGs) in the cases of surrogate motherhood and the dichotomy between compulsory and voluntary maternity leave.

4.1.1. Divergences between the AGs in the cases of surrogate motherhood

In the *C.D.* and *Z.* cases the Court was asked whether, in the case of surrogate motherhood, a commissioning mother had the right to the maternity leave regulated in the PrWD. “The ECJ did not formally join the two preliminary references, and it was faced with two separate and diametrically opposed Opinions of AGs Kokott in *CD* and Wahl in *Z*”³⁰. Whereas in *C.D.* Kokott put forward the defence that maternity leave targets three different categories of female workers (pregnant workers, those who have recently given birth and those who are breastfeeding) (functional approach), in *Z.* Wahl argued that maternity leave targets the same worker who goes through different stages, namely the delivering mother (monistic biological approach). In the opinion of Finck and Kas, the opposite conclusions are rooted in different interpretative techniques: a contextual and teleological approach in *C.D.* and a close adhesion to the wording of the PrWD in the *Z.* case³¹.

In the *C.D.* case, the AG, Ms. Kokott³², defended a functional approach. She stood up for a functional understanding of the PrWD: *the surrogate mother who carries the child but who does not care for it after the birth requires protection only as a pregnant worker or woman who has recently given birth. In the case of the intended mother, who was not pregnant herself but has an infant in her care and, possibly, also breastfeeds it, there is a need for protection after the birth of the child*³³. Consequently, maternity leave had to be divided between the surrogate mother and the intended mother³⁴.

Contrary to that opinion, the AG in the *Z.* case, Mr Wahl³⁵, defended a monistic biological approach. He considered that the Court also attached importance to the special relationship that develops after birth between the woman and her child in construing the rationale of

³⁰ Finck and Kas (2015: 282).

³¹ Ibid. (2015: 284).

³² Opinion AG Kokott 26 September 2013, Court of Justice 18 March 2014, Case C-167/12 *C.D.*, ECLI:EU:C:2013:600.

³³ Ibid., paragraph 47.

³⁴ Ibid., paragraphs 73 and 75.

³⁵ Opinion AG Wahl 26 September 2013, Court of Justice 18 March 2014, Case C-363/12 *Z.*, ECLI:EU:C:2013:604.

maternity leave under the PrWD. However, he believed *that that objective can only be understood in context; as a logical corollary of childbirth (and breastfeeding). Otherwise, if that objective were given independent significance, the scope of protection afforded by Article 8 of Directive 92/85 could not, in my (his) view, be meaningfully limited only to women who have given birth, but would necessarily also cover adoptive mothers or indeed, any other parent who takes full care of his or her new-born child*³⁶.

Finally, both judgments followed the monistic biological approach and declared that a commissioning mother does not have the right to the maternity leave regulated in the PrWD. Although the judgments support a single social risk approach, the previous divergence between the AGs casts doubts on the consistency of this approach and on the limits between the work incapacity and the care elements.

4.1.2. Dichotomy between compulsory and voluntary maternity leave

The maternity leave regulated in the PrWD, a minimum continuous period of 14 weeks allocated around confinement, must include a minimum compulsory period of 2 weeks allocated before and/or after confinement. This dichotomy between compulsory and voluntary maternity leave calls into question the appropriateness of the single social risk approach. It could be thought that only the compulsory period is justified by the protection of the incapacity to work on the part of the delivering mother. This reasonable doubt has been reinforced by several judgments.

The ECJ made clear in the *Boyle* and *Betriu Montull* cases that the delivering worker may renounce the non-compulsory or voluntary period of maternity leave³⁷. Moreover, although maternity leave may not be assigned to the child's father against the mother's will, the PrWD does not preclude her from deciding that the father will take all or part of the voluntary period of maternity leave (*Betriu Montull* case³⁸). In any case, it is up to the Member States to offer this possibility in national legislation, according to the *Burrill and Noriega Guerra* case³⁹. In

³⁶ Ibid., paragraph 47.

³⁷ Court of Justice 27 October 1998, Case C-411/96 *Boyle and Others*, ECLI:EU:C:1998:506, paragraph 58; and Court of Justice 19 September 2013, Case C-5/12 *Betriu Montull*, ECLI:EU:C:2013:571, paragraph 57.

³⁸ Court of Justice 19 September 2013, Case C-5/12 *Betriu Montull*, ECLI:EU:C:2013:571, paragraphs 56 and 58.

³⁹ General Court 26 October 1999, Case T-51/98 *Burrill and Noriega Guerra v Commission*, ECLI:EU:T:1999:271, paragraph 33.

sum, the non-compulsory period of maternity leave, which could last up to a maximum of 12 weeks⁴⁰, is a renounceable and transferable right. The possibility to renounce and to transfer to the father up to 12 weeks, six times more than the compulsory part (2 weeks), is not in line with the single social risk approach. Again, it could be argued that the incapacity to work of the delivering mother is overstated.

4.2. EXTERNAL LEGAL CONSISTENCY ANALYSIS⁴¹

External legal consistency here is defined as the logical coherence between the EU Directives on maternity leave and their transposition into six representative EU Member States – Belgium (BE), Ireland (IE), Spain (ES), the United Kingdom (UK), Sweden (SE) and Portugal (PT)⁴². The idea is to see whether the Member States are following the single social risk approach adopted by these Directives, at least in respect of the minimum EU period of 14 weeks. Naturally, Member States can set a longer period in which case they may pay more attention to the care of the newborn.

From the six Member States studied, four of them provide employees and self-employed workers with “maternity leave” (BE, IE, ES and the UK) and two of them with “generic parental leave” with some periods allocated to mothers only (SE and PT). Nevertheless,

⁴⁰ In case a Member State did not go beyond the minimum requirements of the PrWD, it would have a maternity leave of 14 weeks and a compulsory period of 2 weeks.

⁴¹ Several sources were consulted to carry out this study. First of all, the 2017 Review of the International Network on Leave Policies & Research, which includes country notes of 40 countries, including the 6 countries here covered, was analysed. To double check information, the EU’s Mutual Information System on Social Protection (MISSOC) database was looked at, as well as the relevant European Commission reports [Burri and Van Eijken (2014) and Masselot, Caracciolo di Torella and Burri (2013)]. On top of this information, the primary sources of law and other official documents were examined. Finally, experts from the country in question were consulted regarding any possible relevant additional information and to make sure that the final findings were correct [the following national legal experts contributed to this sub-section: Laura Merla and Paul Schoukens from Belgium (BE); Tony Fahey from Ireland (IR); Irene Lapuerta and Borja Suárez Corujo from Spain (ES); Mark Butler from the United Kingdom (UK); Ann-Zofie Duvander, Helen Heriksson, Marie Jakobsson Randers and Katarina Hyllén-Cavallius from Sweden (SE); Ana Ferreira Reis, Cristina Lobo Ferreira and Alvaro Oliveira from Portugal (PT)].

⁴² There are two representatives of the three approaches to maternity leave policy described by Blum, Koslowski and Moss [Blum, Koslowski and Moss (eds.) (2017: 8-9)], trying to cover short as well as long durations of maternity leave:

- From the most widespread traditional approach (maternity leave is only for women, linked to pregnancy, childbirth and the first months of motherhood and treated as a health and welfare measure): BE (short maternity leave: 15 weeks) and IE (long maternity leave: 42 weeks)
- From the new approach (a move away from the traditional idea of maternity leave), first subgroup (towards a birth-related leave for women, but which can be transferred as a matter of course, at least in part, to fathers): ES (short maternity leave: 16 weeks) and the UK (long maternity leave: 52 weeks)
- From the new approach, second subgroup (towards dropping maternity leave altogether in favour of a generic parental leave usually with periods designated for “mothers only” and “fathers only”): SE and PT (the only representatives of this group)

within the Portuguese “generic parental leave” a “maternity leave” is clearly recognisable, the so-called “initial parental leave”.

In the first four countries and PT, maternity leave⁴³ is granted to delivering mothers in the case of birth for a certain period around childbirth. The duration of the leave for employees ranges from 15 weeks in BE to 52 weeks in the UK⁴⁴. For self-employed workers, the duration is generally shorter, ranging from 12 weeks in BE to 39 weeks in the UK⁴⁵. The compulsory periods of maternity leave are short, from 2 to 6 weeks around the time of childbirth⁴⁶. The only exception is the 10-week obligatory period in BE for employees⁴⁷.

Unlike the other five countries, SE has a system of parental benefits which works both in the case of birth and adoption and is available for both parents. Moreover, the period of parental benefits goes far beyond the time of childbirth; specifically, it can be enjoyed until the natural or adopted child reaches the age of 12. The period of parental benefits is quite long, 480 days, 240 of which correspond to the mother and 240 to the father. Although no compulsory periods are provided for in the framework of the parental benefits system regulated by the 2010 Social Insurance Code, the Parental Leave Act obliges delivering employees to be on leave for a period of 2 weeks before or after birth⁴⁸.

In what follows, some conclusions about some specific characteristics of the national systems will be presented: the context in which maternity leave is regulated, the justification of the leave, the people entitled to it, the use of the leave and the possible variations in leave duration. These features correspond to the criteria used for the analysis of the social risk approach of the EU Directives on maternity leave. By comparing the same elements of maternity leave, it will be possible to draw some conclusions about the (in)consistency

⁴³ Initial parental leave in PT.

⁴⁴ The duration is relatively short for BE and ES (15 weeks in BE and 16 weeks in ES), and long for IE and the UK (42 weeks in IE and 52 weeks in the UK). PT is placed in an intermediate position with 120 or 150 days, depending on the level of income replacement.

⁴⁵ The duration is relatively short for BE and ES (12 weeks in BE and 16 weeks in ES), and long for IE and the UK (26 weeks in IE and 39 weeks in the UK). PT is placed in an intermediate position with 120 or 150 days, depending on the level of income replacement.

⁴⁶ 3 weeks in BE for self-employed workers (1 before and 2 after birth), 6 weeks in IE (2 before and 4 after birth), 6 after-birth weeks in ES, 2 after-birth weeks in the UK for employees (4 if the employee works in a factory) and 42 after-birth days in PT.

⁴⁷ 1 week before and 9 weeks after birth.

⁴⁸ Delivering employees are entitled to an unpaid 14-week maternity leave (*mammaledighet*) under the Parental Leave Act. When exercised, this right has to be used in one go, 7 weeks before and 7 weeks after delivery. If the delivering mother is not on leave for other reasons (for instance when making use of the parental benefit), maternity leave becomes compulsory for a period of 2 weeks before or after birth.

between the approach followed by the national systems and the single social risk perspective adopted by the EU Directives on maternity leave.

CRITERION 1: CONTEXT OF MATERNITY LEAVE

As a general rule, in the Member States analysed maternity leave⁴⁹ is regulated in the context of either a general Labour Act or a general Social Security Act. This broad context does not reveal the social risk approach followed at national level.

CRITERION 2: JUSTIFICATION OF MATERNITY LEAVE

The justification of maternity leave⁵⁰ at national level is mostly blended. In effect, in four of the six Member States analysed (IE, ES, the UK and PT) the reasons to grant maternity leave are mixed: the protection of the delivering mother and the care of the newborn. At one end of the spectrum, BE is the only country which appears to focus on the incapacity to work of the delivering mother. At the other end of the spectrum, SE is noticeably care-oriented.

A blended justification at national level should not represent an infringement of the Directives, since the Member States can provide for leave longer than 14 weeks and thus pay attention to the care of the newborn as well. However, there is a striking problem of external coherence in the case of SE, where parental benefits are only marginally justified by the incapacity to work of the delivering mother.

CRITERION 3: ENTITLEMENT TO MATERNITY LEAVE

The entitlement to maternity leave in the Member States studied is fairly complex. In SE working parents, both mothers and fathers, are entitled to 240 days of parental benefits, 150 of which can be transferred to each other. In the other five Member States, along with delivering mothers, fathers may be entitled to maternity leave⁵¹ in certain cases. First of all, the working father is entitled under exceptional circumstances which affect the delivering mother entitled to maternity leave: death (BE, IE, ES and PT); hospitalisation (BE for employees); and physical or mental incapacity (PT). Secondly, working fathers are entitled to maternity leave under exceptional circumstances even if the delivering mother was never entitled to it: death of a non-working mother (ES and PT); physical or mental incapacity of a non-working mother (PT); and lack of coverage under the working mother's

⁴⁹ Parental benefits in SE and initial parental leave in PT.

⁵⁰ Parental benefits in SE and initial parental leave in PT.

⁵¹ Initial parental leave in PT.

social security scheme (ES). Thirdly, working fathers may be entitled to maternity leave as a matter of course (without exceptional circumstances applying) if the delivering mother decides to transfer part of the leave: the voluntary weeks in ES and the UK (10 out of 16 weeks in ES and 50 weeks out of 52 in the UK); and the non-exclusive days for the delivering mother in PT (between 48/78 and 78/108 days out of 120/150⁵²).

It must be said that, in general terms, the Member States are in line with the EU Directives on maternity leave, which guarantee a minimum period of 14 weeks for delivering workers. However, two complementary comments need to be made. First of all, there are two cases of external legal incoherence: the granting to the working father of the weeks not used by the delivering mother entitled to maternity leave (even if she used less than 14 weeks) when she is hospitalised (BE for employees) and when she is physically or mentally incapable (PT). These cases are not in line with the EU Directives on maternity leave, because the purpose of these Directives is precisely to provide the delivering mother with protection during her incapacity to work in connection with childbirth in cases as such. Secondly, with regard to the possible entitlement of working fathers to the voluntary period of maternity leave (even for periods shorter than 14 weeks) as a matter of course, this has been backed up by the ECJ. Yet, the comments made earlier regarding the inconsistency with a single social risk approach apply *mutatis mutandis* here⁵³.

CRITERION 4: USE OF MATERNITY LEAVE

Member States make it possible for delivering mothers to combine maternity leave and work through different techniques, namely:

- Combination of days of leave and days of work (BE for employees and the UK for employees): in BE it is possible to use up to 2 weeks of maternity leave as “free days” after the 9 week post-birth obligatory period. These “free days” can be used during the 8 weeks following the continuous period of maternity leave. In the UK employees may use up to 10 *Keep in Touch (KIT)* days⁵⁴ after the 2/4 week (post-birth) compulsory period. The KIT days can be used during the maternity leave period without bringing it to an end or extending it.
- Combination of weeks of leave and weeks of work (BE for independent workers): it is possible to enjoy the voluntary period (up to 9 weeks) in weekly periods during the 36 weeks which follow the end of the 2 week post-birth compulsory period.

⁵² 120/150 days, depending on the level of income replacement, minus the exclusive days for the delivering mother (between 42 and 72).

⁵³ See sub-section 4.1.2.

⁵⁴ An employee may carry out up to 10 days’ work for his employer during his maternity leave period, including training or any activity undertaken for the purposes of keeping in touch with the workplace.

- Part-time work (BE for independent workers and ES): in BE it is possible to enjoy the voluntary period (up to 9 weeks) half-time during the 36 weeks which follow the end of the 2 week post-birth compulsory period and in weekly periods. In ES the voluntary weeks (up to 10) can be used part-time (with the agreement of the employer in the case of employees).
- Postponement or suspension of maternity leave (IE for employees, ES and PT): in IE, it is possible to postpone the leave for a maximum of 6 months in the case of hospitalisation of the newborn if the period of maternity leave already taken by the working mother is not less than 14 weeks. In ES the weeks of hospitalisation of the newborn beyond the compulsory period of maternity leave (6 weeks after birth) can be postponed and be resumed when the child is out of hospital. In PT the leave may be suspended in the case of hospitalisation of the newborn or mother's sickness or hospitalisation.

Furthermore, the parental benefit system in SE is generally very flexible. Firstly, it is possible to use it in one continuous period or in discontinuous blocks, up to 3 per year. Secondly, benefits can be taken full-time or part-time. In the latter case, it is allowed to take three-quarters, one half, one-quarter and one-eighth of parental benefit.

The possibility to combine leave and work during the voluntary period of maternity leave (in all the Member States analysed) shows a clear-cut breach with the full-time continuous feature of the maternity leave designed by the EU Directives on maternity leave. What is more, this rupture affects the EU standard of 14 weeks in every country but IE.

CRITERION 5: VARIATIONS IN MATERNITY LEAVE DURATION

At national level, all the Member States under study provide for variations in leave duration in some cases. The extensions of maternity leave⁵⁵ in the case of hospitalisation of the newborn, a child with a disability and multiple births seem to be justified by the care of the newborn:

- Hospitalisation of the newborn (BE and ES): in BE if the newborn is still in hospital 7 days after birth, maternity leave is extended for the hospitalisation period (except for the first 7 days) up to a maximum of 24 weeks; in ES as long as the newborn stays in hospital for at least 7 days, maternity leave is extended during the whole period of hospitalisation up to a maximum of 13 weeks. As for the purpose of these extensions, the additional leave provided seems to compensate the period of maternity leave spent at hospital. The objective would be that the mother could effectively spend all the ordinary maternity leave period at home with her child.

⁵⁵ Parental benefits period in SE and initial parental leave in PT.

- Child with a disability (ES): 2 extra weeks of leave. The pace of development of children with disabilities is slower than normal. This is particularly the case in mentally retarded children. This mental retardation causes a slow or very slow psychomotor development. For instance, these children usually need more time to hold their head up, to sit, to walk or to talk. Therefore, they need more time to reach a certain level of development. Here the additional leave's aim would be to compensate for this slow development.
- Multiple births (BE, ES, SE and PT): in BE 4 extra weeks for employees and 1 extra week for self-employed workers, regardless of the number of extra children; in ES 2 extra weeks per newborn from the second onward; in SE 180 extra days for every additional child (90 for each parent); and in PT 30 extra days for every additional child. Regarding the purpose of these extensions of leave, it has to be acknowledged that taking care of two or more newborns entails greater effort than looking after only one. Some tasks done by the mother (feeding, dressing, bathing...) are multiplied by the number of children. As this additional effort does not extend over a longer period (children in principle go through the same stages of development at the same time), the particular stress of the mother represents here an important element. Nonetheless, it is also true that the mother devotes less time to each child. Consequently, the additional leave may also be provided to compensate somehow for the shorter time devoted to each child and to allow the strengthening of the bonding between the mother and every child.

As these extensions go beyond the minimum requirements of the EU Directives on maternity leave, there is no breach in their implementation.

In conclusion, the majority of countries does not perpetuate the single social risk approach and follows instead a blended or mixed approach, which gives similar importance to the work incapacity and the care elements. The justification of maternity leave is mostly blended (the protection of the delivering mother but also the care of the newborn) and not only the delivering mother but also the father can be entitled to maternity leave, under exceptional circumstances, and as a matter of course, in the latter case during the voluntary part of maternity leave. In addition, it is possible to combine leave and work during the voluntary period of maternity leave, by postponing or suspending maternity leave, working part-time or alternating periods of work and periods of leave (days or weeks). Moreover, the Member States provide for some extensions of maternity leave which seem to be justified by the care of the newborn, i.e. in the case of multiple births, hospitalisation of the newborn and children with disabilities⁵⁶.

⁵⁶ The features listed are not necessarily present in all countries.

The question that emerges now is: why are Member States moving away from the incapacity to work element, even when sometimes this means failing to comply with the EU Directives? There are at least three possible reasons for this situation, which are related to the different persons involved in childbirth: the delivering mother, the father and the newborn. First of all, the national legislature could try to limit the possible perverse effects of maternity leave on women's labour market outcomes, especially women's earnings⁵⁷. A possible way to achieve this is the facilitation of the delivering mother's return to work after maternity leave by maintaining contact with the workplace during the leave. This is done through the possibilities to combine periods of leave and work and to work part-time. Secondly, the Member States may try to engage fathers in looking after the newborn, for instance by allocating a specific part of a generic leave to them, by giving delivering mothers the possibility to transfer the non-compulsory part of maternity leave to them or by granting a sharing bonus⁵⁸. A third reason could be the concern about the well-being of the newborn and the bonding with the child. This is reflected in techniques such as the postponement or suspension of maternity leave in the case of hospitalisation of the newborn, which seems to pursue the effective care of the newborn at home, and the extensions of the leave in the case of multiple births, hospitalisation of the newborn and child with a disability.

It could then be concluded that there are some inconsistencies between the EU Directives on maternity leave and their transposition in Member States. National law shows, through a set of legal techniques, to what extent maternity leave serves the interests of different actors, among whom the delivering mother is obviously included, but also the child needing care and the father. The attention is moving from the mother to the child and the role of men as child carers is also being recognised.

4.3. MEDICAL CONSISTENCY ANALYSIS⁵⁹

⁵⁷ See Ruhm (1998:315), Akgunduz and Plantenga (2013:859-860) and Thévenon and Solaz (2013:40).

⁵⁸ 30 extra days in PT if parents share the leave after the mother's compulsory period in a non-simultaneous way, provided that the father takes 30 consecutive days or two blocks of 15 days.

⁵⁹ The following doctors contributed to this sub-section: María Gabriela del Val Garrido, Francisco Javier Lucas Escobar, Clara Infante Cárdenas and Francesca de Michele, specialists in Gynaecology and Obstetrics, Emérito Carlos Rodríguez Merchán and Primitivo Gómez Cardero, specialists in Orthopaedic Surgery, and Hortensia de la Corte García, Hortensia de la Corte Rodríguez and Juan Manuel Román Belmonte, specialists in Physical Medicine and Rehabilitation.

Medical consistency here is defined as the logical coherence between the single social risk approach embraced by the EU Directives on maternity leave and medical literature. Medical findings show that the period of incapacity to work can be very variable, both during pregnancy and after giving birth.

During pregnancy, the possibilities to combine pregnancy and work will depend on the number and duration of medical complications⁶⁰ and on the kind of job the expecting mother performs. In the words of Murkoff, “every pregnancy, every woman and every job is different”⁶¹. In the same vein, Díez Rubio affirms that “there are not two similar pregnancies, even for the same woman”⁶². In the absence of pregnancy complications and work-related risks, it is possible for an expecting woman to work until the end of pregnancy. At the same time, medical complications or occupational risks during pregnancy may impede the expecting mother from working. Concerning pregnancy complications, it has to be acknowledged that they are unlikely to occur⁶³. Therefore, in most cases the expecting mother will not go through any periods of incapacity to work. In the case of work-related risks, the PrWD contains specific protective measures, other than maternity leave, ranging from the adjustment of the working conditions to the transfer to another job to leave from work.

After giving birth, the delivering mother will be unable to work for up to 6 weeks (the postpartum period or puerperium), which is regarded as a progressive recovery period. This medical evidence has been highlighted by some legal scholars, who refer to 6 to 8 weeks of recovery⁶⁴. Furthermore, the recovery period for the mother could be longer than 6 weeks if there are medical complications after childbirth. Beyond the puerperium, the period of incapacity to work will depend on the number and duration of postpartum complications⁶⁵.

⁶⁰ Common medical complications during pregnancy that may cause incapacity to work on the part of the expecting mother are early pregnancy bleeding, late pregnancy bleeding, intrauterine growth restriction (IUGR), preterm labour, premature rupture of membranes (PROM) and hypertension in pregnancy. For more information see Lyons (2015).

⁶¹ Murkoff (2009: 194).

⁶² Ruiz Vega and Díez Rubio (2009: 193).

⁶³ As pointed out by Murkoff, “pregnancy complications are unlikely to be experienced by the average pregnant woman” [Murkoff (2009: 534)]. Gazmararian et al estimated an overall rate of antenatal hospitalisation of 10.1% of deliveries [Gazmararian et al (2002: 97)].

⁶⁴ Dupate (2006: 14); Foubert and Imamović (2015: 4); Caracciolo di Torella and Foubert (2015: 12); and Foubert (2017: 252).

⁶⁵ Common postpartum complications that may cause incapacity to work on the part of the delivering mother beyond the puerperium are postpartum haemorrhage, postpartum infection and postpartum depression and psychosis. For more information see Lyons (2015).

Again, these complications are unlikely to occur⁶⁶, so in most cases the delivering mother will not experience any periods of incapacity to work beyond the 6-week puerperium.

In conclusion, leaving aside occupational risks, for which a specific treatment is provided for in the PrWD, the real period of incapacity to work varies from mother to mother and from pregnancy to pregnancy, depending on pregnancy and postpartum complications. In the absence of medical complications, the period of incapacity to work will last a maximum of 6 weeks (puerperium), much shorter than the minimum 14-week maternity leave period prescribed by the EU Directives on maternity leave. As medical complications are unlikely, this will be true for most women. To sum up, in many instances 8 weeks cannot be justified by work incapacity. However, for some women the period of incapacity to work could be prolonged if medical complications arise, a period which could be even longer than 14 weeks.

4.4. CONCLUSIONS ABOUT THE COHERENCE ANALYSIS

It can be concluded that the single social risk approach adopted by the EU Directives on maternity level is not consistent enough, because there is no full *agreement or logical coherence among* the different *things or parts* of maternity leave. In this sense, medical evidence is conclusive. For most women, the period of incapacity to work will last a maximum of 6 weeks after childbirth (puerperium), much shorter than the minimum 14-week maternity leave period prescribed by the EU Directives on maternity leave. In other words, in most cases the period from the 7th week on is not justified at all by the work incapacity, but by the care of the newborn. This medical evidence is somehow reflected in some ECJ's case law⁶⁷ and in the Member States' legislation. The justification is blended at national level. As for the distribution of the work incapacity and childcare elements, the distinction between the compulsory and the voluntary parts of maternity leave is essential. The first period (generally from 2 to 6 weeks long) would roughly match the puerperium, during which the work incapacity plays a crucial role. The second (voluntary) period (the greater part of maternity leave) appears to be mainly justified by the care of the newborn, in which both the mother and the father can take part. An indication of this is the possibility for the father to be entitled to this period under normal circumstances if the delivering mother decides to transfer it.

⁶⁶ Following Lyons, "for most pregnancies, the postpartum period is uncomplicated" [Lyons (2015: 205)]. In the same vein, Murkoff explains that postpartum complications are "very unlikely to occur" [Murkoff (2009: 563)].

⁶⁷ Namely, cases *C.D., Z., Boyle* and *Betriu Montull* (see sub-section 4.1).

In sum, this consistency analysis of the EU Directives on maternity leave shows the growing importance of maternity leave as a period of time off work dedicated to childcare. In most instances, by the end of the puerperium work incapacity gets blurred and the care of the child becomes more preponderant.

5. PROBLEMS OF AN INCONSISTENT SINGLE SOCIAL RISK APPROACH: A NEW MULTI-SOCIAL RISK APPROACH AS A SOLUTION?

The question of consistency of the social risk approach adopted by the EU Directives on maternity leave is not only a theoretical one. As pointed out before, a misleading approach may perpetuate the traditional distribution of roles between men and women in relation to work and childcare. In turn, the perpetuation of such roles may have negative consequences for both women and men. Two important negative consequences are the detrimental effects for women in the labour market and the potential discrimination against fathers as regards the care period of maternity leave.

5.1. DETRIMENTAL EFFECTS FOR MOTHERS IN THE LABOUR MARKET

Concerning the consequences for women, not only maternity leave but the whole EU system of child-related leaves may negatively affect women in the labour market. First of all, maternity leave is a right of the delivering mother even if in many instances a considerable part of the leave is devoted only to the care of the newborn. At the same time, there is no parallel EU right to paternity leave for the father. Moreover, as no maximum period is set in the EU Directives on maternity leave, the delivering mother may end up with a maternity leave much longer than the minimum 14 weeks (for instance 42 weeks in IE and 52 weeks in the UK⁶⁸). This legislation puts the burden of the care of the newborn on mothers.

Secondly, Directive 2010/18 establishes a right to parental leave of 4 months for both working mothers and fathers, but it does not encourage an equal take-up by women and men because only 1 month is non-transferable (3 months can be transferred to the other parent) and the payment of the leave is left to the discretion of Member States. Following Becker's

⁶⁸ For employees.

theory of the allocation of time⁶⁹, the second earner (usually the mother) is more likely than the first earner (normally the father) to take parental leave (including the transferable leave from the other parent) so that the economic loss for the family is minimised. As a result, women are more likely than men to take parental leave⁷⁰, including the transferable part from the father (up to 3 months⁷¹). Besides, as no maximum period is set in Directive 2010/18, women may end up with an even longer parental leave (for instance 16 months in BE⁷², 2 years and 3 months in PT⁷³ and 3 years in ES⁷⁴).

In sum, the EU system of child-related leaves, with maternity leave and no paternity leave in the case of the birth of a child, and with an unequal take-up of parental leave, puts the burden of childcare on women, thus perpetuating the traditional distribution of roles between men and women with regard to care and work. The fact that women have to face most responsibilities related to childrearing makes it very difficult for them to compete on an equal footing with men in the labour market, thereby creating inequalities at work. In this sense, economic literature reveals the adverse consequences of child-related leave on women's earnings⁷⁵, and even on women's labour market participation when the absences from work are too prolonged⁷⁶.

5.2. DISCRIMINATION AGAINST FATHERS

Regarding the possible discrimination against fathers, one may wonder why the father (or more generally the non-delivering parent⁷⁷) is not also entitled to a period of leave similar to the one only devoted to the care of the newborn available for the delivering mother (normally

⁶⁹ Becker explains the implications of his theory of the allocation of time on the division of labour among members of the same household this way: "members who are relatively more efficient at market activities would use less of their time at consumption activities than would other members" [Becker (1965: 512)].

⁷⁰ Thévenon and Solaz (2013: 16).

⁷¹ If the national period of parental leave is 4 months.

⁷² 4 months of parental leave until the child is 12 years old (*congé parental / ouderschapsverlof*) plus 12 months of time credit system for a child younger than 8 (*crédit-temps / tijdskrediet*).

⁷³ 3 months of additional parental leave until the child is 6 years old (*licença parental complementar*) and 2 years of "leave to take care of a child" (*licença para assistência a filho*).

⁷⁴ 3 years following the birth or adoption of a child (*excedencia por cuidado de hijos*).

⁷⁵ See Ruhm (1998:315), Akgunduz and Plantenga (2013:859-860) and Thévenon and Solaz (2013:40).

⁷⁶ In terms of employment rates, empirical studies reveal the positive effect for women of relatively short leaves. Conversely, economic literature shows that when leaves are too long the effects become negative, therefore reducing women's participation in the labour market. Different studies report different turning points, ranging from 30 weeks [Akgunduz and Plantenga (2013: 860) to 2 years [Thévenon and Solaz (2013:4)].

⁷⁷ The father in a heterosexual couple or the non-delivering mother in a lesbian couple.

an EU minimum of 8 weeks⁷⁸). The possible discrimination against fathers has already been tackled by the ECJ in the context of the Equal Treatment Directive (ETD)⁷⁹ (current Recast Directive 2006/54). One of the exceptions to the principle of equal treatment between men and women is in Article 2(3), which states that the ETD *shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity* [current Article 28(1) of the Recast Directive]. Concerning the content of this exception, Boch explains that “it is legitimate to derogate from the fundamental principle of ‘equality’ to protect the biological condition of women”⁸⁰. Yet, the ECJ interpreted Article 2(3) in a broader way. Indeed, the ECJ has continuously held since the *Hofmann* case in 1984 that maternity leave is a legitimate exception to the principle of equal treatment because Article 2(3) of the ETD recognises the legitimacy of protecting a woman's needs in two respects: the delivering mother's biological condition and the bonding between the mother and the newborn. The *Hofmann* case law, which applies in principle to any maternity leave, longer or shorter⁸¹, has been criticised by most legal scholars for perpetuating the role of women as child carers. Just to give an example, Suk argues that *Hofmann*'s second consideration “is arguably based on a gender stereotype”⁸². The Court, after a promising judgment in 2010 (*Roca Álvarez* case), where it considered that the Spanish breastfeeding leave⁸³ was a time purely devoted to the child accorded to workers in their capacity as parents and therefore not included in Article 2(3), had the chance to update the *Hofmann* case law in 2013 (*Betriu Montull* case). However, against the opinion of the AG, the ECJ defended that the voluntary part of the Spanish maternity leave (10 weeks transferable to the father) was included in Article 2(3) and therefore reserved for mothers.

Several legal scholars have analysed maternity leave and its implications for men (or in general non-delivering parents) in terms of equality. Prechal states that “the Pregnant Workers Directive and its relationship to equal treatment is problematic”, given the ECJ's broad interpretation of the exception of Article 2(3) ETD and the PrWD, which, in her view, does not stick to the real biological differences between men and women⁸⁴. Robeyns affirms

⁷⁸ EU minimum of 14 weeks minus 6 weeks of puerperium.

⁷⁹ 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 February 1976, 40.

⁸⁰ Boch (1997:397).

⁸¹ In the *Hofmann* case, the disputed German maternity leave was 26 weeks long.

⁸² Suk (2010:51).

⁸³ This leave was also granted in cases of bottle feeding.

⁸⁴ Prechal (2004: 538-9).

that “fathers and co-mothers could rightly complain that they are discriminated against” as for the part of maternity leave that is not connected with pregnancy, birth and birth recovery⁸⁵. Weldon-Johns explains that the *Hofmann* case law reinforces a maternal concept of care and that, in doing so, the ECJ marginalises the caring role of working fathers in the post-birth period⁸⁶.

Other child-related leaves should also be considered when addressing the possible discrimination against non-delivering parents, namely paternity leave and parental leave. In the Member States analysed, paternity leave is granted in the case of birth to working fathers⁸⁷, employees (BE and the UK) or both employees and independent workers (IE, ES and PT). The duration of paternity leave is rather short, ranging from 10 working days in BE to 4 weeks in ES⁸⁸. In light of the above, there is a striking difference between maternity leave and paternity leave: their duration. This divergence raises the question of whether the duration of paternity leave should be equal to the duration of maternity leave, or at least to the period not justified by the protection of the incapacity to work of the delivering mother.

Some authors have acknowledged and criticised the differences between maternity and paternity rights. For example, León affirms that the PrWD is not unproblematic from a gender equality perspective because “the leave provisions of the Directive are evidently asymmetrical and reinforce the presumption that it is mothers who should be the primary carers of children”⁸⁹. Similarly, Currie argues that at EU level “the right to take a period of maternity leave is considerably more developed and protected than the male equivalent right to take paternity leave”⁹⁰. Suk underlines that the European antidiscrimination law has not “invalidated policies that provide more generous benefits for maternity than for paternity”⁹¹. Dupate goes further in arguing that since EU law does protect motherhood but does not protect fatherhood, “it violates the equal treatment principle”⁹².

⁸⁵ Robeyns (2012: 208).

⁸⁶ Weldon-Johns (2013: 666).

⁸⁷ Also the co-parent in BE, defined as the delivering mother’s spouse or life partner; also the non-delivering mother in IE, ES and the UK;

⁸⁸ In BE 10 working days, in IE 2 weeks, in the UK 1 or 2 weeks, in PT 25 days (15 compulsory and 10 voluntary) and in ES 4 weeks.

⁸⁹ León (2007: 346).

⁹⁰ Currie (2013: 394-5).

⁹¹ Suk (2010:51).

⁹² Dupate (2006: 18).

Concerning parental leave, it has to be highlighted that the EU minimum period of maternity leave (14 weeks) is shorter than that of parental leave (4 months). In the Member States under study, only employees are usually entitled to parental leave⁹³. Comparing the maternity leave and the full-time⁹⁴ parental leave available for employees, it is possible to visualise two groups of countries. The first group (BE, ES and PT) has a relatively short maternity leave, between 15 weeks and 120/150 days⁹⁵, and a somewhat long parental leave, between 16 months and 3 years⁹⁶. Conversely, the second group of countries (the UK and IE) has a very long maternity leave, between 42 weeks in IE and 52 weeks in the UK, and a minimalistic 18-week parental leave⁹⁷. In contrast to the EU Directives, in this second group of countries maternity leave is by far longer than parental leave. The situation in the Member States, with the dichotomy short maternity leave-long parental leave and vice versa, calls the boundaries between these two leaves into question. At this point it is worth recalling that terminology matters: the “maternity leave” label means a right of the delivering mother while the “parental leave” label implies a right of both parents. If it turns out that the maternity leave duration, especially in those countries with long maternity leaves, exceeds the time needed for the protection of the incapacity to work of the delivering mother, it could be considered that a part of it is not a real “maternity leave” but in fact a veiled “parental leave”.

Some authors highlight that there is a problem of boundaries between maternity leave and parental leave. For instance, Costello and Davies expound that “very long maternity leave entitlements, to which only women are entitled, may be seen as comprising in substance an element of parental leave” and that “this would then amount to discriminatory allocation of parental leave”⁹⁸. In the same vein, in Foubert and Imamović’s view, “it is sufficient to label a lengthy leave as «maternity leave» within the meaning of the PrWD to set it apart as a «women-only leave», notwithstanding the fact that the leave may go beyond what is needed from a health and safety perspective”⁹⁹. Similarly, Weldon-Johns, commenting about the

⁹³ An exception is the additional parental leave (*licença parental complementar*) in PT.

⁹⁴ In ES and PT there are also part-time parental leaves: in ES the “reduction of working hours of working hours to look after a child” (*reducción de jornada por cuidado de hijos*) until the child is 12 years old; and in PT the right to work half-time (*trabalho a tempo parcial de trabalhador com responsabilidades familiares*) for 2 years until the child turns 12 years old.

⁹⁵ In BE 15 weeks, in ES 16 weeks and 120/150 days in PT, depending on the level of income replacement.

⁹⁶ See footnotes 68, 69 and 70.

⁹⁷ In the UK 18 weeks until the child is 18 years old; and in IE 18 weeks until the child is 8 years old.

⁹⁸ Costello and Davies (2006: 1608-9).

⁹⁹ Foubert and Imamović (2015: 2).

aborted proposal for a Directive amending the PrWD¹⁰⁰, which extended the minimum length of maternity leave from 14 weeks to 18 weeks, affirmed that this proposal potentially undermines “the position of working fathers and shared parenting more generally by allowing parental leave to be subsumed into maternity leave”¹⁰¹. Lastly, Mills argues that a distinction should be made between childbearing capacity and childrearing ability and is of the opinion that “childcare leave should make it equally available to both parents”¹⁰².

5.3. ADOPTION OF A MULTI-SOCIAL RISK APPROACH?

A possible way to overcome the unsatisfactory effects for both women and men of a misleading single social risk approach would be the adoption of a new multi-social risk approach by the EU Directives on maternity leave. This new approach would apply independent rules to the two social risks involved, the protection of the incapacity to work of the delivering mother and the care of the newborn. This has already been suggested by Castro Argüelles, who argues that the best solution to achieve gender equality in the labour market through the reconciliation of family and professional life for both men and women is to have two different tracks of protection¹⁰³.

The incapacity to work period would be variable, depending on the actual medical situation of the delivering mother. This period would vary from mother to mother and from pregnancy to pregnancy, depending on pregnancy and postpartum complications. To avoid misuse, any period of leave before or after the puerperium (6 weeks after childbirth) would be subject to the submission of a medical certificate stating that a leave is necessary due to an illness or complication related to the pregnancy or delivery of the worker concerned. This technique is not unknown to EU law. Something similar already applies in the PrWD to night work¹⁰⁴. This system would guarantee the protection of the actual incapacity to work of the delivering mother.

¹⁰⁰ Proposal for a Directive of the European Parliament and of the Council amending Council Directive 92/85/EEC, on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, Brussels, 3.10.2008, COM(2008) 637 final.

¹⁰¹ Weldon-Johns (2013: 677).

¹⁰² Mills (1992: 508).

¹⁰³ Castro Argüelles in García Murcia (2005: 214 and 387).

¹⁰⁴ According to Article 7, pregnant workers, workers who have recently given birth or who are breastfeeding are not obliged to perform night work during their pregnancy and for a period following childbirth, subject to the submission of a medical certificate stating that this is necessary for the safety or health of the worker concerned.

In contrast, the care period would be fixed. The minimum care period at EU level could be set at 8 weeks, given that in most cases the period of incapacity to work of the delivering mother lasts up to 6 weeks after childbirth (14 weeks minus 6 weeks). Delivering mothers would keep the minimum 8 weeks of the care period and the potential problem of discrimination against non-delivering parents would be avoided by granting the latter 8 weeks as well, by means of paternity leave. This way, there would be no regression of social rights for delivering mothers at EU level. The granting of paternity leave goes in the direction followed lately by the EU institutions, although the number of weeks proposed has been insufficient. In the negotiations on the 2008 proposal of Directive amending the PrWD (withdrawn in 2015) the European Parliament wanted to introduce 2 weeks of paternity leave for the delivering mother's life partner, and in the 2017 proposal for a Directive on work-life balance the European Commission has proposed 2 weeks of paternity leave for fathers.

Granting to fathers a period of leave similar to the care period of maternity leave has already been suggested by some authors. Dupate recommends, for the sake of equality in the provision of child-related leaves, a paternity leave of 10 weeks in Latvia, taking into account that the duration of the Latvian maternity leave is 18 weeks and that only 6 to 8 weeks are necessary for the purposes of mother's physical recovery¹⁰⁵. Robeyns proposes a review of Dutch legislation to respect the principle of non-discrimination by dividing "maternity leave" into three kinds of leave: "pregnancy leave", a leave pregnant women may need before the delivery on grounds of her health and well-being and those of the unborn baby; "delivery leave", a leave the mother needs to recover from delivering the baby; and "birth leave", a leave that tries to meet the need the baby has to be with their parents, and for the new parents to adapt to the new baby in their life. For Robeyns, the principle of non-discrimination does not allow that mothers are given "birth leave", while fathers are not¹⁰⁶.

All things considered, maternity leave would be split into two periods: an incapacity period, composed of a fixed part (6 weeks postpartum) and a variable part (any period of leave before or after the puerperium subject to the submission of a medical certificate); and a fixed care period of 8 weeks. Accordingly, maternity leave would last 14 weeks (6 plus 8) if there were not pregnancy and postpartum complications –as currently stands– or longer if such

¹⁰⁵ Dupate (2006: 15).

¹⁰⁶ Robeyns (2012: 207-209).

complications arose. In addition, non-delivering parents would be entitled to a paternity leave of 8 weeks. The 8 weeks of the care period of maternity leave and paternity leave would be an EU minimum standard. Member States would be allowed to go further as long as the duration of the care period of maternity leave and the duration of paternity leave remained the same. This would avoid any issue of discrimination between the delivering mother and the non-delivering parent.

A multi-social risk approach, while acknowledging and giving special protection to the unique work incapacity element, would be more in line with the principle of equal treatment and equal opportunities for all, men and women, both at work and at home. A right to paternity leave of at least 8 weeks would contribute to a better share of caring responsibilities between mothers and fathers. At the same time, this would reduce the detrimental effects for women in the labour market, who would be less likely to be seen by employers as the main child carers.

6. CONCLUSIONS

The EU Directives on maternity leave adopt a limited and inconsistent approach to maternity. They focus on one social risk, namely incapacity for work, and one actor, i.e. the delivering mother. Moreover, there is evidence that this restricted approach is not consistent enough, since it is putting too much emphasis on the incapacity to work of the delivering mother. A broader and more consistent approach is needed for maternity, but also for paternity. The different social risks and actors involved, including children, need to be duly considered. While the incapacity to work of the delivering mother during pregnancy and after giving birth remains an important social risk to be protected, the bonding between the newborn and both parents needs an explicit protection as well. The first social risk deserves a tailor-made solution adapted to the delivering mother's medical situation. The second social risk needs to be clearly recognised within social security for both the mother and the father. Time off to take care of the newborn and income replacement systems to compensate the lack of earnings for the working parent staying at home should be in place. If social security is meant to be an open concept, the clear recognition of the bonding parent-child as a new and separated social risk could be envisaged as a way to improve the deficient EU system of maternity leave.

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