MATERNITY LEAVE AND DISCRIMINATION AGAINST FATHERS: CURRENT CASE LAW OF THE COURT OF JUSTICE OF THE EUROPEAN UNION AND THE WAY FORWARD

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Abstract:

Recent case law of the Court of Justice of the European Union (CJEU) questions whether traditional women's rights, such as breastfeeding leave and maternity leave, are in line with the principle of non-discrimination between parents (the *Roca Álvarez* and *Betriu Montull* cases). This case law triggers a fundamental question: is maternity leave going beyond biological differences between the sexes and therefore perpetuating the traditional role of women as child carers?

The aim of this article is to gain insight into the compatibility of maternity leave with the principle of equal treatment between the delivering mother and the father. On the one hand, it reviews and analyses in depth the case law of the CJEU, which has consistently held since 1984 that maternity leave is a legitimate exception to the principle of equal treatment between men and women and that Member States are not obliged to confer on fathers a similar period of leave. On the other hand, it reflects on a way forward to find a better balance between the recognition of women's biological specificities and the rights of all parents to spend time with their children.

Keywords: Maternity leave in the European Union; discrimination against fathers; *Hofmann* case law; incapacity to work of the delivering mother; breastfeeding.

Introduction

Maternity leave is the period off work granted to working mothers around the time of childbirth. This leave serves different purposes, namely the protection of the delivering mother, who for a certain period of time is unable to work during pregnancy and after giving birth due to medical reasons, and the protection of the child who needs care after birth. This leave is harmonised in the European Union (EU) through two Directives, namely the Pregnant Workers Directive (PrWD) 92/85[1], applicable to employees, and the Self-Employment Directive (SED) 2010/41[2], relevant for independent workers[3] (hereinafter "the EU Directives on maternity leave"). These Directives focus primarily on the first of the purposes just mentioned. 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. At national level maternity leave can go from relatively short periods of 15 weeks in Belgium (BE) or 16 weeks in Spain (ES) to relatively long periods of 42 weeks in Ireland (IE) and 52 weeks in the United Kingdom (UK)[4].

There are other child-related leaves in the EU. 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. Whereas maternity leave has a consolidated EU standard of 14 weeks, paternity leave is not an EU right yet and its recognition depends on the Member States (though the recent proposal for a Directive on work-life balance[5] has proposed a standard of 2 weeks). Most Member States currently provide for paternity leave, whose duration is relatively short, for instance 2 weeks in BE, IE and the UK and 4 weeks in ES. On top of maternity leave and paternity leave (where paternity leave is provided at national level), there is an EU right to

[1] 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.

[2] 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.

[3] 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.

[4] These durations correspond to employees.

[5] 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.

parental leave under Directive 2010/18[6]. This is a right of working parents, male or female, entitling them to at least 4 months' leave with a view to ensuring the care of children[7] until a given age up to 8 years old. This leave is often taken once the maternity/paternity leave period has expired. At national level there is a great disparity of lengths, from 18 weeks in IE and the UK to 16 months in BE[8] and up to 3 years in ES.

Recent case law of the Court of Justice of the EU (CJEU) questions whether traditional women's rights, such as breastfeeding leave and maternity leave, are in line with the principle of non-discrimination between parents (the *Roca Álvarez* and *Betriu Montull* cases[9]). This case law triggers a fundamental question: is maternity leave going beyond biological differences between the sexes and therefore perpetuating the traditional role of women as child carers? If so, at least two problems might ensue. First, the burden of childcare could have a negative impact on women's career prospects and wages. Second, some fathers may feel discriminated against as a result of an unequal distribution of childcare leave between parents.

The aim of this article is to gain insight into the compatibility of maternity leave with the principle of equal treatment between the delivering mother and the father[10]. To attain this goal, the article will be divided into three sections. In the first section the case law of the CJEU about discrimination against fathers and maternity leave and other child-related rights conferred on women will be studied. The second section will analyse exhaustively the different elements involved in a case of discrimination against fathers and maternity leave to better understand the current position of the Court. The last section will reflect on a way forward to find a better balance between the recognition of women's biological differences and the rights of all parents to spend time with their children.

[6] 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.
[7] Parental leave applies to both natural and adopted children.
[8] 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*).
[9] 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.
[10] The father in a heterosexual couple or the non-delivering mother in a lesbian couple. However, this issue will be tackled from a sex equality perspective −discrimination against men− and not on the basis of parental status −discrimination against non-delivering parents− where European Union law does not apply.

1. Case law of the Court of Justice of the European Union

The current case law of the CJEU about maternity leave and possible discrimination against fathers has emerged in the context of the Equal Treatment Directive (ETD) 76/207[11] (current Recast Directive 2006/54[12]). This Directive provides for several exceptions to the principle of equal treatment. One of these exceptions is in Article 2(4) (current Article 3 of the Recast Directive), which permits positive action measures[13]. Another exception is contained in Article 2(3) [current Article 28(1) of the Recast Directive], which states that the ETD *shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity*. Article 2(3) had to be interpreted by the European Court of Justice (ECJ) several times, making clear which national provisions were included and which ones went beyond this exception. Some cases dealt with national rights conferred on women, including maternity leave but also other rights such as adoption leave or breastfeeding leave. In the following sub-section, this case law will be studied, following a chronological order.

1.1. *Commission v Italy*: adoption leave

The first case law appeared already in 1983 and was related to Italian adoption leave (*Commission v Italy* case[14]). At that moment Italian women who adopted children were entitled, provided that the child was not more than six years old at the time of adoption, to claim the post-birth period of maternity leave[15] (maternity leave was a right of the mother) and the corresponding financial allowance during the first three months following the date on which the child was united with its adoptive family. According to the European Commission, this differential treatment was not compatible with the ETD, as only women and not men were eligible for adoption leave. But the Court considered Italian adoption leave to be included in Article 2(3) of the ETD. The ECJ explained that the fact that the adoptive father is not given this right is justified *by the legitimate concern to assimilate as far as possible the*

[11] 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.
[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] Following the wording of Article 157(4) of the Treaty on the Functioning of the EU, these measures, *with a view to ensuring full equality in practice between men and women in working life*, […] provide *for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers*.
[14] Court of Justice 26 October 1983, case C-163/82 *Commission v Italy*, ECLI:EU:C:1983:295.
[15] Maternity leave was compulsory for women during the two months preceding the expected date of confinement and during the three months following confinement.

conditions of entry of the child into the adoptive family (adoption leave) *to those of the arrival of a new-born child in the family during the very delicate initial period* (maternity leave)[16].

This judgment has been largely disapproved of by legal scholars since adoption leave does not have any connections with the biological condition of the mother. In the words of Mcglynn (2000), "underpinning this judgment is the belief that different treatment on account of motherhood (and not biological differences regarding the capacity to give birth) does not constitute unlawful discrimination" (p. 36). In the same vein, Mills (1992) indicates that adoption leave "clearly cannot be justified by reference to the physical needs of the mother" (p. 511). Moreover, some authors underline the ideology behind this judgment. For instance, Barnard (2012) is of the opinion that this judgment is an example of the initial Court's tendency to "reinforce the traditional gender division of roles: women as child carers, men as breadwinners" (p. 418). Similarly, following Caracciolo di Torella (2014), the assumption of the ECJ was that the role of the father was "that of a breadwinner" and this background explains its decision in the *Commission v Italy* case (p. 96). Finally, this reasoning seems to go against further case law which declares that a male worker and a female worker are in comparable situations as regards the bringing up of children[17]. Moreover, the judgment contradicts the definition of adoption leave in the Recast Directive 2006/54, whose recital 27 refers to *the granting by Member States to men and women of an individual and non-transferable right to leave subsequent to the adoption of a child*. In sum, as Teyssié (2013) affirms, "it is far from certain that the solution given in 1983 […] would be the same 30 years later" (p. 322).

1.2. *Hofmann*: maternity leave

Concerning maternity leave, there have been only two cases that have directly tackled the question of possible discrimination against fathers by interpreting the exception of Article

[16] Court of Justice 26 October 1983, case C-163/82 *Commission v Italy*, ECLI:EU:C:1983:295, paragraph 16.
[17] Court of Justice 25 October 1988, case 312/86 *Commission v France*, ECLI:EU:C:1988:485, paragraph 14; Court of Justice 29 November 2001, case C-366/99 *Griesmar*, ECLI:EU:C:2001:648, paragraph 59; Court of Justice 30 September 2010, case C-104/09 *Roca Álvarez*, ECLI:EU:C:2010:561, paragraph 24; Court of Justice 17 July 2014, case C-173/13 *Leone*, ECLI:EU:C:2014:2090, paragraph 37; and Court of Justice 16 July 2015, case C-222/14 *Maïstrellis*, ECLI:EU:C:2015:473, paragraph 47.

2(3) of the ETD: the first one in 1984, the *Hofmann* case[18]; the second one almost 30 years later, in 2013, the *Betriu Montull* case[19]. This sub-section will be dedicated to the first case.

Maternity leave in the Federal Republic of Germany in 1979 was 6 months long, with a compulsory period of 8 weeks following childbirth and a subsequent voluntary part until the child was 6 months old. If the child died during the obligatory period, the leave finished 3 weeks after the child's death. Mr Hofmann, the plaintiff, became the father of a child in 1979 and obtained unpaid leave from his employer for the period between the expiry of the compulsory maternity leave period of 8 weeks and the day on which the child reached the age of 6 months; during that time he took care of the child while the mother continued her employment. At the same time, Mr Hofmann submitted a claim for the payment of the maternity allowance provided for maternity leave. The plaintiff's request was refused by the German social security administration because only mothers could claim maternity leave and the corresponding allowance.

Mr Hofmann defended, essentially, that the main object of the voluntary period of maternity leave, in contrast with the compulsory period, was not to protect the mother on biological and medical grounds but rather to protect the child. The plaintiff drew that conclusion by paying particular attention to several characteristics of German Law, among them: the optional nature of the leave, which meant that it could not be said to have been introduced to meet imperative, biological or medical needs; and the fact that the leave was withdrawn in the event of the child's death, which demonstrated that the leave was created in the interests of the child and not of the mother. Finally, Mr Hofmann concluded that, in conformity with the principle on non-discrimination between the sexes, the decision to make use of the voluntary part of maternity leave should be left completely to the discretion of the parents of the child[20].

The plaintiff's viewpoint was supported by the European Commission, which took the view that Article 2(3) of the ETD, which permits Member States to maintain provisions concerning the protection of women, particularly as regards pregnancy and maternity, called for a restrictive interpretation inasmuch as it derogates from the principle of equal treatment. According to the Commission, since that principle constitutes a "fundamental right", its

[18] Court of Justice 12 July 1984, case C-184/83 *Hofmann v Barmer Ersatzkasse*, ECLI:EU:C:1984:273.
[19] Court of Justice 19 September 2013, case C-5/12 *Betriu Montull*, ECLI:EU:C:2013:571.
[20] Court of Justice 12 July 1984, case C-184/83 *Hofmann v Barmer Ersatzkasse*, ECLI:EU:C:1984:273, paragraphs 10 and 11.

application could not be limited except by provisions which were objectively necessary for the protection of the mother. If national legislation served the interests of the child as well, its purpose should preferably be achieved by non-discriminatory means[21].

The Government of the Federal Republic of Germany argued that legal protection afforded to the mother aimed to reduce the conflict between a woman's role as a mother and her role as a wage-earner, in order to preserve her health and that of the child. It admitted that there were differing views on the length of time for which a woman should enjoy special treatment following pregnancy and childbirth, but it argued that the period in question, although varying from woman to woman, extends considerably beyond the end of the compulsory period of 8 weeks. Hence, according to the German Government, the creation of maternity leave was justified for reasons which are connected with a woman's biological characteristics[22].

The Advocate General (AG), Mr Darmon[23], defended that the German maternity leave concerned the protection of women within the meaning of Article 2(3) of the ETD, but not for biological reasons, as Germany argued, but for an "objective reason"[24]. In his view, this objective reason was the multiple burdens mothers were confronted by at the end of the 8-week period of leave: the upkeep of the household, the intensive care which an infant requires, especially during the early months, and the resumption of employment. According to the AG, the leave granted to mothers upon expiry of the compulsory leave was intended to temporarily eliminate one of those three burdens. Furthermore, he maintained that this leave also sought to protect mothers' state of health which, generally speaking, was still precarious[25]. He concluded that the voluntary part of maternity leave was a *preventive measure* underpinned by medical and social considerations[26].

Finally, the Court took a similar line and interpreted Article 2(3) of the ETD as comprising not only the protection of the biological condition of the mother, but also the care of the newborn. The ECJ decided that Member States are not obliged to confer on fathers the non-

[21] Ibid., paragraph 12.
[22] Ibid., paragraph 14.
[23] Opinion AG Darmon 27 June 1984, Court of Justice 12 July 1984, case C-184/83 *Hofmann v Barmer Ersatzkasse*, ECLI:EU:C:1984:231.
[24] Ibid., paragraph 10.
[25] Ibid., paragraph 11.
[26] Ibid., paragraph 12.

compulsory period of maternity leave because the ETD recognises the legitimacy of protecting a woman's needs in two respects (hereinafter "the Hofmann reasons"). *First, it is legitimate to ensure the protection of a woman's biological condition during pregnancy and thereafter until such time as her physiological and mental functions have returned to normal after childbirth; secondly, it is legitimate to protect the special relationship between a woman and her child over the period which follows pregnancy and childbirth, by preventing that relationship from being disturbed by the multiple burdens which would result from the simultaneous pursuit of employment*[27]. This case law has ever since been echoed by the ECJ in numerous cases[28].

The *Hofmann* case law has been criticised by most legal scholars for perpetuating the role of women as child carers. Just to give a few examples, Suk (2010) argues that Hofmann's second reason "is arguably based on a gender stereotype" (p. 51). By the same token, Caracciolo di Torella (2014) believes that the Court's message is "that caring for young children is mainly mothers' responsibility" (p. 98). Similarly, Fredman (1992) sees that "the emphasis on a woman's special relationship with her child has worrying associations with the notion that women's child-care obligations are 'natural' and unchangeable" (p. 127). Going further, Mcglynn (2000) affirms that "the Court's jurisprudence reproduces and thereby legitimates the dominant ideology of motherhood" (p. 43). Additionally, some legal scholars make explicit the underlying cause of the problem of the *Hofmann* case law: the frontier between biology and social constructions is not well drawn. For instance, Prechal (2004) contends that "instead of sticking to the real biological differences between men and women, the ECJ is condemning women to their exclusive care-giving function" (p. 539). In the same vein, Issacharof and Rosemblum (1994) consider that "the EC case law has pushed at the uncertain frontier between biology and the more troubling policy initiatives that, regardless of intent, serve to reinforce a societal determination that women should serve as primary providers of childcare" (p. 2207). Lastly, Mills (1992) explains that the ECJ "simply failed to distinguish between childbearing capacity and childrearing ability" (p. 513). Finally, a few

[27] Court of Justice 12 July 1984, case C-184/83 *Hofmann v Barmer Ersatzkasse*, ECLI:EU:C:1984:273, paragraph 25.

[28] Some examples are: Court of Justice 25 July 1991, case C-345/89 *Stoeckel*, ECLI:EU:C:1991:324, paragraph 13; Court of Justice 14 July 1994, case C-32/93 *Webb v EMO Air Cargo*, ECLI:EU:C:1994:300, paragraph 20; Court of Justice 30 June 1998, case C-394/96 *Brown v Rentokil*, ECLI:EU:C:1998:331, paragraph 17; Court of Justice 27 February 2003, case C-320/01 *Busch*, ECLI:EU:C:2003:114, paragraph 42; Court of Justice 1 February 2005, case C-203/03 *Commission v Austria*, ECLI:EU:C:2005:76, paragraph 43; and Court of Justice 30 September 2010, case C-104/09 *Roca Álvarez*, ECLI:EU:C:2010:561, paragraph 27.

legal scholars indicate the lack of protection of fatherhood following the *Hofmann* case law. For example, Weldon-Johns (2013) affirms that "the ECJ rejected a right to care for working fathers and marginalised their role in the post-birth period" (p. 666). In the same way, Dupate (2006) is of the opinion that "the ECJ cultivates the stereotype that protection of motherhood deserves more protection than fatherhood" (p. 14).

1.3. *Commission v France*: special rights for women

The *Commission v France* case[29] appeared in 1988 and, unlike the previous judgments studied, was not related to one specific leave but to a varied set of special rights for women that were recognised under French collective agreements. These rights related in particular to the extension of maternity leave; the shortening of working hours, for example for women over 59 years of age; the advancement of the retirement age; the obtaining of leave when a child is ill; the granting of additional days of annual leave in respect of each child; the granting of one day's leave at the beginning of the school year; the granting of time off work on Mother's Day; the granting of extra points for pension rights in respect of the second and subsequent children; and the payment of an allowance to mothers who have to meet the cost of nurseries or childminders[30]. The French Labour Code had been modified in 1983 to implement the ETD. The new Code, in spite of prohibiting any term reserving the benefit of any measure to employees on grounds of sex included in any collective labour agreement[31], did not forbid the application of usages, terms of contracts of employment or collective agreements in force on the date on which the law was promulgated granting special rights to women. The only safeguard was that employers, groups of employers and groups of employed persons 'shall proceed, by collective negotiation, to bring such terms into conformity' with the new provisions of the Labour Code[32].

The Commission considered that some of those special rights might be covered by the exceptions in Articles 2(3) and 2(4) of the ETD, which involve, respectively, provisions concerning the protection of women, particularly as regards pregnancy and maternity, and positive action measures. It was of the opinion, however, that the French legislation, by its

[29] Court of Justice 25 October 1988, case 312/86 *Commission v France*, ECLI:EU:C:1988:485.
[30] Ibid., paragraph 8.
[31] Except where such a clause was intended to implement the provisions relating to pregnancy, nursing or pre-natal and post-natal rest.
[32] Court of Justice 25 October 1988, case 312/86 *Commission v France*, ECLI:EU:C:1988:485, paragraphs 3 and 4.

generality, made it possible to preserve for an indefinite period measures discriminating between men and women, contrary to the Directive[33].

For its part, the French Government basically argued that the existence of special rights favouring women was considered compatible with the principle of equality because these special rights derived from a concern to protect women and were designed to take account of the situation existing at that time in the majority of French households[34].

The ECJ's decision was categorical: special rights for women recognised under French collective agreements could not find justification in Article 2(3) or Article 2(4). Concerning Article 2(3), the Court explained that *some of the special rights preserved relate to the protection of women in their capacity as older workers or parents −categories to which both men and women may equally belong*[35]. Issacharof and Rosemblum (1994) believe that "by rejecting the French government's position, the ECJ was attempting to draw the line around a loosely expansive pregnancy exemption, and thereby curb the potentially more weeping approach of *Hofmann* that seemed to extend beyond the frontiers defined by biology" (p. 2212). As regards Article 2(4), the ECJ simply affirmed that *nothing in the papers of the case* […] *makes it possible to conclude that a generalized preservation of special rights for women in collective agreements may correspond to the situation envisaged in that provision*[36], without elaborating on the meaning of positive action and whether each of the special rights fell into this category.

Despite the technical shortcomings of the *Commission v France* verdict, its importance lies in the fact that the Court invalidated in 1988 for the first time special leaves for women, after the upholding of the adoption and maternity leaves in 1983 and 1984. This opened the leeway for a new impetus, which still would only materialise many years later, in 2010, in the *Roca Álvarez* case.

[33] Ibid., paragraph 9.
[34] Ibid., paragraphs 7, 10 and 11.
[35] Ibid., paragraph 14.
[36] Court of Justice 25 October 1988, case 312/86 *Commission v France*, ECLI:EU:C:1988:485, paragraph 15.

1.4. *Roca Álvarez*: breastfeeding leave

Another leave that was questioned as being discriminatory against fathers was breastfeeding leave in the just mentioned *Roca Álvarez* case[37]. This case is a about a father, Mr Roca Álvarez, who requested from his employer that he be granted the right to take breastfeeding leave from 4 January 2005 to 4 October 2005. The Spanish Workers Statute provided at that time that female workers were entitled to take 1 hour off work, which they could divide into two parts, in order to breastfeed a child under the age of 9 months. However, breastfeeding the child was not obligatory because bottle-feeding was also permitted. Moreover, this time off work could be taken by the father, provided that both the mother and the father were employed. In view of this legislation, Mr Roca Álvarez was refused leave on the grounds that the mother of Mr Roca Álvarez's child was not employed but self-employed and the mother's employment was an essential condition of entitlement to that leave.

The ECJ first analysed whether the two elements of direct discrimination, i.e. a comparable situation and a differential treatment, were present. The Court confirmed that the positions of a male and a female worker, father and mother of a young child, are comparable with regard to their possible need to reduce their daily working time in order to look after their child[38]. Next, the Court also made clear that the Spanish breastfeeding leave established a difference on the grounds of sex, between male and female employees, since female workers who were mothers and whose status was that of an employed person were directly entitled to take leave during the first nine months following the child's birth, whereas male workers who were fathers with that same status were not entitled to the same leave unless the child's mother was also an employed person[39].

Then, the Court studied whether the measure under consideration could be included in the exceptions to the principle of equal treatment of Articles 2(3) and 2(4) of the ETD. As regards the protection of women in connection with pregnancy and maternity, after reiterating the Hofmann reasons, the Court concluded that the Spanish breastfeeding leave could not be justified by Article 2(3), for two main reasons: its purpose and the persons entitled to it. First, as the leave had been detached from the biological fact of breastfeeding, the Court considered it as time purely devoted to the child and as a measure which reconciled family life and

[37] Court of Justice 30 September 2010, case C-104/09 *Roca Álvarez*, ECLI:EU:C:2010:561.
[38] Ibid., paragraph 24.
[39] Ibid., paragraphs 18 and 25.

work[40]. The second reason is that breastfeeding leave could be taken by the employed father or the employed mother without distinction (provided that both were employed), which meant that the leave seemed to be accorded to workers in their capacity as parents of the child[41]. Taking into account these two arguments, the Court concluded that the leave could not be regarded as ensuring the protection of the biological condition of the woman following pregnancy or the protection of the special relationship between a mother and her child[42].

With regard to the exception of Article 2(4) of the ETD, the ECJ clarified that this provision *authorises national measures relating to access to employment, including promotion, which give a specific advantage to women with a view to improving their ability to compete on the labour market and to pursue a career on an equal footing with men*[43]. The Court did not consider the breastfeeding leave as a positive action measure within the meaning of Article 2(4) because it deemed the differential treatment between men and women *liable to perpetuate a traditional distribution of the roles of men and women by keeping men in a role subsidiary to that of women in relation to the exercise of their parental duties*. For example, it explained that the refusal of breastfeeding leave to a father whose status was that of an employed person, on the sole ground that the mother was a self-employed person, could have as its effect that the mother would have to limit her self-employed activity and bear the burden resulting from the birth of her child alone, without the father being able to ease that burden[44].

The Roca Álvarez judgment has been welcomed by legal scholars. Following Davies (2012), "EU law is now playing a role in ensuring that national parental leave is granted equally to men and women unless it is strictly related to pregnancy" (p. 137). In the same line of thinking, Weldon-Johns (2013) underlines that the decision in *Roca Álvarez* recognises "a boundary between maternity and childcare rights" (p. 680). More enthusiastically, Caracciolo di Torella (2014) claims that *Roca Álvarez* "represents an unprecedented U-turn from the previous reasoning of the Court –and EU legislation more generally− that had *de facto* consistently construed the care of young children as the mother's main, if not sole, responsibility" (p. 88-89).

[40] Ibid., paragraph 28.
[41] Ibid., paragraphs 29 and 31.
[42] Ibid., paragraph 31.
[43] Ibid., paragraph 33.
[44] Ibid., paragraphs 36 to 38.

1.5. *Betriu Montull*: maternity leave

The second case where it was discussed whether maternity leave was discriminatory against men appeared in 2013, almost 30 years after the *Hofmann* case. Unlike the latter case, in *Betriu Montull* the AG, Mr Wathelet, delivered an Opinion that found part of maternity leave to be discriminatory against fathers. The judgment in *Roca Álvarez* and the AG's Opinion, which followed a similar line of reasoning, raised expectations about the revision of the long standing *Hofmann* case law. However, the ECJ defended once again that the whole period of maternity leave was a legitimate exception to the principle of equal treatment between men and women. Consequently, one can say the *Hofmann* case law is very much alive after 30 years. In the words of Foubert and Imamović (2015), "the CJEU trapped itself with *Hofmann* and its progeny" (p. 6).

Maternity leave in Spain in 2004 was 16 weeks long. A period of 6 weeks after birth was obligatory for the mother, while the remaining 10 weeks formed the voluntary period, which was freely distributed by the mother before or after birth. The mother could decide to transfer completely or partly the voluntary weeks of maternity leave to the father as a matter of course. In 2004 Mr Betriu Montull and Ms Macarena Ollé became parents of a child. While Mr Betriu Montull was an employee covered by the Spanish State social security system, Ms Macarena Ollé was a "Procuradora de los Tribunales" (a lawyer[45]), a profession which is exercised on a self-employed basis, and was covered by the "Mutualidad General de los Procuradores" (lawyers' mutual insurance scheme), an occupational scheme independent of the state social security system. Unlike the latter system, the lawyers' mutual scheme did not allow for maternity leave and provided only for an allowance. Following the birth of his child, Mr Betriu Montull applied for the 10-week voluntary period of maternity leave and the corresponding maternity benefit. The Spanish social security administration refused the application, on the grounds that the right to maternity leave is a right of mothers who are covered by a state social security scheme and that the father does not have his own autonomous, separate right to leave, independent of the mother's right, but only a right which necessarily derives from that of the mother. Since Ms Ollé was not covered by any state social security scheme, she did not herself have a primary right to maternity leave, meaning that Mr Betriu Montull could not enjoy leave or the maternity benefit which went with it.

[45] This profession involves the representation of clients in legal proceedings in cases prescribed by law.

The Opinion of AG Wathelet[46] analysed first whether the two elements involved in a case of direct discrimination were present: a differential treatment and a comparable situation between men and women. As for the difference in treatment on grounds of sex, it was clear for him that after the 6 weeks of leave following the birth, an employed mother was, in principle, entitled to an additional 10 weeks of leave, whilst an employed father was entitled to those 10 weeks only with the mother's agreement[47] and if the two parents were employed persons[48]. Concerning the comparable situation, the AG found that *the positions of a male and a female worker, father and mother of a young child, are comparable* and that the 10 weeks' leave was accorded to workers *solely in their capacity as parents of the child*[49].

Next, the AG evaluated whether the specific derogations of the principle of equal treatment provided for in the ETD applied to this case: Article 2(3) and Article 2(4). With regard to the first exception, the AG did not challenge the reasoning of the *Hofmann* case law, in the sense that it maintained the twofold justification of the exception: the protection of the biological condition of the mother and the protection of the newborn[50]. However, he did contest it in terms of time since he did not extend its effects to the whole period of maternity leave. According to the AG, unlike the 6 weeks of leave immediately following the birth, the 10 weeks' leave at issue cannot fall within the scope of Article 2(3) of the ETD. To underpin this conclusion, he argued that the facts of this case had to be distinguished from those in *Hofmann*. Whereas in *Hofmann* the maternity leave at issue was reserved entirely to the mother, to the exclusion of any other person, and strictly linked to the protection of the mother's biological condition, in *Betriu Montull* the Spanish legislature had detached the 10 voluntary weeks of leave from the mother's biological condition by providing that the mother might elect, after the first 6 weeks, for the father to take a designated and continuous part of the subsequent 10-week period of leave[51]. As regards the exception of Article 2(4) of the ETD, which allows positive action measures, the AG concluded that the maternity leave at issue could not be justified under this provision, by using the reasoning just mentioned in

[46] Opinion AG Wathelet 11 April 2013, Court of Justice 19 September 2013, case C-5/12 *Betriu Montull*, ECLI:EU:C:2013:230.
[47] This was not at issue in the main proceedings.
[48] Opinion AG Wathelet 11 April 2013, Court of Justice 19 September 2013, case C-5/12 *Betriu Montull*, ECLI:EU:C:2013:230, paragraphs 59 and 67.
[49] Ibid., paragraphs 68 and 73.
[50] Ibid., paragraph 70.
[51] Ibid., paragraphs 71 and 72.

Roca Álvarez regarding the risk of perpetuation of the traditional allocation of roles of men and women[52].

As previously announced, the ECJ did not follow the Opinion of the AG. After acknowledging a difference on grounds of sex between mothers who are employed persons and fathers with the same status, the Court repeated the Hofmann reasons. What is more, the Court connected the Spanish maternity leave with the first Hofmann reason when it affirmed that such a measure was, *in any event, intended to protect a woman's biological condition during and after pregnancy*[53]. This is probably due to the fact that the duration of the leave in Spain (16 weeks) is very close to the minimum standard in the PrWD (14 weeks) –this Directive is focused on the incapacity to work of the delivering mother.

2. Understanding the current position of the Court: assessment of different elements

This section will pursue a systematic and in-depth analysis of the key elements tackled by the ECJ in a case concerning direct discrimination against fathers and maternity leave. It is also important to recall that direct discrimination cannot be justified, except for the specific derogations provided for. Concerning maternity leave, the specific derogations available are the pregnancy and maternity exception and positive action.

Next, taking into account that a differential treatment between the delivering mother and the father clearly exists in the provision of maternity leave, the following elements will be analysed: the comparability of situations, the pregnancy and maternity exception and positive action. These three elements will be addressed consecutively in the three subsections in which this section is divided. To simplify things, the analysis will be made under the assumption that no period of paternity leave is allocated to the father.

2.1. Are the delivering mother and the father in a comparable situation?

The answer to the question of whether the delivering mother and the father are in a comparable situation is clear-cut: their situations are not comparable because the delivering mother carries the baby for 9 months and delivers the child, suffering from a period of incapacity to work as a result of this. However, the answer has to be nuanced because,

[52] Ibid., paragraphs 74 and 76.
[53] Court of Justice 19 September 2013, case C-5/12 *Betriu Montull*, ECLI:EU:C:2013:571, paragraphs 62 and 63.

according to medical literature, for most delivering women the period of incapacity to work will last a maximum of 6 weeks after childbirth (the so-called puerperium), much shorter than the minimum 14-week maternity leave period prescribed by the EU Directives on maternity leave[54]. In other words, in most cases the period from the 7th week onwards is not justified by work incapacity, but only by the need for the care of the newborn. The question could then be reformulated as follows: are the delivering mother and the father in a comparable situation in relation to the period of maternity leave only justified by the care of the newborn?

The ECJ has consistently held that both parents are in comparable situations as regards the bringing up of children. The ECJ has done so since the *Commission v France* case in 1988, where the Court explained that the category of parents belongs equally to men and women[55]. In 2001 in *Griesmar*, the Court declared that *the situations of a male civil servant and a female civil servant may be comparable as regard the bringing-up of children*[56]. In 2010 in the *Roca Álvarez* case, the Court confirmed that the positions of a male and a female worker, father and mother of a young child, are comparable with regard to their possible need to reduce their daily working time in order to look after their child[57]. In 2014 in *Leone* the Court repeated its declaration in *Griesmar*[58] and in 2015 in *Maïstrellis* it reiterated that *the situation of a male employee parent and that of a female employee parent are comparable as regards the bringing-up of children*[59].

2.2. What is the scope of the pregnancy and maternity exception?

According to the ECJ's case law, the exceptions to the principle of equal treatment must be interpreted strictly, in view of the fundamental importance of this principle of equality of

[54] In the absence of pregnancy and postpartum complications, the period of incapacity to work will last a maximum of 6 weeks after childbirth (puerperium). Concerning pregnancy complications, as pointed out by Murkoff (2009), they "are unlikely to be experienced by the average pregnant woman" (p. 534). Gazmararian, Petersen, Jamieson, Schild, Adams, Deshpande and Franks (2002) estimated an overall rate of antenatal hospitalisation of 10.1% of deliveries (p. 97). Regarding postpartum complications, following Lyons (2015), "for most pregnancies, the postpartum period is uncomplicated" (p. 205). In the same vein, Murkoff (2009) explains that postpartum complications are "very unlikely to occur" (p. 563). As medical complications are unlikely, for most women the period of incapacity to work will last a maximum of 6 weeks. 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.

[55] Court of Justice 25 October 1988, case 312/86 *Commission v France*, ECLI:EU:C:1988:485, paragraph 14.

[56] Court of Justice 29 November 2001, case C-366/99 *Griesmar*, ECLI:EU:C:2001:648, paragraph 56.

[57] Court of Justice 30 September 2010, case C-104/09 *Roca Álvarez*, ECLI:EU:C:2010:561, paragraph 24.

[58] Court of Justice 17 July 2014, case C-173/13 *Leone*, ECLI:EU:C:2014:2090, paragraph 37.

[59] Court of Justice 16 July 2015, case C-222/14 *Maïstrellis*, ECLI:EU:C:2015:473, paragraph 47.

treatment[60]. The Court has also pointed out that, in determining the scope of any derogation from an individual right such as the equal treatment of men and women, the principle of proportionality, one of the general principles of law underlying the Community legal order, must be observed[61].

The majority of authors consider the pregnancy and maternity exception seeks the protection of the biological condition of the mother. Boch (1997) thinks that "it is legitimate to derogate from the fundamental principle of 'equality' to protect the biological condition of women" (p. 397). Likewise, Issacharof and Rosemblum (1994) affirm that "the Article 2(3) exemption treats pregnancy and childbirth as experiences that uniquely burden women in the workplace, and allows special treatment for women during and immediately after pregnancy to promote full equality between the sexes" (p. 2203). Other legal scholars have made similar claims[62]. The opinion of the majority of legal scholars about the pregnancy and maternity exception is in line with the ECJ's law which requires a restrictive interpretation of the exceptions to the principle of equal treatment. They identify *the protection of women, particularly as regards pregnancy and maternity* with the protection of the biological condition of women during pregnancy and after giving birth. In other words, the exception would cover the work incapacity period of maternity leave.

Against the opinion of the legal scholarship, the ECJ has consistently held an interpretation beyond the protection of the biological condition of the mother. The *Hofmann* case law maintains that it is legitimate to protect, not only the delivering mother's biological condition during pregnancy and after giving birth, but also *the special relationship between a woman and her child over the period which follows pregnancy and childbirth*[63]. Put another way, the ECJ includes in the pregnancy and maternity exception the care period of maternity leave.

The first element of the exception, the protection of the biological condition of the delivering mother, is connected to the EU Directives on maternity leave, which focus on the incapacity

[60] Court of Justice 15 May 1986, case 222/84 *Johnston / Chief Constable of the Royal Ulster Constabulary*, ECLI:EU:C:1986:206, paragraphs 36 and 44; Court of Justice 6 March 2014, case C-595/12 *Napoli*, ECLI:EU:C:2014:128, paragraph 41.
[61] Court of Justice 15 May 1986, case 222/84 *Johnston / Chief Constable of the Royal Ulster Constabulary*, ECLI:EU:C:1986:206, paragraph 38; and Court of Justice 19 March 2002, case C-476/99 *Lommers*, ECLI:EU:C:2002:183, paragraph 39.
[62] Pedrosa Alquézar (2013, p. 193), Prechal (2004, p. 539), and Weldon-Johns (2013, p. 666).
[63] Court of Justice 12 July 1984, case C-184/83 *Hofmann v Barmer Ersatzkasse*, ECLI:EU:C:1984:273, paragraph 25.

to work of the delivering mother. These Directives have established a minimum EU standard of 14 weeks of maternity leave, which is the legislative reference at EU level to be taken into account when assessing this first element. The approach followed by the EU legislature is not individualised because it does not take into account the individual circumstances of the worker concerned, a worker who may need shorter or longer periods of work incapacity, depending on pregnancy and postpartum complications.

Regarding the second element of the pregnancy and maternity exception, despite the continuous repetition by the ECJ of the *Hofmann* case law, no judgment has directly clarified what *the special relationship between a woman and her child* stands for. The only clue is given in the *Roca Álvarez* and *Otero Ramos*[64] cases. In the first case the Court seems to associate this special relationship with breastfeeding. In the ECJ's words, *the fact that the evolution of the national legislation and its interpretation by the courts has little by little detached the granting of 'breastfeeding' leave from the biological fact of breastfeeding precludes a finding that this measure ensures the protection of a woman's biological condition following pregnancy, within the meaning of the case-law cited at paragraph 27 of this judgment* (Hofmann case law). The Court continues: *feeding and devoting time to the child can be carried out just as well by the father as by the mother. Therefore this leave seems to be accorded to workers in their capacity as parents of the child. It cannot therefore be regarded as ensuring the protection of the biological condition of the woman following pregnancy or the protection of the special relationship between a mother and her child*[65]. In *Otero Ramos* the ECJ explains that breastfeeding is *intimately related* to maternity and maternity leave[66]. Another possible interpretation of the special relationship between a mother and her newborn could go beyond the fact of breastfeeding. Some may argue that carrying the baby for 9 months of pregnancy and giving birth creates a unique bond between the mother and the child over the period following childbirth. However, taking into account the indication given by the ECJ in the *Roca Álvarez* case, it will be assumed that breastfeeding is the determinant element of the mother-child special bonding. As in the case of the incapacity to work element, the ECJ applies a non-individualised approach to breastfeeding, because it only takes into account the fact that in general women breastfeed

[64] Court of Justice, 19 October 2017, case C-531/15 *Otero Ramos*, ECLI:EU:C:2017:789.
[65] Court of Justice 30 September 2010, case C-104/09 *Roca Álvarez*, ECLI:EU:C:2010:561, paragraphs 29, 30 and 31.
[66] Court of Justice, 19 October 2017, case C-531/15 Otero Ramos, ECLI:EU:C:2017:789, paragraph 59.

their babies during maternity leave. However, some women cannot breastfeed[67] or simply do not do it, for different reasons[68]. Moreover, even if they do breastfeed there are often specific provisions at national level (different from maternity leave) especially designed to facilitate breastfeeding. These provisions are the so-called breastfeeding breaks[69].

All things considered, *the protection of women, particularly as regards pregnancy and maternity* is interpreted by the ECJ as including not only the protection of the biological condition of women during pregnancy and after giving birth, but also the protection of breastfeeding. In other words, the exception covers the two biological elements that are unique to women in comparison to men. As put by Dupate (2006), "the only biological differences existing between the sexes are that only women are able to give birth and provide breastfeeding" (p. 4). As it stands, the interpretation of the pregnancy and maternity exception by the ECJ is rather broad, because the protection of breastfeeding is not so much connected with *the protection of women*, which is the aim of the exception, but rather with the protection of the newborn that benefits from breastfeeding. As a matter of fact, there is consensus in medical literature on the fact that breastfeeding is beneficial to children, because it protects them against some infections, improves neurologic development, reduces the risks of suffering from cancer and increases the mother-child bond[70]. In the words of Newton (2004), "breastmilk is uniquely composed to satisfy the biologic needs of the human infant" (p. 641). The World Health Organization (WHO) recommends exclusive breastfeeding up to 6 months of age, with continued breastfeeding along with appropriate complementary foods up to 2 years of age or beyond[71]. Having in mind the minimum EU period for the protection of the biological condition of the mother (14 weeks) and the period during which the WHO recommends breastfeeding (until the child is 2 or beyond), the pregnancy and maternity exception seems to be far-reaching. The exception could justify almost any period of

[67] There are some counter-indications to breastfeeding (meaning that the mother cannot breastfeed), due to maternal problems (AIDS infection, cells T leukaemia, taking some medicaments) or child's problems (deficit of enzymes like lactose and galactosaemia) [Fabre González (1996, chapters 17 and 18); and Asociación Española de Pediatría (2009)].

[68] Even if most women start breastfeeding in Europe, the proportion of children being breastfed declines with age. According to the data from the OECD Family Database, the rate of children who were "ever breastfed" in the EU around 2005 was an average of 89.1%, ranging from 43.8% in Ireland to 98% in Denmark. At 3, 4 and 6 months of children's age the average declined to 49.8%, 38,4% and 27.7% respectively (retrieved August 2017 from http://www.oecd.org/els/family/database.htm#child_outcomes: indicator CO1.5 Breastfeeding rates).

[69] 23 out 28 Member States of the EU provided for paid nursing breaks for employees in 2013 [International Labour Organization (2014, p. 185-187)].

[70] Fabre González (1996, chapter 17); Rosenthal (2002, chapter 6); and retrieved August 2017 from http://www.who.int/maternal_child_adolescent/topics/child/nutrition/breastfeeding/en/.

[71] Retrieved August 2017 from http://www.who.int/topics/breastfeeding/en/.

maternity leave and it is not surprising that both short and relatively long periods of maternity leave −16 weeks in *Betriu Montull* and 6 months in *Hofmann*− were found to be included in the exception of Article 2(3) of the ETD.

2.3. Is maternity leave a positive action measure?

Up to this date, there is no case law about maternity leave and its possible categorisation as a positive action measure. In fact, in the two cases that have directly tackled the question of a possible discrimination against men −*Hofmann* and *Betriu Montull*− maternity leave was considered to be included within the pregnancy and maternity exception of Article 2(3) of the ETD and there was no need for the ECJ to analyse Article 2(4). However, the AG in *Betriu Montull*, as it excluded maternity leave from the scope of Article 2(3), did evaluate whether positive action was applicable. The AG followed the solution given to breastfeeding leave in *Roca Álvarez* and following the same reasoning concluded that the maternity leave at issue could not be justified under Article 2(4) of the ETD.

As a matter of fact, economic literature shows how the different interruptions of work due to maternity leave affect the labour market outcomes of women. Economic studies show some positive effects on women's labour market participation[72], but also the perverse effects on women's earnings[73]. The settled case law of the ECJ allows measures *which give a specific advantage to women with a view to improving their ability to compete on the labour market and to pursue a career on an equal footing with men*[74]. But maternity leave improves neither women's ability to compete on the labour market nor women's ability to pursue a career on an equal footing with men. On the contrary, maternity leave puts the burden of the care of the new-born on mothers and career interruptions associated with maternity leave affect negatively women's promotion opportunities and salaries. All in all, it could be concluded that neither the case law of the ECJ nor economic evidence seems to support the categorisation of maternity leave as a positive action measure.

[72] 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, p. 860] to 2 years [Thévenon and Solaz (2013, p. 4)].

[73] Ruhm (1998, p. 315), Akgunduz and Plantenga (2013, p. 859-860) and Thévenon and Solaz (2013, p. 40).

[74] Court of Justice 19 September 2013, case C-5/12 *Betriu Montull*, ECLI:EU:C:2013:571, paragraph 74; Court of Justice 30 September 2010, case C-104/09 *Roca Álvarez*, ECLI:EU:C:2010:561, paragraph 33; and Court of Justice 19 March 2002, case C-476/99 *Lommers*, ECLI:EU:C:2002:183, paragraph 32.

3. Conclusions and the way forward

The position of the ECJ cannot be regarded as ill-judged. In the Court's view, although both parents are in comparable situations as regards the bringing up of children, specific biological conditions unique to women justify a differential treatment between men and women. These exclusive biological conditions are the capacity of women to become pregnant and give birth and the capacity of women to breastfeed. A differential treatment would aim at protecting the biological condition of the delivering mother during pregnancy and after childbirth and breastfeeding. In this sense, it is undeniable that maternity leave is a suitable instrument to protect the work incapacity of the delivering mother and facilitate breastfeeding.

Concerning the second unique biological element, it seems reasonable to facilitate breastfeeding via maternity leave, as this is clearly beneficial to children. Nonetheless, the position of the ECJ could be criticised for several reasons. First of all, the interpretation of the pregnancy and maternity exception by the ECJ is rather broad, because the protection of breastfeeding is not so much connected with *the protection of women*, which is the aim of the exception, but rather with the protection of the newborn that benefits from breastfeeding. Moreover, this broad interpretation contradicts the very case law of the ECJ about the strict interpretation of the exceptions to the principle of equal treatment. Secondly, even if breastfeeding is formally considered as an exception to the principle of equal treatment by the ECJ, there are at least two substantial reasons to challenge this position. The first reason is connected with the idea that in certain situations maternity leave is not serving the purposes of facilitating breastfeeding. For instance, where women, for one reason or another, do not breastfeed their babies, or where there are breastfeeding breaks at national level, which are especially designed to facilitate breastfeeding. Yet, this second situation is not so straightforward because sometimes breastfeeding breaks are not long enough to breastfeed adequately. The second reason is deeper and applies to situations where mothers are indeed breastfeeding. While acknowledging the importance of breastfeeding, it could be argued that taking care of the newborn is much more than just breastfeeding. Caring activities include changing diapers, bathing, dressing and feeding the baby, taking them for walks, putting them to sleep, rocking the baby and taking them to the paediatrician, among others. Both parents are able to carry out all these activities. The only difference is with regard to "feeding". The mother is the only one capable of breastfeeding the baby. The father cannot breastfeed, but he can bottle-feed the baby with formula (artificial product) or with natural milk (if the mother pumps the milk). Does it make sense to assign periods of childcare only to mothers because

they are the only ones capable of breastfeeding? Is it not possible to find other more proportionate ways of facilitating breastfeeding, for instance by means of appropriate breastfeeding breaks? Maybe the care period of maternity leave is just a measure that does not remain within the limits of what is appropriate and necessary for achieving the aim in view −*the facilitation of breastfeeding*− and the principle of equal treatment is not reconciled with the aim pursued. All things considered, there is a case to challenge the recognition of the care period of maternity leave only to mothers.

As regards the first unique biological element, it is very difficult to say with certainty how long the period of incapacity to work will be. This is why it is understandable that the EU legislature decided to set a fixed amount of weeks for this purpose. The minimum of 14 weeks in the EU Directives on maternity leave could have been considered as a reasonable period to cover the recovery of the mother during the 6 weeks after childbirth (puerperium), as well as other potential medical complications that could arise during pregnancy and after the puerperium. However, medical evidence suggests that such complications are unlikely and that, consequently, for most women the actual period of work incapacity is only 6 weeks. In other words, for most women there is a period of at least 8 weeks only devoted to the care of the newborn, which potentially could also be recognised to fathers by means of paternity leave. Despite this reality, it does not look realistic to expect that the ECJ will declare the whole care period of maternity leave discriminatory against fathers thereby allocating to fathers a similar period of leave, because it will imply a profound revision of the EU Directives on maternity leave. What the ECJ could do more easily is, based on its case law on the principle of proportionality[75] and the *IP* case[76], interpreting the minimum of 14 weeks in the Directives also as a maximum for the protection of work incapacity, thus allocating also to fathers by means of paternity leave any national period of maternity leave beyond 14 weeks. This would affect countries with long maternity leaves, such as the UK with 38 extra weeks of maternity leave[77] versus the current 2 weeks of paternity leave (difference of 36

[75] As previously explained, in determining the scope of any derogation (such as maternity leave) from an individual right such as the equal treatment of men and women, the principle of proportionality, one of the general principles of law underlying the Community legal order, must be observed.

[76] A national more stringent measure (a measure going beyond the EU minimum standard) has to fulfil two conditions: first, it does not undermine the coherence of Community action in the area of workers' health and safety; second, it applies in a non-discriminatory way and does not hinder the exercise of the fundamental freedoms guaranteed by the Treaties (Court of Justice 17 December 1998, case C-2/97 IP, ECLI:EU:C:1998:613, paragraphs 36 to 39). This case law about the Working Time Directive 93/104 could be applied to the maternity leave of the PrWD, whose legal base is also health and safety of workers.

[77] 52 weeks minus 14 weeks.

weeks) or IE with 28 extra weeks[78] versus 2 weeks (difference of 26 weeks), whereas countries with shorter maternity leaves would be less affected or not affected at all, for example ES with 2 extra weeks of maternity leave[79] versus the current 4 weeks of paternity leave or BE with 1 extra week[80] versus 2 weeks.

To conclude, two final reflections will be offered. First, it is clear that the relationship between maternity leave and the principle of equal treatment between the delivering mother and the father is problematic. Second, the solution to this problematic relationship is not straightforward and attention should be paid to the individual situation of the delivering mother and to different parameters, such as medical complications during pregnancy and after giving birth, whether the mother actually breastfeeds the baby and whether breastfeeding is accommodated by means of adequate breaks. Despite this complexity, it is worth exploring more proportionate ways of conciliating the recognition of women's biological differences and the rights of all parents to spend time with their children. A possible solution would be to have different tracks of protection: a leave to cover work incapacity work periods, which would be variable depending on the actual medical situation of the delivering mother; a leave to cover care periods, which would be fixed and available to both parents: and breaks to facilitate breastfeeding or expressing breast milk, which would again be fixed and available to mothers. Further research is needed on this issue.

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[78] 42 weeks minus 14 weeks.
[79] 16 weeks minus 14 weeks.
[80] 15 weeks minus 14 weeks.

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