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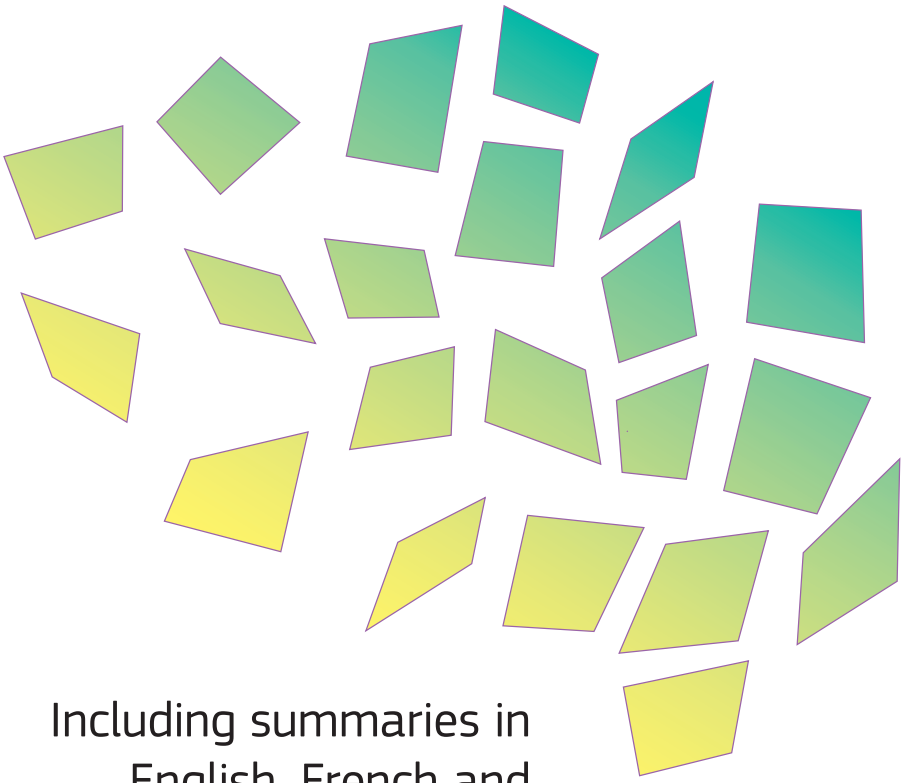

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Family leave: enforcement of the protection against dismissal and unfavourable treatment

Justice and Consumers

EUROPEAN COMMISSION

Directorate-General for Justice and Consumers
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Family leave: enforcement of the protection against dismissal and unfavourable treatment

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Executive summary

1 Introduction

Following the proclamation of the European Pillar of Social Rights on 17 November 2017, the European Commission adopted a proposal for a Directive to support work-life balance for working parents and carers, which strengthens and expands family-related leave measures as well as acknowledges the value of unpaid work that carers, predominantly women, shoulder in caring for dependents. The proposed Directive builds on existing EU legal provisions in the field of work-family reconciliation, and in particular the Pregnant Workers Directive 92/85/EEC, the Gender Equality Directive (Recast Directive) 2006/54/EC, the Self-Employed Directive 2010/41/EU and the Parental Leave Directive 2010/18/EU, as well as Treaty provisions such as Articles 2 and 3(3) TEU, Articles 153(1)(i), 153(2)(b) and 157 TFEU and the EU Charter of Fundamental Rights. The measures envisaged extend existing rights and introduce new forms of protection. They include a right to take at least four months of non-transferable paid leave for parents of children (up to a certain age, at least twelve), compensated at least at sick-pay level. The proposed Directive creates an individual right to paid paternity leave of at least 10 days. It also establishes the right to request flexible working arrangements for parents with children up to a given age (at least twelve). In addition, the proposed Directive introduces, for the first time, a right to at least five days of carers' leave per year for dependent or seriously ill relatives. It also includes the right to take time off work in case of *force majeure* for all workers (not only parents or care-givers) for urgent family reasons, as currently provided in the Parental Leave Directive. Under the proposed Directive the dismissal, discrimination or unfavourable treatment of workers on the ground that they have applied for, or have taken, leave guaranteed by the Directive, or on the ground that they have exercised the rights to request flexible working arrangements is to be prohibited.

Against this background, this thematic report considers enforcement issues in relation to discrimination, unfavourable treatment and dismissal in the context of the various types of family-related leave, including pregnancy/maternity leave, parental/adoption leave and paternity leave, as well as carers' leave and other family-related leave. It also considers issues of compensation, reparation and sanctions, as well as the role of national equality bodies. The objective is to obtain an overview of enforcement in practice of relevant existing EU law. The study covers the 28 Member States and three EEA countries: Iceland, Liechtenstein and Norway. It is based on answers provided by the national experts of the European network of legal experts in gender equality to a questionnaire (attached in Annex 1 of the report) assessing the situation in these countries. The information provided in this report is valid as at 29 August 2018.

This study covers the protection against dismissal, discrimination and unfavourable treatment provided under the Pregnant Workers Directive 92/85/EEC, the Gender Equality Directive (Recast Directive) 2006/54/EC, the Self-Employed Directive 2010/41/EU and the Parental Leave Directive 2010/18/EU. Paternity and adoption leave are not guaranteed as such by EU law but where Member States have adopted such leave, EU law provides for the protection against dismissal based on the exercise of the right to this type of leave and the right to return to the same or a similar job as well as to benefit from any improvement in working conditions to which workers would have been entitled during their absence. Insofar as Member States have existing statutory rights on paternity, adoption or carers' leave, the enforcement of these types of leave is also addressed in this report. This report further addresses the issues of dismissal based on adoption, fertility treatment and other Assisted Reproductive Technology (ART). It also covers discrimination and unfavourable treatment faced by women who have lost their baby or who have given birth to a stillborn baby.

This report consists of ten sections. Following the general introduction in Section 1, Section 2 discusses the enforcement of the protection against discrimination and unfavourable treatment due to the take-up of family-related leave at national level. In particular, it considers legislative provisions, national case law, decisions of national equality bodies and studies and/or annual reports etc. conducted by national equality bodies or other bodies in relation to the enforcement of the prohibition against discrimination and unfavourable treatment. It addresses enforcement difficulties in relation to pregnancy/maternity leave, parental and adoption leave, paternity leave, carers' leave, and the leave of self-employed workers. As paternity leave and carers' leave are not prescribed under EU law, the report provides an outline of these leave arrangements under national law insofar as they exist. Section 3 focuses on the enforcement of the protection against dismissal based on family-related leave at the national level, following the same structure as in Section 2. It provides an assessment of specific judicial barriers to the enforcement of the ban against dismissal in relation to the take-up of family-related leave. Section 4 discusses the access to justice and effective enforcement of the prohibition of dismissal, discrimination and unfavourable treatment based on family-related leave. Section 5 explores the role of actors such as ombudspersons, labour inspectorates and social partners in the enforcement of existing legal protection. Section 6 contemplates additional enforcement problems within the scope of this report in the countries under review. Section 7 outlines some good practices in regard to the protection against discrimination, unfavourable treatment and/or dismissal in the countries under review. Section 8 covers some other relevant issues in light of the scope and aim of this report, including breastfeeding, the birth of a stillborn child, or Assisted Reproductive Technology (ART), such as IVF and surrogacy. Section 9 draws some conclusions and provides tentative recommendations. The last section provides a list of national relevant bibliographic sources.

2 Enforcement of the protection against discrimination and unfavourable treatment due to the take-up of family-related leave at national level

2.1 Pregnancy and maternity leave

Under EU law, pregnancy, maternity and parental rights are firmly intended to contribute to the principle of gender equality. In the countries under review, the motivation for the adoption of pregnancy, maternity and parental rights, however, can be underpinned by other considerations such as demographic concerns. This results in a tension, in particular with regard to the length of maternity leave, since long periods of leave are sometimes – wrongly – considered to help increase fertility rates while they have also been identified as an obstacle to women's access to paid employment.

The discrimination and unfavourable treatment of workers on the ground of pregnancy or maternity leave is formally prohibited in all countries under review. Most States have a specific legal provision prohibiting discrimination and unfavourable treatment on the ground of pregnancy and maternity with legal provisions that go beyond the EU legal requirements. In Bulgaria, Germany, Lithuania and Poland, where there is no explicit provision specifically banning discrimination and unfavourable treatment based on pregnancy or maternity leave, individuals must rely on general anti-discrimination provisions. Although this complies with EU obligations, the absence of a specific provision explicitly prohibiting discrimination or unfavourable treatment based on pregnancy and maternity leave represents a gap in the law, which makes it more difficult for individuals to fight discrimination on the grounds of pregnancy and maternity leave. This weakens the awareness of workers' rights and therefore weakens the enforcement of these rights.

Despite the existence of a formal legal provision specifically or generally prohibiting the discrimination and unfavourable treatment of workers on the ground of pregnancy and maternity leave in all countries under review, instances of discrimination or unfavourable treatment are reported to be numerous in

practice, even though at the same time there are few or no legal cases. A series of recent national studies shows a disconnect between law and what happens in reality, reflecting the fact that traditional gender assumptions and stereotypes have not yet sufficiently been challenged.

There appears to be general hostility towards pregnant workers and women on maternity, parental or care leave in the workplace, resulting in many instances of sexual harassment and bullying against these workers. Moreover, victimisation and the fear of victimisation often means that victims are reluctant to take legal action, especially but not exclusively in times of economic crises due to labour-market instability, and when they have a precarious job. Individuals who complain can also be exposed to further victimisation during court proceedings.

Many instances of discrimination or unfavourable treatment are based on the perception that young women are likely to become pregnant and therefore necessarily need to take leave to look after children. Such deeply rooted harmful stereotypes and prejudices about the role of women as mothers and carers damages their ability to be considered as workers in their full right. These stereotypes lead to a view that women are less fit and less skilled than men for work. Most at risk of being excluded from employment based on negative stereotypes are mothers, especially single mothers, and those with disabled children, women with low levels of education and qualification, women in precarious work, women who have been long-term unemployed and women from ethnic communities, particularly Roma women. Many employers refuse to employ female candidates based on their age and/or marital status, or ask questions about their future reproductive plans. Complaints against this sort of discrimination remain minimal or non-existent because it is particularly difficult to produce evidence in pre-employment recruitment situations.

The personal scope of the applicable prohibition of discrimination and unfavourable treatment on the ground of pregnancy and maternity leave is unclear in some countries. In *Danosa*,[1] the CJEU held that executive board members of companies must be considered as employees with regard to the protection from discrimination and unfavourable treatment in case of pregnancy and the right to leave connected with childbirth and childcare. However, members of executive boards in Latvia and legal counsel forming part of a senior executive team in Malta remain excluded from this protection.

Efficient and effective dissemination of information on the right to family-related leave is vital to support the enforcement of these rights. However, the lack of access to information about, and awareness of, existing rights regarding pregnancy and maternity leave contribute not only to discrimination but also to enforcement difficulties. Access to information seems to be particularly difficult during periods of maternity or parental leave, when issues such as salary negotiations and re-organisations are often not discussed with, or disclosed to, such workers. Employers also seem to be lacking information and awareness about pregnancy and maternity rights. In some countries, members of the judiciary appear to lack specific knowledge about anti-discrimination law in relation to pregnancy and maternity.

Specific enforcement problems can be noted in relation to a number of pregnancy and maternity leave rights. In particular, the right to return to the same or an equivalent job following the period of maternity leave is problematic. Although in most countries a formal legal provision guarantees this right, in practice, many returning workers are given new tasks and/or find that changes have been made to their job. They are often pressured into accept less attractive working conditions, including the downgrading of their position or the imposition of part-time work or rotation work. The economic crisis and resulting job shortages, as well as high rates of unemployment have reinforced this trend, in particular in Greece.

Other enforcement problems include the potential clash between the prohibition of discrimination based on maternity and the obligation to protect pregnant employees against health risks. Directive 92/85/EEC aims to protect pregnant workers, workers who have recently given birth and workers who are breastfeeding by guaranteeing that their health is not compromised by the work environment. However,

1 C-232/09 *Dita Danosa v LKB Lizings SIA*. ECLI:EU:C:2010:674.

difficulties arise when a pregnant worker must be withdrawn from the workplace on the basis of health concerns, but there is no other vacant position to which that worker could be temporarily transferred.

Furthermore, the right to maintenance of payment during maternity under Article 11 of the Pregnant Workers Directive is complex and ill-enforced despite the existence of a number of CJEU cases.[2] The complexity of EU law in this area results in confusion within the domestic systems. Concretely, the payment of maternity benefits can be restricted to a continuous period of employment and/or other conditions such as the payment of insurance contributions. To qualify for paid maternity leave, in some countries, workers who are on unpaid leave need to return to work before being able to qualify for paid maternity leave.

A number of legal concepts also continue to raise difficulties of application in some countries. In particular, the concept of indirect discrimination is not clearly understood and therefore under-used in Hungary and Greece. The rules relating to the shift of the burden of proof are also found to be relatively complex and not always well implemented or enforced in Croatia, Greece, Hungary, the Netherlands, Poland and Slovakia.

Finally, EU law requires that domestic remedies, sanctions or penalties for the violation of the prohibition of discrimination on the ground of pregnancy and maternity leave be effective, proportionate and dissuasive. While they are generally compliant with EU law, and in some countries exceed the EU requirements, in practice some difficulties remain because payment or remedies can be limited to specific injuries. The length of court proceedings means that by the time remedies are provided they are no longer adequate. The level of sanctions and penalties is often considered too low to prevent discrimination or to be adequate to provide an effective remedy for workers.

2.2 Parental and adoption leave

In most countries, the legal protection against discrimination and unfavourable treatment based on parental and adoption leave is the same as that for pregnancy and maternity leave. This means that the difficulties regarding enforcement are similar.

In Belgium, Germany, Lithuania and Poland, since there is no specific formal legal provision prohibiting the discrimination and unfavourable treatment of workers on the grounds of either adoption leave or parental leave, the claimant must rely on the general sex discrimination provisions. Although such national law formally complies with Clause 5(4) of the Parental Leave Directive, which requires that Member States and/or social partners take the necessary measures to protect workers against unfavourable treatment or dismissal on the grounds of taking up parental leave, it is unlikely to be specific enough. The lack of explicit prohibition of discrimination and unfavourable treatment due to taking parental leave and adoption leave represents an obstacle to enforcing such a prohibition.

Where there is a specific legal prohibition, conditions of application may create difficulties in the enforcement of the right. Domestic law on parental and adoption leave can be unclear, complex, unequal, fragmented, scattered, and/or modified frequently and unexpectedly. In turn, this leads to difficult implementation and legal uncertainty for workers.

2 See e.g. C-342/93, *Joan Gillespie and Others v Northern Health and Social Services Boards, Department of Health and Social Services, Eastern Health and Social Services Board and Southern Health and Social Services Board* ECLI:EU:C:1996:46; C-411/96 *Margaret Boyle and Others v Equal Opportunities Commission* ECLI:EU:C:1998:506; C-66/96 *Handels- og Kontorfunktionærernes Forbund i Danmark, acting on behalf of Berit Høj Pedersen v Fællesforeningen for Danmarks Brugsforeninger and Dansk Tandlægeforening and Kristelig Funktionær-Organisation v Dansk Handel & Service* ECLI:EU:C:1998:549; C-333/97 *Susanne Lewen v Lothar Denda* ECLI:EU:C:1999:512; C-218/98 *Oumar Dabo Abdoulaye E.A. v Regie Nationale des Usines Renault SA* ECLI:EU:C:1999:424.

A number of workers find themselves excluded from accessing parental-leave rights. Although Clause 1(3) warns that a part-time status, fixed-term contract or contract through a temporary agency are not valid grounds for excluding workers from the scope of the Directive, it nevertheless remains that the application of the Directive is linked to the existence of a contract of employment defined under national law. Access to parental leave is therefore not universal and can be restricted following specific conditions set under national law.

For those who can access parental leave, the enforcement of the prohibition against discrimination and unfavourable treatment poses problems in a number of ways. In some countries, the period of parental leave is not taken into account in relation to the calculation of certain rights and benefits deriving from the employment contract. Payment during parental leave can also represent an issue: although it is not guaranteed by the Parental Leave Directive, acquired rights are to be maintained during the leave according to Clause 5(2). This has led to issues in relation to entitlement to bonuses in some Member States. In addition, taking consecutive periods of maternity leave and parental leave can often result in the payment of lower benefits. In some countries such as Germany, Poland and Sweden, the right to return to the same job has not been fully implemented.

As for pregnancy and maternity leave, the legal concept of indirect discrimination and the rules of the reversal of the burden of proof are not always clear in a number of countries. Moreover, the concept of time off from work on grounds of *force majeure*, which implies urgency and a short period off work, is not always well understood and has required judicial clarification in some countries.

Despite the existence of formal provisions prohibiting discrimination and unfavourable treatment based on parental leave, in practice there are frequent legal breaches, but few or no cases are taken to court. Although compliant with EU law, remedies and sanctions for the violation of the protection against discrimination and unfavourable treatment based on parental leave are considered insufficient and ineffective.

The European Commission has identified a number of keys reasons explaining why families have not been able to make full use of parental leave rights so far. It has acknowledged that a lack of flexibility in parental-leave arrangements represents a key reason for its historically low take-up.[3] Indeed, in some countries access to parental leave is governed by rigid criteria and complex procedures, which means that parents are not always able to take leave when they want to. Workers, for example, are often unable to take parental leave on a part-time basis. In addition, the regulations allowing both parents to take the leave are often complex, which means that the rights are not used.

The European Commission has further identified that the lack of compensation and the lack of non-transferable/dedicated periods of parental leave for each of the parents has resulted in the fact that women have disproportionately made use of parental leave. The take-up of parental leave by fathers across all of the countries under review is perceived to be low because of discrimination (perceived and real), the structural organisation of society (men often remain the main breadwinners), the persistent gender pay gap, the non-existent or low level of payment during the period of parental leave, and gender stereotypes (women continue to be seen as the primary caretakers). From an employers' perspective, parental leave is perceived to affect businesses negatively because it takes employees away from work for periods of time that are considered too long. In turn, the negative view of some businesses on parental leave contributes to increasing discrimination and unfavourable treatment.

Finally, in most countries, adoption leave is shorter than, and complementary to, parental leave. Where there is a specific adoption leave, parental leave is also available to adopting parents. Where adoption

3 The Council position changes, and slightly reduces the Commission's proposal. Although the Council is proposing to keep the existing individual right of four months of leave, it proposes to reduce the non-transferability to two months of which only 1.5 months would be paid at a level set by the Member State concerned.

leave is available it is protected at least at the same level and on the same conditions as parental leave. A formal adoption might be necessary for adoption leave to be granted.

2.3 Paternity leave

While the proposed Directive on work-life balance envisages such a right, EU law does not yet guarantee the right to paternity leave. However, Article 16 of the Recast Directive provides that in countries that have adopted such leave, workers who take up paternity or adoption leave must be protected against dismissal based on the exercise of those rights. Workers who take up paternity or adoption leave are also granted the right to return to work to the same or a similar job. Almost all the countries under review offer a period of paternity leave, with the exception of Austria, Croatia, Germany, Liechtenstein and Slovakia.

In some countries, paternity leave is reserved to fathers only, while in others, paternity leave is open to a broader range of parents, including same-sex partners. Restrictions might also apply regarding marital status or whether the partner lives with the mother. Paternity leave is also not always accessible to all fathers, especially those in precarious employment, such as agency work, zero-hours or casual-hours contracts. In countries where paternity leave exists, its duration varies but remains short overall, between one day in Malta to 54 days in Finland. Conditions of application, such as the notification of the birth to the employer, the production of a medical certificate or a continuous period of employment, might restrict the right to paternity leave. In most countries, a social security allowance equivalent to that of sick leave is granted but the benefit can be more generous, including full pay.

When paternity leave is available, protection against discrimination, unfavourable treatment and dismissal is often framed in the same ways as maternity or parental leave. For this reason, enforcement problems are similar. For instance, there is no specific provision prohibiting discrimination and unfavourable treatment based on paternity leave in Austria, Belgium, Lithuania and the Netherlands, where a claimant must use the instruments available within the existing gender discrimination legal framework. Even when a specific provision exists, very few or no cases are taken to court. In addition, as seen in relation to pregnancy and maternity, the remedies and sanctions for the violation of the protection against discrimination and unfavourable treatment based on paternity leave is generally considered to be insufficient and ineffective.

Finally, it should be noted that the take-up of paternity leave is considered to be low in some of the countries under review or even sometimes decreasing due to discrimination, the complexity of the requirements, the rigidity of the leave format, the low level of compensation, the fact that the leave is not mandatory, and/or the low level of awareness. In addition, traditional gender stereotypes and conservative cultural views contribute to keeping fathers from taking paternity leave.

2.4 Carers' leave

The EU does not yet guarantee periods of leave to people who have caring responsibilities for others than children in the form of maternity, parental and adoption leave. The proposed Directive on work-life balance for parents and carers would, for the first time, introduce a carers' leave in EU law. Workers would be entitled to at least five working days of paid leave per year to care for dependent or seriously ill relatives. In addition, the proposed Directive also provides the right to take time off work for urgent family reasons in case of *force majeure* to all workers, not just to parents or care-givers, as currently provided in the Parental Leave Directive. Existing EU Directives and the proposed Directive address the needs of workers who care for others by providing flexibility around working time and leave from work, thus facilitating their remaining in the labour market. In contrast, policies encouraging the development of care services, such as childcare or elderly care, allow caregivers to enter and remain in the labour market.

Many countries already provide some form of carers' leave, although Iceland, Latvia, Romania, Slovakia and the United Kingdom do not. Where it exists, carers' leave is not homogeneous across the countries

under review as its meaning is broad and at times covers children, disabled persons, elderly relatives and/or other urgent family reasons in various combinations. The purpose, personal and material scope, the length, the conditions of application, the payment and the level of protection against dismissal, discrimination and unfavourable treatment all vary widely across countries. Within each country a variety of carers' leaves may exist, each with specific personal and material scopes as well as specific conditions of application.

Where it is offered, carers' leave is not universal and can be restricted according to sector, marital status, condition of living under the same roof or limited to one parent. The length of carers' leave is not clear-cut in many countries and may vary according to the type of leave, its personal scope or the personal situation of the worker. Carers' leave is available in most countries for the purpose of caring for children, although its duration might differ and/or its conditions of application depend on the age of the child. Carers' leave is also broadly available to care for a spouse/partner or close relative in many countries, with potentially limiting conditions of application and restrictions. In specific countries, carers' leave is also available to care for other categories including: disabilities/severe illness; elderly people; relatives up to the second degree of kinship; terminally ill relatives/end-of-life situations in foster family; short-term leave for IVF treatment; and for general work-life balance or in the event of unforeseen closure of the nursery, kindergarten or school. Carers' leave is often remunerated at a flat rate under the social security system. The benefit however varies between 100 % of the wage in Croatia and the minimum wage in Estonia.

Although most countries provide for some form of carers' leave, the protection against discrimination, unfavourable treatment or dismissal based on the take-up of this leave is not always guaranteed. This is also true for other associated rights, such as the right to return to the same or to an equivalent post. The lack of legal protection against discrimination and unfavourable treatment also means that there is little or no case law.

Finally, carers' leave is typically drafted in gender-neutral terms, but in practice, it is disproportionately taken by women because it is unpaid or compensated at a low level, reinforcing negative gender stereotypes.

2.5 Self-employed persons (Directive 2010/41/EU)

Directive 2010/41/EU sets out the principle of equal treatment between men and women engaged in an activity in a self-employed capacity. Article 8(1) of Directive 2010/41/EU provides that Member States must grant self-employed workers and 'assisting spouses' maternity benefits for a period similar to the duration of maternity leave for employees currently in place at Union level (14 weeks). Maternity benefits can be granted either on a mandatory or voluntary basis. In practice, the insufficient transposition of this provision means that it is difficult for self-employed women in Cyprus, Finland, France, Greece, Hungary, Portugal, Romania and Spain to claim the benefit of these rights. Moreover, domestic law often fails to cover spouses (or life partners, when recognised at national level) of self-employed men.

Article 8(2) and (3) of Directive 2010/48 requires that women should be granted a maternity allowance (of at least 14 weeks). However, the calculation method of this allowance poses problems in relation to the basis for calculation of salary compensation, the insurance provider or the complexity of the system in a number of countries.

Moreover, Article 8(4) of the Self-Employed Directive provides that in order to take the specificities of self-employed activities into account, female self-employed workers and assisting spouses (or assisting life partners of self-employed workers, when recognised at national level) should be given access to any existing services supplying temporary replacement that enable interruptions in their occupational activity

owing to pregnancy or motherhood, or access to any existing national social services. However, this right has not been transposed in a number of countries.

Finally, few self-employment-related issues, especially when related to pregnancy/maternity, are taken to court. The legal monitoring of the protection of the self-employed is rendered difficult because the institutions that are traditionally concerned with issues of pregnancy and maternity discrimination and unfavourable treatment do not have competence over self-employed workers.

3 Enforcement of the protection against dismissal due to the take-up of family-related leave

3.1 Pregnancy and maternity leave

Following Article 10(1) and (2) of Directive 92/85/EEC and Article 14(1)(c) of the Recast Directive, the dismissal of workers on the ground of pregnancy or maternity is prohibited in all countries under review. The formal legal protection against dismissal on the ground of pregnancy or maternity is strong in most countries, with national law exceeding the minimum protection period and the sanctions for non-observance prescribed by Article 10 of Directive 92/85/EEC. Nevertheless, national studies highlight high rates of dismissal of pregnant workers and workers on maternity leave.

Often, employers do not directly dismiss pregnant workers, relying instead on bullying techniques and/or unacceptable changes in working conditions. It is also common for employers to create apparently valid reasons for dismissal so that it becomes difficult for a worker to prove that her dismissal was indeed connected to pregnancy or maternity. When challenged in court, these techniques are typically found to constitute unlawful direct sex discrimination if substantiated by evidence. However, few cases are brought to court and when they are, national law often provides that the dismissal of pregnant workers or women on maternity leave can be justified if legitimately related to reasons of business operation. Therefore, employers often present justification on economic grounds or due to the specific circumstances of an undertaking. Cases of redundancy based on economic or environmental issues are particularly difficult. The choice of employees to be made redundant should not be linked to the pregnancy or maternity leave of a worker. However, this is not always easy to prove for employees. Additionally, while most national laws are compliant with EU law on damages, these are considered too weak to represent serious deterrents.

Some legal concepts remain unclear to some national courts. In particular, confusion concerns the fact that dismissing a worker on the grounds of pregnancy or maternity constitutes direct sex discrimination. EU rules relating to sex discrimination and unfavourable treatment apply to cases of dismissal of pregnant workers, including the shift of the burden of proof. However, these rules are not always clear to national courts either.

The non-renewal of fixed-term contracts of pregnant employees remains a contentious issue in many countries despite the Court of Justice clarifying in *Melgar* that the refusal to renew the fixed-term employment contract of a pregnant worker constitutes direct sex discrimination.[4] As no specific justification is needed at the end of fixed-term employment, contracts are typically not renewed when workers are pregnant, who rarely decide to take legal action. This is compounded by the increase in precarious employment contracts. The main difficulty is to prove direct sex discrimination. Some countries have established an assumption of discrimination, or a requirement that the national equality body is informed of the non-renewal. Other issues explored in this report are the dismissal of pregnant workers during their probationary period and the so-called 'blank resignations'.

4 C-438/99 *Maria Luisa Jiménez Melgar v Ayuntamiento de Los Barrios* ECLI:EU:C:2001:509 and C-109/00 *Tele Danmark A/S v Handels- og Kontorfunktionærernes Forbund i Danmark (HK)* ECLI:EU:C:2001:513.

3.2 Parental and adoption leave

The Parental Leave Directive and Article 14(1)(c) of Recast Directive 2006/54/EC prohibit dismissal based on the take-up of parental or adoption leave. These provisions are well implemented in national law. Nevertheless, there is little case law, which does not reflect the reality on the ground. It is reported that pressure from employers is often so strong that women agree to give up their rights – by resigning from their job or not returning to work after the leave – because they face a hostile working environment. In addition, filing complaints with labour inspectors or starting litigation in court requires a large variety of resources, both financial and emotional, which many workers do not have.

3.3 Paternity leave

The right to paternity leave does not necessarily come with a protection against dismissal in most countries. In Hungary and Slovenia there is no protection against dismissal during paternity leave and this is in breach of Article 16 of the Recast Directive. There is no or little case law on this issue, either because there is no problem with the application of the law or possibly because there is no protection or the law on paternity leave is too recent for any difficulties to be observed.

3.4 Carers' leave

The right to carers' leave is not necessarily combined with a protection against dismissal based on the take-up of such leave. In a number of countries such leave is protected extensively, while in others there is no specific provision protecting workers who take carers' leave against dismissal so that such claims must be based on general anti-discrimination provisions. There is little case law on this issue in the countries under review.

4 Access to justice and effective enforcement

Access to justice and effective enforcement of the prohibition of dismissal and discrimination based on family-related leave is not homogenous across the countries studied in this report. The number of cases taken to court is not a reflection of the reality on the ground as individuals are reluctant to go to court for many reasons including of an emotional, physiological (e.g. physical and psychological situation after a pregnancy) and/or financial nature. Access to the justice system is costly, prohibitively so for some individuals, and the legal costs often do not outweigh possible gains. Legal aid is often inadequate and/or difficult to obtain. In addition, workers and employers are not always aware of their rights and obligations. Other factors leading to low litigation include the fear of victimisation, especially during times of economic crisis and high unemployment rates where workers in precarious and temporary employment are particularly at risk. Legal proceedings are mostly too long to provide adequate solutions for individuals. They can also be complex and therefore constitute a hurdle in pursuing legal claims. Conditions to apply for legal action can be difficult to meet. In particular, a short time limit for submitting a case may impair a victim's ability to claim discrimination. Finally, some workers have little faith in the court system or the ability of courts to provide unbiased outcomes, which is reinforced by the confusion around some EU legal concepts at domestic level.

5 Role of other actors in the enforcement of the protection against discrimination and/or dismissal due to the take-up of family-related leave

5.1 National equality bodies

In some countries, national equality bodies' decisions are not legally binding. This may represent a difficulty in enforcing the prohibition of discrimination against pregnant workers and workers taking family-related leave, especially in countries where accessing more formal judicial proceedings is problematic. Despite not being legally binding, some national equality bodies' decisions can be used in courts as evidential or persuasive material. Some equality bodies have autonomous standing in courts and can represent clients or intervene in proceedings. They can also influence the outcome of cases in practice. Even where their decisions are legally binding, however, few cases are typically brought forward.

Some national equality bodies contribute generously to the dissemination of information, research, monitoring of dismissal, discrimination and unfavourable treatment based on family-related leave and specifically in relation to pregnancy and maternity discrimination. Free personal advice is also sometimes provided. National equality bodies are also a source of good practices, including collaboration between actors and stimulation to enforce rights to family leave. National equality bodies have also been instrumental in contributing to legal development in some countries.

5.2 The role of other government bodies

Some government bodies help unpack the complexity of the law by publishing materials for the public and the legal profession. In most countries, the national equality body and the ombudsperson are the same office and represent a valuable source of information. Although some ombudspersons have judicial powers, their power is limited to complaints about public bodies. Employees in the public sector can contact the ombudsperson, but hardly ever do so, likely because other actors, such as national equality bodies, are more adequate. Labour inspectors are also instrumental in monitoring discrimination and unfavourable treatment. Their annual reports can provide information on family-related leave, although they are often too general to draw any concrete information on the enforcement of such leave. Labour inspectors often have the competence to impose administrative sanctions and penalties for violations of employees' rights or refer a case to court. Their powers can be wide and inquisitorial.

5.3 Trade unions and social partners

Trade unions are typically active in contributing to enforcing family-related rights by providing information and legal advice and/or legal representation to their members. Employers' organisations can also represent a good source of information. Trade unions are also a source of influence on legal development. However, it should be noted that, in some counties, trade unions are not active/interested in family-related issues.

5.4 Non-Governmental Organisations (NGO), civil society and charities

In some countries, NGOs contribute to improving the enforcement of pregnancy and parental leave rights by publishing materials for the public and the legal profession. Sometimes, NGOs are engaged in legal actions. The lack of resources made available in this sector however, limits the level of engagement of NGOs, civil society and charities.

6 Additional enforcement problems, good practices and other related issues

The meaning of 'family' under the law is important to define the scope of pregnancy, maternity, parental and paternity rights. The term 'family' is not always used consistently in the various legal acts. There might also be differential treatment according to the relationship of the parents, whether they are married, in a registered partnership or cohabitating.

Childcare facilities are an important complement to maternity/parental leave as they help individuals enter and remain in the labour market. In 2002, the European Council adopted the Barcelona targets, which are a series of objectives aimed at removing the obstacles for women's participation in the labour market. In particular, Member States have been encouraged, along with their competent authorities at national, regional and local levels and their social partners, to ensure that by the year 2010 access to quality childcare facilities affordable to everyone are provided for 90 % of children over three years old until they reach school age and, for 33 % of children under the age of three. The 2018 review of the Barcelona targets shows that the targets for children from 0 to 3 has finally been reached on average in the EU-28 but that the targets have not yet been reached for children from 3 to mandatory school-going age.

Flexible working arrangements, including the possibility to work part-time, flexitime or telework, are not common in some countries. The proposed Directive on work-life balance aims to contribute to change in this area as it provides for a right to request flexible working arrangements not only to parents of children but to all carers. This provision introduces the possibility for these workers to make use of (i) reduction in working hours, (ii) flexible work schedules, and (iii) teleworking possibilities.

Care work is still generally seen as a predominately female task in most countries and gendered ideologies, attitudes and culture also reinforce enforcement problems.

In Section 7, this report provides detailed examples of good practices. In particular, some companies seriously attempted to turn themselves into 'paradises for pregnant workers' but these examples remain far too few, and for some, this is only window dressing.

In Section 8, this study explores related issues such as the birth of a stillborn child, Assisted Reproductive Technology (ART), including IVF, and surrogacy. In some countries, the protection against dismissal on the ground of pregnancy and maternity also applies to parents who have a stillborn child. In contrast, miscarriages are not always considered as a case of pregnancy/maternity. Although anti-discrimination law applies in most cases, access to pregnancy and maternity rights such as paid leave does not apply. Fostering children is sometimes considered to be equivalent to the situation of adoption as the need to establish a relationship with the child is the same as for adoptive parents. Some countries have built on the *Mayr*[5] case to protect workers who undergo IVF treatment against dismissal, discrimination or unfavourable treatment. Surrogacy is not recognised in a number of countries and as a result, no specific right to leave is granted to commissioning parents. In others, protection against dismissal on the ground of pregnancy/maternity applies to surrogate mothers and the commissioning parents.

7 Conclusions / recommendations

This report reveals that despite the existence of clear formal statutory rights implementing the rights laid out in EU law at domestic level, in practice many individuals continue to experience dismissal, discrimination and unfavourable treatment because they are pregnant or exercise their right to family-related leave. Such discrimination appears to be systemic and widespread and has not decreased across

5 C-506/06 *Sabine Mayr v Bäckerei und Konditorei Gerhard Flöckner* OHG.ECLI:EU:C:2008:119.

the countries under review. Studies conducted at national level reveal that the law, which has been in place for decades, has not reached its objectives. Moreover, it has not sufficiently contributed to changing the traditional gender division of labour in the private sphere. Women continue to bear the main burden of unpaid care work and, as a result, tend to be the primary target of dismissal, discrimination and unfavourable treatment based on family leave. Men who take family-related leave are also found to be the target of dismissal, discrimination and unfavourable treatment. While it is hoped that women might experience less discrimination as more men take part in unpaid care activities, in practice women continue to be the main users of family-related leave.

EU law on **pregnancy and maternity leave** is well transposed into domestic law and the rights at national level typically go beyond the requirements set under the Pregnant Workers Directive. In spite of this, national studies and statistics show that pregnancy and maternity rights are violated across the board and women are often being dismissed, discriminated against and treated unfavourably based on pregnancy and maternity leave. Too many enforcement issues are salient, ranging from the non-renewal of pregnant workers' fixed-term employment contracts to their unjustified dismissal during probationary periods. Generally, workers in precarious jobs are more vulnerable to dismissal, discrimination and unfavourable treatment on the ground of pregnancy and maternity. At the same time, they are also less likely to enforce their rights for fear of jeopardising their jobs, due to a lack of awareness of their right, and/or because they cannot afford access to justice. Self-employed workers are another category experiencing difficulties in relation to pregnancy and maternity. Moreover, women face discrimination on the basis of age because they are perceived as likely to become pregnant and to take family-related leave in the future. Some of the legal concepts such as indirect discrimination or the rule of the reversal of the burden of proof continue to present difficulties of application in a number of the countries under review. Often, the protection against dismissal, discrimination and unfavourable treatment on the basis on pregnancy and maternity leave is not respected by employers, who disregard the law and are not afraid of the consequences, either because workers do not take legal action or because sanctions represent no real deterrent. The failures in adequate enforcement of the rights to pregnancy and maternity leave reveal that European societies remain deeply gendered overall, where women are primarily considered to be mothers and not workers in their own right.

Parental leave rights also continue to encounter serious problems of enforcement in the countries under review. This report reveals deeply gendered behaviours in this regard. Women more often than men take parental leave because the leave is not paid or paid at such a low level that it does not enable both parents to make equal use of their entitlements. The existing Parental Leave Directive has failed to adequately promote greater involvement of fathers in care responsibilities. The guarantee of paid parental leave envisaged in the proposed Directive on work-life balance would go some way in encouraging men to take parental leave. Even though the proposed level of remuneration is not full pay, this would be a step towards paid parental leave. In addition to the establishment of a minimum non-transferrable period of parental leave of at least four months, this should contribute to increasing fathers' take-up of parental leave, and in turn to making sure that men are involved in care responsibilities. This report also shows that the take-up rate of parental leave by both men and women is hindered by the lack of flexibility. By allowing workers to take parental leave on a full-time or part-time basis, or in other flexible forms, the proposed Directive would also contribute to raising the number of parents, and especially fathers, who can take the leave. This report further shows that dismissal and discrimination are persistent in this regard and not limited to women. As for pregnancy and maternity rights, the number of court cases is small, however, for similar reasons.

Paternity leave is not yet guaranteed by EU law but is envisaged in the proposed Directive on work-life balance along with protection against dismissal, discrimination and unfavourable treatment. The majority of countries under review have already adopted some form of paternity leave and some form of legal protection against dismissal and/or discrimination and/or unfavourable treatment (with some rare exceptions). Where it exists, paternity leave is generally not long and only weakly protected against discrimination and dismissal. National provisions on 'paternity leave' are too often reserved to married

men and therefore exclude same-sex couples and non-married partners. The proposed Directive should remedy some of these difficulties by providing that the right to paternity leave should be without prejudice to marital or family status. At present, paternity leave is not massively taken by men, arguably due to the lack of adequate payment, but also due to deeply entrenched stereotypes on gender roles. In many countries, women continue to be considered the primary carers for children, while for fathers caring is only considered as an option. Such a mindset contributes to a lack of balance in care responsibilities between men and women around the time of the birth of a child, which hopefully the adoption of the proposed Directive will challenge.

Carers' leave is not yet guaranteed by EU law. The proposed Directive on work-life balance envisages introducing the right to a period of leave for workers to take care of a relative in the event of serious illness or dependency with some guarantees against dismissal and discrimination. However, carers' leave already exists in the majority of the countries under review as well as some form of protection against dismissal and/or discrimination, albeit not systematically or comprehensively. Indeed, carers' leave is not homogeneous across the countries under review and the protection against dismissal and discrimination remains weak overall. Assessing the enforcement of these rights is difficult in view of the lack of homogeneity of their personal and material scopes. In addition, in some countries, carers' leave has only very recently been adopted at national level so that no assessment of its enforcement is available yet. Nevertheless, experience in the countries where such leave already exists indicates patterns of enforcement that are similar to that of pregnancy, maternity and parental leave. The issues include common violations of the protection against dismissal, discrimination and unfavourable treatment, and at the same time a general lack of willingness of individuals to seek redress when these rights are violated. In addition, carers' leave is deeply gendered, which means that women also face most of the dismissal, discrimination and unfavourable treatment.

This report identified a number of barriers to the enforcement of family-related leave. A lack of awareness and access to information should be tackled by supporting awareness-raising campaigns. The lack of data and studies in some countries exacerbates difficulties in enforcing pregnancy, maternity and parental rights. Education of judges, lawyers, labour inspectors and other practitioners would help improve the application of some perceived complex legal concepts such as the reversal of the burden of proof or indirect sex discrimination.

Some barriers to the effective implementation of the rights to family-related leave are not strictly legal and are therefore more difficult to fully assess and/or combat using solely legislative instruments. Traditional gender roles are increasingly challenged, but traditional ideas and cultural ideologies, where women continue to be considered fully responsible for the day-to-day care of children, remain widespread. The lack of relevant services, such as nurseries and kindergartens, strengthens this strict division of roles within the family. There should be support for campaigns to eradicate stereotypes, as well as for increased compensation/pay of care work in order to raise both its economic and social valorisation and attractiveness for men. This would also help change cultural and ideological schemes about gender roles. Economic difficulties weaken the enforcement of family-leave rights.

Remedies and sanctions, although generally compliant with EU law, remain inefficient because they often fail to represent a sufficient deterrent against dismissal, discrimination or unfavourable treatment. More effective remedies, including stronger pecuniary sanctions need to be adopted to represent a powerful enforcement tool. In the same vein, better, cheaper and easier access to justice should be provided to victims, for example, by reducing the costs of legal procedures or by banning fees conditioning the access to courts. Another issue involves the existence of a time limit for bringing legal actions to courts and tribunals. Women who are pregnant or who are on maternity leave might need more time to bring a legal claim because they are under increased pressure given that they are expecting or caring for a new-born and might be particularly vulnerable at that time. There might be value in complementing individual rights with systematic top-down monitoring at national level. Such monitoring might involve setting targets and could include effective and pecuniary sanctions for violation of the rights associated with family leave.

A more holistic approach is needed to effectively enforce the protection against dismissal, discrimination and unfavourable treatment of family-related leave. Hard law alone is clearly insufficient to change and challenge gender stereotypes and improve enforcement of the rights to family leave. Moreover, as family leave, flexible working arrangements and access to childcare are inter-related, all issues must be addressed together. In this context, the European Pillar of Social Rights represents a step in the right direction because – along with the work-life balance proposal and non-legislative measures intended to support work-life balance for working parents and carers, it considers measures additional to family-leave arrangements, including improving access to childcare facilities and combating gender stereotyping. Such complementary measures go a long way to support the framework for work-family reconciliation. It remains to be seen, however, to what extent these measures will eventually be effective given the fact that they are not envisaged as a legally binding tool.

Résumé

1 Introduction

À la suite de la proclamation du socle européen des droits sociaux le 17 décembre 2017, la Commission européenne a adopté une proposition de directive qui, visant à promouvoir l'équilibre entre vie professionnelle et vie privée des parents et aidants qui travaillent, consolide et développe les mesures en matière de congé tout en reconnaissant la valeur du travail non rémunéré que les aidants, parmi lesquels une grande majorité de femmes, assument pour s'occuper de personnes dépendantes. La directive proposée s'appuie sur des dispositions existantes de la législation de l'UE en matière de conciliation entre obligations professionnelles et familiales, et en particulier sur la directive 92/85/CEE relative aux travailleuses enceintes, la directive 2006/54/CE (refonte) relative à l'égalité entre les hommes et les femmes, la directive 2010/41/UE relative à l'égalité entre hommes et femmes exerçant une activité indépendante et la directive 2010/18/UE relative au congé parental, de même que sur certaines dispositions des traités telles que les articles 2 et 3, paragraphe 3, du TUE; les articles 153, paragraphe 1 sous i) et paragraphe 2 sous b), et 157 du TFUE; et la Charte des droits fondamentaux de l'Union européenne. Les mesures envisagées élargissent les droits existants et instaurent de nouvelles formes de protection. Elles prévoient pour les parents d'enfants jusqu'à un âge déterminé (12 ans au moins) le droit de prendre quatre mois au moins de congé rémunéré non transférable payé au minimum à hauteur de la prestation de maladie. La directive proposée crée un droit individuel à un congé de paternité rémunéré de 10 jours au moins. Elle établit également le droit de demander des formules souples de travail pour les parents d'enfants n'ayant pas encore atteint un âge déterminé (douze ans au moins). La proposition de directive introduit en outre pour la première fois un droit à un congé d'aidant de cinq jours au moins par an pour s'occuper de proches dépendants ou gravement malades. Elle prévoit également le droit de tous les travailleurs (et pas seulement des parents ou aidants) de s'absenter du travail en cas de force majeure pour des raisons familiales urgentes, comme le prévoit actuellement la directive relative au congé parental. La directive proposée prévoit l'interdiction de tout licenciement, discrimination ou traitement moins favorable de travailleurs parce qu'ils ont demandé ou qu'ils ont pris un congé garanti par la directive, ou parce qu'ils ont exercé leur droit à des formules souples de travail.

Telle est la toile de fond du présent rapport thématique, consacré aux questions de mise en œuvre sous l'angle de la discrimination, du traitement moins favorable et du licenciement en rapport avec les différents types de congés familiaux que sont le congé de grossesse/maternité, le congé parental/d'adoption et le congé de paternité ainsi que le congé d'aidant et autre congé pour raison familiale. Il se penche également sur les questions d'indemnisation, de réparation et de sanctions, et sur le rôle des organismes nationaux pour la promotion de l'égalité de traitement. Son but est donc de faire un bilan de l'application pratique de la législation européenne pertinente actuellement en vigueur. L'analyse couvre les 28 États membres et trois pays de l'EEE: l'Islande, le Liechtenstein et la Norvège. Elle se fonde sur les réponses fournies par les experts nationaux du Réseau européen d'experts juridiques dans le domaine de l'égalité des genres à un questionnaire d'évaluation de la situation dans ces pays (joint à l'annexe 1 du rapport). Les informations communiquées dans le présent rapport sont valides au 29 août 2018.

L'analyse couvre la protection contre le licenciement, la discrimination et le traitement moins favorable prévue par la directive 92/85/CEE relative aux travailleuses enceintes, la directive 2006/54/CE (refonte) relative à l'égalité entre les hommes et les femmes, la directive 2010/41/UE relative à l'égalité entre hommes et femmes exerçant une activité indépendante et la directive 2010/18/UE relative au congé parental. Le congé de paternité et le congé d'adoption ne sont pas garantis en tant que tels par le droit de l'UE mais celui-ci prévoit, lorsque des États membres les ont adoptés, une protection contre le licenciement fondé sur l'exercice du droit à ce type de congé ainsi que le droit des travailleurs de retrouver

le même emploi ou un emploi similaire et de bénéficier de toute amélioration des conditions de travail à laquelle ils auraient eu droit durant leur absence. Le présent rapport couvre également la mise en œuvre du congé de paternité, du congé d'adoption et du congé d'aidant pour autant que les États membres se soient dotés de droits statutaires relatifs à ces formes de congé. Il aborde également les questions de licenciement en rapport avec l'adoption, le traitement de fertilité et autres techniques de procréation assistée (TPA) ainsi que la problématique de la discrimination et du traitement moins favorable envers les femmes qui ont fait une fausse couche ou qui ont accouché d'un bébé mort-né.

Le rapport s'articule en dix chapitres. Après un premier chapitre constituant une introduction générale, le deuxième se penche sur la mise en application au niveau national de la protection contre la discrimination et le traitement moins favorable en raison de la prise d'un congé familial. Il examine plus particulièrement les dispositions législatives, la jurisprudence nationale, les décisions des organismes nationaux pour la promotion de l'égalité de traitement ainsi que les études et/ou rapports annuels consacrés par ces organismes ou d'autres à la mise en application de l'interdiction de discrimination et de traitement moins favorable. Il aborde les difficultés d'application posées par le congé de grossesse/maternité, le congé parental et d'adoption, le congé de paternité, le congé d'aidant et le congé des travailleurs indépendants. Le congé de paternité et le congé d'aidant ne sont pas visés par le droit de l'UE, mais le rapport donne un aperçu de ces formules de congé lorsqu'elles existent en droit national. Le troisième chapitre se concentre sur la mise en œuvre de la protection prévue au niveau national contre le licenciement motivé par la prise d'un congé pour raison familiale en suivant la même structure que le chapitre précédent. Il procède à une évaluation des obstacles judiciaires qui entravent plus spécifiquement l'application de l'interdiction de licenciement en rapport avec la prise d'un congé pour raison familiale. Le quatrième chapitre examine l'accès à la justice et l'application effective de l'interdiction de licenciement, de discrimination et de traitement moins favorable en raison de la prise d'un congé familial. Le cinquième chapitre s'intéresse au rôle d'acteurs tels que les médiateurs, les inspecteurs du travail et les partenaires sociaux dans la mise en œuvre de la protection juridique existante. Le sixième chapitre envisage d'autres problèmes de mise en application constatés dans les différents pays couverts par le rapport. Le septième chapitre met en évidence les bonnes pratiques en matière de protection contre la discrimination, le traitement moins favorable et/ou le licenciement dans les pays examinés. Le huitième chapitre aborde d'autres questions relevant de l'objet et de l'objectif du présent rapport, parmi lesquelles l'allaitement, la naissance d'un enfant mort-né et les techniques de procréation assistée (fécondation in vitro et maternité de substitution notamment). Le neuvième chapitre propose une série de conclusions et de recommandations. Le dernier chapitre contient une liste de sources bibliographiques nationales pertinentes.

2 Mise en application au niveau national de la protection contre la discrimination et le traitement moins favorable en raison de la prise d'un congé familial

2.1 Congé de grossesse et de maternité

Les droits liés à la grossesse, la maternité et la parentalité sont fermement ancrés dans le droit de l'UE dans le but de consolider le principe de l'égalité entre les hommes et les femmes. L'adoption de ces droits dans les pays examinés ici peut néanmoins être motivée par d'autres considérations, et par des préoccupations d'ordre démographique notamment. Cette situation peut créer des tensions, en particulier pour ce qui concerne la durée du congé de maternité dans la mesure où de longues périodes de congé sont parfois considérées – à tort – comme favorisant une hausse des taux de fécondité alors qu'elles sont également identifiées comme entravant l'accès des femmes à un emploi rémunéré.

La discrimination et le traitement moins favorable de travailleuses pour cause de congé de grossesse ou de maternité est formellement interdit dans tous les pays couverts par le rapport. La plupart d'entre eux se sont dotés d'une disposition juridique interdisant spécifiquement la discrimination et le traitement

moins favorable fondés sur la grossesse et la maternité, et le plus souvent de dispositions juridiques allant au-delà des exigences légales de l'UE. En Allemagne, en Bulgarie, en Lituanie et en Pologne, où aucune disposition n'interdit expressément la discrimination et le traitement moins favorable en raison de la prise d'un congé de grossesse ou de maternité, ce sont les dispositions antidiscrimination générales qui doivent être invoquées. Si cette approche satisfait aux obligations européennes, l'absence de disposition spécifique interdisant expressément la discrimination ou le traitement moins favorable pour cause de congé de grossesse ou de maternité n'en constitue pas moins une lacune de la loi qui complique la tâche des personnes qui luttent contre cette forme de discrimination. Cette situation conduit à une moindre conscientisation des droits des travailleurs et nuit, partant, à leur mise en application.

En dépit de l'existence dans tous les pays examinés d'une disposition juridique formelle interdisant de façon spécifique ou générale la discrimination et le traitement moins favorable de travailleuses pour cause de congé de grossesse et de maternité, de nombreux cas de non-respect de cette interdiction sont signalés dans la pratique, même si les actions en justice restent rares, voire inexistantes. Une série d'études nationales récentes attestent d'une déconnexion entre la loi et la réalité sur le terrain – un constat qui montre que les postulats et stéréotypes traditionnellement liés au genre n'ont pas encore été suffisamment mis en cause.

Une hostilité générale semble se manifester sur le lieu de travail à l'égard des femmes enceintes et de celles qui prennent un congé de maternité, parental ou de garde. Elle se traduit dans de nombreux cas par une intimidation et un harcèlement sexuel à leur égard. Il arrive souvent en outre que les rétorsions, et la crainte de rétorsions, dissuadent les victimes d'engager des poursuites, surtout (mais pas exclusivement) en périodes de crise économique vu l'instabilité du marché du travail et en cas d'occupation d'un emploi précaire. Les personnes qui déposent plainte peuvent également se trouver exposées à une victimisation supplémentaire durant les procédures judiciaires.

De nombreux cas de discrimination ou de traitement moins favorable naissent de l'idée que les jeunes femmes seront probablement enceintes un jour et qu'elles prendront nécessairement congé pour s'occuper de leurs enfants. Profondément ancrés, ces stéréotypes et préjugés malfaisants concernant le rôle des femmes en tant que mères et responsables de la garde et des soins préjudicient leur capacité d'être considérées comme des travailleuses à part entière. Ces stéréotypes induisent une vision selon laquelle les femmes sont moins aptes et moins qualifiées au travail que les hommes. Les femmes les plus exposées au risque d'une exclusion de l'emploi fondée sur des stéréotypes négatifs sont les mères de famille, et en particulier les mères célibataires et les mères d'enfants handicapés; les femmes peu instruites et peu qualifiées; les femmes occupant un emploi précaire; les chômeuses de longue durée; et les femmes appartenant à des communautés ethniques, roms surtout. Nombreux sont les employeurs qui refusent d'embaucher des candidates en raison de leur âge et/ou de leur état matrimonial, ou qui posent des questions concernant leurs projets en matière de planification familiale. Les dépôts de plaintes à l'encontre de cette forme de discrimination restent extrêmement rares, voire inexistantes, car il s'avère particulièrement complexe de produire des preuves lorsqu'il s'agit de situations préalables à l'embauche.

Le champ d'application personnel de l'interdiction actuelle de discrimination et de traitement moins favorable fondés sur le congé de grossesse et de maternité est imprécis dans plusieurs pays. Dans l'affaire *Danosa*,[1] la CJUE a dit pour droit que les membres du comité de direction d'une entreprise doivent être considérés comme des salariées pour ce qui concerne la protection contre la discrimination et le traitement moins favorable en cas de grossesse et le droit au congé associé à la naissance et l'éducation d'enfants. Des membres de comités de direction en Lettonie et une conseillère juridique faisant partie d'une équipe de direction à Malte demeurent cependant exclues de cette protection.

Une diffusion efficace et effective d'informations sur le droit au congé pour raison familiale est indispensable pour en assurer l'application. Or l'accès insuffisant aux informations concernant les droits existants en

1 C-232/09 *Dita Danosa c. LKB Līzings SIA.* ECLI:EU:C:2010:674.

matière de congé de grossesse et de maternité, voire leur méconnaissance, génèrent non seulement une discrimination mais également certaines difficultés en termes de mise en application. L'accès à ce type d'information s'avère particulièrement complexe en période de congé de maternité ou parental car les travailleuses dans cette situation ne sont pas impliquées dans l'examen de questions telles que les négociations salariales et les restructurations, par exemple, ou n'en sont même pas informées. Il apparaît aussi que les employeurs eux-mêmes manquent d'informations et de connaissances en matière de droits liés à la grossesse et à la maternité. Dans plusieurs pays, ce sont les membres de la magistrature qui semblent méconnaître la législation antidiscrimination portant spécifiquement sur la grossesse et la maternité.

Des problèmes d'application sont plus particulièrement constatés en rapport avec un certain nombre de droits liés au congé de grossesse et de maternité. Ainsi le droit de retrouver le même emploi ou un emploi équivalent à l'issue de la période de congé de maternité apparaît problématique. Bien que ce droit soit garanti dans la plupart des pays par une disposition légale formelle, on constate dans la pratique que de nombreuses travailleuses de retour au travail se voient affecter de nouvelles tâches et/ou constatent que leur fonction a été modifiée. Elles sont fréquemment poussées à accepter des conditions de travail moins attrayantes, y compris un déclassement de poste ou l'obligation de travailler à temps partiel ou en rotation – une tendance que la crise économique et les pénuries d'emploi qu'elle a générées ainsi que les taux de chômage élevés n'ont fait que renforcer, en Grèce plus particulièrement.

On peut citer parmi les autres problèmes de mise en application le conflit potentiel entre l'interdiction de discrimination fondée sur la maternité et l'obligation de protéger les femmes enceintes contre les risques pour leur santé. La directive 92/85/CEE vise à protéger les travailleuses enceintes, accouchées et allaitantes en garantissant que leur santé ne peut être mise en danger par leur environnement de travail. Des difficultés surgissent néanmoins lorsqu'une travailleuse enceinte doit être éloignée de son lieu de travail en raison d'inquiétudes pour sa santé mais qu'il n'y aucun poste vacant auquel la travailleuse en question peut être temporairement transférée.

De surcroît, le droit au maintien de la rémunération durant la maternité, consacré par l'article 11 de la directive susmentionnée, s'avère complexe et mal appliqué en dépit de l'existence de toute une série d'arrêts de la CJEU.[2] La complexité du droit de l'UE dans ce domaine est source de confusion dans les ordres juridiques internes. Concrètement, le paiement des prestations de maternité peut être subordonné à une période ininterrompue d'emploi et/ou à d'autres conditions telles que le versement de cotisations sociales. Dans certains pays, les travailleuses en congé non rémunéré doivent retourner au travail pour pouvoir bénéficier d'un congé de maternité rémunéré.

Plusieurs concepts juridiques continuent aussi de susciter des difficultés d'application dans certains pays. C'est ainsi que la notion de discrimination indirecte n'est pas clairement comprise en Hongrie et en Grèce et qu'elle y reste dès lors sous-utilisée. Les règles relatives au renversement de la charge de la preuve sont également perçues comme relativement complexes et, partant, mises en œuvre et en application de façon parfois insatisfaisante en Croatie, en Grèce, en Hongrie, aux Pays-Bas, en Pologne et en Slovaquie.

Enfin, le droit de l'UE exige que les voies de recours, sanctions ou pénalités prévues au niveau national en cas de non-respect de l'interdiction de discrimination fondée sur le congé de grossesse et de maternité soient effectives, proportionnées et dissuasives. Tout en étant généralement conformes au droit de l'UE, et en allant dans certains pays au-delà des exigences européennes, elles peuvent continuer de poser

2 Voir notamment C-342/93, *Joan Gillespie e.a. contre Northern Health and Social Services Boards, Department of Health and Social Services, Eastern Health and Social Services Board and Southern Health and Social Services Board*, ECLI:EU:C:1996:46; C-411/96 *Margaret Boyle e.a. contre Equal Opportunities Commission,* ECLI:EU:C:1998:506; C-66/96 *Handels- og Kontorfunktionærernes Forbund i Danmark, agissant pour Berit Høj Pedersen contre Fællesforeningen for Danmarks Brugsforeninger et Dansk Tandlægeforening et Kristelig Funktionær-Organisation contre Dansk Handel & Service,* ECLI:EU:C:1998:549; C-333/97 *Susanne Lewen contre Lothar Denda,* ECLI:EU:C:1999:512; C-218/98 *Oumar Dabo Abdoulaye e.a. contre Régie nationale des usines Renault SA,* ECLI:EU:C:1999:424.

problème dans la pratique du fait que les versements ou les recours sont parfois limités à des préjudices spécifiques. La durée des procédures judiciaires est telle que les redressements ne sont plus adéquats au moment où sont prononcés. Le niveau des sanctions et des pénalités est souvent considéré comme trop faible pour empêcher la discrimination ou pour offrir un recours effectif aux travailleuses concernées.

2.2 Congé parental et d'adoption

La protection juridique contre la discrimination et le traitement moins favorable fondés sur le congé parental et d'adoption est, dans la plupart des pays, identique à celle assurée en cas de congé de grossesse et de maternité – ce qui signifie que les difficultés rencontrées pour la mettre en œuvre présentent elles aussi de grandes similitudes.

En Allemagne, en Belgique, en Lituanie et en Pologne, étant donné l'absence de disposition juridique formelle interdisant spécifiquement la discrimination et le traitement moins favorable de travailleurs en raison de la prise d'un congé d'adoption ou d'un congé parental, la partie plaignante doit invoquer les dispositions générales en matière de discrimination fondée sur le sexe. Si ce type de législation nationale respecte formellement la clause 5, paragraphe 4, de la directive relative au congé parental, qui exige que les États membres et/ou les partenaires sociaux prennent les mesures nécessaires pour protéger les travailleurs contre un traitement moins favorable ou un licenciement en raison de la prise d'un congé parental, elle n'est sans doute pas suffisamment spécifique. L'absence d'interdiction expresse de discrimination et de traitement moins favorable en raison de la prise d'un congé parental et d'un congé d'adoption fait obstacle à la mise en application de ladite interdiction.

Lorsqu'une interdiction juridique spécifique existe, ce sont les conditions d'application qui peuvent entraver l'exercice du droit. Il arrive que la législation nationale relative au congé parental et d'adoption soit peu claire, complexe, inégale, fragmentée, dispersée et/ou modifiée de manière fréquente et inopinée – ce qui peut engendrer à son tour une difficulté de mise en œuvre et une incertitude juridique pour les travailleurs.

Un certain nombre de travailleurs se trouvent exclus de l'accès aux droits en matière de congé parental. Même si la directive sur le congé parental prévient en sa clause 1, paragraphe 3, qu'un statut de travailleur à temps partiel, un contrat à durée déterminée ou un contrat via une agence intérimaire ne peut justifier l'exclusion de travailleurs de son champ d'application, il n'en reste pas moins que l'application de ladite directive est liée à l'existence d'un contrat de travail tel que défini en droit national. L'accès au congé parental n'est donc pas universel et peut être restreint par des conditions spécifiques fixées en vertu de ce droit interne.

À divers égards, la mise en application de l'interdiction de discrimination et de traitement moins favorable pose également problème à ceux qui peuvent accéder au congé parental. Dans plusieurs pays, la période de ce congé n'est pas prise en compte pour le calcul de certains droits et de certaines prestations découlant du contrat d'emploi. La rémunération durant le congé parental peut également s'avérer problématique: elle n'est pas garantie par la directive relative au congé parental, mais celle-ci prévoit en sa clause 5, paragraphe 2, que les droits acquis sont maintenus pendant la durée du congé. Ce point a posé problème dans certains États membres en rapport avec le droit à des primes. De surcroît, la prise de périodes consécutives de congé de maternité et de congé parental peut souvent donner lieu au versement de prestations moins élevées. Le droit de retrouver le même emploi n'a pas été totalement mis en œuvre dans plusieurs pays parmi lesquels l'Allemagne, la Pologne et la Suède.

Comme dans le cas du congé de grossesse et de maternité, le concept juridique de discrimination indirecte et les règles relatives au renversement de la charge de la preuve manquent de clarté dans une série de pays. La notion d'absence du travail en cas de force majeure, associée à une urgence et à une absence de courte durée, n'est en outre pas toujours bien comprise et a requis, dans certains pays, une clarification juridique.

En dépit de l'existence de dispositions formelles interdisant la discrimination et le traitement moins favorable en raison de la prise d'un congé parental, les infractions sont fréquentes dans la pratique mais les cas portés en justice sont rares, voire inexistants. Tout en étant conformes au droit de l'UE, les voies de recours et les sanctions pour non-respect de la protection contre la discrimination et le traitement moins favorable en raison de la prise d'un congé parental sont considérées comme insuffisantes et inefficaces.

La Commission européenne a identifié une série de raisons clés pour lesquelles des familles n'ont pu exercer pleinement jusqu'ici leur droit au congé parental. Elle a admis qu'un manque de flexibilité au niveau des modalités du congé est l'un des principaux facteurs à l'origine d'un taux d'exercice de ce droit historiquement bas.[3] Dans plusieurs pays, en effet, l'accès au congé parental est régi par des critères stricts et des procédures complexes ayant pour effet que les parents ne sont pas toujours en mesure de prendre congé quand ils le souhaitent. Il est fréquent par exemple que des travailleurs ne puissent prendre un congé parental à temps partiel. Les réglementations autorisant les deux parents à prendre ce type de congé sont, en outre, fort complexes avec pour conséquence que les droits ne sont pas exercés.

La Commission européenne a déterminé par ailleurs que l'absence de rémunération et le manque de périodes non transférables/dédiées de congé parental pour chacun des parents expliquent que les femmes font un usage disproportionné de ce congé. La prise du congé parental par les pères est considérée dans tous les pays analysés comme peu développée pour cause de discrimination (perçue ou réelle), d'organisation structurelle de la société (les hommes restant souvent les principaux soutiens de famille), de persistance d'une inégalité de revenus salariaux entre hommes et femmes, de l'inexistence ou du faible niveau de rémunération durant le congé parental, et de stéréotypes liés au genre (les femmes restant considérées comme les principales responsables des obligations ménagères et familiales). Du côté des employeurs, le congé parental est perçu comme ayant une incidence négative sur l'entreprise car il éloigne des salariés du travail pendant des périodes jugées trop longues. La vision négative de certaines entreprises à l'égard du congé parental contribue elle aussi à renforcer la discrimination et le traitement moins favorable.

Enfin, dans la plupart des pays, le congé d'adoption est plus court que le congé parental et revêt un caractère complémentaire. Lorsqu'un congé d'adoption spécifique existe, les parents peuvent également exercer un droit au congé parental. Le congé d'adoption bénéficie d'une protection au moins égale à celle allouée au congé parental, et aux mêmes conditions. Une adoption formelle peut être requise pour que le congé soit accordé.

2.3 Congé de paternité

Si la proposition de directive relative à l'équilibre entre vie professionnelle et vie privée envisage un droit au congé de paternité, celui-ci n'est pas encore garanti en droit de l'UE. L'article 16 de la directive de refonte prévoit toutefois que, dans les pays qui ont adopté ce type de congé, les travailleurs qui prennent un congé de paternité ou d'adoption doivent être protégés d'un licenciement résultant de l'exercice de ce droit. Ces travailleurs bénéficient également du droit de retrouver leur emploi ou un emploi similaire à l'issue du congé. La quasi-totalité des pays examinés offrent une période de congé de paternité à l'exception de l'Allemagne, de l'Autriche, de la Croatie, du Liechtenstein et de la Slovaquie.

Dans certains pays, le congé de paternité est exclusivement réservé aux pères tandis que, dans d'autres, il est ouvert à une plus grande diversité de parents, en ce compris les partenaires de même sexe. Des restrictions s'appliquent parfois en rapport avec l'état matrimonial ou le fait que le partenaire vive ou non avec la mère. De même, le congé de paternité n'est pas systématiquement accessible à tous les pères, et notamment à ceux qui occupent un emploi précaire (travail intérimaire, contrat «zéro heure» ou contrat

3 La position du Conseil évolue, et restreint légèrement la proposition de la Commission. Tout en proposant de maintenir le droit individuel existant de quatre mois de congé, il propose d'en réduire la non-transférabilité à deux mois dont 1,5 mois seulement serait rémunéré à un niveau fixé par l'État membre concerné.

de travail occasionnel, par exemple). Dans les pays où le congé de paternité existe, sa durée varie mais reste globalement courte puisqu'elle va d'un seul jour à Malte à 54 jours en Finlande. Le droit au congé de paternité peut se trouver restreint par les conditions à remplir, telles que la notification de la naissance à l'employeur, la présentation d'un certificat médical ou une période ininterrompue d'emploi. Une prestation de sécurité sociale d'un niveau équivalent à celui d'une prestation maladie est allouée dans la plupart des pays, mais elle peut aussi être plus généreuse, voire représenter le salaire complet.

Lorsqu'un droit au congé de paternité peut être exercé, une protection contre la discrimination, le traitement moins favorable et le licenciement est souvent prévue selon les mêmes modalités que celles applicables au congé de maternité ou parental. Les problèmes posés par sa mise en œuvre sont dès lors similaires. Ainsi par exemple, il n'existe aucune disposition interdisant spécifiquement la discrimination et le traitement moins favorable en rapport avec le congé de paternité en Autriche, en Belgique, en Lituanie et aux Pays-Bas, où une partie plaignante doit recourir aux instruments mis à sa disposition dans le cadre juridique instauré en matière de discrimination fondée sur le genre. Et même lorsqu'une disposition spécifique existe, les cas d'infraction portés en justice sont rares, voire inexistants. De surcroît, comme indiqué à propos de la grossesse et de la maternité, les voies de recours et les sanctions pour violation de la protection contre une discrimination ou un traitement moins favorable en raison de la prise d'un congé de paternité sont généralement jugées insuffisantes et inefficaces.

Enfin, il convient d'observer que la prise d'un congé de paternité est peu répandue dans plusieurs pays examinés ici, et parfois même en recul – un constat qui peut s'expliquer par l'existence d'une discrimination, par la complexité des exigences, par la rigidité des formules de congé, par le faible niveau de rémunération, par le caractère non obligatoire du congé et/ou par une sensibilisation insuffisante. Les stéréotypes classiques liés au genre et des vues conservatrices traditionnelles font aussi que les pères s'abstiennent de prendre un congé de paternité.

2.4 Le congé d'aidant

L'UE ne garantit pas encore de périodes de congé à des travailleurs ayant des responsabilités d'aide ou de soins vis-à-vis d'autres que leurs enfants sous la forme d'un congé de maternité, parental ou d'adoption. La proposition de directive concernant l'équilibre entre vie professionnelle et vie privée instaurerait pour la première fois un congé d'aidant en droit de l'UE. Les travailleurs auraient un droit individuel de cinq jours ouvrables au moins de congé rémunéré par an pour s'occuper de proches dépendants ou gravement malades. La directive proposée prévoit en outre le droit de s'absenter du travail pour raisons familiales urgentes (force majeure) pour tous les travailleurs et pas seulement pour les parents ou les aidants comme le prévoit actuellement la directive sur le congé parental. Les directives de l'UE déjà en vigueur et la directive proposée répondent aux besoins de travailleurs en charge d'autres personnes en leur offrant une certaine flexibilité en termes de temps de travail et d'absence du travail, et en facilitant ainsi leur maintien sur le marché du travail. De leur côté, les mesures destinées à favoriser le développement de services de prise en charge (garde des enfants et soins aux aînés, entre autres) permettent aux aidants d'entrer et de rester sur le marché du travail.

De nombreux pays prévoient déjà l'une ou l'autre forme de congé d'aidant, même si tel n'est pas le cas de l'Islande, de la Lettonie, de la Roumanie, du Royaume-Uni et de la Slovaquie. Ce congé ne se présente pas de manière homogène dans les pays qui l'ont adopté car il revêt un sens large et couvre parfois les enfants, les personnes handicapées, les proches âgés et/ou d'autres combinaisons de situations familiales urgentes. L'objet, le champ d'application personnel et matériel, la durée, les conditions à remplir, la rémunération et le degré de protection contre le licenciement, la discrimination et le traitement moins favorable sont autant d'éléments qui varient fortement selon le pays. Divers congés d'aidant peuvent en outre exister au sein d'un même pays, dotés chacun de leur propre champ d'application personnel et matériel ainsi que de conditions spécifiques à remplir.

Lorsqu'il est prévu, le congé d'aidant n'est pas universel et peut faire l'objet de restrictions selon le secteur, l'état matrimonial ou l'obligation de vivre sous le même toit, ou se limiter à un seul parent. La durée du congé d'aidant n'est pas clairement fixée dans plusieurs pays et peut varier en fonction du type de congé, de son champ d'application matériel ou de la situation personnelle du travailleur. Dans la plupart des pays, le droit au congé d'aidant peut être exercé dans le but de s'occuper d'un enfant, bien que sa durée puisse varier – et/ou que les conditions à remplir puissent varier – en fonction de l'âge de celuici. Dans beaucoup de pays, le droit au congé d'aidant peut également être largement exercé pour s'occuper d'un conjoint/partenaire ou d'un proche, moyennant d'éventuelles conditions restrictives ou autres formes de restrictions. Dans quelques pays particuliers, le droit au congé d'aidant peut aussi être exercé pour s'occuper d'autres catégories telles que des personnes handicapées/gravement malades; des personnes âgées; des proches jusqu'au deuxième degré de parenté; des proches en phase terminale/ des situations de fin de vie en famille d'accueil; un congé de courte durée pour traitement FIV; et à des fins d'équilibre général entre vie professionnelle et vie privée ainsi qu'en cas de fermeture inopinée de la garderie, du jardin d'enfants ou de l'école. Le congé d'aidant est souvent rémunéré à un taux forfaitaire au titre du régime de sécurité sociale. La prestation varie néanmoins de 100 % du salaire en Croatie au salaire minimum en Estonie.

Si la plupart des pays prévoient une forme ou une autre de congé d'aidant, la protection contre la discrimination, le traitement moins favorable et le licenciement en raison de l'exercice du droit à ce congé n'est pas toujours garantie pour autant. Ce constat vaut également pour d'autres droits associés, tel celui de retrouver le même emploi ou un emploi équivalent. La protection juridique insuffisante contre la discrimination et le traitement moins favorable se traduit également par une jurisprudence peu abondante, voire inexistante.

Enfin, si le droit au congé d'aidant est généralement libellé en termes neutres par rapport au sexe, il est, dans la pratique, exercé de façon disproportionnée par des femmes du fait qu'il n'est pas, ou pratiquement pas, rémunéré – ce qui ne manque pas de conforter certains stéréotypes négatifs fondés sur le genre.

2.5 Les travailleurs indépendants (directive 2010/41/UE)

La directive 2010/41/UE énonce le principe de l'égalité de traitement entre hommes et femmes exerçant une activité indépendante. Elle prévoit en son article 8, paragraphe 1, que les États membres doivent allouer aux travailleuses indépendantes ainsi qu'aux «épouses aidantes» des prestations de maternité pendant une période similaire à la durée du congé de maternité des salariées actuellement en vigueur au niveau de l'Union (14 semaines). Les prestations de maternité peuvent être allouées sur base obligatoire ou volontaire. En pratique, la transposition insuffisante de cette disposition fait que les travailleuses indépendantes de Chypre, d'Espagne, de Finlande, de France, de Grèce, de Hongrie, du Portugal et de Roumanie éprouvent beaucoup de difficulté à exercer ce droit. Il est fréquent en outre que la législation nationale ne couvre pas les épouses (ou partenaires de vie, lorsqu'elles sont reconnues au niveau national) des hommes exerçant une activité indépendante.

L'article 8, paragraphes 2 et 3, de la directive 2010/48 exige que les femmes bénéficient d'une allocation de maternité (pendant 14 semaines au moins). Mais la formule de calcul de cette allocation pose problème dans plusieurs pays – la difficulté pouvant être liée à la base de calcul de l'indemnisation salariale, à la variation du montant selon le prestataire d'assurance ou à la complexité du système.

L'article 8, paragraphe 4, de la directive relative aux travailleurs indépendants dispose en outre qu'afin de tenir compte des spécificités des activités indépendantes, les femmes exerçant une activité indépendante et les épouses aidantes (ou les partenaires de vie de travailleurs indépendants lorsqu'elles sont reconnues au niveau national) doivent avoir accès à des services de remplacement temporaire existants qui leur permettent d'interrompre leur activité professionnelle durant leur grossesse ou leur maternité, ou avoir

accès à des services sociaux existant au niveau national. Une série de pays n'ont cependant pas transposé ce droit.

Enfin, il est rare que des problématiques liées au travail indépendant, en particulier lorsqu'elles sont associées à la grossesse/maternité, soient portées en justice. Le contrôle juridique de la protection des travailleurs indépendants s'avère d'autant plus difficile que ceux-ci ne relèvent pas de la compétence des institutions traditionnellement chargées des questions de discrimination et de traitement moins favorable en rapport avec la grossesse et la maternité.

3 Mise en application de la protection contre le licenciement en raison de la prise d'un congé familial

3.1 Congé de grossesse et de maternité

En application de l'article 10, paragraphes 1 et 2, de la directive 92/85/CEE et de l'article 14, paragraphe 1 sous c), de la directive de refonte, le licenciement de travailleuses pour cause de grossesse ou de maternité est interdit dans tous les pays couverts par le présent rapport. Une forte protection juridique formelle contre un licenciement fondé sur ces motifs est assurée dans la plupart des pays, où la législation nationale va au-delà de la durée minimale de protection et des sanctions prévues à l'article 10 de la directive 92/85/CEE. Des études nationales n'en attirent pas moins l'attention sur les taux élevés de licenciement de travailleuses enceintes et de travailleuses en congé de maternité.

Très souvent, les employeurs ne licencient pas directement les travailleuses enceintes: ils préfèrent recourir à des techniques d'intimidation et/ou à des changements inacceptables des conditions de travail. Il est fréquent également que des employeurs créent des raisons apparemment valables de procéder au licenciement, de sorte qu'il devient difficile pour la travailleuse de prouver que son licenciement était effectivement lié à sa grossesse ou sa maternité. Lorsqu'elles sont mises en cause devant un tribunal, ces techniques sont généralement considérées comme constitutives d'une discrimination directe illégale fondée sur le sexe, à condition que des éléments probants le confirment. Rares sont cependant les affaires portées en justice et, lorsque tel est le cas, la législation nationale stipule fréquemment que le licenciement de travailleuses enceintes ou de femmes en congé de maternité peut être justifié s'il est légitimement motivé par des raisons relevant du fonctionnement de l'entreprise. Il est donc fréquent également que des employeurs présentent une justification fondée sur des raisons économiques ou sur la situation particulière de l'entreprise. Les cas de licenciement pour motif économique ou environnemental sont particulièrement complexes. La décision quant aux salariés à licencier ne peut être liée au congé de grossesse ou de maternité d'une travailleuse – mais l'apport de preuves n'est guère aisée sur ce point. De surcroît, si la plupart des lois nationales respectent la législation de l'UE pour ce qui concerne les indemnisations, celles-ci sont jugées insuffisantes pour être véritablement dissuasives.

Plusieurs concepts juridiques restent peu clairs aux yeux de certaines juridictions nationales. La confusion porte notamment sur le fait que le licenciement d'une travailleuse pour cause de grossesse ou de maternité constitue une discrimination directe fondée sur le sexe. Les règles de l'UE en matière de discrimination et de traitement moins favorable en raison du sexe s'appliquent aux cas de licenciement de travailleuses enceintes, y compris le renversement de la charge de la preuve. Or ces règles ne sont pas toujours bien saisies non plus par les juridictions nationales.

Le non-renouvellement des contrats à durée déterminée de salariées enceintes reste une question litigieuse dans de nombreux pays, même si la Cour de justice a clairement établi dans son arrêt *Melgar* que le refus de renouveler le contrat d'emploi à durée déterminée d'une travailleuse enceinte constitue une

discrimination directe fondée sur le sexe.[4] Aucune justification particulière n'étant requise à l'échéance d'un emploi à durée déterminée, les contrats ne sont généralement pas renouvelés lorsque les travailleuses sont enceintes, et il est rare que celles-ci décident d'engager une action en justice. Cette situation se trouve aggravée par la multiplication des contrats d'emploi précaires. La principale difficulté réside dans la preuve de la discrimination directe fondée sur le sexe. Certains pays ont instauré une présomption de discrimination, ou une obligation d'informer l'organisme national de promotion de l'égalité de traitement du non-renouvellement du contrat. Le rapport s'intéresse également aux problématiques que sont le licenciement de travailleuses enceintes pendant leur période d'essai et les «démissions en blanc».

3.2 Congé parental et d'adoption

La directive sur le congé parental et l'article 14, paragraphe 1 sous c), de la directive de refonte 2006/54/CE interdisent le licenciement motivé par la prise d'un congé parental ou d'adoption. Ces dispositions sont dûment mises en œuvre en droit national. La jurisprudence est cependant peu abondante, ce qui ne reflète pas la réalité sur le terrain. On signale en effet que la pression exercée par les employeurs est souvent telle que des femmes acceptent de renoncer à leurs droits – en démissionnant de leur emploi ou en ne retournant pas travailler à l'issue de leur congé – face à l'hostilité rencontrée dans leur environnement de travail. De surcroît, le dépôt de plaintes auprès d'inspecteurs du travail ou l'engagement de poursuites en justice requiert d'importantes ressources, à la fois financières et psychologiques, que de nombreuses travailleuses ne possèdent pas.

3.3 Congé de paternité

Le droit au congé de paternité n'est pas nécessairement assorti, dans la plupart des pays, d'une protection contre le licenciement. Ainsi n'existe-t-il pas de protection contre le licenciement durant le congé de paternité en Hongrie et en Slovénie, ce qui enfreint l'article 16 de la directive de refonte. La jurisprudence sur ce point est rare, voire inexistante, soit parce que l'application de la loi ne pose pas de problème soit peut-être parce qu'aucune protection n'est prévue ou que la législation en matière de congé de paternité est trop récente pour que des difficultés aient déjà été observées.

3.4 Congé d'aidant

Le droit à un congé d'aidant n'est pas nécessairement conjugué à une protection contre un licenciement fondé sur la prise d'un congé de ce type. Ce dernier est largement protégé dans un certain nombre de pays mais, dans d'autres, aucune disposition spécifique ne protège les travailleurs exerçant leur droit au congé d'aidant contre un licenciement, de sorte que les recours à cet égard doivent invoquer les dispositions antidiscrimination générales. Il y a peu de jurisprudence sur ce point dans les pays couverts par le rapport.

4 Accès à la justice et mise en application effective

L'accès à la justice et la mise en application effective de l'interdiction de licenciement et de discrimination en raison de la prise d'un congé familial ne présentent pas d'homogénéité entre les différents pays examinés ici. Le nombre de cas portés en justice ne reflète pas la réalité sur le terrain car les personnes concernées hésitent à engager des poursuites pour divers motifs, et notamment pour des raisons d'ordre émotionnel, psychologique (état physique et psychologique après une grossesse, par exemple) et/ou financier. L'accès au système judiciaire est onéreux, et peut même avoir un coût prohibitif, sans compter qu'il est fréquent que les frais de justice ne compensent pas les gains éventuels. L'assistance juridique est souvent inadéquate et/ou difficile à obtenir. De surcroît, les travailleurs et les employeurs ne sont

4 C-438/99 *Maria Luisa Jiménez Melgar* c. *Ayuntamiento de Los Barrios* ECLI:EU:C:2001:509 et C-109/00 *Tele Danmark A/S v Handels- og Kontorfunktionærernes Forbund i Danmark (HK)* ECLI:EU:C:2001:513.

pas toujours au courant de leurs droits et obligations. On peut encore citer au titre de facteurs à l'origine du faible contentieux la crainte de rétorsions, surtout en période de crise économique et de chômage élevé où les travailleurs occupant un emploi précaire ou temporaire sont particulièrement menacés. La plupart des procédures juridiques sont trop longues pour offrir des solutions adéquates aux personnes concernées. Elles peuvent également s'avérer complexes et faire ainsi obstacle à l'engagement d'une action en justice. Les conditions à remplir pour ce type d'action peuvent poser problème – la courte durée du délai imparti pour le dépôt d'une plainte pouvant compromettre la capacité d'une victime d'invoquer une discrimination. Enfin, certains travailleurs ont une confiance très limitée dans le système judiciaire ou dans la capacité des cours et tribunaux de rendre des verdicts équitables – un sentiment conforté par la confusion qui règne au niveau national autour d'une série de concepts juridiques européens.

5 Rôle d'autres acteurs dans la mise en application de la protection contre la discrimination et/ou le licenciement en raison de la prise d'un congé familial

5.1 Les organismes nationaux de promotion de l'égalité de traitement

Il est des pays où les décisions des organismes nationaux pour l'égalité ne sont pas juridiquement contraignantes, ce qui peut compliquer la mise en application de l'interdiction de discrimination envers des travailleuses enceintes et des travailleurs prenant un congé pour raison familiale – surtout s'il s'agit de pays où l'accès à des procédures judiciaires davantage formelles s'avère problématique. Sans être juridiquement contraignantes, certaines décisions de ces organismes peuvent être invoquées devant les tribunaux en tant qu'éléments probants ou convaincants. Plusieurs organismes pour l'égalité bénéficient d'une habilitation autonome à ester en justice et peuvent représenter des clients ou intervenir dans les procédures. Ils peuvent également, dans la pratique, influencer l'issue de certaines affaires. Rares sont cependant les cas dont ils sont saisis, même lorsque leurs décisions sont juridiquement contraignantes.

Une série d'organismes nationaux pour la promotion de l'égalité de traitement contribuent généreusement à la diffusion d'informations, à la réalisation d'études et au contrôle en matière de licenciement, de discrimination et de traitement moins favorable en rapport avec un congé pour raison familiale et plus particulièrement en rapport avec une discrimination fondée sur la grossesse et la maternité. Ils fournissent parfois des conseils individuels gratuits. Ces organismes nationaux sont aussi une source de bonnes pratiques, et notamment de collaboration entre acteurs et d'incitation à l'exercice des droits aux congés familiaux. Les organismes nationaux pour la promotion de l'égalité de traitement ont également joué, dans certains pays, un rôle déterminant dans l'évolution de la législation.

5.2 Le rôle d'autres organismes publics

Plusieurs organismes publics peuvent contribuer à dénouer la complexité de la loi en réalisant des publications à l'intention du grand public et de la profession juridique. Presque partout, l'organisme national pour l'égalité et le Médiateur sont regroupés et constituent une source précieuse de renseignements. Si certains médiateurs jouissent de pouvoirs judiciaires, leur compétence n'en reste pas moins limitée aux plaintes relatives aux administrations publiques. Les agents de la fonction publique peuvent prendre contact avec le médiateur, mais ne le font quasiment jamais – sans doute parce que d'autres acteurs, et notamment les organismes pour l'égalité, sont davantage qualifiés. Les inspecteurs du travail sont particulièrement bien placés, eux aussi, pour contrôler la discrimination et le traitement moins favorable. Leurs rapports annuels peuvent fournir des informations concernant le congé pour raison familiale, même s'ils revêtent souvent un caractère trop général pour contenir une information concrète concernant la mise en application de ce type de congé. Les inspecteurs du travail sont souvent habilités à imposer des sanctions ou pénalités administratives pour non-respect des droits des salariés ou à porter une affaire en justice. Ils peuvent être dotés de larges compétences, y compris de nature inquisitoire.

5.3 Les syndicats et les partenaires sociaux

Les syndicats participent généralement de manière active à la mise en application des droits en matière familiale en fournissant des informations et des conseils juridiques et/ou en représentant juridiquement leurs membres. Les organisations patronales peuvent constituer elles aussi une bonne source d'information. Si les syndicats peuvent influencer l'évolution du droit, il convient de préciser qu'ils ne se montrent pas, dans un certain nombre de pays, mobilisés/intéressés par les questions liées à la famille.

5.4 Les organisations non gouvernementales (ONG), de la société civile et caritatives

Des ONG contribuent dans certains pays à améliorer la mise application des droits au congé de grossesse et parental en réalisant à ce sujet des publications destinées au grand public et à la profession juridique. Il arrive que des ONG participent à des actions en justice. Le manque de ressources dont dispose ce secteur limite cependant le niveau d'engagement des ONG, des organisations de la société civile et des organisations caritatives.

6 Autres problèmes de mise en application, bonnes pratiques et questions connexes

Le sens du terme «famille» en droit est important pour définir la portée des droits liés à la grossesse, la maternité, la parentalité et la paternité. Il n'est pas toujours utilisé de façon cohérente dans les divers actes législatifs, et un traitement différencié peut également exister selon le lien entre les parents (mariage, partenariat enregistré ou cohabitation).

Les structures de garde d'enfants sont un complément majeur du congé de maternité/parental dans la mesure où elles aident certaines personnes à entrer et à rester sur le marché du travail. Le Conseil européen a adopté en 2002 les objectifs de Barcelone, à savoir une série d'objectifs destinés à supprimer les obstacles à la participation des femmes au marché du travail. Ils engagent notamment les États membres, ainsi que leurs autorités compétentes au niveau national, régional et local et leurs partenaires sociaux, à fournir à l'horizon 2010 un accès à des places d'accueil de qualité et abordables pour tous à 90 % des enfants ayant entre trois ans et l'âge de la scolarité obligatoire, et à 33 % des enfants de moins de trois ans. Le rapport 2018 concernant l'avancement des objectifs de Barcelone montre que ceux-ci ont été atteints en moyenne dans l'UE-28 pour les enfants de 0 à 3 ans, mais qu'ils n'ont pas encore été atteints pour les enfants entre trois ans et l'âge de la scolarité obligatoire.

Les formules souples de travail, y compris la possibilité de travailler à temps partiel, les horaires flexibles ou le télétravail, ne sont guère répandues dans un certain nombre de pays. La proposition de directive concernant l'équilibre entre vie professionnelle et vie privée vise à favoriser un changement à cet égard en prévoyant le droit de demander des formules souples de travail non seulement pour les parents d'enfants mais pour tous les aidants. Cette disposition introduit la possibilité pour ces travailleurs d'avoir recours à (i) une réduction du temps de travail, (ii) des horaires flexibles et (iii) des possibilités de télétravail.

La garde et les soins restent généralement perçus dans la plupart des pays comme des tâches essentiellement féminines, et des idéologies, attitudes et cultures sexospécifiques contribuent également à renforcer les problèmes de mise en application.

Le rapport propose en son septième chapitre des exemples détaillés de bonnes pratiques, en montrant notamment que certaines entreprises s'efforcent réellement de se transformer en «paradis pour travailleuses enceintes». Ces exemples restent cependant beaucoup trop rares – sans compter qu'il ne s'agit, dans certains cas, que d'une façade.

L'étude ci-après consacre son huitième chapitre à des questions connexes telles que la naissance d'un enfant mort-né et les techniques de procréation assistée (TPA), y compris la fécondation in vitro et la maternité de substitution. Dans plusieurs pays, la protection contre le licenciement fondé sur la grossesse et la maternité s'applique également aux parents qui ont un enfant mort-né. En revanche, les fausses couches ne sont pas toujours considérées comme relevant de la grossesse/maternité et si la législation antidiscrimination s'applique dans la plupart des cas, il n'en va pas de même de l'accès à certains droits liés à la grossesse et la maternité tel le congé rémunéré. La prise d'enfants en famille d'accueil est parfois considérée comme une situation équivalente à une adoption, étant donné que la nécessité de créer un lien avec l'enfant existe de la même façon que dans le cas de parents adoptifs. Certains pays se sont inspirés de l'arrêt *Mayr*[5] pour protéger contre un licenciement, une discrimination ou un traitement moins favorable les travailleuses soumises à un traitement de fécondation in vitro. La maternité de substitution n'est pas reconnue dans plusieurs pays avec pour conséquence qu'aucun droit spécifique à un congé n'est octroyé aux parents demandeurs. Dans d'autres pays, la protection contre un licenciement motivé par une grossesse/maternité s'applique aux mères porteuses et aux parents demandeurs.

7 Conclusions / recommandations

Il ressort du présent rapport qu'en dépit de l'existence de droits statutaires mettant formellement en œuvre au niveau national les droits énoncés dans la législation de l'UE, de nombreuses personnes continuent dans la pratique de faire l'objet d'un licenciement, d'une discrimination ou d'un traitement moins favorable du fait qu'elles sont enceintes ou qu'elles exercent leur droit à un congé pour raison familiale. Cette discrimination apparemment systémique et largement répandue n'est en recul dans aucun des pays examinés. Les études réalisées à l'échelon national révèlent en effet que la loi en place depuis plusieurs décennies n'a pas atteint ses objectifs. Elle n'a pas suffisamment contribué par ailleurs à faire évoluer la répartition traditionnelle des tâches entre hommes et femmes dans la sphère privée. Les femmes continuent d'assumer la charge principale des tâches de garde et de soins et tendent par conséquent à être les premières visées par un licenciement, une discrimination ou un traitement moins favorable pour cause de congé familial. Les hommes qui prennent ce type de congé apparaissent eux aussi exposés à un licenciement, une discrimination ou un traitement moins favorable. Bien que l'on puisse espérer moins de discrimination à l'égard des femmes du fait que les hommes deviennent plus nombreux à assumer des activités de garde et de soins non rémunérées, force est de constater que la plupart des travailleurs exerçant leur droit à un congé familial sont encore toujours féminins.

La législation de l'UE en matière de **congé de grossesse et de maternité** est dûment transposée dans les ordres juridiques internes et les droits prévus au niveau national vont souvent au-delà des exigences fixées par la directive relative aux travailleuses enceintes. Il n'empêche que des études et statistiques nationales attestent d'un non-respect général des droits liés à la grossesse et à la maternité et de cas fréquents de licenciement, de discrimination et de traitement moins favorable de femmes en rapport avec un congé de grossesse ou de maternité. Les problèmes de mise en application, qui vont du non-renouvellement de contrats d'emploi à durée déterminée de femmes enceintes à leur licenciement non justifié durant leur période d'essai, restent trop nombreux. Les travailleuses occupant un emploi précaire sont, de façon générale, davantage exposées au risque d'un licenciement, d'une discrimination ou d'un traitement moins favorable en rapport avec une grossesse ou une maternité. Ces mêmes travailleuses sont par ailleurs moins susceptibles de faire valoir leurs droits par crainte de mettre leur emploi en péril, par méconnaissance de leurs droits et/ou faute de moyens financiers pour aller en justice. Les travailleuses indépendantes forment une autre catégorie de personnes confrontées à des difficultés liées à un état de grossesse et de maternité. Les femmes en général sont en outre visées par une discrimination fondée sur l'âge car elles sont perçues comme susceptibles d'être un jour enceintes et de prendre un congé pour raison familiale. Plusieurs concepts juridiques tels que la discrimination indirecte ou la règle du renversement de la charge de la preuve continuent de poser des difficultés d'application dans certains

5 C-506/06 *Sabine Mayr c.* Bäckerei und Konditorei Gerhard Flöckner OHG.ECLI:EU:C:2008:119.

pays examinés dans le cadre du rapport. Il est fréquent que la protection contre le licenciement, la discrimination et le traitement moins favorable pour cause de grossesse et de maternité ne soit pas respectée par les employeurs, lesquels font fi de la loi sans crainte des conséquences, soit parce que les travailleurs n'engagent pas d'action en justice soit parce que les sanctions ne sont pas réellement dissuasives. Les manquements au niveau de la mise en application des droits au congé de grossesse et de maternité montrent que les sociétés européennes restent globalement et profondément marquées par une différenciation selon le genre, les femmes y étant perçues avant tout comme des mères et non comme des travailleuses à part entière.

Les **droits au congé parental** se heurtent encore, eux aussi, à de sérieux problèmes de mise en application dans les pays couverts par le rapport. Celui-ci fait état dans ce domaine de comportements fortement différenciés selon le sexe. Les femmes exercent davantage que les hommes leur droit à un congé parental parce que celui-ci ne permet pas aux deux parents de faire usage égal de leurs droits du fait qu'il n'est pas, ou pratiquement pas, rémunéré. La directive actuelle sur le congé parental n'a pas réussi à accroître la prise en charge des responsabilités de garde et de soins par les pères. La garantie d'un congé parental rémunéré envisagée dans la proposition de directive concernant l'équilibre entre vie professionnelle et vie privée encouragerait jusqu'à un certain point les hommes à prendre un congé de ce type. Sans équivaloir au salaire intégral, le niveau de rémunération proposé serait une avancée vers un congé parental rémunéré. Conjuguée à l'instauration d'une période minimale non transférable d'au moins quatre mois, cette disposition contribuerait à inciter davantage les pères à prendre un congé parental – ce qui contribuerait à son tour à une participation plus intensive des hommes aux responsabilités de garde et de soins. Le présent rapport montre également que la prise d'un congé parental est freinée, tant du côté des hommes que du côté des femmes, par son manque de flexibilité. En permettant aux travailleurs de prendre ce congé à temps plein ou à temps partiel, ou selon d'autres formules flexibles, la directive proposée contribuerait également à faire augmenter le nombre de parents, et de pères surtout, en mesure d'y recourir. Le rapport montre en outre que le licenciement et la discrimination persistent dans ce contexte, et ne se limitent pas aux femmes. Tout comme dans le cas des droits liés à la grossesse et à la maternité, le nombre d'actions en justice est pourtant peu élevé, et ce pour les mêmes raisons.

Le **congé de paternité** n'est pas encore garanti par la législation de l'UE mais il est envisagé dans la proposition de directive concernant l'équilibre entre vie professionnelle et vie privée avec une protection contre le licenciement, la discrimination et le traitement défavorable. La majorité des pays examinés ont d'ores et déjà adopté, sous une forme ou une autre, un congé de paternité et une protection juridique contre le licenciement et/ou la discrimination et/ou le traitement moins favorable (à quelques rares exceptions près). Lorsqu'il existe, le congé de paternité n'est généralement pas long et n'est que faiblement protégé contre la discrimination et le licenciement. Les dispositions nationales relatives au «congé de paternité» sont souvent réservées aux hommes mariés et excluent dès lors les couples de même sexe et les partenaires non mariés. La proposition de directive devrait pallier certaines de ces difficultés en disposant que le droit au congé de paternité doit être octroyé sans préjudice de l'état matrimonial ou familial. À l'heure actuelle, le droit au congé de paternité n'est pas massivement exercé par les travailleurs masculins, en raison incontestablement de sa rémunération inadéquate mais également de stéréotypes profondément ancrés quant aux rôles respectifs des hommes et des femmes. Dans de nombreux pays, les femmes persistent à être perçues comme ayant la responsabilité principale de l'éducation des enfants, alors que la prise en charge de tâches de garde et de soins par les pères n'est envisagée qu'à titre d'option. Cette mentalité contribue au déséquilibre entre hommes et femmes en termes de responsabilités au moment de la naissance d'un enfant – et on peut espérer qu'elle sera mise en cause par l'adoption de la proposition de directive.

Le **congé d'aidant** n'est pas encore consacré par la législation de l'UE. La proposition de directive concernant l'équilibre entre vie professionnelle et vie privée envisage l'introduction du droit à une période de congé pour les travailleurs qui s'occupent d'un proche gravement malade ou dépendant, lequel droit serait assorti de garanties contre le licenciement et la discrimination. Le congé d'aidant existe cependant déjà dans la majorité des pays examinés, tout comme une certaine protection contre le licenciement

et/ou le traitement moins favorable, même si ce n'est pas de manière systématique ou exhaustive. Le congé d'aidant ne se présente effectivement pas de façon homogène dans les différents pays couverts par le rapport et la protection contre le licenciement et la discrimination reste globalement faible. L'absence d'homogénéité entre ces droits en termes de champs d'application personnel et matériel complique l'évaluation de leur mise en application. Dans plusieurs pays, l'adoption du congé d'aidant au niveau national est en outre très récente de sorte qu'aucune évaluation de sa mise en œuvre n'est encore disponible. Ceci dit, l'expérience des pays ayant déjà adopté ce type de congé fait apparaître des schémas de mise en application très similaires à ceux observés pour le congé de grossesse, de maternité et parental – les difficultés rencontrées étant le non-respect fréquent de la protection contre le licenciement, la discrimination ou le traitement moins favorable parallèlement à une absence générale de volonté de la part des personnes visées d'exiger réparation lorsque ces droits sont enfreints. Le congé d'aidant revêt de surcroît une dimension fortement sexospécifique, ce qui signifie que les femmes sont davantage confrontées au licenciement, à la discrimination et au traitement moins favorable dans ce contexte.

Le présent rapport a identifié une série d'entraves à la mise en application du congé pour raison familiale. Le manque de conscientisation et d'accès à l'information devrait être comblé au moyen de campagnes de sensibilisation. La pénurie de données et d'études accentue encore, dans certains pays, la difficulté de faire appliquer les droits liés à la grossesse, la maternité et la parentalité. Une formation des magistrats, des juristes, des inspecteurs du travail et d'autres praticiens contribuerait à améliorer l'application de certains concepts juridiques perçus comme complexes, tels que le renversement de la charge de la preuve ou la discrimination indirecte fondée sur le sexe.

Certains obstacles à l'implémentation effective des droits au congé pour raison familiale ne sont pas d'ordre strictement juridique et s'avèrent dès lors plus difficiles à cerner totalement et/ou à combattre à l'aide d'instruments exclusivement législatifs. Les rôles traditionnels des hommes et des femmes sont toujours davantage remis en question, mais des notions classiques et des idéologies culturelles conservant aux femmes la pleine responsabilité des enfants au quotidien n'en restent pas moins très répandues. La pénurie de services pertinents tels que des garderies et des jardins d'enfants renforce cette stricte division des rôles au sein de la famille. Il conviendrait de soutenir des campagnes en faveur de l'éradication de ces stéréotypes, et d'une meilleure indemnisation/rémunération des tâches de garde et de soins en vue d'en rehausser la valeur économique et sociale et d'en accroître l'attrait pour les hommes. Une telle approche contribuerait également à faire évoluer les schémas culturels et idéologiques quant aux rôles des hommes et des femmes. Les difficultés économiques nuisent à la mise en application des droits liés aux congés familiaux.

Les voies de recours et les sanctions, tout en étant généralement conformes au droit de l'UE, demeurent inefficaces car la plupart ne constituent pas un élément suffisamment dissuasif contre un licenciement, une discrimination ou un traitement moins favorable. L'efficacité des recours doit être renforcée, y compris au moyen de sanctions pécuniaires plus lourdes, pour qu'ils deviennent un puissant outil de mise en application. De même, un accès amélioré, moins onéreux et plus aisé à la justice devrait être donné aux victimes en réduisant, par exemple, le coût des procédures judiciaires ou en interdisant le paiement de frais en tant que condition d'accès aux tribunaux. Un autre problème concerne le délai fixé pour saisir la justice. Les femmes enceintes ou en congé de maternité devraient peut-être disposer d'un délai plus long pour introduire un recours car, étant davantage sous pression lorsqu'elles attendent un enfant ou qu'elles s'occupent d'un nouveau-né, elles peuvent être particulièrement vulnérables durant cette période. Au niveau national, il serait sans doute utile de compléter les droits individuels d'une surveillance qui, opérant de manière systématique et descendante, prévoirait la fixation d'objectifs ainsi que des sanctions pécuniaires efficaces en cas de violation des droits associés aux congés familiaux.

Une approche davantage holistique s'impose pour garantir l'application efficace de la protection contre le licenciement, la discrimination et le traitement moins favorable en lien avec la prise d'un congé pour raison familiale. Une législation contraignante ne suffit manifestement pas à faire évoluer et mettre en cause les stéréotypes liés au genre et à améliorer la mise en application des droits relatifs à ce type de

congé. Étant donné en outre que le congé familial, les formules souples de travail et l'accès aux structures de garde d'enfants sont des problématiques interdépendantes, il est impératif que tous les aspects en soient traités de manière conjointe. Le socle européen des droits sociaux est un pas dans la bonne direction puisqu'il envisage, parallèlement à la proposition concernant l'équilibre entre vie professionnelle et vie privée et aux mesures non législatives destinées à promouvoir cet équilibre pour les parents et aidants qui travaillent, des mesures venant compléter les dispositions concernant le congé familial, y compris l'amélioration de l'accès aux structures de garde d'enfants et la lutte contre les stéréotypes liés au genre. Ces mesures complémentaires contribueraient largement au renforcement du cadre permettant de concilier famille et travail. Mais encore faudra-t-il qu'elles fassent preuve à terme de leur efficacité, étant donné qu'elles ne sont pas envisagées en tant qu'instrument juridiquement contraignant.

Zusammenfassung

1 Einleitung

Nach der Proklamation zur europäischen Säule sozialer Rechte am 17. November 2017 hat die Europäische Kommission den Vorschlag für eine Richtlinie zur Vereinbarkeit von Beruf und Privatleben für Eltern und pflegende Angehörige verabschiedet, der die Rechte auf Urlaub aus familiären Gründen stärkt und erweitert und den Wert der unbezahlten Arbeit anerkennt, den pflegende Angehörige, und vor allem Frauen, bei der Betreuung abhängiger Personen leisten. Die vorgeschlagene Richtlinie baut auf bestehenden Rechtsvorschriften der Europäischen Union (EU) zur Vereinbarkeit von Beruf und Familie auf, insbesondere auf der Mutterschutzrichtlinie 92/85/EWG, der Gleichbehandlungsrichtlinie (Neufassung) 2006/54/EG, der Richtlinie 2010/41/EU zur Verwirklichung des Grundsatzes der Gleichbehandlung von Männern und Frauen, die eine selbständige Erwerbstätigkeit ausüben, und der Elternzeitrichtlinie 2010/18/EU sowie auf Bestimmungen der europäischen Verträge, z. B. Artikel 2 und 3(3) des EUV, Artikel 153(1)(i), 153(2)(b) und 157 des AEUV und der EU-Grundrechtecharta. Mit der Richtlinie sollen bestehende Rechte erweitert und neue Formen des Schutzes eingeführt werden. Dazu gehört der Anspruch auf mindestens vier Monate Elternurlaub für die Eltern von Kindern bis zu einem bestimmten Alter (mindestens 12 Jahre), der nicht übertragen werden kann und mindestens in Höhe des Krankengeldes vergütet wird. Der Richtlinienvorschlag sieht auch einen Anspruch auf mindestens 10 Tage vergüteten Vaterschaftsurlaub vor. Außerdem erhalten Eltern von Kindern bis zu einem bestimmten Alter (mindestens 12 Jahre) das Recht, flexible Arbeitsregelungen zu beantragen. Die vorgeschlagene Richtlinie führt ferner erstmalig das Recht auf mindestens fünf Tage Pflegeurlaub pro Jahr für die Pflege von schwerkranken oder hilfsbedürftigen Familienangehörigen ein. Schließlich ist in der Richtlinie auch ein Anspruch auf Freistellung von der Arbeit in Fällen *höherer Gewalt* für alle Arbeitnehmer (nicht nur für Eltern und pflegende Angehörige) aus dringenden familiären Gründen vorgesehen, der derzeit durch die Elternzeitrichtlinie gegeben ist. Mit der vorgeschlagenen Richtlinie würde die Entlassung, Diskriminierung oder Benachteiligung von Arbeitnehmern verboten, die einen in der Richtlinie garantierten Urlaub beantragt oder genommen oder ihr Recht auf Beantragung flexibler Arbeitsregelungen in Anspruch genommen haben.

Vor diesem Hintergrund untersucht dieser thematische Bericht, wie das Verbot von Diskriminierung, Benachteiligung und Entlassung im Zusammenhang mit Schwangerschafts- bzw. Mutterschaftsurlaub, Eltern- bzw. Adoptionsurlaub, Vaterschaftsurlaub, Pflegeurlaub und anderen Formen von Urlaub aus familiären Gründen umgesetzt wird. Außerdem werden die Themen Ausgleichszahlungen, Schadensersatz und Sanktionen und die Rolle der nationalen Gleichbehandlungsstellen behandelt. Ziel dieses Berichts ist ein Überblick über die praktische Umsetzung des geltenden Unionsrechts in diesem Bereich. Für den Bericht wurden die 28 Mitgliedstaaten und drei EWR-Länder, nämlich Island, Liechtenstein und Norwegen untersucht. Seine Datengrundlage wurde mit Hilfe eines Fragebogens erhoben (Anhang 1 zu diesem Bericht), in dem nationale Experten des Europäischen Netzwerks von Rechtsexpertinnen und Rechtsexperten auf dem Gebiet der Gleichstellung von Frauen und Männern die Situation in ihrem Land bewertet haben. Die Informationen in diesem Bericht bilden den Stand vom 29. August 2018 ab.

Diese Studie behandelt den Schutz gegen Entlassung, Diskriminierung und Benachteiligung, der durch die Mutterschutzrichtlinie 92/85/EWG, die Gleichbehandlungsrichtlinie (Neufassung) 2006/54/EG, die Richtlinie 2010/41/EU und die Elternzeitrichtlinie 2010/18/EU besteht. Vaterschafts- und Adoptionsurlaub wird zwar an sich nicht durch Unionsrecht garantiert; wenn ein Mitgliedstaat jedoch einen entsprechenden Urlaubsanspruch vorsieht, schützen die Rechtsvorschriften der EU Arbeitnehmer, die ihr Recht auf diesen Urlaub wahrnehmen, vor einer Entlassung. Außerdem garantieren sie das Recht, an den früheren oder einen gleichwertigen Arbeitsplatz zurückzukehren und alle Verbesserungen der Arbeitsbedingungen in Anspruch zu nehmen, auf die sie während ihrer Abwesenheit Anspruch gehabt hätten. Sofern ein

Mitgliedstaat einen gesetzlichen Anspruch auf Vaterschafts-, Adoptions- oder Pflegeurlaub eingeführt hat, wird in diesem Bericht auch die Durchsetzung dieses Rechtsanspruchs untersucht. Außerdem behandelt der Bericht Entlassungen aufgrund einer Adoption, einer Fruchtbarkeitsbehandlung oder eine andere assistierte Reproduktionstechnik. Schließlich werden Fälle von Diskriminierung oder Benachteiligung von Frauen berücksichtigt, die ihr Kind verloren oder eine Totgeburt erlitten haben.

Dieser Bericht besteht aus zehn Kapiteln. Nach einer allgemeinen Einführung in *Kapitel 1* behandelt *Kapitel 2* die Frage, wie der Schutz von Arbeitnehmern, die einen Urlaub aus familiären Gründen in Anspruch genommen haben, vor Diskriminierung und Benachteiligung in den einzelnen Mitgliedstaaten umgesetzt wird. Dazu werden insbesondere Rechtsvorschriften, die nationale Rechtsprechung, die Entscheidungen nationaler Gleichbehandlungsstellen sowie Studien und/oder Jahresberichte der Gleichbehandlungsstellen und anderer Stellen über die Durchsetzung des Verbots von Diskriminierung und Benachteiligung untersucht. Berücksichtigt werden Probleme bei der Inanspruchnahme von Schwangerschafts- bzw. Mutterschaftsurlaub, Eltern- bzw. Adoptionsurlaub, Vaterschaftsurlaub, Pflegeurlaub und den Urlaubsansprüchen von selbständig Erwerbstätigen. Da das Unionsrecht noch keinen Anspruch auf Vaterschaftsurlaub und Pflegeurlaub bietet, skizziert der Bericht ggf. die gesetzlichen Urlaubsansprüche in den Mitgliedstaaten. *Kapitel 3* konzentriert sich auf die Durchsetzung des Entlassungsschutzes im Falle eines Urlaubs aus familiären Gründen in den Mitgliedstaaten und folgt dabei der gleichen Struktur wie Kapitel 2. Dabei werden die juristischen Hürden untersucht, die bei der Durchsetzung des Entlassungsverbots in Zusammenhang mit der Inanspruchnahme von Urlaub aus familiären Gründen bestehen. *Kapitel 4* behandelt den Zugang zur Justiz und die wirksame Durchsetzung des Verbots von Entlassung, Diskriminierung und Benachteiligung in Bezug auf Urlaub aus familiären Gründen. *Kapitel 5* untersucht, welche Rolle Ombudspersonen, Gewerbeaufsichtsbehörden und die Sozialpartner bei der Durchsetzung des geltenden Rechtsschutzes spielen. In *Kapitel 6* werden sonstige Probleme bei der Rechtsdurchsetzung in dem hier behandelten Bereich in den untersuchten Ländern erläutert. *Kapitel 7* skizziert einige bewährte Verfahren, mit denen das Verbot von Diskriminierung, Benachteiligung und/oder Entlassung in einzelnen Ländern wirksam durchgesetzt wird. *Kapitel 8* behandelt weitere Themen, die einen Bezug zu Gegenstand und Zielsetzung dieses Berichts haben, z. B. Stillen, Totgeburten oder assistierte Reproduktionstechniken, wie In-vitro-Fertilisation oder Leihmutterschaft. *Kapitel 9* enthält erste Schlussfolgerungen und Empfehlungen. *Das letzte Kapitel* bietet ein Verzeichnis der einschlägigen Literatur zu den einzelnen Mitgliedstaaten.

2 Durchsetzung des Schutzes von Arbeitnehmern, die einen Urlaub aus familiären Gründen in Anspruch genommen haben, vor Diskriminierung und Benachteiligung in den einzelnen Mitgliedstaaten

2.1 Schwangerschafts- und Mutterschaftsurlaub

Das Unionsrecht stärkt die Rechte von Schwangeren, Müttern und Eltern mit dem klaren Ziel, den Grundsatz der Gleichstellung von Frauen und Männern zu verwirklichen. In den untersuchten Ländern werden Schwangeren, Müttern und Eltern teils aber auch aus anderen Überlegungen heraus bestimmte Rechte garantiert, z. B. aus demografischen Gründen. Dies führt, insbesondere bei der Länge des Mutterschaftsurlaubs, zu einem Spannungsverhältnis, weil oft – fälschlicherweise – angenommen wird, dass ein langer Urlaubsanspruch zur Erhöhung der Geburtenquote beiträgt, und gleichzeitig auch festgestellt wurde, dass ein langer Urlaubsanspruch den Zugang von Frauen zum Arbeitsmarkt erschwert.

Die Diskriminierung und Benachteiligung von Arbeitnehmern aufgrund eines Schwangerschafts- oder Mutterschaftsurlaubs ist in allen untersuchten Ländern formal verboten. In den meisten Staaten gelten spezielle Rechtsvorschriften, die eine Diskriminierung und Benachteiligung aufgrund von Schwangerschaft und Mutterschaft verbieten und dabei über die unionsrechtliche Vorgaben hinausgehen. In Bulgarien,

Deutschland, Litauen und Polen ist eine Diskriminierung und Benachteiligung wegen des Schwangerschafts- und Mutterschaftsurlaubs nicht ausdrücklich verboten und die Betroffenen müssen sich auf das allgemeine Diskriminierungsverbot berufen. Damit sind die unionsrechtliche Verpflichtungen zwar erfüllt, das Fehlen von Rechtsvorschriften, die Diskriminierung und Benachteiligung wegen eines Schwangerschafts- oder Mutterschaftsurlaubs ausdrücklich verbieten, ist jedoch eine Gesetzeslücke, die es den Betroffenen erschwert, sich gegen Diskriminierung aufgrund ihres Schwangerschafts- oder Mutterschaftsurlaubs zu wehren. Dies führt dazu, dass Arbeitnehmer ihre Rechte nicht ausreichend kennen und diese daher auch nicht immer durchsetzen.

In allen untersuchten Ländern gibt es Rechtsvorschriften, die eine Diskriminierung und Benachteiligung von Arbeitnehmern, die Schwangerschafts- oder Mutterschaftsurlaub nehmen, speziell oder im Rahmen weiter gefasster Bestimmungen verbieten. Dennoch finden Berichten zufolge in der Praxis viele Fälle von Diskriminierung und Benachteiligung statt, die jedoch nur selten oder nie vor Gericht kommen. Eine Reihe von aktuellen nationalen Studien beschreiben eine Diskrepanz zwischen Rechtslage und Wirklichkeit, die zeigt, dass herkömmliche Geschlechterrollen und Stereotypen noch immer nicht ausreichend bekämpft werden.

Berufstätige Schwangere und Frauen, die Mutterschafts-, Eltern- oder Pflegeurlaub in Anspruch nehmen, werden im Arbeitsleben negativ gesehen, weshalb diese Arbeitnehmerinnen am Arbeitsplatz häufig sexuelle Belästigung oder Mobbing erleben. Außerdem führen Viktimisierung und die Angst vor Viktimisierung oft dazu, dass sich die Betroffenen vor rechtlichen Schritten scheuen, insbesondere aber nicht ausschließlich in wirtschaftlich schwierigen Zeiten mit einem instabilen Arbeitsmarkt oder bei einer prekären Beschäftigung. Betroffene, die dennoch rechtliche Schritte einleiten, können während des Gerichtsverfahrens eine weitere Viktimisierung erleben.

Viele Fälle von Diskriminierung oder Benachteiligung beruhen auf der Wahrnehmung, dass junge Frauen sehr wahrscheinlich schwanger werden und dann Urlaub für die Betreuung der Kinder brauchen. Diese tief verwurzelten schädlichen Klischees und Vorurteile über die Rolle von Frauen als Mütter und pflegende Angehörige verhindern, dass Frauen als vollwertige Arbeitnehmer anerkannt werden. Und sie führen dazu, dass Frauen nicht dieselbe Eignung und Fähigkeit für ihre Arbeit zuerkannt wird wie Männern. Das höchste Risiko, aufgrund von negativen Stereotypen vom Arbeitsmarkt ausgeschlossen zu werden, haben Mütter, insbesondere alleinerziehende Mütter und Mütter mit behinderten Kindern, gering qualifizierte Frauen mit niedrigem Bildungsabschluss, Frauen in prekärer Beschäftigung, Frauen, die lange arbeitslos waren, und Frauen aus ethnischen Minderheiten, insbesondere Roma. Viele Arbeitgeber lehnen weibliche Stellenbewerber aufgrund ihres Alters und/oder Familienstands ab oder stellen ihnen Fragen zu ihrer künftigen Familienplanung. Gegen diese Form der Diskriminierung wird äußerst selten oder nie geklagt, weil es gerade für Bewerbungssituationen besonders schwierig ist, die nötigen Nachweise vorzulegen.

In manchen Ländern ist nicht klar, für welchen Personenkreis der Schutz vor Diskriminierung und Benachteiligung aufgrund eines Schwangerschafts- oder Mutterschaftsurlaubs gilt. In der Rechtssache *Danosa*[1] kam der EuGH zu dem Urteil, dass Mitglieder der Geschäftsleitung in Bezug auf den Schutz vor Diskriminierung und Benachteiligung im Falle einer Schwangerschaft und im Bezug auf ihre Urlaubsansprüche im Zusammenhang mit Geburt und Kinderbetreuung als Arbeitnehmer gelten. Allerdings bleiben Mitglieder der Geschäftsführung in Lettland und Rechtsberaterinnen, die in Malta Teil der Geschäftsführung sind, von diesem Schutz ausgeschlossen.

Um die Durchsetzung des Rechts auf Urlaub aus familiären Gründen zu stärken, muss ausreichend und wirksam über dieses Recht informiert werden. Wenn Informationen über die Rechte in Bezug auf Schwangerschafts- und Mutterschaftsurlaub nur schwer verfügbar sind, erleichtert dies nicht nur Diskriminierung, sondern führt auch dazu, dass diese Rechte kaum durchgesetzt werden. Der Zugang zu Informationen ist besonders während des Mutterschafts- oder Elternurlaubs schwierig, wenn die

1 C-232/09 *Dita Danosa gegen LKB Līzings SIA*. ECLI:EU:C:2010:674.

betreffende Arbeitnehmerin häufig nicht über Gehaltsverhandlungen oder Umstrukturierungen informiert oder an diesen beteiligt wird. Wie die Untersuchung zeigt, kennen und beachten auch die Arbeitgeber die Rechte von Schwangeren und Müttern nicht ausreichend. In manchen Ländern fehlen sogar den Mitgliedern der Justiz spezialisierte Fachkenntnisse zum gesetzlichen Diskriminierungsverbot bei Schwangerschaft und Mutterschaft.

Eine Reihe von Rechten in Bezug auf Schwangerschafts- und Mutterschaftsurlaub werden nur unzureichend durchgesetzt. Insbesondere das Recht auf Rückkehr an den früheren oder einen gleichwertigen Arbeitsplatz nach dem Mutterschaftsurlaub ist problematisch. Obwohl dieses Recht in den meisten Ländern gesetzlich garantiert ist, bekommen viele Arbeitnehmerinnen in der Praxis nach ihrer Rückkehr neue Aufgaben und/oder stellen fest, dass ihr Arbeitsplatz verändert wurde. Häufig stimmen sie unter Druck weniger attraktiven Arbeitsbedingungen zu, beispielsweise einer beruflichen Herabstufung, einer erzwungenen Teilzeitstelle oder einem rotierenden Arbeitszeitmodell. Dieser Trend wurde durch die Wirtschaftskrise mit nachfolgendem Arbeitsplatzmangel und hohen Arbeitslosenquoten weiter verstärkt, insbesondere in Griechenland.

Ein anderes Problem bei der Rechtedurchsetzung entsteht durch den potenziellen Widerspruch zwischen dem Verbot der Diskriminierung aufgrund von Mutterschaft und der Pflicht, schwangere Arbeitnehmerinnen vor Gesundheitsrisiken zu schützen. Die Richtlinie 92/85/EEW dient dem Schutz von schwangeren Arbeitnehmerinnen, Wöchnerinnen und stillenden Arbeitnehmerinnen und stellt sicher, dass deren Gesundheit nicht durch die Arbeitsumgebung gefährdet wird. Problematisch wird es, wenn eine schwangere Arbeitnehmerin aus Gründen des Gesundheitsschutzes von einem Arbeitsplatz entfernt werden muss, jedoch keine andere Stelle frei ist, die die Arbeitnehmerin vorübergehend besetzen könnte.

Außerdem ist das Recht auf Lohnfortzahlung während der Mutterschaft nach Artikel 11 der Mutterschutzrichtlinie komplex und schlecht durchsetzbar, obwohl bereits einige Fälle vor dem EuGH verhandelt wurden.[2] Die Komplexität des Unionsrechts in diesem Bereich führt auch in den Rechtssystemen der Mitgliedstaaten zu Verwirrung. Konkret kann die Zahlung von Mutterschaftsleistungen an eine durchgehende Beschäftigung und/oder andere Bedingungen, wie die Zahlung von Versicherungsbeiträgen, geknüpft sein. In manchen Ländern müssen Arbeitnehmerinnen, die im unbezahlten Urlaub sind, erst an ihren Arbeitsplatz zurückkehren, um sich für einen vergüteten Mutterschaftsurlaub zu qualifizieren.

Auch die Anwendung bestimmter rechtlicher Begriffe führt in einigen Ländern zu Problemen. Insbesondere in Ungarn und Griechenland ist der Begriff der mittelbaren Diskriminierung nicht klar und wird daher viel zu selten angewendet. Auch die Regeln zur Umkehr der Beweislast gelten als relativ komplex und werden in Griechenland, Kroatien, den Niederlanden, Polen, der Slowakei und Ungarn, nicht immer erfolgreich angewendet bzw. durchgesetzt.

Schließlich müssen die Rechtsmittel, Sanktionen und Strafen bei Verstößen gegen das Diskriminierungsverbot in Bezug auf Schwangerschafts- und Mutterschaftsurlaub gemäß dem Unionsrecht wirksam, verhältnismäßig und abschreckend sein. Zwar entsprechen sie im allgemeinen dem Unionsrecht und gehen in manchen Ländern sogar über die unionsrechtliche Vorgaben hinaus, in der Praxis kommt es aber weiterhin zu Problemen, weil Zahlungen oder Rechtsmittel auf konkrete Schäden begrenzt sind. Weil die Gerichtsverfahren so lange dauern, sind die Entschädigungen zum Zeitpunkt des Urteils nicht mehr angemessen. Die Höhe der Sanktionen gilt oft als zu gering, um Diskriminierung zu verhindern oder um die Schäden für die Arbeitnehmerin angemessen auszugleichen.

2 Siehe z. B. C-342/93, *Joan Gillespie u. a. gegen Northern Health and Social Services Boards, Department of Health and Social Services, Eastern Health and Social Services Board und Southern Health and Social Services Board* ECLI:EU:C:1996:46; C-411/96 *Margaret Boyle u. a. gegen Equal Opportunities Commission* ECLI:EU:C:1998:506; C-66/96 *Handels- og Kontorfunktionærernes Forbund i Danmark handelnd für Berit Høj Pedersen gegen Fællesforeningen for Danmarks Brugsforeninger und Dansk Tandlægeforening und Kristelig Funktionær-Organisation gegen Dansk Handel & Service* ECLI:EU:C:1998:549; C-333/97 *Susanne Lewen gegen Lothar Denda* ECLI:EU:C:1999:512; C-218/98 *Oumar Dabo Abdoulaye E.A. gegen Regie Nationale des Usines Renault SA* ECLI:EU:C:1999:424.

2.2 Eltern- und Adoptionsurlaub

In den meisten Ländern gilt für Eltern- und Adoptionsurlaub derselbe gesetzliche Schutz vor Diskriminierung und Benachteiligung wie beim Schwangerschafts- und Mutterschaftsurlaub. Daher sind auch die Probleme bei der Durchsetzung ähnlich.

In Belgien, Deutschland, Litauen und Polen gibt es keine spezielle Rechtsvorschrift, die Diskriminierung oder Benachteiligung von Arbeitnehmern aufgrund eines Adoptions- oder Elternurlaubs verbietet; Kläger müssen sich daher auf das allgemeine Verbot der Diskriminierung aufgrund des Geschlechts berufen. Obwohl das nationale Recht in diesen Fällen formal Paragraf 5(4) der Elternzeitrichtlinie entspricht, nach dem die Mitgliedstaaten und/oder Sozialpartner die erforderlichen Maßnahmen ergreifen müssen, um Arbeitnehmer vor Benachteiligung oder Entlassung infolge der Inanspruchnahme von Elternurlaub zu schützen, ist es wahrscheinlich nicht spezifisch genug. Ohne ein ausdrückliches Verbot von Diskriminierung oder Benachteiligung infolge der Inanspruchnahme von Elternurlaub oder Adoptionsurlaub ist die Durchsetzung eines solchen Verbots schwierig.

Aber auch wenn ein ausdrückliches gesetzliches Verbot besteht, können die Bedingungen für seine Anwendung zu Problemen bei der Rechtsdurchsetzung führen. Die Gesetze der Mitgliedstaaten zum Eltern- oder Adoptionsurlaub sind in manchen Fällen unklar, komplex, ungleich, fragmentiert und/oder sie werden häufig und unerwartet geändert. Dies führt zu Schwierigkeiten bei der Durchsetzung und Rechtsunsicherheit bei den Arbeitnehmern.

Zahlreiche Arbeitnehmer sind vom Recht auf Elternurlaub ausgenommen. Zwar besagt Paragraf 1(3), dass ein Teilzeitvertrag, befristeter Vertrag oder Vertrag durch ein Zeitarbeitsunternehmen keinen gültigen Grund darstellt, um den Arbeitnehmer vom Anwendungsbereich der Richtlinie auszuschließen; allerdings ist die Anwendung der Richtlinie an einen Arbeitsvertrag im Sinne der nationalen Rechtsvorschriften gebunden. Der Anspruch auf Elternurlaub ist daher nicht allgemein gültig und kann im nationalen Recht an bestimmte Bedingungen geknüpft werden.

Aber auch Arbeitnehmer mit Anspruch auf Elternurlaub stellt die Durchsetzung des Verbots von Diskriminierung und Benachteiligung vor zahlreiche Probleme. In manchen Ländern wird der Elternurlaub bei der Berechnung bestimmter im Arbeitsvertrag geregelter Rechte und Vergünstigungen nicht berücksichtigt. Auch die Lohnfortzahlung während des Elternurlaubs kann ein Problem darstellen: Obwohl dies durch die Elternzeitrichtlinie nicht gewährleistet ist, müssen erworbene Rechte gemäß Paragraf 5(2) bis zum Ende des Elternurlaubs bestehen bleiben. Dies hat in einigen Mitgliedstaaten zu Unklarheiten in Bezug auf den Anspruch auf Bonuszahlungen geführt. Außerdem kann die aufeinander folgende Inanspruchnahme von Mutterschafts- und Elternurlaub zu niedrigeren Leistungen führen. In manchen Ländern wie Deutschland, Polen und Schweden wurde das Recht auf Rückkehr an den früheren Arbeitsplatz noch nicht vollständig umgesetzt.

Wie beim Schwangerschafts- und Mutterschaftsurlaub sind auch hier der Rechtsbegriff der mittelbaren Diskriminierung und die Regeln der umgekehrten Beweislast in einigen Ländern nicht eindeutig geklärt. Auch das Konzept des Fernbleibens von der Arbeit aus Gründen *höherer Gewalt*, das eine gewisse Dringlichkeit und ein kurzfristiges Fernbleiben beinhaltet, wird nicht immer ausreichend verstanden und musste in einigen Ländern juristisch geklärt werden.

Obwohl Diskriminierung und Benachteiligung aufgrund eines Elternurlaubs formal verboten sind, kommt es in der Praxis häufig zu Rechtsverstößen, die jedoch nur selten oder nie vor Gericht kommen. Die Rechtsmittel und Sanktionen bei Fällen von Diskriminierung und Benachteiligung im Zusammenhang mit Elternurlaub entsprechen zwar dem Unionsrecht, sind nach Ansicht der Expertinnen jedoch ungenügend und unwirksam.

Die Europäische Kommission hat einige wichtige Gründe identifiziert, aus denen Familien das Recht auf Elternurlaub bisher nicht uneingeschränkt nutzen können. Sie hat anerkannt, dass die mangelnde Flexibilität der Vorschriften ein wichtiger Grund dafür ist, dass der Elternurlaub bisher so selten in Anspruch genommen wird.[3] In einigen Ländern gelten für den Anspruch auf Elternurlaub tatsächlich sehr strenge Kriterien und komplexe Verfahren, weshalb Eltern diesen Urlaub nicht immer so nehmen können, wie sie möchten. So können Arbeitnehmer den Elternurlaub oft nicht auf Teilzeitbasis nehmen. Außerdem sind die Vorschriften, die beiden Elternteilen einen Urlaub ermöglichen, sehr komplex, weshalb diese Rechte häufig nicht in Anspruch genommen werden.

Wie die Europäische Kommission außerdem festgestellt hat, haben die mangelnde Vergütung und das Fehlen nicht übertragbarer bzw. beiden Elternteilen fest zugeordneter Urlaubszeiten dazu geführt, dass es hauptsächlich Frauen sind, die den Elternurlaub in Anspruch nehmen. In allen untersuchten Ländern nehmen nur wenige Väter den Elternurlaub in Anspruch. Die Gründe sind eine (gefühlte oder echte) Diskriminierung, gesellschaftliche Strukturen (Männer sind weiterhin oft die Haupternährer), das Lohngefälle zwischen Frauen und Männern, die fehlende oder geringe Lohnfortzahlung während des Elternurlaubs und Geschlechterstereotypen (familiäre Pflichten gelten im Wesentlichen als Aufgabe der Frau). Aus der Perspektive des Arbeitgebers schadet Elternurlaub dem Unternehmen, weil er Arbeitnehmer zu lange von ihrem Arbeitsplatz fernhält. Diese negative Sicht mancher Unternehmen auf den Elternurlaub trägt wiederum zu mehr Diskriminierung und Benachteiligung bei.

Schließlich ist der Adoptionsurlaub in den meisten Ländern kürzer als der Elternurlaub und eine komplementäre Maßnahme. Wo es einen speziellen Adoptionsurlaub gibt, können die Adoptiveltern auch Elternurlaub nehmen. In den Ländern, in denen es Adoptionsurlaub gibt, ist er mindestens ebenso geschützt und zu den gleichen Bedingungen verfügbar wie Elternurlaub. Allerdings besteht häufig nur bei einer formalen Adoption ein Anspruch auf Adoptionsurlaub.

2.3 Vaterschaftsurlaub

Während die vorgeschlagene Richtlinie zur Vereinbarkeit von Beruf und Privatleben ein solches Recht auf Vaterschaftsurlaub vorsieht, garantiert das Unionsrecht dies bisher noch nicht. Gemäß Artikel 16 der Gleichbehandlungsrichtlinie müssen Mitgliedstaaten, die einen Vaterschafts- oder Adoptionsurlaub eingeführt haben, die Arbeitnehmer jedoch vor einer Entlassung infolge der Inanspruchnahme dieser Rechte schützen. Außerdem haben Arbeitnehmer, die Vaterschafts- oder Adoptionsurlaub nehmen, das Recht, an ihren früheren oder einen gleichwertigen Arbeitsplatz zurückzukehren. Fast alle untersuchten Länder, mit Ausnahme von Deutschland, Kroatien, Liechtenstein, Österreich und der Slowakei, ermöglichen einen Vaterschaftsurlaub.

In einigen Ländern haben nur Väter einen Anspruch auf Vaterschaftsurlaub, in anderen dagegen können z. B. auch gleichgeschlechtliche Partner Vaterschaftsurlaub nehmen. Weitere Einschränkungen betreffen den Familienstand und die Frage, ob der Partner mit der Mutter des Kindes zusammenlebt. Auch steht der Vaterschaftsurlaub nicht unbedingt allen Vätern zu Verfügung, insbesondere im Fall von prekärer Beschäftigung wie z. B. Leiharbeit, Null-Stunden-Verträgen oder Gelegenheitsarbeit. In den Ländern mit Vaterschaftsurlaub schwankt die Anspruchsdauer zwischen einem Tag in Malta und 54 Tagen in Finnland; meist ist der Urlaubsanspruch also recht gering. Die Antragsformalitäten, z. B. eine Benachrichtigung des Arbeitgebers über die Geburt, die Vorlage eines ärztlichen Attests oder eine bestimmte Beschäftigungsdauer, schränken den Anspruch auf Vaterschaftsurlaub in manchen Ländern weiter ein. In den meisten Ländern werden Sozialleistungen in Höhe des Krankengeldes ausgezahlt, es gibt aber auch höhere Leistungen bis hin zur vollen Lohnfortzahlung.

3 Die Position des Rates hat den Vorschlag der Kommission abgeändert und leicht eingeschränkt. Obwohl der Rat vorschlägt, den bisherigen individuellen Anspruch auf vier Monate Urlaub beizubehalten, möchte er die nicht übertragbare Urlaubszeit auf zwei Monate senken, von denen nur 1,5 Monate in einer vom jeweiligen Mitgliedstaat zu bestimmenden Höhe vergütet werden.

Wo ein Anspruch auf Vaterschaftsurlaub besteht, ist der Schutz gegen Diskriminierung, Benachteiligung und Entlassung häufig genauso gestaltet wie bei Mutterschafts- oder Elternurlaub. Daher gibt es auch bei der Umsetzung ähnliche Probleme. So gibt es beispielsweise in Belgien, Litauen, den Niederlanden und Österreich, keine speziellen Rechtsvorschriften, die Diskriminierung oder Benachteiligung aufgrund eines Vaterschaftsurlaubs verbieten, sodass Kläger die vorhandenen Rechtsmittel gegen Diskriminierung aufgrund des Geschlechts nutzen müssen. Selbst dort, wo es spezielle Bestimmungen gibt, werden nur wenige oder gar keine Fälle vor Gericht gebracht. Außerdem sind die Rechtsmittel und Sanktionen bei Verstößen gegen das Verbot von Diskriminierung und Benachteiligung im Zusammenhang mit Vaterschaftsurlaub nach Ansicht der Expertinnen ebenso ungenügend und unwirksam wie im Fall des Schwangerschafts- und Mutterschaftsurlaubs.

Schließlich ist festzuhalten, dass der Vaterschaftsurlaub nur selten in Anspruch genommen wird und die Zahlen in manchen Ländern sogar zurückgehen. Die Gründe hierfür sind Diskriminierung, die komplexen Vorschriften, die unflexiblen Bedingungen, die geringe Vergütung, die Tatsache, dass der Urlaub freiwillig ist, und/oder mangelndes Wissen. Außerdem schrecken herkömmliche Rollenbilder und konservative kulturelle Überzeugungen Väter davon ab, Vaterschaftsurlaub zu nehmen.

2.4 Pflegeurlaub

Die EU garantiert Menschen, die Angehörige pflegen, bisher keine Urlaubsansprüche, vom Mutterschafts-, Eltern- und Adoptionsurlaub für die Betreuung von Kindern einmal abgesehen. Die vorgeschlagene Richtlinie zur Vereinbarkeit von Beruf und Privatleben für Eltern und pflegende Angehörige würde den Pflegeurlaub erstmalig im Unionsrecht verankern. Dadurch bekämen Arbeitnehmer das Recht, mindestens fünf Arbeitstage pro Jahr bezahlten Urlaub zu nehmen, um pflegebedürftige oder schwerkranke Angehörige zu pflegen. Außerdem würde mit der Richtlinie auch das Recht auf Freistellung von der Arbeit aus dringenden familiären Gründen in Fällen *höherer Gewalt* für alle Arbeitnehmer eingeführt, d. h. nicht nur für Eltern oder pflegende Angehörige, wie derzeit in der Elternzeitrichtlinie festgelegt. Die bestehenden EU-Richtlinien und die vorgeschlagene Richtlinie gehen auf die Bedürfnisse von pflegenden Arbeitnehmern ein, indem sie ein Anrecht auf flexiblere Arbeitszeit- und Urlaubsregelungen garantieren und es den Arbeitnehmern dadurch erleichtern, berufstätig zu bleiben. Politische Initiativen, mit denen soziale Dienstleistungen ausgebaut werden, z. B. die Kinderbetreuung oder Altenpflege, ermöglichen pflegenden Angehörigen dagegen erst den Zugang zum Arbeitsmarkt.

Viele Länder haben den Pflegeurlaub bereits in irgendeiner Form eingeführt, die Ausnahmen sind Island, Lettland, Rumänien, die Slowakei und das Vereinigte Königreich. Allerdings ist der Inhalt des Begriffs „Pflegeurlaub“ in den untersuchten Ländern sehr uneinheitlich und umfasst je nach Land Kinder, Menschen mit Behinderungen, pflegebedürftige Angehörige und/oder sonstige dringende familiäre Gründe in unterschiedlichen Kombinationen. Auch in Bezug auf Zielsetzung, persönlichen und sachlichen Anwendungsbereich, Dauer, Antragsbedingungen, Vergütung sowie den Schutz vor Entlassung, Diskriminierung und Benachteiligung gibt es große Unterschiede zwischen den einzelnen Ländern. Manchmal gibt es sogar innerhalb eines Landes mehrere Formen des Pflegeurlaubs mit jeweils eigenem persönlichen und sachlichen Anwendungsbereich und unterschiedlichen Antragsbedingungen.

Wo bereits ein Pflegeurlaub eingeführt wurde, ist dieser nicht allgemein gültig, sondern oft vom Wirtschaftssektor oder Personenstand abhängig, auf ein Elternteil beschränkt oder nur verfügbar, wenn die Beteiligten unter einem Dach leben. Auch die Dauer des Pflegeurlaubs ist in vielen Ländern nicht eindeutig und hängt häufig von der Art des Urlaubs, dem persönlichen Anwendungsbereich oder den persönlichen Umständen des Arbeitnehmers ab. In den meisten Ländern besteht ein Anspruch auf Pflegeurlaub für die Pflege von Kindern; wobei der Urlaub nicht immer gleich lang ist und/oder die Bedingungen für die Inanspruchnahme vom Alter des Kindes abhängen. Auch für die Pflege des Ehegatten bzw. Partners oder enger Angehöriger gibt es in vielen Ländern Pflegeurlaub, für den aber oftmals strenge Bedingungen und Einschränkungen gelten. In einzelnen Ländern ist auch für andere pflegebezogene Tätigkeiten ein

Pflegeurlaub möglich, z. B. für die Pflege von Menschen mit Behinderungen bzw. Schwerkranken, Senioren, Verwandten zweiten Grades, sterbenden Angehörigen bzw. Mitgliedern einer Pflegefamilie; außerdem besteht die Möglichkeit eines Kurzurlaubs für eine IVF-Behandlung, allgemein zur Vereinbarung von Beruf und Privatleben, oder bei der unerwarteten Schließung von Kindertagesstätte, Kindergarten oder Schule. Der Pflegeurlaub wird häufig im Rahmen der sozialen Sicherungssysteme pauschal vergütet. Die Höhe der Leistungen schwankt jedoch zwischen 100 % des Gehalts in Kroatien und dem Mindestlohn in Estland.

Obwohl die meisten Länder eine Form des Pflegeurlaubs kennen, wird nicht immer ein Schutz gegen Diskriminierung, Benachteiligung oder Entlassung infolge der Inanspruchnahme des Urlaubs gewährleistet. Dies gilt auch für andere damit verbundene Rechte, z. B. das Recht, an den früheren oder einen gleichwertigen Arbeitsplatz zurückzukehren. Weil dieser Rechtsschutz gegen Diskriminierung und Benachteiligung fehlt, gibt es auch wenig oder gar keine Rechtsprechung.

Schließlich kann der Pflegeurlaub auch negative Geschlechterstereotypen verstärken: die gesetzlichen Bestimmungen sind zwar geschlechtsneutral formuliert, in der Praxis nehmen jedoch unverhältnismäßig viele Frauen einen Pflegeurlaub, weil dieser nicht oder nur sehr gering vergütet wird.

2.5 Selbständig Erwerbstätige (Richtlinie 2010/41/EU)

Mit der Richtlinie 2010/41/EU wird der Grundsatz der Gleichbehandlung von Männern und Frauen, die eine selbständige Erwerbstätigkeit ausüben, festgelegt. Laut Artikel 8(1) der Richtlinie 2010/41/EU müssen die Mitgliedstaaten selbständig erwerbstätigen Frauen sowie Ehepartnerinnen und Lebenspartnerinnen Mutterschaftsleistungen bereitstellen, deren Dauer dem in der EU garantierten Mutterschaftsurlaub für Arbeitnehmerinnen entspricht (14 Wochen). Die Mutterschaftsleistungen können entweder auf obligatorischer oder freiwilliger Basis gewährt werden. Da diese Bestimmung nur unzureichend umgesetzt wurde, ist es für selbständig erwerbstätige Frauen in Finnland, Frankreich, Griechenland, Ungarn, Portugal, Rumänien, Spanien und Zypern in der Praxis sehr schwer, derartige Leistungen in Anspruch zu nehmen. Außerdem gilt das Recht der Mitgliedstaaten häufig nicht für die Ehepartnerinnen (oder Lebenspartnerinnen, sofern diese gesetzlich anerkannt werden) von selbständig erwerbstätigen Männern.

Gemäß Artikel 8(2) und (3) der Richtlinie 2010/48 müssen Frauen (mindestens 14 Wochen lang) Mutterschaftsleistungen erhalten. Allerdings gibt es in einigen Ländern Probleme bei der Berechnung dieser Leistung, zum Beispiel was die Grundlage für die Berechnung des Verdienstausfalls, den Versicherungsanbieter oder die Komplexität des Systems angeht.

Unter Berücksichtigung der Besonderheiten einer selbständigen Erwerbstätigkeit besagt Artikel 8(4) der Richtlinie 2010/48 außerdem, dass selbständig erwerbstätige Frauen sowie mitarbeitende Ehepartnerinnen (oder ggf. Lebenspartnerinnen) Zugang zu jeglichen bestehenden Diensten zur Bereitstellung einer zeitlich befristeten Vertretung, die es ihnen erlauben, ihre berufliche Tätigkeit aufgrund einer Schwangerschaft oder Mutterschaft zu unterbrechen, oder zu jeglichen bestehenden sozialen Diensten auf nationaler Ebene erhalten müssen. Diese Bestimmung wurde jedoch in mehreren Ländern nicht in nationales Recht umgesetzt.

Es werden kaum Fälle aus dem Bereich der selbständigen Beschäftigung, insbesondere in Bezug auf Schwangerschaft bzw. Mutterschaft, vor Gericht gebracht. Die rechtliche Aufsicht über den Schutz von selbständig Beschäftigten ist schwierig, weil die Stellen, die sich sonst um Fragestellungen zu Diskriminierung oder Benachteiligung von Schwangeren und Müttern kümmern, nicht für Selbständige zuständig sind.

3 Durchsetzung des Kündigungsschutzes von Arbeitnehmern, die einen Urlaub aus familiären Gründen in Anspruch genommen haben

3.1 Schwangerschafts- und Mutterschaftsurlaub

In Übereinstimmung mit Artikel 10(1) und (2) der Richtlinie 92/85/EWG und Artikel 14(1)(c) der Gleichbehandlungsrichtlinie ist die Kündigung von Arbeitnehmerinnen aufgrund einer Schwangerschaft oder Mutterschaft in allen untersuchten Ländern verboten. Der formale Rechtsschutz vor Entlassung aufgrund einer Schwangerschaft oder Mutterschaft ist in den meisten Ländern sehr stark, wobei das nationale Recht über die in Artikel 10 der Richtlinie 92/85/EWG genannte Mindestdauer und die Sanktionen für Verstöße hinausgeht. Trotzdem stellen nationale Studien fest, dass viele schwangere Arbeitnehmerinnen und Arbeitnehmerinnen im Mutterschaftsurlaub entlassen werden.

Auch kommt es häufig vor, dass die Arbeitgeber schwangere Arbeitnehmerinnen nicht direkt entlassen, sondern durch Mobbing und/oder inakzeptable Änderungen der Arbeitsbedingungen dazu bringen, selbst zu kündigen. Ebenso häufig führen Arbeitgeber einen scheinbar berechtigten Kündigungsgrund an, sodass die Arbeitnehmerin nur schwer beweisen kann, dass sie tatsächlich aufgrund der Schwangerschaft bzw. Mutterschaft entlassen wurde. Wenn derartige Methoden vor Gericht bewiesen werden können, werden sie in der Regel als rechtswidrige unmittelbare Diskriminierung aufgrund des Geschlechts bestraft. Allerdings kommen nur wenige Fälle vor Gericht und selbst im Fall einer Klage ist die Kündigung schwangerer Arbeitnehmerinnen oder Arbeitnehmerinnen im Mutterschaftsurlaub nach nationalem Recht oft zulässig, wenn dies aus unternehmerischen Gründen gerechtfertigt werden kann. Das heißt, die Arbeitnehmer geben häufig wirtschaftliche Gründe oder die konkreten Umstände ihres Unternehmens als Kündigungsgrund an. Besonders schwierig sind Fälle, in denen Arbeitnehmer aufgrund wirtschaftlicher oder ökologischer Probleme überflüssig werden. Welche Arbeitnehmer aus diesem Grund entlassen werden, darf nicht von einer Schwangerschaft oder dem Mutterschaftsurlaub einer Arbeitnehmerin abhängig gemacht werden. Das lässt sich jedoch kaum beweisen. Außerdem entspricht die gesetzliche Entschädigung zwar in den meisten Mitgliedstaaten dem Unionsrecht, ist aber zu niedrig, um tatsächlich abschreckend zu wirken.

Auch sind der Justiz mancher Mitgliedstaaten nicht alle rechtlichen Begriffe völlig klar. Insbesondere wissen sie oft nicht, dass die Kündigung einer Arbeitnehmerin aufgrund von Schwangerschaft oder Mutterschaft eine unmittelbare Diskriminierung aufgrund des Geschlechts darstellt. Bei der Entlassung einer schwangeren Arbeitnehmerin gelten die unionsrechtliche Bestimmungen über Diskriminierung und Benachteiligung aufgrund des Geschlechts, einschließlich der Umkehrung der Beweislast. Auch dies ist den nationalen Gerichten aber nicht immer klar.

Obwohl der Gerichtshof in der Rechtssache *Melgar* entschieden hat, dass die Nichterneuerung des befristeten Arbeitsvertrags einer schwangeren Arbeitnehmerin eine unmittelbare Diskriminierung aufgrund des Geschlechts darstellt, ist dieses Thema in vielen Ländern weiterhin eine strittige Frage.[4] Da die Beendigung eines befristeten Arbeitsverhältnisses nicht begründet werden muss, werden Arbeitsverträge in der Regel nicht erneuert, wenn eine Arbeitnehmerin schwanger wird. Rechtliche Schritte gegen diese Praxis sind äußerst selten. Die Zunahme prekärer Beschäftigungsverträge hat dieses Problem weiter verschärft. Das größte Problem besteht darin, eine unmittelbare Diskriminierung aufgrund des Geschlechts nachzuweisen. In einigen Ländern wird in solchen Fällen gesetzlich eine Diskriminierung angenommen, oder die nationale Gleichbehandlungsstelle muss über die Nichterneuerung informiert werden. Ebenfalls in dem Bericht behandelt wird die Entlassung von schwangeren Arbeitnehmerinnen während der Probezeit und das Phänomen der „Blanko-Kündigung".

4 C-438/99 *Maria Luisa Jiménez Melgar* gegen *Ayuntamiento de Los Barrios* ECLI:EU:C:2001:509 und C-109/00 *Tele Danmark A/S gegen Handels- og Kontorfunktionærernes Forbund i Danmark (HK)* ECLI:EU:C:2001:513.

3.2 Eltern- und Adoptionsurlaub

Die Elternzeitrichtlinie und Artikel 14(1)(c) der Gleichbehandlungsrichtlinie 2006/54/EG verbieten Entlassungen aufgrund der Inanspruchnahme eines Eltern- oder Adoptionsurlaubs. Dieses Verbot wurde vollständig in nationales Recht umgesetzt. Die spärliche Rechtsprechung spiegelt jedoch nicht die Realität wider. Wie Berichte zeigen, werden Arbeitnehmerinnen häufig so stark unter Druck gesetzt, dass sie auf ihre Rechte verzichten, indem sie selbst kündigen oder nach dem Urlaub nicht an ihren Arbeitsplatz zurückkehren, weil sie in ihrer Arbeitsumgebung Anfeindungen ausgesetzt sind. Beschwerden bei einer Arbeitsaufsichtsbehörde oder eine Klage vor Gericht erfordern hohe finanzielle und emotionale Ressourcen, über die viele Arbeitnehmerinnen nicht verfügen.

3.3 Vaterschaftsurlaub

Der Anspruch auf Vaterschaftsurlaub ist in den meisten Ländern nicht unbedingt mit einem Entlassungsschutz verbunden. In Ungarn und Slowenien sind Arbeitnehmer während des Vaterschaftsurlaubs überhaupt nicht vor einer Kündigung geschützt; dies verstößt gegen Artikel 16 der Gleichbehandlungsrichtlinie. Es gibt sehr wenig oder gar keine Rechtsprechung zu diesem Thema, entweder weil das Gesetz problemlos umgesetzt wird oder möglicherweise kein Kündigungsschutz besteht oder das Gesetz zum Vaterschaftsurlaub so neu ist, dass noch keine Streitfälle entstehen konnten.

3.4 Pflegeurlaub

Das Recht auf Pflegeurlaub ist nicht in jedem Fall mit einem Schutz vor Kündigung bei Inanspruchnahme verknüpft. In manchen Ländern ist diese Urlaubsform umfassend geschützt, in anderen dagegen gibt es keine speziellen Bestimmungen, die Arbeitnehmer, die Pflegeurlaub nehmen, vor einer Entlassung schützen, sodass diese sich bei rechtlichen Schritten auf das allgemeine Diskriminierungsverbot berufen müssen. In den untersuchten Ländern liegt zu dieser Frage kaum Rechtsprechung vor.

4 Zugang zur Justiz und wirksame Durchsetzung

Der Zugang zur Justiz und die Durchsetzung des Verbots von Kündigung und Diskriminierung aufgrund eines Urlaubs aus familiären Gründen unterscheiden sich in den für diesen Bericht untersuchten Ländern erheblich. Da die Betroffenen aus emotionalen, physiologischen (z. B. körperlicher und psychischer Zustand nach einer Schwangerschaft) und/oder finanziellen Gründen häufig von einer Klage absehen, spiegelt die Anzahl der vor Gericht gebrachten Fälle nicht die tatsächliche Situation wider. Der Zugang zum Rechtssystem ist teuer, für manche Betroffenen zu teuer, und die Prozesskosten übersteigen oft den möglichen Nutzen. Die Prozesskostenhilfe reicht oft nicht aus und/oder ist nur schwer zu erhalten. Außerdem kennen nicht alle Arbeitnehmer und Arbeitgeber ihre Rechte und Pflichten. Ein weiterer Faktor hinter den geringen Klagezahlen ist die Angst vor Viktimisierung, insbesondere in wirtschaftlich schwierigen Zeiten mit hoher Arbeitslosigkeit, wobei Arbeitnehmer in prekärer oder befristeter Beschäftigung besonders gefährdet sind. Gerichtsverfahren dauern oft zu lange, um eine für die Betroffenen angemessene Lösung zu erzielen. Außerdem sind sie oft kompliziert, was ein weiteres Hindernis für die Durchsetzung der eigenen Rechte darstellt. Manchmal ist es schwierig, die Bedingungen für rechtliche Schritte zu erfüllen. Insbesondere die kurzen Klagefristen können dazu beitragen, dass nur wenige von Diskriminierung Betroffene Klage einreichen. Schließlich haben manche Arbeitnehmerinnen auch wenig Vertrauen in das Rechtssystem oder die Fähigkeit der Gerichte, ein unparteiisches Urteil zu fällen. Dies wird durch die Verwirrung über bestimmte Rechtsbegriffe der EU in den Mitgliedstaaten noch verschärft.

5 Die Rolle anderer Teilnehmer bei der Durchsetzung des Schutzes vor Diskriminierung und/oder Entlassung aufgrund eines Urlaubs aus familiären Gründen

5.1 Nationale Gleichbehandlungsstellen

In manchen Ländern sind die Entscheidungen der nationalen Gleichbehandlungsstelle nicht rechtsverbindlich. Dadurch wird es noch schwerer, den Schutz von schwangeren Arbeitnehmerinnen und von Arbeitnehmern, die aus familiären Gründen Urlaub nehmen, vor Diskriminierung durchzusetzen, insbesondere in Ländern, in denen der Zugang zu förmlichen Gerichtsverfahren problematisch ist. Auch wenn sie nicht rechtsverbindlich sind, können die Entscheidungen mancher nationaler Gleichbehandlungsstellen vor Gericht als Beweismittel oder Zeugenaussage verwendet werden. Einige Gleichbehandlungsstellen haben vor Gericht eine eigenständige Stellung und können Betroffene vertreten oder sich an Verfahren beteiligen. Sie können Urteile aber auch praktisch beeinflussen. Aber auch in den Ländern, in denen ihre Entscheidungen rechtsverbindlich sind, sind die Fallzahlen gering.

Einige nationale Gleichbehandlungsstellen tragen durch großzügige Finanzhilfen dazu bei, dass Fälle von Kündigung, Diskriminierung und Benachteiligung aufgrund eines Urlaubs aus familiären Gründen, und insbesondere die Diskriminierung von Schwangeren und Müttern, erforscht und überwacht und die entsprechenden Informationen veröffentlicht werden. Manche bieten kostenlose Beratungstermine an. Außerdem verbreiten die nationalen Gleichbehandlungsstellen bewährte Verfahren und sie fördern die Zusammenarbeit der zuständigen Teilnehmer und die Durchsetzung des Rechts auf Urlaub aus familiären Gründen. In einigen Ländern hat die nationale Gleichbehandlungsstelle so auch zur Rechtsentwicklung beigetragen.

5.2 Die Rolle anderer staatlicher Stellen

Manche Regierungsbehörden veröffentlichen Materialien für die breite Öffentlichkeit und für Juristen, in denen die komplexe Rechtslage einfach erklärt wird. In den meisten Ländern fallen die nationale Gleichbehandlungsstelle und die Ombudsperson zusammen und stellen eine wertvolle Informationsquelle dar. Zwar verfügen manche Ombudspersonen über justizielle Befugnisse, diese sind aber auf Beschwerden gegen staatliche Behörden beschränkt. Arbeitnehmer der öffentlichen Hand können sich an die Ombudsperson wenden, tun dies aber nur selten; wahrscheinlich deshalb, weil andere Teilnehmer, wie die nationale Gleichbehandlungsstelle, näher liegen. Auch die Arbeitsaufsichtsbehörden leisten einen wichtigen Beitrag zur Erfassung von Diskriminierung und Benachteiligung. Ihre Jahresberichte können Informationen zu Urlaub aus familiären Gründen enthalten, die jedoch oft zu allgemein gehalten sind, um konkrete Schlussfolgerungen über die Durchsetzung dieser Urlaubsform zu ziehen. Arbeitsaufsichtsbehörden sind oft befugt, für die Verletzung von Arbeitnehmerrechten verwaltungsrechtliche Geldbußen und Sanktionen zu verhängen oder den Fall an ein Gericht zu verweisen. Ihre Befugnisse können sehr weit gefasst sein und auch eigene Untersuchungen ermöglichen.

5.3 Gewerkschaften und Sozialpartner

Die Gewerkschaften treten in der Regel aktiv für die Durchsetzung von familienbezogenen Rechten ein, indem sie ihren Mitgliedern Informationen und eine Rechtsberatung bzw. rechtliche Vertretung anbieten. Aber auch Arbeitgeberorganisationen sind oft wertvolle Informationsquellen. Gewerkschaften beeinflussen auch die rechtliche Entwicklung. Allerdings ist festzustellen, dass sich die Gewerkschaften mancher Länder nicht für familienbezogene Themen interessieren bzw. engagieren.

5.4 Nichtregierungsorganisationen (NRO), Zivilgesellschaft und Wohltätigkeitsorganisationen

In einigen Ländern tragen NRO dazu bei, die Durchsetzung des Rechts auf Schwangerschafts- und Elternurlaub zu verbessern, indem sie Materialien für die breite Öffentlichkeit und die Angehörigen von Rechtsberufen veröffentlichen. Manchmal beteiligen sich NRO auch an Klagen vor Gericht. Das Engagement von NRO, Zivilgesellschaft und Wohltätigkeitsorganisationen ist jedoch aufgrund fehlender Ressourcen für diesen Bereich begrenzt.

6 Sonstige Probleme bei der Durchsetzung, bewährte Verfahren und verwandte Themen

Der Anwendungsbereich der Rechte von Schwangeren, Müttern, Eltern und Vätern hängt auch davon ab, wie *„Familie“* rechtlich definiert ist. Dabei wird der Begriff „Familie“ nicht in allen Rechtsvorschriften einheitlich verwendet. So können Eltern unterschiedlich behandelt werden, je nachdem ob sie verheiratet sind, in einer eingetragenen Partnerschaft leben oder sich eine Wohnung teilen.

Kinderbetreuungsangebote sind *eine wichtige Ergänzung zum Mutterschafts- bzw. Elternurlaub*, weil sie es den Betroffenen erleichtern, in den Arbeitsmarkt einzutreten bzw. berufstätig zu bleiben. Im Jahr 2002 hat der Europäische Rat die Barcelona-Ziele verabschiedet, mit denen Hemmnisse beseitigt werden sollten, die Frauen von einer Beteiligung am Erwerbsleben abhalten. Insbesondere wurden die Mitgliedstaaten aufgefordert, durch eine Zusammenarbeit aller zuständigen Behörden auf nationaler, regionaler und lokaler Ebene mit den Sozialpartnern dafür zu sorgen, dass bis 2010 für mindestens 90 % der Kinder zwischen drei Jahren und dem Schulpflichtalter und für mindestens 33 % der Kinder unter drei Jahren hochwertige und für alle bezahlbare Betreuungsplätze zur Verfügung stehen. Der Bericht zu den Barcelona-Zielen von 2018 zeigt, dass das Ziel in Bezug auf Kleinkinder im Alter von bis zu drei Jahren im Durchschnitt der EU-28 erreicht wurde, die Ziele für Kinder zwischen drei Jahren und dem Schulpflichtalter jedoch noch nicht.

Flexible Arbeitsregelungen, z. B. die Möglichkeit, in Teilzeit, Gleitzeit oder im Homeoffice zu arbeiten, sind in einigen Ländern kaum verfügbar. Die vorgeschlagene Richtlinie zur Vereinbarkeit von Beruf und Privatleben soll dies ändern, indem sie nicht nur Eltern, sondern allen pflegenden Angehörigen das Recht gibt, flexible Arbeitsregelungen zu beantragen. Diese Bestimmung führt daher für diese Arbeitnehmerinnen und Arbeitnehmer die Möglichkeit von (i) reduzierten Arbeitszeiten, (ii) flexiblen Arbeitsmodellen und (iii) Telearbeit ein.

Pflegearbeit gilt in den meisten Ländern immer noch als vorwiegend weibliche Aufgabe und auch *Ideologien, Einstellungen und kulturelle Traditionen, die auf Geschlechterrollen basieren*, verstärken die Probleme bei der Rechtsdurchsetzung.

Kapitel 7 dieses Berichts beschreibt detailliert einige *bewährte Verfahren* in diesem Bereich. So versuchen manche Unternehmen z. B. ernsthaft, sich in ein „Paradies für schwangere Arbeitnehmerinnen“ zu verwandeln. Leider sind diese Beispiele selten und werden von manchen Seiten als reine Imagepflege kritisiert.

In Kapitel 8 dieses Berichts werden *verwandte Themengebiete behandelt, z. B. Totgeburten und assistierte Reproduktionstechniken wie In-vitro-Fertilisation oder Leihmutterschaft*. In manchen Ländern sind Eltern, die eine Totgeburt erlitten haben, genauso vor einer Kündigung geschützt wie Schwangere und Mütter. Eine Fehlgeburt gilt dagegen nicht immer als Schwangerschaft bzw. Mutterschaft. Obwohl solche Fälle meist unter das Antidiskriminierungsverbot fallen, beinhalten sie nicht die gleichen Rechte wie eine Schwangerschaft oder Mutterschaft, also z. B. den Anspruch auf bezahlten Urlaub. Die Aufnahme von

Pflegekindern wird manchmal mit einer Adoption gleichgesetzt, weil Pflegeeltern genauso eine Beziehung zu dem Kind aufbauen müssen wie Adoptiveltern. Einige Länder haben Lehren aus der Rechtssache *Mayr*[5] gezogen und Arbeitnehmerinnen, die eine IVF-Behandlung erhalten, vor Entlassung, Diskriminierung und Benachteiligung geschützt. Leihmutterschaft wird in vielen Ländern nicht anerkannt, weshalb Eltern, die mit Hilfe einer Leihmutter ein Kind bekommen, auch keine speziellen Urlaubsansprüche haben. In anderen Ländern gilt der Kündigungsschutz bei Schwangerschaft bzw. Mutterschaft auch für Leihmütter und die auftraggebenden Eltern.

7 Schlussfolgerungen / Empfehlungen

Dieser Bericht macht deutlich, dass die von der EU garantierten Rechte zwar in den Mitgliedstaaten durch klare gesetzliche Regelungen umgesetzt wurden, in der Praxis aber immer noch viele Betroffene entlassen, diskriminiert oder benachteiligt werden, weil sie schwanger sind oder ihr Recht auf Urlaub aus familiären Gründen in Anspruch nehmen. Nach den Ergebnissen der Studie ist diese Form der Diskriminierung systeminhärent, weit verbreitet und hat in den untersuchten Ländern nicht abgenommen. Studien, die in den Mitgliedstaaten durchgeführt wurden, zeigen, dass die Ziele der seit Jahrzehnten bestehenden Rechtsvorschriften noch nicht erreicht wurden. Auch ist es nicht ausreichend gelungen, die herkömmliche Arbeitsteilung zwischen Männern und Frauen im Privatleben zu verändern. Noch immer leisten Frauen den Hauptteil der unbezahlten Pflege- und Betreuungsarbeit und sind damit auch häufiger Opfer von Entlassung, Diskriminierung oder Benachteiligung infolge eines Urlaubs aus familiären Gründen. Aber auch Männer, die aus familiären Gründen Urlaub nehmen, werden entlassen, diskriminiert und benachteiligt. Zwar besteht die Hoffnung, dass Frauen weniger diskriminiert werden, wenn mehr Männer unbezahlte Pflege- und Betreuungsaufgaben übernehmen, derzeit wird Urlaub aus familiären Gründen aber noch hauptsächlich von Frauen in Anspruch genommen.

Die EU-Rechtsvorschriften zum **Schwangerschafts- und Mutterschaftsurlaub** wurden vollständig in nationales Recht umgesetzt, wobei die Rechte in den Mitgliedstaaten in der Regel sogar über die Vorgaben der Mutterschutzrichtlinie hinausgehen. Dennoch zeigen nationale Studien und Statistiken, dass überall die Rechte von Schwangeren und Müttern verletzt und Frauen häufig aufgrund ihres Schwangerschafts- und Mutterschaftsurlaubs entlassen, diskriminiert oder benachteiligt werden. Bei der Durchsetzung springen zahlreiche Lücken ins Auge, z. B. die Nichterneuerung der befristeten Arbeitsverträge schwangerer Arbeitnehmerinnen oder ihre rechtswidrige Kündigung in der Probezeit. Grundsätzlich werden Arbeitnehmerinnen in prekärer Beschäftigung besonders häufig aufgrund einer Schwangerschaft oder Mutterschaft Opfer von Kündigung, Diskriminierung und Benachteiligung. Gleichzeitig versuchen sie seltener, ihre Rechte durchzusetzen, weil sie Angst haben, ihre Arbeit zu verlieren, sie ihre Rechte nicht kennen und/oder sie sich den Rechtsweg nicht leisten können. Selbständig Beschäftigte sind eine weitere Gruppe, die im Fall einer Schwangerschaft und Mutterschaft häufig Probleme bekommt. Außerdem werden Frauen aufgrund ihres Alters diskriminiert, da angenommen wird, dass sie wahrscheinlich noch schwanger werden und dann aus familiären Gründen Urlaub in Anspruch nehmen. Bei der Anwendung bestimmter Rechtsbegriffe gibt es in einigen der untersuchten Ländern weiterhin Defizite, z. B. bei mittelbarer Diskriminierung oder der Umkehrung der Beweislast. Der Schutz vor Kündigung, Diskriminierung und Benachteiligung infolge eines Schwangerschafts- oder Mutterschaftsurlaubs wird von den Arbeitgebern häufig nicht respektiert. Sie missachten geltendes Recht ohne Angst vor Konsequenzen, entweder weil Arbeitnehmerinnen keine rechtlichen Schritte unternehmen oder weil die zu befürchtenden Sanktionen keine wirkliche Abschreckung darstellen. Die Tatsache, dass das Recht auf Schwangerschafts- und Mutterschaftsurlaub nicht ausreichend durchgesetzt wird, zeigt, dass die europäischen Länder immer noch stark von geschlechtsspezifischen Rollenbildern geprägt sind, bei denen Frauen vor allem als Mütter gesehen werden und nicht als eigenständige Arbeitnehmerinnen.

5 C-506/06 *Sabine Mayr gegen Bäckerei und Konditorei Gerhard Flöckner* OHG.ECLI:EU:C:2008:119

Auch die **Rechte auf Elternurlaub** werden in den untersuchten Ländern nur unzureichend umgesetzt. Dieser Bericht weist hier auf eine strikte Rollenaufteilung zwischen den Geschlechtern hin. Frauen nehmen viel häufiger Elternurlaub als Männer, weil der Urlaub nicht oder nur so gering vergütet wird, dass nicht beide Elternteile in der Lage sind, ihre Ansprüche gleich häufig geltend zu machen. Mit der derzeit gültigen Elternzeitrichtlinie ist es nicht gelungen, den Anteil der Väter an der Kinderbetreuung angemessen zu erhöhen. Der in der vorgeschlagenen Richtlinie zur Vereinbarkeit von Beruf und Privatleben geplante bezahlte Elternurlaub würde diesem Ziel etwas näher kommen und mehr Männer zur Inanspruchnahme des Elternurlaubs bewegen. Zwar sieht der Vorschlag keine volle Lohnfortzahlung vor, dennoch ist er ein Schritt hin zu einem vergüteten Elternurlaub. Zusammen mit der Garantie von mindestens vier Monaten nicht übertragbarem Elternurlaub sollte dies dazu beitragen, dass mehr Väter den Elternurlaub nutzen und sich dann auch stärker an der Kinderbetreuung beteiligen. Der Bericht zeigt auch, dass sowohl Männer als auch Frauen von unflexiblen Regelungen daran gehindert werden, Elternurlaub in Anspruch zu nehmen. Mit der vorgeschlagenen Richtlinie würden Arbeitnehmer die Möglichkeit bekommen, Elternurlaub auf Vollzeit- oder Halbzeitbasis oder in anderer flexibler Form zu nehmen. Auch dies würde dazu führen, dass mehr Eltern, und insbesondere Väter, einen Elternurlaub nehmen können. Außerdem zeigt der Bericht, dass immer noch sowohl Arbeitnehmerinnen als auch Arbeitnehmer aus diesem Grund entlassen und diskriminiert werden. Genau wie beim Schwangerschafts- und Mutterschaftsurlaub und aus ähnlichen Gründen werden auch hier nur wenige Gerichtsverfahren angestrengt.

Der **Vaterschaftsurlaub** wird bisher vom Unionsrecht nicht garantiert, soll aber mit der vorgeschlagenen Richtlinie zur Vereinbarkeit von Beruf und Privatleben eingeführt und mit einem Schutz vor Entlassung, Diskriminierung und Benachteiligung verknüpft werden. Die Mehrzahl der untersuchten Länder verfügt bereits über eine Form des Vaterschaftsurlaubs und auch über einen gewissen Rechtsschutz gegen Entlassung und/oder Diskriminierung und/oder Benachteiligung (mit wenigen Ausnahmen). Sofern es ihn gibt, ist der Vaterschaftsurlaub jedoch nur kurz, und nur schwach gegen Diskriminierung und Kündigung geschützt. Die Bestimmungen der Mitgliedstaaten zum „Vaterschaftsurlaub" gelten oft nur für verheiratete Männer und schließen damit gleichgeschlechtliche und unverheiratete Paare aus. Mit der vorgeschlagenen Richtlinie würde dieses Problem beseitigt, weil sie das Recht auf Vaterschaftsurlaub unabhängig vom Ehe- oder Personenstand garantiert. Derzeit wird der Vaterschaftsurlaub nur zögernd in Anspruch genommen, vermutlich, da er nicht ausreichend vergütet wird, aber auch aufgrund von tief verankerten Stereotypen über die Rolle von Frauen und Männern. In vielen Ländern gilt die Betreuung der Kinder immer noch im Wesentlichen als Pflicht der Frau, wogegen für die Väter die Kinderbetreuung nur eine Option ist. Aufgrund dieser Denkweise sind die Betreuungspflichten nach der Geburt eines Kindes immer noch sehr ungleich verteilt; die Verabschiedung der vorgeschlagenen Richtlinie wird dies hoffentlich ändern.

Das Unionsrecht garantiert den **Pflegeurlaub** bisher noch nicht. Mit der vorgeschlagenen Richtlinie zur Vereinbarkeit von Beruf und Privatleben würde für alle Arbeitnehmerinnen und Arbeitnehmer das Recht eingeführt, für die Pflege von schwerkranken oder pflegebedürftigen Angehörigen eine bestimmte Zahl von Urlaubstagen zu nehmen, wobei sie in gewissem Umfang vor Kündigung und Diskriminierung geschützt wären. Allerdings gibt es in der Mehrzahl der untersuchten Länder bereits eine Form des Pflegeurlaubs und einen gewissen Kündigungs- und Diskriminierungsschutz, der jedoch nicht systematisch oder einheitlich gilt. Tatsächlich unterscheidet sich der Pflegeurlaub stark von Land zu Land und der Schutz vor Entlassung und Diskriminierung ist generell schwach. Da der persönliche und sachliche Anwendungsbereich dieser Rechte sehr uneinheitlich ist, lässt sich auch deren Durchsetzung nur schwer beurteilen. Außerdem wurden die Rechtsvorschriften zum Pflegeurlaub in manchen Ländern erst vor kurzem erlassen, sodass noch keine Daten zu ihrer Durchsetzung vorliegen. Dennoch deuten die Erfahrungen aus den Ländern, in denen solche Urlaubsansprüche schon länger bestehen, auf ähnliche Probleme bei der Umsetzung hin wie beim Schwangerschafts-, Mutterschafts- oder Elternurlaub. Gegen das Verbot von Entlassung, Diskriminierung und Benachteiligung wird häufig verstoßen und die Betroffenen versuchen in der Regel nicht, ihre Rechte juristisch einzuklagen. Außerdem gibt es beim Pflegeurlaub große Unterschiede zwischen den Geschlechtern, wodurch es meist Frauen sind, die entlassen, diskriminiert oder benachteiligt werden.

Dieser Bericht hat zahlreiche Hemmnisse identifiziert, die der Durchsetzung von Urlaubsansprüchen aus familiären Gründen im Wege stehen. Um die Kenntnis dieser Rechte und den Zugang zu Informationen zu verbessern, sollten entsprechende Aufklärungskampagnen gefördert werden. In manchen Ländern werden die Probleme von Schwangeren, Müttern und Eltern, ihre Rechte durchzusetzen, noch dadurch verschärft, dass kaum Daten und Studien zu dem Thema vorliegen. Weiterbildungen für Richter, Anwälte, Arbeitsaufsichtsbehörden und anderen Berufsgruppen würden dazu beitragen, dass als kompliziert wahrgenommene Rechtsbegriffe, wie die Umkehr der Beweislast und mittelbare Diskriminierung aufgrund des Geschlechts, besser angewendet werden.

Manche Hindernisse für eine erfolgreiche Durchsetzung der Rechte auf Urlaub aus familiären Gründen sind nicht rein rechtlich und lassen sich daher auch nicht ausschließlich mit gesetzgeberischen Mittel verstehen und/oder bekämpfen. Zwar werden herkömmliche Geschlechterrollen immer öfter in Frage gestellt, dennoch sind traditionelle kulturelle Vorstellungen und Ideologien, nach denen die volle Verantwortung für die tägliche Kinderbetreuung bei der Frau liegt, immer noch weit verbreitet. Diese strenge Rollenverteilung in der Familie wird noch verstärkt, wenn Betreuungsangebote wie Kindertagesstätten und Kindergärten fehlen. Um den wirtschaftlichen und sozialen Wert der Betreuungsarbeit und damit ihre Attraktivität für Männer zu erhöhen, sollten einerseits Kampagnen zur Bekämpfung von Stereotypen unterstützt und andererseits die Vergütung/Entlohnung für die Kinderbetreuung erhöht werden. Dies würde dazu beitragen, kulturell und ideologisch bedingte Geschlechterrollen zu durchbrechen. Wirtschaftliche Probleme sind ein weiterer Faktor, der dazu führt, dass Ansprüche auf Urlaub aus familiären Gründen selten durchgesetzt werden.

Die Rechtsbehelfe und Sanktionen entsprechen zwar in der Regel dem Unionsrecht, sind aber nach wie vor nicht wirkungsvoll, weil sie keine angemessene Abschreckung gegen Entlassung, Diskriminierung und Benachteiligung darstellen. Um die Durchsetzung zu verbessern, sollten wirksamere Sanktionen, einschließlich höherer Geldstrafen, eingeführt werden. Im gleichen Zuge sollte der Zugang von Betroffenen zur Justiz besser, günstiger und einfacher gemacht werden, beispielsweise durch eine Senkung der Prozesskosten oder durch eine Abschaffung von Gebühren als Voraussetzung für den Zugang zu Gerichten. Ein weiteres Problem sind die bestehenden Fristen für Klagen vor ordentlichen Gerichten und Arbeitsgerichten. Schwangere Frauen und Frauen im Mutterschaftsurlaub brauchen für die Einleitung rechtlicher Schritte möglicherweise mehr Zeit; sie stehen unter besonderem Druck, weil sie ein Kind erwarten oder ein Neugeborenes betreuen und zu diesem Zeitpunkt besonders verletzlich sind. Es wäre vielleicht hilfreich, die Rechte des Einzelnen durch eine systematische Kontrolle auf nationaler Ebene zu ergänzen. Im Rahmen dieser Kontrolle könnten Zielvorgaben festgelegt und wirksame Geldstrafen für Verstöße gegen die mit einem Urlaub aus familiären Gründen verbundenen Rechte vorgesehen werden.

Um den Schutz vor Kündigung, Diskriminierung und Benachteiligung aufgrund von Urlaub aus familiären Gründen wirksamer durchzusetzen, braucht es einen ganzheitlicheren Ansatz. „Harte“ Rechtsvorschriften reichen eindeutig nicht aus, um Geschlechterstereotypen zu bekämpfen und zu verändern und das Recht auf Urlaub aus familiären Gründen durchzusetzen. Außerdem hängen der Urlaub aus familiären Gründen, flexible Arbeitsregelungen und verfügbare Betreuungsangebote zusammen und müssen auch gemeinsam angegangen werden. In diesem Zusammenhang ist die europäische Säule sozialer Rechte ein Schritt in die richtige Richtung, weil sie – wie die vorgeschlagene Richtlinie und weitere nichtlegislative Maßnahmen zur besseren Vereinbarkeit von Beruf und Privatleben für erwerbstätige Eltern und pflegende Angehörige – parallel zum Urlaub aus familiären Gründen ergänzende Maßnahmen vorsieht, z. B. einen besseren Zugang zu Betreuungsangeboten und die Bekämpfung geschlechtsspezifischer Stereotypen. Derartige ergänzende Maßnahmen würden entscheidend zur Schaffung eines besseren Rahmens für die Vereinbarkeit von Beruf und Familie beitragen. Es bleibt jedoch abzuwarten, ob diese Maßnahmen tatsächlich die gewünschte Wirkung erzielen werden, da sie nicht als rechtsverbindliche Instrumente vorgesehen sind.

1 Introduction

On 17 November 2017, the European Parliament, the Council and the Commission solemnly proclaimed the European Pillar of Social Rights.[1] As it is not legally binding, the European Commission explained that the Pillar is designed as a 'compass for a renewed process of upward convergence towards better working and living conditions in the European Union'.[2] The Pillar sets out 20 key principles and rights to support fair and well-functioning labour markets and welfare systems.[3] It covers a range of social policy issues, including gender equality[4] and work-life balance,[5] specifically recognising that caring is the responsibility of both women and men and acknowledging that caring goes beyond parenting. Based on the Pillar, the European Commission adopted an initiative on Work-Life Balance consisting of a proposal for a Directive and a Communication to support work-life balance for working parents and carers.[6] The Communication foresees, among other things, non-legislative actions in order to support and reinforce the legal measures of the Directive. The Proposed Directive is the first concrete proposal to come from the European Pillar of Social Rights. On 21 June 2018, the Council agreed its negotiating position (general approach) on the Directive on work-life balance for parents and carers.[7] Based on this mandate, the Council Presidency will start negotiations with the European Parliament once the latter has adopted its position.

The Proposed Directive on work-life balance strengthens and expands several legislative measures regarding parental leave. The Commission identified a lack of compensation and the lack of non-transferable/dedicated periods of parental leave for each of the parents as key reasons explaining why families have not been able to make full use of parental leave so far.[8] As a result, the proposal introduces paid parental leave.[9] It also provides that parents of children (up to a certain age of the child, which should be at least twelve) would be able to take at least four months of non-transferable paid leave each, compensated at least at sick-pay level.[10] The non-transferability clause is intended to encourage men to take up more leave, as men are currently less likely to forego their income for child-care duties.[11] The Proposed Directive acknowledges that a lack of flexibility in leave arrangements in parental leave represents another key reason for its historically low take-up, even though under the Commission's Proposal there is still no obligation on the employer to grant such arrangements, but only to 'consider' the request.[12] Along similar lines of reasoning, the proposed Directive introduces a requirement for paid paternity leave of at least 10 days.[13] In contrast to previous EU policy which framed paternity leave as an option for Member States,[14] the Proposed Directive recognises an *individual right*

1 Interinstitutional Proclamation on the European Pillar of Social Rights OJ C 428, 13.12.2017 pp. 10-15, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017C1213(01)&from=EN, accessed 24 August 2018.
2 European Commission, *Monitoring the Implementation of the European Pillar of Social Rights*, COM(2018) 130, p. 2, available at: https://ec.europa.eu/commission/sites/beta-political/files/social-summit-european-pillar-social-rights-booklet_en.pdf, accessed 24 August 2018.
3 See Bell, M., 'The Principle of Equal Treatment and the European Pillar of Social Rights' *Giornale di Diritto del Lavoro e di Relazioni Industriali* (forthcoming).
4 Principle 2 of the European Pillar of Social Rights.
5 Principle 9 of the European Pillar of Social Rights.
6 Respectively COM (2017) 253 final and COM (2017) 252 final, relevant documents are available at: http://ec.europa.eu/social/main.jsp?catId=1311&langId=en accessed 24 August 2018.
7 Outcome of the Council meeting on Employment, Social Policy, Health and Consumer Affairs, 3625th Council meeting, Luxembourg, 21 and 22 June 2018, 10291/18, available at: http://data.consilium.europa.eu/doc/document/ST-10291-2018-INIT/en/pdf, accessed 24 August 2018.
8 Proposed Directive on Work-life balance COM (2017) 253 final, Explanatory Memorandum, 12.
9 Proposed Directive on Work-life balance COM (2017) 253 final, Article 5.
10 Proposed Directive on Work-life balance COM (2017) 253 final, Articles 5 and 8.
11 Proposed Directive on Work-life balance COM (2017) 253 final, 2.
12 The Council position diverts, and slightly reduces the Commission's proposal. Although the Council is proposing to keep the existing individual right of 4 months of leave, it proposes to reduce the non-transferability to 2 months of which only 1.5 months would be paid at a level set by the Member State concerned. Article 8 of the General Secretariat of the Council, Proposal for a Directive of the European Parliament and of the Council on work-life balance for parents and carers and repealing Council Directive 2010/18/EU – General approach, 25 June 2018, 10291/18, available at: http://data.consilium.europa.eu/doc/document/ST-10291-2018-INIT/en/pdf, accessed 24 August 2018.
13 Proposed Directive on Work-life balance COM (2017) 253 final, Article 4.
14 Article 2(7) of the Recast Directive 2006/54 allows 'without prejudice to the right of Member States to recognize distinct rights to paternity and/or adoption leave.'

for fathers to be able to participate in their family life.[15] The proposed Directive also introduces the 'right to request' flexible working arrangements for parents with children up to a given age, which should be at least the age of twelve.[16] Finally, the proposed Directive introduces, for the first time, a right to carers' leave,[17] acknowledging the value of unpaid work that carers, predominantly women, shoulder in caring for dependents. Workers will be able to take at least five working days of paid carers' leave per year for dependent or seriously ill relatives.[18] The proposed Directive also plans to extend the right to take time off work in case of *force majeure* to all workers (not only parents or care-givers) for urgent family reasons.[19] Importantly, the proposed Directive would prohibit the dismissal discrimination or unfavourable treatment[20] of workers on the ground that they have applied for, or have taken, leave guaranteed by the Directive, or on the ground that they have exercised the rights to request flexible working arrangement.[21] The protection against dismissal includes the reversal of the burden of proof.[22]

Against this background, this report is concerned with the enforcement of the protection against dismissal and discrimination in the area of work-life balance. This study is part of the continued monitoring of the transposition of EU legislation in order to improve the implementation of legislation and promote compliance, as envisaged in the Communication to support work-life balance for working parents and carers.[23]

Specifically, this thematic report[24] considers enforcement issues in relation to potential discrimination and dismissals in the context of the various types of family-related leave, including pregnancy/maternity leave, parental leave/adoption leave and paternity leave, and carers' leave and other family-related leave. It aims to provide information on the enforcement of the protection against dismissal, discrimination and unfavourable treatment of pregnant workers and workers exercising their right to take family leave, including issues of compensation, reparation and sanctions, as well as the role of national equality bodies, in the 28 Member States and three EEA countries: Iceland, Liechtenstein and Norway. It reviews the enforcement and potential obstacles/hindrances in practice of the rights relating to the protection against discrimination, unfavourable treatment and dismissal, highlighting the main experiences in Member States with such enforcement by judicial (courts) and equality bodies. The aim is to obtain an overview of enforcement in practice of relevant existing EU legislation. At present, some of the various family-related leave arrangements are guaranteed and protected under EU law, including pregnancy, maternity and parental leave. This study specifically covers the protection against dismissal, discrimination and unfavourable treatment provided under the Pregnant Workers Directive,[25] the Gender Equality Directive

15 Caracciolo di Torella, E. (2017), 'An emergent right to care in the EU: the New Start to Support Work-Life Balance for Parents and Carers' *ERA Forum* Vol. 18, pp. 187-198.
16 Proposed Directive on Work-life balance COM (2017) 253 final, Article 9.
17 Proper English would use the term 'care leave'. However, this report makes reference to the concept of 'carers' leave' as specified in Article 6 of the Proposed Directive on Work-life balance COM (2017) 253 final.
18 Proposed Directive on Work-life balance COM (2017) 253 final, Article 6.
19 Proposed Directive on Work-life balance COM (2017) 253 final, Article 7.
20 The concept of discrimination includes unfavourable treatment. Article 2(2)(c) of the Recast Directive provides that the definition of discrimination includes 'any less favourable treatment of a woman related to pregnancy or maternity leave.' It provides for the principle of equal treatment between women and men which means that there should be no discrimination or unfavourable treatment whatsoever – direct or indirect – on grounds of sex, including gender reassignment as established in Case C-13/94 *P v S* ECLI:EU:C:1996:170 and subsequently established in Recital 3 of Recast Directive 2006/54. Article 2(1)(a) of the Recast Directive 2006/54 defines direct discrimination as occurring 'where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation.' Referring to case law of the Court of Justice, the Recital 23 of Recast Directive also states that 'unfavourable treatment of a woman related to pregnancy or maternity constitutes direct discrimination on grounds of sex'.
21 Proposed Directive on Work-life balance COM (2017) 253 final, Articles 11 and 12.
22 Proposed Directive on Work-life balance COM (2017) 253 final, Article 12.
23 Communication to support work-life balance for working parents and carers, COM (2017) 252 final: The Commission will notably support the enforcement of the existing Pregnant Workers Directive 92/85/EEC:, p. 11.
24 See also generally, McColgan, A. (2015) European network of legal experts in gender equality and non-discrimination, *Measures to address challenges of work-life balance in the EU Member States, Iceland, Liechtenstein and Norway*, available at: https://www.equalitylaw.eu/downloads/3631-reconciliation, accessed 19 August 2018.
25 Council Directive 92/85/EEC.

(Recast Directive),[26] the Self-Employed Directive[27] and the Parental Leave Directive. Paternity and adoption leave are not guaranteed as such by EU law but where Member States have adopted such leave, EU law provides for the protection against dismissal based on the exercise of the right to this type of leave and the right to return to the same or a similar job as well as to benefit from any improvement in working conditions to which workers would have been entitled during their absence.[28] Insofar as Member States have existing statutory rights on paternity, adoption or carers' leave, the enforcement of these types of leave is also addressed in this report. This report also addresses the issues of dismissal and unfavourable treatment based on adoption, fertility treatment and other Assisted Reproductive Technology (ART). The Court of Justice of the EU (CJEU)[29] has already considered some of these issues including discrimination based on in vitro fertilisation (IVF) treatment[30] and the right to maternity leave in case of surrogacy.[31] The report also addresses discrimination faced by women who have lost their baby or who have given birth to a stillborn baby.

All family-related leave arrangements considered as such under EU law are intended to contribute to gender equality, even if the rights afforded in each of the arrangements are different. Therefore, EU law provides for a general protection based on sex in the equality directives and a specific protection against dismissal discrimination and unfavourable treatment based on the take-up of family-related leave.

The prohibition of discrimination, unfavourable treatment and dismissal on the ground of pregnancy, maternity, paternity and parental leave is addressed by the provisions of the Treaty on the Functioning of the European Union (TFEU) and secondary legislation (directives). The case law of the EU has further been instrumental in shaping pregnancy, maternity and parental law[32] by ensuring that individuals can effectively exercise and enforce their rights.[33]

The European network of legal experts in the field of gender equality has produced a number of thematic reports that are relevant for this report, in particular:

– *Measures to address challenges of work-life balance in the EU Member States, Iceland, Liechtenstein and Norway*;[34]
– *Fighting discrimination on the grounds of pregnancy, maternity and parenthood. The application of EU and national law in practice in 33 European countries*;[35]

26 Directive 2006/54/EC. See Burri S. and Prechal S. (2009) European network of legal experts in the field of gender equality, *The transposition of Recast Directive 2006/54/EC*, available at: https://www.equalitylaw.eu/downloads/2815-transposition-recast-directive-2009, accessed 24 August 2018.
27 Directive 2010/41/EU.
28 Article 16 of Recast Directive 2006/54/EC.
29 Until the entry into force of the Lisbon Treaty: the European Court of Justice (ECJ). In this report, reference is made to the Court of Justice of the EU (CJEU or Court), also in cases pre-dating the Lisbon Treaty.
30 Case C-506/06 *Sabine Mayr v Bäckerei und Konditorei Gerhard Flöckner OHG*. ECLI:EU:C:2008:119.
31 Cases C-167/12 C.D. v S.T. ECLI:EU:C:2014:169 and C-363/12 *Z v Government Department and the Board of Management of a Community School* in relation to surrogacy ECLI:EU:C:2014:159.
32 See the overview of relevant EU case law provided in Masselot, A., Caracciolo Di Torella, E. and Burri, S., European Network of Legal Experts in the Field of Gender Equality (2013), *Fighting discrimination on the grounds of pregnancy, maternity and parenthood. The application of EU and national law in practice in 33 European countries*, pp. 6-12, available at: https://www.equalitylaw.eu/downloads/2805-discrimination-pregnancy-maternity-parenthood-en, accessed 19 August 2018. See also Ellis, E., & Watson, P. (2012). *EU anti-discrimination law*. Oxford University Press.
33 See for instance Case 177/88, *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus*. ECLI:EU:C:1990:383; Case 179/88 *Handels- og Kontorfunktionaerernes Forbund i Danmark v Dansk Arbejdsgiverforening. (Hertz)* ECLI:EU:C:1990:384; Case C-32/93 *Carole Louise Webb v EMO Air Cargo (UK) Ltd.* ECLI:EU:C:1994:300 or Case C-438/99 *Maria Luisa Jiménez Melgar v Ayuntamiento de Los Barrios* [2001] ECR I-6915.
34 McColgan, A. (2015) European network of legal experts in gender equality and non-discrimination, *Measures to address challenges of work-life balance in the EU Member States, Iceland, Liechtenstein and Norway*, available at: https://www.equalitylaw.eu/downloads/3631-reconciliation, accessed 19 August 2018.
35 Masselot, A., Caracciolo Di Torella, E. and Burri, S., European Network of Legal Experts in the Field of Gender Equality (2013), *Fighting discrimination on the grounds of pregnancy, maternity and parenthood. The application of EU and national law in practice in 33 European countries*, available at: https://www.equalitylaw.eu/downloads/2805-discrimination-pregnancy-maternity-parenthood-en, accessed 19 August 2018.

- *Sex discrimination in relation to part-time and fixed-term work. The application of EU law and national law in practice in 33 European countries*;[36]
- *The implementation of Parental Leave Directive 2010/18/EU in 33 European countries*;[37]
- *Self-employed. The implementation of Directive 2010/41/EU on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity*;[38] and
- *The transposition of Recast Directive 2006/54/EC*.[39]

Some background to the EU legislation specifically on the enforcement of pregnancy/maternity leave, parental leave and paternity leave is provided below.[40]

1.1 Treaty provisions and the Charter of Fundamental Rights

Article 157 TFEU prohibits both direct and indirect sex discrimination in pay and demonstrates that the concept of pay is broad, according to the case law of the CJEU. As well as providing for equal pay for work of equal value, Article 157 TFEU provides for a general legal basis for the adoption of measures in the field of gender equality,[41] which includes equality and anti-discrimination on the ground of pregnancy or maternity at the workplace. Moreover, Article 153(1)(i) and (2)(b) TFEU[42] provides a legal basis for EU competence in the area of gender equality in the labour market. The Treaty on European Union (TEU) declares that the EU is founded *inter alia* on equality between women and men[43] and that the promotion of equality between men and women throughout the EU is one of the essential tasks of the EU.[44]

Since the entry into force of the Lisbon Treaty in 2009, the EU Charter of Fundamental Rights (the Charter)[45] has become a binding catalogue of EU fundamental rights,[46] which apply to EU institutions, bodies, offices and agencies, and to the Member States when they are implementing Union law,[47] i.e. when they are acting 'within the scope' of Union law.[48] The Charter contains provisions relevant to the

36 Burri S. and Aune, H. European network of legal experts in gender equality and non-discrimination (2013) Sex discrimination in relation to part-time and fixed-term work. The application of EU and national law in practice in 33 European countries, available at: https://www.equalitylaw.eu/downloads/2804-sex-discrimination-en, accessed 19 August 2018.

37 Do Rosário Palma Ramalho, M., Foubert, P. and Burri, S., (2015) European network of legal experts in the field of gender equality, *The implementation of Parental Leave Directive 2010/18/EU in 33 European countries*, available at: https://www.equalitylaw.eu/downloads/2723-parental-leave-en, accessed 19 August 2018.

38 Barnard, C. and Blackham, A., European network of legal experts in the field of gender equality (2015), Self-employed. The implementation of Directive 2010/41/EU on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity, available at: https://www.equalitylaw.eu/downloads/2732-self-employed-en, accessed 19 August 2018.

39 Burri S. and Prechal S. (2009) European network of legal experts in the field of gender equality, *The transposition of Recast Directive 2006/54/EC*, available at: https://www.equalitylaw.eu/downloads/2815-transposition-recast-directive-2009, accessed 24 August 2018.

40 Further extensive information on the implementation and enforcement of EU gender equality law at national level in 35 countries can be found in the European network of legal experts in gender equality and non-discrimination general reports and the comparative analysis of these reports available at: https://www.equalitylaw.eu/publications, accessed 24 August 2018. See also Lembke, U. (2016), 'Tackling sex discrimination to achieve gender equality? Conceptions of sex and gender in EU non-discrimination law and policies' *European Equality Law Review*, issue 2, pp. 46-58.

41 Article 157(3) TFEU.

42 Article 153(1)(i) TFEU: 'With a view to achieving the objectives of Article 151, the Union shall support and complement the activities of the Member States in the following fields: equality between men and women with regard to labour market opportunities and treatment at work"; Article 153 (2)(b) TFEU: "To this end, the European Parliament and the Council: may adopt, in the fields referred to in paragraph 1(a) to (i), by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States. Such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings.'

43 Article 2 TEU.

44 Article 3(3) TEU.

45 OJ [2010] C82/02.

46 See Article 6(1) TEU.

47 Article 51(1) of the Charter. See Koukoulis-Spiliotopoulos, S. (2008), 'The Lisbon Treaty and the Charter of Fundamental Rights: maintaining and developing the *acquis* in gender equality', *European Gender Equality Law Review* Issue 1, pp. 15-24 and Ellis, E., 'The Impact of the Lisbon Treaty on Gender Equality', *European Gender Equality Law Review* No. 1/2010, pp. 7-13; available at: https://www.equalitylaw.eu/publications/law-reviews, accessed 24 August 2018.

48 Case C-617/10 *Åklagaren v Hans Åkerberg Fransson*. EU:C:2013:105.

area of pregnancy, maternity and parental rights. The Charter firmly establishes the importance of the concept of equality[49] and more specifically gender equality.[50] Article 33 states that 'to reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity, and the right to paid maternity leave and to parental leave following the birth or adoption of a child'. This provision guarantees that issues related to pregnancy, maternity and parental leave – as far as EU law is at stake – are to be considered as fundamental rights.[51] The protection offered to the European citizen is therefore reinforced, as issues of pregnancy, maternity and parental rights are transformed from issues in employment and social law to issues in human rights law.

1.2 The Pregnant Workers Directive (Directive 92/85/EEC)[52]

While discrimination for reason of pregnancy and any less favourable treatment of a woman related to pregnancy or maternity leave is considered to be *direct discrimination* under EU law,[53] the protection for reasons of pregnancy and maternity justifies different treatment for the women concerned. *Special rights*, related to pregnancy and maternity, such as maternity leave, therefore do not amount to discrimination against men.[54] In the past, such rights were seen as an exception to the principle of equal treatment. Formal equality requires that 'things that are alike must be treated alike, while things that are unlike should be treated in proportion to their unalikeness'.[55] The EU has moved away from a strict formal equality approach. Substantive equality, which takes account of the starting differences and different contexts in which individuals are placed, is now favoured by the EU. Indeed, the CJEU, on several occasions, has clarified that pregnancy and maternity provisions aim to promote substantive gender equality. Such rights are now considered as a means to ensure the implementation of the principle of equal treatment for men and women regarding both access to employment and working conditions.[56]

The relationship between pregnancy and maternity rights on the one hand and the principle of gender equality on the other hand, remains complex and continues to evolve. How far should protective measures go, in view of a more balanced division of work and family life obligations between men and women, when a very long period of maternity leave and/or many protective measures exist?[57] It has been argued that a very long period of maternity leave may hamper the balanced division of family responsibilities in the family and the access to the labour market for women.[58] A combination of not excessively long

49 Article 20 of the Charter.
50 Article 23 of the Charter.
51 See for instance see Triantafyllou, D. (2002), 'The European Charter of Fundamental Rights and the Rule of Law: Restricting Fundamental Rights by Reference' *Common Market Law Review* vol. 39 pp. 53-59. See also Case C-149/10 *Zoi Chatzi v Ipourgos Ikonomikon.* ECLI:EU:C:2010:407.
52 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, OJ [1992] L348/1. See generally, Masselot, A., Caracciolo Di Torella, E. and Burri, S., European Network of Legal Experts in the Field of Gender Equality (2013), *Fighting discrimination on the grounds of pregnancy, maternity and parenthood. The application of EU and national law in practice in 33 European countries*, available at: https://www.equalitylaw.eu/downloads/2805-discrimination-pregnancy-maternity-parenthood-en, accessed 19 August 2018.
53 Article 2(2)(c) of Recast Directive 2006/54/EC. The Directive on equal treatment of men and women in employment 76/207/EEC, amended by Directive 2002/73/EC has been repealed by Recast Directive 2006/54/EC.
54 Directive 92/85/EEC and Article 28 of the Recast Directive.
55 Aristotle, *Ethica Nicomachea* V. 3 1131a – 1131b (W. Ross trans., 1925).
56 Timmer, A. and Senden, L., European network of legal experts in gender equality and non-discrimination (2018), *A comparative analysis of gender equality law in Europe 2017* p. 32, available at: https://www.equalitylaw.eu/downloads/4553-a-comparative-analysis-of-gender-equality-law-in-europe-2017-pdf-1-mb, accessed 25 August 2018.
57 On this point, diverging approaches on the matter and the EU in this context have evolved but appear to be prioritising the equal sharing of care. In contrast, it has been argued, notably in the US, that granting compulsory maternity leave to women is a paternalistic measure which reinforces gender stereotypes and locks women in traditional gender roles. Hence, there seems to be a tension field between anti-stereotyping (e.g. US) and social policy as paths to gender equality in the case of pregnancy and maternity. See for instance Suk, J. (2012), 'From Antidiscrimination to Equality: Stereotypes and the Life Cycle in the United States and Europe' *The American Journal of Comparative Law* vol. 60, No. 1, pp. 75-98.
58 Caracciolo di Torella, E. and Masselot, A. (2010), *Reconciling Work and Family Life in EU Law and Policy*. London: Palgrave Macmillan, at p. 54.

maternity leave together with adequate access to paternity leave, parental leave, and childcare leave is arguably the best answer to prevent such drawbacks.[59]

The Pregnant Workers Directive was adopted in 1992 with a view to strengthening the protection of pregnant women and women who have recently given birth. The Directive is primarily aimed at improving health and safety at work for pregnant workers, workers who have recently given birth and workers who are breastfeeding. It provides for two sorts of measures: health and safety, and protection against dismissal.

In terms of leave arrangements, Directive 92/85/EEC provides for a number of specific types of leave for pregnant workers and women who have recently given birth. The most important provision in practice is contained in Article 8, which provides for a minimum of 14 continuous weeks' maternity leave before and/or after birth, including at least two weeks of compulsory maternity leave. In addition, Article 11 addresses the issue of rights related to the employment contract and specifically the right to maintenance of payment and/or the entitlement to an adequate allowance during the period of maternity leave, which should not be set at a lower rate than the level of national sick benefits.[60]

It is important for the purpose of this report that Article 10 provides that Member States shall take the necessary measures to prohibit the dismissal of pregnant workers, workers who have recently given birth and workers who are breastfeeding, during the period from the beginning of their pregnancy until the end of the period of maternity leave. The beginning of the period of protection remains unclear under Article 10 of Directive 92/85/EEC because it refers to Article 2(a), which defines a pregnant worker as 'a pregnant worker who informs her employer of her condition, in accordance with national legislation and/or national practice.' The question therefore remains as to whether the Directive provides protection effectively from the beginning of the pregnancy or whether 'the beginning of the pregnancy' in Article 10 relates to the definition of a pregnant worker in Article 2(a). This is an issue which has been addressed by the Court of Justice[61] and is raised by some Member States in this report.[62]

Apart from providing for leave and employment protection, the Pregnant Workers Directive provides for health and safety protection for pregnant women or women who are breastfeeding. Article 5(3) obliges employers to grant a pregnant worker a leave of absence to protect her health and safety if moving her to another job is not technically and/or objectively feasible or cannot reasonably be required on duly substantiated grounds. Leave must also be granted if a pregnant or breastfeeding worker is exposed to prohibited substances or required to do night work, if moving her to another job or changing to daytime work is not possible.[63] Pregnant and breastfeeding workers are not obliged to perform night work during their pregnancy and for a period following childbirth, if performing night work would be detrimental to the safety or health of the worker concerned as stated in a medical certificate.[64] Transfer to daytime work or, if this is technically and/or objectively feasible, leave from work or extension of maternity leave should be possible. Article 9 further provides that pregnant workers must be entitled, where necessary, to time off work without loss of pay to attend antenatal examinations.

Article 12 of the Pregnant Workers Directive provides that Member States shall introduce into their national legal systems such measures as are necessary to enable all workers who find themselves wronged by failure to comply with the obligations arising from this Directive to pursue their claims by judicial process (and/or, in accordance with national laws and/or practices, by recourse to other competent authorities).

59 Burri, S. (2015), 'Parents who want to reconcile work and care: which equality under EU law?' In M. van den Brink, S. Burri & J. Goldschmidt (Eds.), *Equality and human rights: nothing but trouble? Liber amicorum Titia Loenen* (pp. 261-277). Utrecht: SIM/Universiteit Utrecht, available at: https://www.uu.nl/staff/SDBurri/2, accessed 24 July 2018.
60 Article 11(3) of the Pregnant Workers Directive.
61 Case C-232/09 *Dita Danosa v LKB Līzings SIA*. ECLI:EU:C:2010:674, para. 55.
62 See the discussion in Section 3.1.3 below.
63 Article 5(4) of the Pregnant Workers Directive.
64 Article 7 of the Pregnant Workers Directive.

Amendments to the Pregnant Workers Directive were proposed by the European Commission in 2008.[65] The amendments provided for an extension of the period of maternity leave, which was going to be paid at wages replacement level, subject to a ceiling. The proposal, which was introduced a few months before the beginning of the Global Financial Crisis, was ultimately formally withdrawn on 1 July 2015.[66] No further proposal has been put forward to amend the Pregnant Workers Directive. However, the European Commission Proposal for a Directive on Work-Life Balance for Parents and Carers[67] under the New Start Initiative, which is intended to replace and repeal the Parental Leave Directive,[68] also provides complementary rights to the Pregnant Workers Directive. Specifically, the Proposed Directive states that the Commission will support the enforcement of the existing Directive 92/85/EEC so that workers can be better informed and supported to exercise their rights and to ensure that they are able to enforce these rights more effectively at the national level.[69]

1.3 The Recast Directive (Directive 2006/54/EC)[70]

The Recast Directive incorporated and updated the following – now repealed – Directives: Equal Pay Directive 75/117,[71] Equal Treatment Directive 76/207 as amended by Directive 2002/73,[72] Occupational Social Security Directive 86/378 as amended by Directive 96/97[73] and Burden of Proof Directive 97/80.[74]

The Recast Directive prohibits direct and indirect discrimination. As a rule, direct discrimination is prohibited and cannot be justified, unless a specific written exception applies, such as that the sex of the person concerned is a determining factor for the job.[75] Moreover, positive actions which aim at eliminating or counteracting the detrimental effects of gender stereotypes concerning the traditional division of roles in

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

66 Foubert, P. and Imamović, Š. (2015), 'The pregnant workers directive: must do better – lessons to be learned from Strasbourg?' *Journal of Social Welfare and Family Law*, vol. 37 issue 3, pp. 309-320 and Masselot, A. (2015), 'The EU childcare strategy in times of austerity, Journal of Social Welfare and Family Law' *Journal of Social Welfare and Family Law*, vol. 37 issue 3, pp. 345-355.

67 COM(2017) 253.

68 Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC.

69 Proposal for a Directive on Work-Life Balance for Parents and Carers, COM(2017) 253, Explanatory memorandum p. 4.

70 Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ [2006] L204/23. See generally, Burri S. and Prechal S. (2009) European network of legal experts in the field of gender equality, *The transposition of Recast Directive 2006/54/EC*, available at: https://www.equalitylaw.eu/downloads/2815-transposition-recast-directive-2009, accessed 24 August 2018.

71 Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, OJ [1975] L45/19.

72 Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regard access to employment, vocational training and promotion, and working conditions, OJ [2002] L269/15.

73 Council Directive 96/97/EC of 20 December 1996 amending Directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes, OJ [1997] L46/20.

74 Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex, OJ [1998] L14/6.

75 Article 14(2) of Recast Directive 2006/54.

society between men and women[76] are authorised under Article 157(4) TFEU and the Recast Directive[77] but interpreted restrictively by the CJEU.[78]

Article 2(1)(b) of the Recast Directive defines indirect discrimination as occurring 'where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.' Indirect discrimination concerns measures that appear neutral, but which have a disadvantageous effect on specific people. For example, less favourable treatment of part-time workers amounts to indirect sex discrimination, when mainly women are employed on a part-time basis. In contrast to direct discrimination, indirect discrimination can be objectively justified.[79]

The protection of pregnancy and maternity not only requires the prohibition of discrimination based on pregnancy and maternity, but it also justifies different treatment for the women concerned. Accordingly, Article 28(1) of the Recast Directive provides that the Directive shall be without prejudice to provisions concerning the protection of women, particularly regarding pregnancy and maternity. This is further reinforced by the dictum in Recitals 23 to 25 of the preamble to the Recast Directive, which provide a safeguard in the form of an acknowledgment of the Court of Justice's case law in this area.

Article 15 grants a woman on maternity leave the **right to return to her job or to an equivalent post** on terms that are no less favourable to her and to benefit from any improvement in working conditions to which she would be entitled during her absence.[80]

The Recast Directive also prohibits **harassment** on the ground of a person's sex and **sexual harassment** and equates both types of harassment with sex discrimination, which cannot be justified.[81] Article 2(1)(c) defines *harassment* as 'unwanted conduct related to the sex of a person [that] occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment.' Article 1(d) defines *sexual harassment* as 'any form of unwanted verbal, non-verbal or physical conduct of a sexual nature [that] occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.' The harassment of a pregnant worker or a worker who has recently given birth may fall under these provisions.[82]

76 On stereotyping, see: Timmer, A. (2016), 'Gender Stereotyping in the case law of the EU Court of Justice' European Equality Law Review, Issue 1, pp. 37-48, available at: https://www.equalitylaw.eu/downloads/3867-european-equality-law-review-1-2016, accessed 25 August 2018.

77 Article 3 of the Gender Recast Directive 2006/54: 'Member States may maintain or adopt measures within the meaning of Article 141(4) of the Treaty [now Article 157(4) TFEU] with a view to ensuring full equality in practice between men and women in working life.'

78 See Cases C-450/93 *Eckhard Kalanke v Freie Hansestadt Bremen*. ECLI:EU:C:1995:322; C-409/95 *Hellmut Marschall v Land Nordrhein-Westfalen.* ECLI:EU:C:1997:533; C-158/97 *Georg Badeck and Others.* ECLI:EU:C:2000:163; C-79/99 Julia Schnorbus v Land Hessen. ECLI:EU:C:2000:676; C-407/98 *Katarina Abrahamsson and Leif Anderson v Elisabet Fogelqvist.* ECLI:EU:C:2000:367; C-366/99 *Joseph Griesmar v Ministre de l'Economie, des Finances et de l'Industrie et Ministre de la Fonction publique, de la Réforme de l'Etat et de la Décentralisation*. ECLI:EU:C:2001:648; C-476/99 *H. Lommers v Minister van Landbouw, Natuurbeheer en Visserij*. ECLI:EU:C:2002:183; C-319/03 *Serge Briheche v Ministre de l'Intérieur, Ministre de l'Éducation nationale and Ministre de la Justice*. ECLI:EU:C:2004:574. See Selanec, G. and Senden, L. (2011), European network of legal experts in the field of gender equality, *Positive Action Measures to Ensure Full Equality in Practice between Men and Women, including on Company Boards*, available at: https://www.equalitylaw.eu/downloads/3864-positive-action-measures-to-ensure-full-equality-in-practice-between-men-and-women-including-on-company-boards-pdf-2-639-kb, accessed 25 August 2018.

79 See McCrudden, C, and Prechal, S., European Network of Legal Experts in the Field of Gender Equality (2009), *The Concepts of Equality and Non-Discrimination in Europe: A practical approach*, European Commission, pp.38-39, available at: https://www.equalitylaw.eu/downloads/2812-concepts-of-equality, accessed 13 July 2018.

80 Article 16 of the Recast Directive provides that in the Member States that recognise the right to paternity leave and/or adoption leave, the protection against dismissal and the right to return to the same job apply for workers who take such leave.

81 See Section 2.1.7 on sexual harassment below.

82 In Case C-303/06 *Coleman v Attridge Law and Steve Law* ECLI:EU:C:2008:415, the CJEU links the prohibition of harassment to care responsibility rather than pregnancy.

In addition, Article 2(2)(b) of the Recast Directive prohibits an **instruction to discriminate** on the ground of a person's sex, which is considered discrimination.[83] Therefore, where an employer requests a temporary work agency to supply non-pregnant workers, workers without young children or even workers of one sex only, both the employer and the agency are liable for sex discrimination.

Furthermore, Article 24 of the Recast Directive prohibits **victimisation** of a person who has made a complaint or initiated legal proceedings aimed at enforcing compliance with the principle of equal treatment, which includes pregnancy and maternity rights. Such a person must be protected against dismissal or any adverse treatment or consequence in reaction to their action.[84]

Finally, Article 19 of the Recast Directive provides for a **shift of the burden of proof** in sex discrimination cases.[85] Proving discrimination can be difficult; therefore, initially the Court of Justice of the EU,[86] and later legislation, established an obligation to shift the burden of proof in relation to EU gender equality law. The shift occurs when an alleged victim of discrimination establishes facts from which it may be inferred that there has been direct or indirect discrimination. The respondent then must prove that there has been no breach of the principle of equal treatment. The EU provision is only minimal and Member States may introduce rules that are more favourable for claimants.

The enforcement of the protection against dismissal discrimination and unfavourable treatment on the grounds of pregnancy and maternity can be achieved through a judicial process involving cases decided by the national courts. Under Article 20 of Recast Directive 2006/54/EC, Member States and EEA countries are also obliged to designate **national equality bodies**, whose task it is to promote, analyse, monitor and support equal treatment of all persons without discrimination on the grounds of sex.[87] These bodies must have the competence to provide independent assistance to victims of gender discrimination, to conduct independent surveys concerning gender discrimination and to publish independent reports and make recommendations.

1.4 The Parental Leave Directive (Directive 2010/18/EU)[88]

As its name indicates, the Parental Leave Directive 2010/18[89] mainly addresses the issue of parental leave. Clause 2(1) entitles male and female workers to an individual right to parental leave on the grounds of the birth or adoption of a child to take care of that child until a given age, up to eight years to be defined by Member States and/or social partners, for a minimum of four months.[90] A number of conditions of application are left to the Member States as outlined in Clause 3. Clause 5 provides the bulk of the employment rights and the principle of non-discrimination. In particular, Clause 5(1) provides for the right to return to a job, or if impossible, a similar one consistent with the contract, and Clause 5(2) guarantees that acquired rights are to be maintained. Clause 5(4) requires Member States and/or social partners to take the necessary measures to protect workers against less favourable treatment or dismissal on the grounds of an application for, or the taking of, parental leave in accordance with national law, collective agreements and/or practice. Clause 5(5) clarifies that matters regarding social security and income are of the competence of the national legislators, but it remains up to Member States to take into account

83 See Section 2.1.8 on victimisation and instruction to discriminate below.
84 See Section 2.1.8 on victimisation below.
85 See Section 2.1.12 on the reversal of the burden of proof below.
86 Case 109/88 *Danfoss* ECLI:EU:C:1989:383; Case C-104/10 *Kelly* ECLI:EU:C:2011:506 and Case C-145/10 *Meister* ECLI:EU:C:2012:217.
87 See Section 5.1 below on national equality bodies.
88 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 (Text with EEA relevance), OJ [2010] L68/13. See generally, do Rosário Palma Ramalho, M., Foubert, P. and Burri, S., (2015) European network of legal experts in the field of gender equality, *The implementation of Parental Leave Directive 2010/18/EU in 33 European countries*, available at: https://www.equalitylaw.eu/downloads/2723-parental-leave-en, accessed 19 August 2018.
89 This Directive revises the Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repeal Directive 96/34/EC.
90 Clause 2(2) of the Parental Leave Directive.

the importance of the continuity of the entitlements to social security cover under the different schemes, in particular healthcare and the role of income – among other factors – in the take-up of parental leave. Clause 6(1) provides for a right to request flexible working arrangements following a period of parental leave. Clause 6(2) encourages employers and employees to keep in touch while the employee is on leave.

The Parental Leave Directive also covers adoption, which is guaranteed under Clause 2. In Clause 4, the Directive requires that Member States and/or social partners assess the need for additional measures necessary in order to address the specific needs of adoptive parents.

In addition, Clause 7 of Directive 2010/18 provides for the right to take time off on grounds of *force majeure* for urgent family reasons in cases of sickness or accident making the immediate presence of the worker indispensable.

As stated earlier, the Commission's Proposed Directive on Work-Life Balance for Parents and Carers[91] under the New Start Initiative is intended to replace and repeal Parental Leave Directive 2010/18.

1.5 Structure and method of this report

This report consists of ten parts. Following the general introduction (Part 1), Part 2 discusses the enforcement of the protection against discrimination and unfavourable treatment due to the take-up of family-related leave at national level. In particular it considers legislative provisions, judicial cases, decisions of national equality bodies and studies and/or annual reports etc. conducted by a national equality body or other bodies in relation to enforcement of the prohibition against discrimination and unfavourable treatment. It considers the enforcement difficulties in relation to pregnancy/maternity leave; parental and adoption leave; paternity leave; carers' leave and the leave of self-employed workers. As paternity leave and carers' leave are not prescribed under EU law, the report provides an outline of these leave arrangements under national law insofar as they exist. Part 3 focuses on the enforcement of the protection against dismissal based on family-related leave at the national level, following the same logic as in Part 2. Part 3 provides an assessment of specific judicial barriers to the enforcement of the ban against discrimination, unfavourable treatment and dismissal in relation to the take-up of family-related leave. Part 4 discusses access to justice and effective enforcement of the prohibition of dismissal and discrimination based on family-related leave. Part 5 explores the role of actors such as ombudspersons, labour inspectorates and social partners in the enforcement of the protection against discrimination, unfavourable treatment and/or dismissal due to the taking up of family-related leave. Part 6 contemplates additional enforcement problems within the scope of this report in the countries under review. Part 7 outlines some good practices in regard to the protection against discrimination, unfavourable treatment and/or dismissal in the countries under review. Part 8 covers any other issue that could be relevant to address in the light of the scope and aim of this report, for example in relation to breastfeeding, the birth of a stillborn child, or Assisted Reproductive Technology (ART), including IVF and surrogacy. Part 9 draws some conclusions and provides tentative recommendations. The final part provides a list of national relevant bibliographic sources.

This thematic report is based on answers provided by the national experts of the European network of legal experts in gender equality to a questionnaire[92] assessing the situation in Member States. The questionnaire focused on the enforcement of the EU legislative protection against discrimination, unfavourable treatment and dismissal in employment, including issues of compensation, reparation and sanctions, as well as the role of equality bodies. The information provided in this report is valid as at 29 August 2018.

91 COM(2017) 253.
92 The original questionnaire is attached in the Annex.

2 Enforcement of the protection against discrimination and unfavourable treatment due to the take-up of family-related leave at national level

2.1 Pregnancy and maternity leave

The national experts were asked to describe specific difficulties in the enforcement of the prohibition of discrimination and/or unfavourable treatment with regard to both direct and/or indirect sex discrimination due to the take-up of pregnancy and maternity leave in their country.

Under EU law, pregnancy, maternity and parental rights are firmly intended to contribute to the principle of gender equality. The motivation for the existence of pregnancy, maternity and parental rights, however, is not always only based on gender equality in the countries under consideration. In **Estonia** and **France** the development of pregnancy, maternity and parental legislation is largely underpinned by demographic concerns. The two aims are not necessarily incompatible but could also contribute to tension, in particular with regard to the length of maternity leave. Indeed, long periods of maternity leave, which are sometimes (wrongly) considered to help increase fertility rates, have been identified as an obstacle to women's access to paid employment.[93]

2.1.1 Legal implementation of the prohibition against discrimination and unfavourable treatment

The discrimination and unfavourable treatment of workers on the ground of pregnancy or maternity leave is formally prohibited in **all countries under review**. Most States have a specific legal provision prohibiting discrimination on the ground of pregnancy and maternity. Most countries also have legal provisions that go beyond the EU legal requirements. However, in some countries, there is no explicit provision banning discrimination or unfavourable treatment based on pregnancy or maternity leave since such prohibition is part of the general anti-discrimination law (**Bulgaria**, **Germany**, **Lithuania** and **Poland**). In **Germany** for instance, if a woman is treated unfavourably as a result of pregnancy or motherhood, this is deemed to be discrimination on the basis of sex under the General Equal Treatment Act.[94] Although there is no provision specifically banning discrimination or unfavourable treatment based on pregnancy or maternity leave, in **Bulgaria**, there is a provision prohibiting the refusal to employment to a person based on pregnancy, maternity leave or caring for a child.[95]

Although such provisions are considered to comply with the EU obligations, the absence of a specific provision explicitly prohibiting discrimination or unfavourable treatment based on pregnancy and maternity leave represents a gap in the law. In turn, such a gap makes it more difficult for individuals to fight discrimination and unfavourable treatment on the grounds of pregnancy and maternity leave. In particular, this might weaken broad awareness of workers' rights and thus their enforcement. In **Poland**, the lack of an explicit provision on the prohibition of discrimination on the grounds of pregnancy and maternity results in the fact that employees, employers and sometimes judges[96] do not know that such discrimination is prohibited direct sex discrimination.

93 The theory that long periods of leave lead to a higher fertility rate has been challenged by the facts that in some countries, such as **France**, **Sweden** and **Finland**, higher female employment rates feature alongside higher fertility rates. See Plantenga, J. and Remery, C. (2009), *The Provision of Childcare Services: A Comparative Review of 30 European Countries* (Office for Official Publications of the European Communities).

94 Germany: *Allgemeines Gleichbehandlungsgesetz* of 14 August 2006, Official Journal (*Bundesgesetzblatt BGBl.*), part I p. 1897, available at: https://www.gesetze-im-internet.de/agg/, accessed 25 August 2018.

95 Article 12 Paragraph 3 of the Bulgarian Law on Protection from Discrimination.

96 See for example: Court of Appeals in Warsaw, ruling of 5 February 2016 (Case No. III AUa 124/15); Court of Appeals in Lublin, ruling of 12 August 2015 (Case No. III AUa 417/15) and of 13 April 2016 (Case No. III AUa 898/1), Supreme Court, ruling of 7 October 2014 (Case No. I UK 51/14).

The term 'less favourable treatment', which is included in the concept of discrimination, has been interpreted comprehensively in a **Dutch** case to include not only negative changes in the formal contractual position of an employee, but also changes that might have a negative effect on the career of an employee and changes of a temporary nature.[97] The specific case concerned a police officer, who had been placed in a higher position for the duration of one year. One month before the assignment would start, the police officer was granted parental leave for two days a week. However, three months after the start of the assignment, the police organisation terminated the assignment on the ground that the parental leave caused problems for the work organisation. The Administrative High Court ruled, on appeal, that the termination of the temporary assignment constituted less favourable treatment because of taking up parental leave. The termination damaged the career of the police officer, by limiting the period during which he could gain experience in a higher position. He also suffered financial damage because his temporary allowance also stopped. Finally, he had been placed at a disadvantage, because it was noted in his file that his attitude had not been constructive.

2.1.2 Personal scope

Directive 92/85/EEC provides protection to 'workers'. In some countries, there are uncertainties with regard to the personal scope of the applicable prohibition of discrimination and unfavourable treatment on the ground of pregnancy and maternity leave. In particular, the application of the protection against discrimination and unfavourable treatment on the ground of pregnancy and maternity to members of corporate executive boards and practising lawyers remains uncertain.

In *Danosa*,[98] the CJEU held that executive board members of companies must be considered as employees with regard to the protection from discrimination in case of pregnancy and the right to leave connected with childbirth and childcare. However, in **Latvia**, the enforcement of the prohibition of discrimination and unfavourable treatment against pregnant workers and workers on maternity leave remains problematic for the members of companies' executive boards in practice and despite the ruling in *Danosa* there is still no national provision explicitly protecting these categories of workers. Neither Labour Law[99] nor Commercial Law[100] regulates the status and type of such relationships.

In a similar vein, in **Malta**, practising lawyers, such as legal counsel forming part of a senior executive team, are deemed to be self-employed. These kinds of lawyers are not considered to be employees and therefore they can be refused to access maternity leave.[101]

2.1.3 Alarming disconnect between the law on paper and its application in reality

Despite the existence of a formal legal provision prohibiting the discrimination and unfavourable treatment of workers on the ground of pregnancy and maternity leave in all countries under review, instances of discrimination and unfavourable treatment of pregnant workers and women on maternity leave are reported to be numerous, even though at the same time the number of legal cases is small (**Bulgaria**, **Croatia**, **Cyprus**, **Czech Republic**, **Denmark**, **Germany**, **Greece**, **Finland**, **Italy**, **Malta**, the **Netherlands**, **Poland**, **Portugal**, **Romania**, **Slovakia** and the **United Kingdom**) or non-existent (**Lithuania** and **Luxembourg**). The disconnect between law and what happens in reality reflects the fact that traditional gender assumptions and stereotypes have not yet been challenged.

A number of recent national studies highlight alarming trends.

97 The Netherlands: CRvB, 23 November 2017, ECLI:NL:CRVB:2017:4067.
98 The decision of the CJEU in Case C-232/09 *Dita Danosa v LKB Līzings SIA*. ECLI:EU:C:2010:674.
99 Latvia: *Darba likums*, Official Gazette No.105, 6 July 2001.
100 Latvia: *Komerclikums*, Official Gazette No. 158/160, 4 May 2000.
101 Malta Industrial decision, available at: https://dier.gov.mt/en/Industrial%20Relations/Industrial%20Tribunal/Decisions/Documents/Dec_2014/dec%202275.pdf, accessed 31 May 2018.

A 2012 study conducted by the **Croatian** Ombudsperson for Gender Equality shows a high level of discrimination and unfavourable treatment.[102] Almost half of the women who returned to work after maternity leave were downgraded or felt that they had been downgraded: 16.4 % had been downgraded to an inferior workplace, 14.6 % faced wage cutbacks and 9.7 % felt that they had been denied the possibility of promotion to better workplaces. Only 13 % of participants declared that they would be ready to seek court protection of their rights, whereas the rest of the participants (over 80 %) would either never seek court protection or were not sure about it.

In a 2016 report, the **Danish** Institute for Human Rights conducted a qualitative report on discrimination against parents. The report was based on interviews with parents on the perceived discrimination related to pregnancy leave. According to this report, approximately 50 % of the women had experienced discrimination or unfavourable treatment related to pregnancy leave.

In **Lithuania**, human rights activists and women lobbies point out that pregnant women (and women on pregnancy and maternity leave) still quite often become the victim of less favourable treatment and discrimination by employers.[103] Employers' negative attitudes in most cases are not caused by the fact that the employee takes statutory maternity leave *per se*, but rather by the pregnancy itself and, eventually, anticipated future necessary adaptations of work patterns, such as days off to care for children. Pregnant women claim that they are subject to a decrease of salary, denied vocational training or promotion, and denied pregnancy and maternity leave.[104] All these actions are prohibited by law but there is no or rare case law.

In the **Netherlands**, the national equality body published the report 'Monitor Discrimination Cases 2017',[105] which reveals a high level of discrimination and non-renewal of fixed-term contract for pregnant workers.[106]

In **Norway**, the Equality Ombud conducted a survey in 2015, which showed that 55 % of all women who had been pregnant had experienced discrimination and 20 % of pregnant women had refrained from applying for jobs while pregnant in fear that the pregnancy would be an obstacle.[107] A large proportion of the cases concerns pregnant women being bypassed in hiring processes including non-renewed temporary contracts, which would otherwise have been renewed.

In the **United Kingdom**, two studies conducted in 2016 also highlight enforcement-related difficulties, including the lack of women challenging discriminatory behaviour using the available legal routes.[108] In fact, fewer than 1 % of the mothers surveyed (18 out of 3 254) pursued a claim to an employment tribunal. Reasons include: earlier resolution of the grievance; the prospect of a tribunal being too daunting; being too busy with the new baby or wanting to focus on pregnancy or maternity leave; not wanting to get

102 Croatia Ombudsperson for Gender Equality (2012), '*Položaj trudnica i majki s malom djecom na tržištu rada*', available at: https://www.prs.hr/attachments/article/633/Polo%C5%BEaj%20trudnica%20i%20majki%20sa%20malom%20djecom%20na%20tr%C5%BEi%C5%A1tu%20rada%20WEB.pdf, accessed 31 May 2018.

103 See, for example, Discrimination: pregnant women shall fight for work (in Lithuanian), available at http://www.snaujienos.lt/miesto-gyvenimas/1313-diskriminacija-nesciosioms-del-darbo-tenka-pakovoti.html, accessed 1 July 2018. More complaints about discrimination of pregnant women, available at https://www.alfa.lt/straipsnis/10282716/daugeja-nesciuju-skundu-del-diskriminavimo-darbe-lygiu-galimybiu-kontroliere, accessed 1 July 2018.

104 More complaints from pregnant women. Available at https://www.delfi.lt/news/daily/lithuania/daugeja-nesciuju-skundu-del-diskriminacijos-darbe.d?id=23201819 (in Lithuanian), accessed 1 July 2018.

105 'Monitor Discrimination Cases 2017': https://www.mensenrechten.nl/nl/publicatie/38427.

106 See Section 3.1.5 on the non-renewal of fixed-term contracts below.

107 Norwegian Equality Ombud survey (2015) available at: http://www.ldo.no/nyheiter-og-fag/nyheiter/nyheiter-2015/gravide-diskrimineres/, accessed 25 August 2018.

108 United Kingdom: The Equality and Human Rights Commission / Dept of Business, Innovation and Skills 'Pregnancy and Maternity Related Discrimination and Disadvantage' investigation of March 2016 (EHRC/BIS, 2016), available at: https://www.equalityhumanrights.com/en/managing-pregnancy-and-maternity-workplace/pregnancy-and-maternity-discrimination-research-findings, accessed 16 May 2018 and The Equality Commission in Northern Ireland *Expecting Equality* (2016), available at: https://www.equalityni.org/PregnancyInvestigation, accessed 16 May 2018.

into trouble at work; feeling that the case was not strong enough; fear of losing their job; getting another job; and not being able to afford the fees.[109]

Moreover, a report of the **Czech** Public Defender of Rights on victims of discrimination and barriers of enforcement of their rights, published in 2015,[110] shows that NGOs have identified discrimination on the ground of maternity and parental leave as the most burning issue amongst all gender discrimination.

These reports show that the implementation in practice and the enforcement of the law relating to the protection against discrimination and unfavourable treatment on the grounds of pregnancy and maternity leave are problematic. These difficulties do not necessarily transpire into the legal court cases and respective case law. This situation suggests the existence of severe problems with access to justice and a disconnect between formal rights and their application in practice.

Although this section is concerned with discrimination and unfavourable treatment on the ground of pregnancy and maternity leave and a separate section will specifically address the issue of dismissal, it should nevertheless be noted that in its overwhelming majority, the case law related to maternity at work concerns the termination of the employment relationship. Issues of discrimination or unfavourable treatment are often raised in the argument against the termination of employment, rather than as a stand-alone issue (**Belgium**, **Bulgaria**, **Denmark**, the **Netherlands** and the **United Kingdom**). Issues of discrimination, unfavourable treatment and dismissal should therefore be read as a continuum even though the legal provisions and this report distinguish between discrimination and unfavourable treatment on the one hand and dismissal on the other.

2.1.4 Recruitment, stereotypes and statistical discrimination

Many instances of discrimination and unfavourable treatment can be statistical. In other words, the discrimination or the unfavourable treatment is not based on the actual existence of pregnancy but on the perception that young women are likely to become pregnant and will therefore necessarily take leave to look after their children. The discrimination or the unfavourable treatment, in these cases, is in anticipation of an event that has not taken place and might never happen. It is based on stereotypes and has a negative impact on women. In a number of countries, there is a perception that women are not considered to be reliable employees because they need to take periods of pregnancy, maternity or care leave (**Bulgaria**, **Czech Republic**, **Greece** and **Latvia**). There appear to be deeply rooted harmful stereotypes and prejudices about the role of women as mothers and about the fact that women are sometimes considered to be less fit and skilled than men for work (**Bulgaria**, **Czech Republic**, **Italy** and **Latvia**). Most at risk of being excluded from employment based on negative stereotypes are mothers, especially single mothers, and those with disabled children. Also at risk are women with low levels of education and qualification, women who have been long-term unemployed and women from ethnic communities (**Bulgaria**, **Italy** and the **United Kingdom**). Younger workers appear to suffer disproportionally from discrimination and unfavourable treatment based on family leave, not only because they are more likely to have children than older workers but also because on average they hold more precarious jobs (**Italy**). Pregnant workers and new mothers who are casual, zero hours or agency workers are 'less likely to feel confident about challenging discriminatory behaviour'[111] (**Italy** and the **United Kingdom**). In **Slovakia**, the courts tend to downplay the severity of discrimination, overlooking or not understanding its *prima facie* impact on an individual's dignity. In particular, it has been argued that courts have been biased or

109 Ibid. p.149.

110 Discrimination in the Czech Republic: victim of discrimination and barriers to access to justice, final report from a survey conducted by the Public Defender of Rights. Brno. 2015. available at: https://www.ochrance.cz/fileadmin/user_upload/ESO/CZ_Diskriminace_v_CR_vyzkum_01.pdf, accessed 25 August 2018.

111 UK House of Commons, Women and Equalities Committee (2017), p. 20 para 56, available at: https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/358/358.pdf, accessed 25 August 2018.

prejudicial particularly when dealing with the cases of discrimination against Roma women.[112] This would be a clear case of multiple discrimination.

It is reported that many employers refuse to employ female candidates who are likely to have children, based on their age and/or marital status (**Belgium**, **Cyprus** and **Lithuania**). The number of complaints against this sort of discrimination, however, remains minimal or non-existent (**Cyprus**) because it is particularly difficult to produce evidence in pre-employment recruitment situations. Questions about future reproductive plans are rarely included in written questionnaires but are often asked in the course of the oral employment interview and may result in refusals to employ (**Bulgaria**, **Croatia**, **Estonia**, **Hungary**, **Lithuania** and **Romania**). Yet individuals are unable to prove that there is a correlation between the questions they were asked and the refusal to employ. In this context, in **Bulgaria**, the Commission for Protection from Discrimination produced a special report in 2018 entitled 'Discriminatory attitudes towards women in the sphere of labour relations',[113] which shows high levels of direct sex discrimination. In particular, some employers state that they prefer to recruit men and refuse to recruit women who have young children. The most vulnerable women are between 25 and 34 years old. The Bulgarian report mentions a complaint that concerned a draft contract of employment, which included a provision stating that if the employee were to become pregnant she would have to pay 700 BGN in penalty to the employer.

In some countries, workers refrain from declaring their pregnancy or declare it very late, to avoid being discriminated or treated unfavourably at work (**France**).

It is often assumed that the public sector is better at addressing discrimination than the private sector. While discrimination and unfavourable treatment in practice appear to be more frequent in the private sector compared to the public sector in **Greece**, in **Latvia** there was no distinction between the public and the private sectors.

2.1.5 Lack of access to information and/or lack of awareness

Information in relation to the right to family-related leave must not only be accessible to individuals, but individuals must also actively be made aware of the information. Efficient and effective dissemination of information is therefore vital to support the enforcement of rights. In many of the countries surveyed, the dissemination of information on family-related leave is the responsibility of a designated government-related body, labour inspectorate (**Croatia**, **Norway**), the social insurance board (**Estonia**)[114] or equality bodies (**Czech Republic**, **Croatia**, **Estonia**, the **Netherlands**, **Norway**, **Sweden**, the **United Kingdom**) that tends to have a dedicated website. These websites provide general information and materials on family-related leave and its enforcement. However, specific information on enforcement of family-related leave is not always available (**Germany**, **Spain**). Some countries have even made the effort to provide this information in multilingual format (**Estonia**).

In addition to dedicated websites, there are also other ways to ensure that information is disseminated. The increasing use of the Internet and social media has been useful in raising awareness. In particular, various Blogs provide rich information about working relations. Awareness-raising media campaigns not only contribute to increasing individuals' knowledge regarding their rights but also lead to more individuals claiming the application of their rights. In **Belgium**, the Institute for Equality of Women and

112 Slovakia report on Discrimination (2012), available in Slovak with a summary in English at: http://www.poradna-prava.sk/sk/dokumenty/diskriminacia-na-slovensku-hladanie-barier-v-pristupe-k-ucinnej-pravnej-ochrane-pred-diskriminaciou/, accessed 5 June 2018.

113 Bulgaria: Commission for Protection from Discrimination (2018), special report 'Discriminatory attitudes towards women in the sphere of labour relations', available at: http://eurocom.bg/news/article/diskriminaciia-na-rabotnoto-miasto-, accessed 30 June 2018.

114 In Estonia, the Social Insurance Board is a governmental agency under the Ministry of Social Affairs.

Men has developed a specific information campaign on the issue of maternity at work,[115] which met great success. In some countries, agencies team up to disseminate the information more effectively to different people (**Estonia**, the **Netherlands** and **Sweden**). In **Estonia** for instance, various NGOs and government institutions have teamed up to answer frequently asked questions, including on family-related leave.[116] In the **Netherlands**, a range of organisations, such as social security agencies, health organisations and midwifes, provide information on pregnancy and maternity leave and the rights of the women involved, both to women and to employers. Raising awareness or rights through national campaigns via mass media (television, radio, newspapers and the Internet) can also be successful (**Czech Republic**, the **Netherlands**).

The information appears to be generally available, but still it does not seem to reach individuals effectively. Lack of access to information and awareness in relation to the existing rights regarding pregnancy and maternity leave contribute not only to discrimination and unfavourable treatment but also to difficulties in the enforcement of such rights.

Workers are not always well informed about their rights, and they seem to be particularly isolated during periods of maternity leave. In particular, workers who are on maternity leave are not always well informed about what is going on at the workplace during their leave. Issues such as salary negotiations and re-organisations are often not discussed with, or disclosed to such workers. As a result, these workers are unable to enforce their rights (**Bulgaria**, **Czech Republic**, **Denmark** and **Romania**). The Proposed Directive on Work-Life Balance[117] would help by encouraging workers and employers to maintain contact with the labour market during period of maternity and parental leave. Lack of access to information through isolation during family related leave can be compounded by the fact that during maternity leave, performing work is strictly prohibited in **France**, and the prohibition may be monitored by labour inspectors. This would make it even more difficult to access information during the leave period. To a certain extent, e-working could alleviate this issue somewhat as many employees ask for work during the leave and many qualified/professional women do work this way.

Employers also appear to be lacking information and awareness about pregnancy and maternity rights (**Hungary**, **Latvia** and the **United Kingdom**). In **Hungary**, a study revealed that employers frequently ask questions about the number of children, childbearing duties, etc. to applicants, and that they tend to ask such questions more often to women than to men during job interviews. While the Hungarian Equality Act prohibits employers from asking such questions, it is believed that employers and HR practitioners appear to be unaware of the illegality of these questions.[118]

In 2017, the Ombudsperson's Office in **Latvia** carried out a study on the observance of the rights of parents of small children,[119] which reveals a lack of awareness on the part of employers with regard to pregnancy and maternity rights and a disconnect between their perception and that of employees. Although employers do not appear to systematically recruit candidates of a particular sex and they claim that they do not ask questions on family status during job interviews, employees (both male and female) claim that they have been asked about their marital status and pregnancy. Moreover, employers consider that information related to an expected addition to the family should be disclosed during a job interview. However, employers consider that the non-disclosure of such information is less unethical if the refusal

115 See Institute for Equality of Women and Men, *Grossesse au travail* or *Zwanger aan het werk*, 2017, at https://igvm-iefh.belgium.be/fr/publications/grossesse_au_travail_experiences_de_candidates_demployees_et_de_travailleuses, accessed 27 May 2018.

116 The Estonian Labour Inspectorate, Ministry of Social Affairs, Health Board and National Institute for Health Development, available at: http://www.tooelu.ee/en/Starting-Entrepreneur/Working-relations/Vacation/Family-Vacations, accessed on 19 October 2018. The information is mainly in Estonian, but also in Russian and some in English.

117 Recital 16 of the Proposed Directive on Work-Life Balance COM (2017) 253.

118 Simonovits, Bori – Koltai, Júlia(2013), Employee selection practice in the mirror of discrimination, p. 6, available at: http://egyenlobanasmod.hu/sites/default/files/kiadvany/2_2_english_summary.pdf, accessed 25 August 2018.

119 Latvia Annual Report 2017, Ombudsperson, pages 241-244, available in Latvian at: http://www.tiesibsargs.lv/uploads/content/lapas/tiesibsarga_2017_gada_zinojums_1520515340.pdf, accessed 25 August 2018.

to provide such information comes from a male candidate compared to a female candidate. The Equality and Human Rights Commission (EHRC) also found that many employers held similar views regarding the disclosure of pregnancy at interviews in the **United Kingdom** in 2018,[120] and a 2016 study reveals that there is a discrepancy between employers' understanding of discrimination and the extent of its occurrence and employees' experience of it.

The lack of awareness about the law is not just limited to employers and employees. More worrying is the fact that members of the judiciary appear to lack specific knowledge about discrimination. Judges are ill-informed about the application of anti-discrimination law in relation to pregnancy and maternity in **Bulgaria**, **Hungary**, **Poland**, **Romania** and **Slovakia**.

In contrast, some countries have implemented good procedures to make sure that information is well disseminated and that all parties are well informed about pregnancy and maternity rights.[121] Specific initiatives are worth highlighting. In **Ireland**, a person who may have been discriminated against or may have been dismissed or otherwise unfavourably treated has the right to access material information.[122] 'Material information' represents information as to the other person's reasons for performing or failing to perform any relevant act and also the practice and procedures in respect of any material act, information on the treatment of the person seeking the information, or information about the financial resources of an employer's business which in the circumstances of the case are material. However, 'material information' does not mean 'confidential information'.

In the **United Kingdom**, the questionnaire procedure – a process that allowed claimants to ask questions at an early stage about their potential claim to the alleged discriminator – was abolished in 2014. The process was valuable because it recognised the difficulties faced by claimants and sought to offer some way to address the imbalance by enabling them to secure information that might not have been secured through any other route and helped determine whether they had a case or not. In addition, if a respondent failed to reply to the questionnaire or provided evasive or equivocal replies, the courts and tribunals had the power to draw adverse inferences, which was a useful tool for the claimant to use.

2.1.6 The right to return to work following the period of maternity leave[123]

In most countries, a formal legal provision guarantees the right to return to the same or an equivalent job following a period of maternity leave. The existence of such a legal provision, however, does not alleviate the existence of difficulties in practice. Many workers who return from a period of maternity leave are given new tasks and/or find that changes have been made to their job. Mothers are pressed to accept less attractive working conditions, including the downgrading of their position or the imposition of part-time work or rotation work (**Denmark** and **Greece**). The economic crisis and resulting job shortages, as well as high rates of unemployment (much higher for women than men), have contributed to this trend being reinforced (**Greece**).

By contrast, the **Netherlands** does not have an express provision that guarantees the right of a woman to return after maternity leave to her job or an equivalent job, on terms and conditions that are no less

120 United Kingdom: Equality and Human Rights Commission (EHRC) survey (2018), available at: https://www.theguardian.com/world/2018/feb/19/uk-bosses-believe-women-should-say-at-interview-if-they-are-pregnant-report, accessed 25 August 2018.
121 See Sections 5 and 7 on actors active in enforcement and good practices below.
122 Ireland: Section 76 of the Employment Equality Act 1998 (as amended).
123 Article 15 of Directive 2006/54.

favourable to her, and to benefit from improvement in working conditions during her absence.[124] However, in practice this legislative gap does not create problems, because the general prohibition on discrimination offers sufficient protection in this respect.

2.1.7 Sexual harassment and bullying[125]

There is general hostility, sexual harassment and bullying towards pregnant workers and women on maternity, parental or care leave in many countries (**Bulgaria**, **Estonia**, **Greece**, **Italy**, **Romania**, and the **United Kingdom**). In **Romania**, the national equality body has developed a substantial body of decisions which sanctions employers for harassment on the ground of pregnancy.[126] Unfortunately, the courts do not necessarily comply with these decisions.

2.1.8 Victimisation and the fear of victimisation[127]

Victimisation and the fear of victimisation or the fear of being given a bad name in the labour market often make victims of discrimination and unfavourable treatment reluctant to take legal action, especially but not exclusively in times of economic crises and when they hold a precarious job (**Croatia**, **Czech Republic**, **Greece**, **Italy**, **Latvia**, **Romania** and the **United Kingdom**). Indeed, the deregulation of employment relationships and the growing rate of deterioration of the position of women in the labour market have made them more vulnerable to victimisation and the fear of victimisation (**Greece** and **Italy**).

In **Croatia** victims of discrimination are extremely vulnerable and exposed to further victimisation during court proceedings. The fact that judicial cases take a long time to proceed further aggravates the risk of victimisation. Moreover, fear of victimisation is also reported to influence the reliability of testimony in **Croatia**. Some courts take into account the fact that witnesses of discrimination are in a position of financial and occupational subordination towards the employer, which may affect their testimony.[128]

2.1.9 The potential clash between the prohibition of discrimination grounded on maternity and the obligation to protect pregnant employees against health risks

Directive 92/85/EEC aims to protect pregnant workers, workers who have recently given birth and workers who are breastfeeding by guaranteeing that their health is not compromised by the work environment.[129]

In **Belgium** there is a potential clash between the prohibition of discrimination grounded on maternity and the obligation to protect pregnant employees against health risks. When a pregnant worker must be withdrawn from the workplace on the basis of health concerns, but the employer has no other vacant position to which that worker could be transferred temporarily, that worker is put in an unfavourable

124 Case C-252/13 *European Commission v Kingdom of the Netherlands*. ECLI:EU:C:2014:2312. The Commission started proceedings against the Netherlands for not establishing sufficiently clearly that, if female workers returning after the end of the period of maternity leave are confronted with less favourable employment conditions, this is contrary to the prohibition on discrimination on the grounds of pregnancy, childbirth and motherhood. However, the CJEU had to dismiss the action on technical grounds. The Commission did not identify any rule of Dutch law whose content or application is contrary to the wording or to the objective of the relevant provisions of Directive 2006/54. Therefore, the Court held that it was not able, in full knowledge of the relevant facts, to rule on the form of order sought in the application.

125 Articles 1(d) and 2(1)(c) of Directive 2006/54.

126 Romania: Consiliul Naţional pentru Combaterea Discriminării (CNCD), Decision No. 417 of 15 December 2010, Decision No. 28 of 18 January 2012, and Decision No. 61 of 6 February 2013.

127 Article 24 of Directive 2006/54.

128 Kesonja, D., Šimonović Einwalter, T. (2017), Analysis of case law in anti-discrimination claims before the Croatian courts (*Analiza sudske prakse u postupcima pred hrvatskim sudovima pokrenutima zbog diskriminacije*) CES, p. 20, available at: https://www.cms.hr/system/publication/pdf/104/Analiza_sudske_prakse_u_postupcima_pred_hrvatskim_sudovima_pokrenutima_zbog_diskriminacije.pdf, accessed 25 August 2018.

129 Articles 5-7 of the Pregnant Workers Directive.

situation. The CJEU's decision in *Mahlburg*[130] does not provide a useful answer as the employee concerned had in fact already been transferred.

In **Greece**, private-sector employers often fail to adopt measures for the health and safety of pregnant women, which is in breach of Articles 5-7 of the Pregnant Workers Directive.

In the **United Kingdom**, a study conducted in 2016[131] shows that employers often fail to conduct a risk assessment or to conduct adequate individual risk assessment for pregnant workers and mothers. The impact of the lack of risk assessments or the existence of poor risk assessments was raised as an issue in this study: where risks were not resolved, women reported leaving work to start maternity leave earlier than they wanted to (38 %) or taking sick leave (28 %). One in five (21 000 annually) left their employment as a result.

2.1.10 Maintenance of payment during maternity is complex and ill-enforced

The legal framework relating to the remuneration of workers on maternity leave is complex, involving, on the one hand, the articulation of the principle of equal pay under Article 157 TFEU and the Recast Directive and, on the other hand, the right to be paid an allowance under Article 11 of the Pregnant Workers Directive. The Court of Justice has reviewed this area in a number of cases.[132] The complexity of this area may result in confusion within the domestic systems.

Some countries have imposed conditions on the payment of the maternity allowance. The payment of maternity benefits and/or the payment of lump sums for the birth of a child can be restricted to a continuous period of employment and/or other conditions such as the payment of insurance contributions.

In **Cyprus**, maternity benefit is only paid to insured women who, amongst other conditions, satisfy the contribution conditions over a period of one year. This means that many mothers are excluded from receiving maternity benefits.

In **Belgium**, maternity benefits are provided by the Maternity Insurance Scheme under conditions of a 120-day waiting period of employment and continuous payment of the contributions to the general social security scheme. The condition of a waiting period could give rise to situations in which an employee is entitled to maternity leave (including the 10-week compulsory leave) without receiving any benefit or

130 Case C-207/98 *Silke-Karin Mahlburg v Land Mecklenburg-Vorpommern*. ECLI:EU:C:2000:64. The CJEU confirmed that an employer discriminates against a job applicant even if the applicant concerned could not perform the job initially because she is pregnant. The Court further held that an employer cannot justify treating a pregnant woman less favourably by claiming that he acted with the purpose of protecting the health and safety of the woman concerned.

131 United Kingdom: The Equality and Human Rights Commission / Dept of Business, Innovation and Skills 'Pregnancy and Maternity Related Discrimination and Disadvantage' investigation of March 2016 (EHRC/BIS, 2016), available at: https://www.equalityhumanrights.com/en/managing-pregnancy-and-maternity-workplace/pregnancy-and-maternity-discrimination-research-findings, accessed 16 May 2018 and The Equality Commission in Northern Ireland *Expecting Equality* (2016), available at: https://www.equalityni.org/PregnancyInvestigation, accessed 16 May 2018.

132 See for example: Case C-342/93, *Joan Gillespie and Others v Northern Health and Social Services Boards, Department of Health and Social Services, Eastern Health and Social Services Board and Southern Health and Social Services Board.* ECLI:EU:C:1996:46; Case 411/96 *Margaret Boyle and Others v Equal Opportunities Commission.* ECLI:EU:C:1998:506; Case 66/96 *Handels- og Kontorfunktionærernes Forbund i Danmark, acting on behalf of Berit Høj Pedersen v Fællesforeningen for Danmarks Brugsforeninger and Dansk Tandlægeforening and Kristelig Funktionær-Organisation v Dansk Handel & Service*. ECLI:EU:C:1998:549; Case C-333/97 *Susanne Lewen v Lothar Denda.* ECLI:EU:C:1999:512; Case C-218/98 *Oumar Dabo Abdoulaye E.A. v Regie Nationale des Usines Renault SA.* ECLI:EU:C:1999:424. See generally the European Commission report on the application of 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, Annex to the implementation report of Recast Directive 2006/54, SWD(2013) 512 final.

pay. This situation might be in breach of the Pregnant Workers Directive and could constitutes direct discrimination under Directive 92/85/EEC,[133] as confirmed by the CJEU's decision in *Rosselle*.[134]

In **Italy**, the clause of a collective agreement provided that 'real presence at work' was a criterion for eligibility to receive additional remuneration as an incentive, and did not regard periods of family-related leave – including compulsory maternity leave, parental leave and sick leave – as working time, but the Turin Court of Appeal held that such a clause caused indirect sex discrimination.[135]

In a similar vein, it can be difficult to access paid maternity leave when the worker is already taking unpaid leave of a different type. To qualify for paid maternity leave, in some countries, workers need to be at work. This means that workers who are on unpaid leave need to return to work before being able to qualify for maternity leave. This situation is contrary to EU law.[136] In *Kiiski*,[137] the CJEU held that the requirement that a person works between periods of family-related leave is discriminatory. The case concerned the right to interrupt care leave and start a new period of paid maternity leave. This appears to be a relatively important issue in **Finland** where a number of collective agreements continue to require that the employee returns to work for a period of time following a period of leave before being allowed to take further paid maternity leave. The **Finnish** Supreme Court has confirmed that collective agreements that require employees to return to work between periods of family-related leave in order to qualify for paid maternity leave are discriminatory on the ground of family care responsibilities.[138] The Labour Court has also addressed the similar issue of employees' right to receive pay during maternity leave, when they start maternity leave during or directly after another period of family-related leave.[139] The Labour Court held that such clauses in a collective agreements are void to the extent that they prevent payment of maternity leave to the employee whose maternity leave starts while she is on family-related leave.

The issue also exists in **Spain**, where workers who are on unpaid leave cannot apply for paid maternity leave or paid paternity leave, unemployment or sickness leave.[140] As a consequence, if a child is born during a period of parental leave, such leave does not automatically turn into maternity leave for the mother. She would have to return to work for at least one day in order to apply for, and be granted, maternity leave. The same requirement applies in the case of paternity leave.

The allowance during maternity leave in **Spain** is a social security benefit that consists in a payment equivalent to 100 % of the previous month's social security contribution base.[141] The contribution base of the previous month is usually the same amount as the salary of the previous month, so most workers on maternity leave receive the same amount as they received when they were working. However, this base has a maximum, so highly paid women do not receive 100 % of their previous salaries. A similar situation can be found in the **Netherlands**. As workers in high positions are often under pressure to return to work before the end of the maternity leave, the fact that they do not receive their full salary during maternity leave could represent an additionally deterrent effect.

133 Although it should be noted that Member States are allowed to introduce as a condition for the maternity benefit up to 12 months of previous service under Article 11(4) of Directive 92/85/EEC.

134 Case 65/14 *Charlotte Rosselle v Institut national d'assurance maladie-invalidité (INAMI) and Union nationale des mutualités libres (UNM)* ECLI:EU:C:2015:339. The specific situation disputed in Rosselle has been removed in Belgium by the Royal Decree of 28 October 2016, amending the Royal Decree of 3 August 1996. However, the latent contradiction with EU law remains in existence and can lead to direct discrimination in other potential situations.

135 Italy: Court of Appeal of Turin 10.1.2018.

136 See Case C-320/01 *Wiebke Busch v Klinikum Neustadt GmbH & Co. Betriebs-KG*. ECLI:EU:C:2003:114.

137 Case C-116/06 *Kiiski* ECLI:EU:C:2007:536.

138 Finland: Section 8(1)2 of the Finish Act on Equality prohibits discrimination on such ground, unlike EU law.

139 Finland: Cases TT 2014-17 and TT:2014-115.

140 Spain: Additional Provision 4 of Royal Decree 295/2009, of 6 March 2009, available at: https://www.boe.es/boe/dias/2009/03/21/pdfs/BOE-A-2009-4724.pdf, accessed 26 May 2018.

141 Spain: *Base de cotización*: Article 179 of the General Law of Social Security, available at: https://www.boe.es/buscar/act.php?id=BOE-A-2015-11724, accessed 26 May 2018.

In **Sweden**, the Labour Court[142] has stated that it is permitted to exclude employees on maternity leave from certain bonuses or additional payments that are paid on top of the ordinary wage.[143]

The lack of flexibility in the way that pregnancy and maternity leave is offered can make it difficult to access it in practice. In **Greece**, the Ombudsman has received complaints of permanent state school teachers, who are not granted the possibility to change their daily working time reduction into a paid leave of the same duration (amounting to the total number of hours by which the daily working time would be reduced) and vice versa.

2.1.11 Difficulties in relation to the application of the concept of indirect discrimination

In at least two countries, difficulties have been identified in relation to the concept of indirect discrimination. In **Hungary**, this concept as adopted in the Equality Act is narrower than that of the Recast Directive. Indeed, it requires a 'considerably larger disadvantage'[144] compared to a 'particular disadvantage' as mentioned in Article 2(1)b of Directive 2006/54. Moreover, the exemptions and the test of objective justification provided in Article 7(2) of the **Hungarian** Equality Act make the scope of direct and indirect discrimination narrower than that of Article 2(1)a and b of the Recast Directive.

In **Greece** the concept of indirect discrimination[145] remains unclear to judges and has therefore been absent from case law.

2.1.12 Difficulties in relation to the reversal of the burden of proof[146]

The rules relating to the shift of the burden of proof are found to be relatively complex and not always well implemented into the countries under review.

The rule on the reversal of the burden of proof has been transposed into **Greek** law. In practice, however, the rule is not applied because it has not been incorporated in the procedural codes, where the burden of proof remains on the claimant.[147]

The rules relating to the reversal of the burden of proof are not consistent in the two main anti-discrimination laws in **Croatia**. In one of the laws, a party claiming discrimination only needs to establish a probability that the discrimination occurred ('shall make it plausible that discrimination has taken place'), while the respondent has to prove the opposite with a sufficient degree of certainty. In the other law, by contrast, the burden of proof provision is formulated much more broadly: a party claiming that his/her right has been violated has to present facts that raise the suspicion that discriminatory behaviour has occurred; the burden of proof then shifts to the opposing party who has to prove that there has been no discrimination. The inconsistencies create uncertainties which make it challenging for the Croatian

142 Swedish Labour Court AD 2009 No. 13 and 2009 No. 15.
143 The Swedish Court decision is based on CJEU case law, in particular see Cases C-194/08 *Susanne Gassmayr v Bundesminister für Wissenschaft und Forschung.* ECLI:EU:C:2010:386; C-471/08; *Sanna Maria Parviainen v Finnair Oyj*. ECLI:EU:C:2010:391; and Case C-333/97 *Susanne Lewen v Lothar Denda.* ECLI:EU:C:1999:512.
144 Articles 8 and 9 of the Hungarian Equality Act.
145 Case C-196/02 *Vasiliki Nikoloudi v Organismos Tilepikoinonion Ellados AE*. ECLI:EU:C:2005:141.
146 Article 19 of Recast Directive 2006/54/EC. See also generally, Lilla Farkas and Orlagh O'Farrell, European network of legal experts in gender equality and non-discrimination (2014), *Reversing the burden of proof: Practical dilemmas at the European and national level*, available at: https://www.equalitylaw.eu/downloads/1076-burden-of-proof-en, accessed 19 August 2018.
147 Contrary to Council of State (CS) Opinion 348/2003 on the draft Decree transposing Directive 97/80/EC on the burden of proof in cases of discrimination based on sex, OJ L 14, 20.01.1998, pp. 6-8.

judiciary. Moreover, claimants sometimes reinforce this uncertainty, because they misunderstand the burden of proof rules as not requiring them to offer any facts about discrimination.[148]

In **Poland**, the Labour Code[149] only requires the employer to prove that she/he acted according to objective criteria. This provision, however, does not regulate the evidence status of the employee who feels discriminated against.

In some countries, courts, especially lower courts, still experience difficulties in applying the rule on the burden of proof (**Hungary**, the **Netherlands**, **Poland** and **Slovakia**). In **Hungary** for instance, it is still common for lower-level courts to request claimants to prove the existence of discrimination,[150] requiring the *Kuria* (Supreme Court) to overturn such decisions when appealed.

However, there are also some examples of a good application of the rules on the reversal of the burden of proof in **Croatia** and **Spain**.

The reversal of the burden of proof in matters of health and safety at work in relation to breastfeeding was not applied in **Spain**. Following *Otero Ramos*,[151] where the CJEU held that the reversal of the burden of proof should be applied when the woman presents a *prima face* case of discrimination alleging that the work is incompatible with breastfeeding, Spanish courts are now applying this rule systematically to similar cases as well as other cases.

In **Croatia**, the rules on the burden of proof are being applied more widely than required in Directive 2006/54. The Supreme Court[152] has confirmed that the reversal of the burden of proof applies not only to individual cases but also to cases where there is representative action (as a form of collective redress). Moreover, the **Croatian** Ombudsperson for Gender Equality also applies the reversal of the burden of proof in its proceedings, as it should.

2.1.13 Remedies and sanctions

EU law requires that remedies, sanctions or penalties for the breach of the prohibition of discrimination on the ground of pregnancy and maternity leave should be effective, proportionate and dissuasive.[153] Such remedies as provided by national law are generally compliant with EU law. In some countries, these remedies exceed the requirement set under EU law. In **Greece** for instance, the victims of discrimination, *inter alia*, are entitled to full compensation, including actual damage and loss of earnings as well as moral damages. Once an illegality is established through the traditional procedural rules, the remedies and sanctions are traditionally effective, proportionate and dissuasive. In most cases the claimant is placed in the position in which she/he would have been had the illegal act or omission not occurred (*restitutio in integrum*). In **Latvia**, victims of discrimination are entitled to compensation for moral damage without needing to establish suffering or the employer's intention.[154] In **Norway**, high amounts are awarded in compensation for economic loss and punitive damages.[155]

148 Kesonja, D., Šimonović Einwalter, T. (2017) Analysis of case law in anti-discrimination claims before the Croatian courts (*Analiz a sudske prakse u postupcima pred hrvatskim sudovima pokrenutima zbog diskriminacije*) CES, available at: https://www.cms.hr/system/publication/pdf/104/Analiza_sudske_prakse_u_postupcima_pred_hrvatskim_sudovima_pokrenutima_zbog_diskriminacije.pdf, accessed 25 August 2018.

149 Polish Labour Code, Article 18^{3b}.

150 See for example the Hungarian case Mfv.I.10.630/2014.

151 Case C-531/15 *Elda Otero Ramos v Servicio Galego de Saúde and Instituto Nacional de la Seguridad Social* ECLI:EU:C:2017:789.

152 Croatian Supreme Court: Rev-300/10 – in procedures for protection of the right to equal treatment in accordance with the Anti-Discrimination Act *Zakon o suzbijanju diskriminacije*, Official Gazette *Narodne novine* nos. 85/08 and 112/12.

153 Article 25 of the Recast Directive.

154 Latvia Supreme Court No. SKC-1702/2013 (29 November 2013), point 9, Compilation of the case law of the Supreme Court in employment disputes, 2018, available in Latvian at: http://www.at.gov.lv/lv/judikatura/tiesu-prakses-apkopojumi/civiltiesibas, accessed 26 August 2018.

155 See the Norwegian municipal court cases: TOSLO-2006-52718 (NOK 136 000/Euro 14 413 in economic loss in addition NOK 129 000/Euro 13 671 in non-pecuniary damages and TALTA-2007-74733 (NOK 113 000/Euro 11 775 in economic loss and NOK 100 000/Euro 950 800 in non-pecuniary damages), exchange rate of 0106.

Some difficulties with remedies remain, however, in the **Netherlands**, where non-pecuniary damage can only be awarded if the person has suffered mental injury equivalent to a psychiatric illness.[156] Lighter forms of anguish are not sufficient in this respect. This means that sometimes victims of discrimination are not awarded compensation, because they are unable to prove that they have suffered psychiatric complaints.

Difficulties with remedies also exist in the application of the law. In **Slovakia**, for example, the courts are extremely reluctant to award any financial compensation for victims of discrimination.

In **Hungary**, a woman who had been found to have been discriminated against when she was not awarded an administrative promotion because she took maternity leave, was awarded limited remedies because the court held that she had not suffered from wage reduction.[157]

Remedies in **Poland** are not effective because of the excessive length of the legal proceedings.[158] By the time a legal decision has been taken, the need for leave no longer applies. In addition, in most cases damages do not exceed the statutory minimum provided for in the law.[159] The reasoning of some court judgments furthermore indicates that such damages are associated only with the reimbursement of material loss and fails to recognise the punitive character of the damages, as well as their dissuasive function.[160]
Even if the remedies are compliant with EU law, the level of remedies is not always considered high enough to prevent discrimination (**Belgium** and **Czech Republic**) or adequate to provide an effective remedy to the worker (**Italy** and **Poland**).

2.1.14 Breastfeeding

Directive 92/85/EEC provides for a series of measures to encourage improvements in the safety and health at work of workers who are breastfeeding.[161] However, the Directive does not guarantee the right to a specific period of breastfeeding leave other than the period of maternity leave.[162] Similarly, the protection against dismissal is limited to the time from the beginning of pregnancy until the end of the period of maternity leave and does not include protection on the basis of any separate period for breastfeeding.[163] Nevertheless, many countries have adopted some form of a right to leave, time off, or breaks for breastfeeding.

156 Dutch civil code: Article 6:106(1)(b).
157 Hungary: Visszavontak vezetoi megbizasat, mert gyereke szuletett (Managerial position terminated due to giving birth) (6 June 2018), available at: http://www.egyenlobanasmod.hu/hu/birosagi-dontes/visszavontak-vezetoi-megbizasat-mert-gyermeke-szuletett, accessed 28 August 2018.
158 Polish Law of 17 June 2004 on claims for violation of the right of a party to recognize the case in proceedings prepared, conducted or supervised by a state prosecutor and in court proceedings, without undue delay (JoL 2016.1259). Nevertheless there are very few such cases (in 2017 in all legal matters around 18.000) and damages based on this law are awarded very rarely (about 80 % claims are refused for formal reasons or rejected), available at: http://www.rp.pl/W-sadzie-i-urzedzie/303229980-Coraz-wiecej-skarg-na-zbyt-dlugie-procesy-sadowe.html, and http://www.rp.pl/W-sadzie-i-urzedzie/303229980-Coraz-wiecej-skarg-na-zbyt-dlugie-procesy-sadowe.html, accessed 16 May 2018.
159 Polish Article 18^{3d} Labour Code.
160 There is also a dispute on this issue in the legal literature (see Sanetra, W. (2014), commentary to chapter IIa article 18^{3d} LC [in:] J. Iwulski, W. Sanetra, Kodeks pracy. Komentarz (Labour Code. Commentary); see also: Barzycka Banaszczyk, M. (2017), Odpowiedzialność odszkodowawcza pracodawcy (Liability of employer for damage), C.H. Beck, Warszawa. Worth noting is the Polish Supreme Court judgment of 22 February 2007 (Case No. I PK 242/06). The Supreme Court stated that, when the allegation concerns wage discrimination, in addition to punitive compensation for discrimination agreed on the basis of Article 18^{3d} LC, the employee may also claim compensation, which ought to equal the difference between the wage received and that which should have been received if the principle of equal treatment had not been violated, for the period during which the violation of the right occurred. See also ruling of the Supreme Court of 7 January 2009 (Case No. III PK 43/2008, LexPolonica No. 2162070).
161 Articles 4(1), 5 and 6(2) of the Pregnant Workers Directive.
162 It is worth noting that the right to breastfeeding leave is considered under Article 8(3) of the European Social Charter. However, the European Social Charter is not legally binding and therefore it is deemed too weak to encourage Member States to adopt such aspect of protection of maternity.
163 Article 10 of the Pregnant Workers Directive. See also Case C-177/88 *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum)* Plus. ECLI:EU:C:1990:383.

Hungary does not provide for a period of breastfeeding breaks. In fact, breastfeeding is not defined by **Hungarian** law.

However, many countries provide specific provisions guaranteeing breastfeeding breaks and prohibiting discrimination based on breastfeeding (**Bulgaria**, **Cyprus**, **Croatia**, **Italy**, **Spain** and **Norway**). In **Cyprus**, although new legal developments are welcome, they need to be supplemented by information campaigns to guarantee the effective implementation of the rights.[164] The **Dutch** context shows that rights on paper are often difficult to realise in practice; for example, when appropriate facilities are lacking.

Where breastfeeding rest/breaks exist, they are usually for one (**Cyprus**) or two hours daily (**Bulgaria**, **Croatia** and **Italy**). In **Norway**, the law provides for a minimum of one hour per day, which means that the break can be longer depending on the needs of the child.[165] In **Cyprus**, workers are guaranteed a one-hour daily work break to breastfeed or pump and store breast milk at work for a period of nine months from the birth or adoption of the child[166] and employers must provide facilities for breast milk to be stored at work.

Bulgaria provides for the protection of breastfeeding workers against discrimination[167] and a paid leave of up to 2 hours per day for breastfeeding a child until 8 months. A leave of up to 1 hour per day can be granted until the child turns 2 if prescribed by the health authorities.[168] Increased time for breastfeeding of up to 3 hours can be granted to mothers of twins or a premature baby. The leave is not restricted to breastfeeding as it can also be used by the adoptive mother or the stepmother of a baby. These types of leave are fully paid by the employer.

In **Croatia**, a breastfeeding break is one of the rights guaranteed to breastfeeding mothers until the child turns 1,[169] in duration of 2 hours per day (either once or twice per day). Research by the Ombudsperson for Gender Equality from 2015[170] shows that only a very small share of women uses this right (160 women in 2015), while the majority of participants (70 %) uses this right at home. 41 % of participants in the research revealed that they are not even aware of the existence of such right, which probably explains its low usage.

In **Italy**, daily breastfeeding breaks for working mothers can be granted during the first year of the child, two rest periods of an hour each, which may be added up and taken during the working day (doubled for multiple births). Rest periods are granted to fathers when children are under their exclusive custody, as alternative to the working mother, when the mother is not employed, or when the mother dies or falls seriously ill.[171] Such differential treatment could potentially represent a form of direct sex discrimination, unless it is justified on the ground of natural breastfeeding, which would be unique to women.

In **Luxembourg**, daily breastfeeding breaks for working mothers can be granted as two rest periods of 45 minutes each, at the beginning and at the end of the working day. On certain conditions, there may be one single daily breastfeeding break of 90 minutes. Breastfeeding breaks are considered as working time and the mother is entitled to the normal wage.

164 For more details from the Ombudsman see: http://www.ombudsman.gov.cy/Ombudsman/Ombudsman.nsf/All/4340B2B512D8003FC22582960028F673/$file/%CE%A4%CE%BF%CF%80%CE%BF%CE%B8_3-18_21052018.pdf?OpenElement, accessed 28 August 2018.
165 Norway: WEA Section 12-8.
166 Article 5 of Cypriot Law 21 (I)/2018 regarding the Promotion and the Protection of Breastfeeding.
167 Article 166 of the Bulgarian Labour Code.
168 Article 163 paragraph 3 of the Bulgarian Labour Code.
169 Article 19 of the Croatian Act on Maternity and Parental Benefits.
170 Ombudsperson for Gender Equality (2015) Use of breastfeeding break (Korištenje prava na stanku za dojenje djeteta), available at http://www.prs.hr/attachments/article/1987/Istra%C5%BEivanje%20o%20kori%C5%A1tenju%20prava%20na%20stanku%20za%20dojenje%20djeteta,%202015.pdf.
171 Italy: Article 39-41 Decree No. 151/2001.

Spain also guarantees a right to breastfeeding leave, which is in fact a general right to time off for new parents of babies under the age of 9 months. However, in practice, there is no specific measure designed to promote and facilitate the breastfeeding of working mothers.

Breastfeeding is protected outside the workplace in **Cyprus** where criminal legislation[172] was adopted to protect breastfeeding mothers against threat and public abuse.

Discrimination of breastfeeding mothers in public places and in restaurants and other places where goods and services are offered is widespread and a serious problem in **Germany**. Instead of enforcing the legislation against discrimination in access to and the provision of goods and services, to solve this problem the respective authorities try to promote a non-discriminatory environment and proudly present lists of the few local providers that do not discriminate. In **Belgium**, Bianca Debaets, Minister of Equal Opportunities in the Brussels-Capital Region, has launched a campaign to encourage breastfeeding by granting a 'sticker' to cafés welcoming breastfeeding mothers.

2.2 Parental leave and adoption leave

In most countries, the legal protection against discrimination and unfavourable treatment based on parental and adoption leave is the same as that for pregnancy and maternity leave. This means that the difficulties regarding enforcement are likely to be similar.

2.2.1 Legal implementation of the prohibition against discrimination and unfavourable treatment

Some countries have no specific formal legal provision prohibiting the discrimination or unfavourable treatment of workers on the grounds of either adoption leave or parental leave (, **Belgium**, **Germany**, **Lithuania** and **Poland**). In **Austria**, although pregnant workers and breastfeeding mothers are protected by equal treatment legislation, there is no specific discrimination prohibition in the relevant leave legislation. In cases of discrimination or unfavourable treatment based on the use of parental or adoption leave, the claimant would have to rely on the general sex discrimination provisions. Although such national law would be compliant with Clause 5(4) of the Parental Leave Directive, this is not specific enough. Ultimately, this means that the protection is not visible enough and that it is more difficult for individuals to identify the discrimination and therefore to fight it. In **Austria**, workers who take up parental leave or adoption leave and who claim to have been discriminated against or treated unfavourably for this specific reason would have to demonstrate that there is a connection between their sex and the motive for a discriminatory decision by the employer.[173] In addition, the rule of the reversal of the burden of proof does not apply in Austria to cases of discrimination and unfavourable treatment based on parental leave and adoption leave, which could potentially represent a breach of EU law if indirect discrimination was at stake. The proposed Directive on Work-Life Balance would contribute to remedying such gap.[174] The lack of explicit prohibition of discrimination or unfavourable treatment due to taking parental leave and adoption leave might represent an obstacle when trying to enforce such a prohibition.

Enforcement of the protection against discrimination and unfavourable treatment based on parental and adoption leave can be hindered because the leave itself is not guaranteed for some individuals. In **Poland**, fathers do not have an individual right to parental leave, because their access to this right depends on the right of the mother. This represents a breach of Clause 2 of the Framework Agreement on parental leave attached to the Parental Leave Directive, which provides that parental leave is an individual right.

172 Article 99B – amending Cypriot Law 24(I)/2018.

173 Austria: OGH 25.10.2011, 9 ObA 78/11b, available at: https://www.ris.bka.gv.at/Dokumente/Justiz/JJT_20111025_OGH0002_009OBA00078_11B0000_000/JJT_20111025_OGH0002_009OBA00078_11B0000_000.pdf, accessed 16 June 2018.

174 See Articles 11 and 12 of the Proposed Directive on work-life balance COM (2017) 253.

Where there is a formal legal prohibition of discrimination and unfavourable treatment on the ground of parental and adoption leave, the conditions of application of the prohibition may sometimes create difficulties in the enforcement of the right involved.

Legal justification of differential treatment might exist in the law. For example, in **Sweden**, although parental leave is protected at the same level as maternity leave,[175] the Swedish Parental Leave Act, in some cases, allows an employer to treat a worker less favourably because of his or her parental leave. This is the case when the less favourable treatment can be seen as a *necessary consequence* of the parental leave. For example, in some special cases, an employee who wants to take leave on a part-time basis must accept being transferred for the duration of the leave, if this is necessary for the organisation. A need for such temporary reassignment may arise if the employee normally works in shifts, as the agreed working hours are the basis for the organisation.[176]

In **Belgium** and **Greece**, the transposition of the rights to parental leave and adoption leave are unclear and complex. In turn, this leads to difficult implementation and legal uncertainty. The rules related to parental leave and adoption leave in **Greece** appear to be not only complex but also unequal, fragmented, scattered, and modified frequently and unexpectedly. This means that many workers are unable to access these rights.

2.2.2 Personal scope[177]

Clause 1(2) of the Parental Leave Directive applies to male and female workers, who have an employment contract or employment relationship as defined by the law, collective agreements and/or practice in force in each Member State. Although Clause 1(3) warns that part-time status, fixed-term contract or contract through temporary agency are not good grounds for excluding workers from the scope of the Directive, it nevertheless remains that the application of the Directive is linked to the existence of a contract of employment defined under national law. Access to parental leave is therefore not universal and can be restricted to some conditions set under national law.

In the **United Kingdom**, for example, parental leave is only available to employees with one year's qualifying service. In **Luxembourg**, parents are entitled to parental leave only if they have been affiliated with the social security scheme for at least 12 continuous months.

Since 2009, **Hungarian** labour law has recognised a special category of fixed-term employment entitled 'simplified employment'[178] to which the parental leave regulations do not apply. Simplified employment covers agricultural and touristic seasonal work and short-term fixed-term contracts, whose length must not exceed 120 days per calendar year.

In the **United Kingdom**, parental leave can be postponed for reasons relating to the business. In the **Netherlands**, parental leave can be refused because it creates difficulty for the business. Most cases on parental leave concern the question of whether the objections of an employer against parental leave qualify as serious business reasons as meant in the law and can as such restrict the right to parental leave. The courts usually take a critical stance towards business objections raised by employers.[179]

175 Swedish Parental Leave Act (1995:548).
176 Swedish Government White Paper Ds 2005:15, 108.
177 Clause 1(2) and (3) of the Parental Leave Directive.
178 The first Hungarian regulation related to this issue was Act CLII of 2009, which was replaced by Act LXXV of 2010.
179 See further Dutch literature on the case law on refusing or granting parental leave: Stekelenburg, A.A. (2011), 'Het belang van de werknemer om ouderschapsverlof op te nemen en het zwaarwegend bedrijfs- of dienstbelang van de werkgever' (The interest of the employee in taking up parental leave and the serious business or organisational interests of the employer), *TAP* 2011(4); Van Leeuwen, C. (2013), 'Het zwaarwegend bedrijfs- of dienstbelang in de Wet aanpassing arbeidsduur: hoeveel gewicht legt een vergelijkbare ouderschapsverlofperiode in de schaal bij een verzoek om vermindering van de arbeidsduur?' (The serious business or organisational interest in the Working Hours Amendment Act: what is the importance of a comparable period of parental leave for a request for reduction of working hours?), *ArbeidsRecht* 2013(6/7), 36.

2.2.3 The period of parental leave counts as service time

In some countries, the period of parental leave is not taken into account in relation to the calculation of certain rights and benefits deriving from the employment contract. In **Greece**, the 4-month parental leave of substitute teachers is neither taken into account as service time for the calculation of annual leave and wages[180] nor in the ranking in the evaluation lists which counts towards promotion.[181] A similar situation existed in **Croatia** for police officers. However, upon recommendation from the Ombudsperson for Gender Equality, the Ministry of Interior allowed the time spent on pregnancy-related sick leave, maternity/parental leave to be included in the period required for the promotion of civil servants employed by the Ministry of Interior. In **Germany**, the process of acquiring certain rights can be suspended during parental leave. This would not be considered by German courts to constitute indirect sex discrimination or if it did it could be objectively justified by the lack of work experience of parents who had taken parental leave.[182] However, the Federal Labour Court held that disadvantages which go beyond the consequences of the suspension of the employment relationship due to taking parental leave are prohibited as discriminatory.[183] It has been recommended that a provision should be adopted to guarantee any entitlements obtained before taking the leave.[184]

Moreover, in 2018, the **German** Administrative Court of Schleswig-Holstein decided that an employer who does not consider a female applicant who is on parental leave when filling a promotion vacancy does not constitute discrimination.[185] Although it was recognised that like pregnancy and maternity, parental leave must not be detrimental to recruitment and career advancement within the civil service, the court held that the timely filling of a position is a compelling factual reason which justifies the failure to consider a female applicant who is on parental leave. This decision represents a breach of EU law, as the behaviour of the employer should be classified as direct sex discrimination contrary to Clause 5(4) of the Parental Leave Directive and the CJEU decision in *Napoli*.[186]

In the **Czech Republic** and at least until recently in **Lithuania**, academics working at universities or State Scientific Councils are identified as a group that experiences discrimination because parental-leave periods are excluded from the qualification periods of researchers, which allows them not to produce scientific publications during the leave. Periods of parental leave are therefore not counted towards services for the purpose of promotion.
In contrast, in **Finland**, the Labour Court held that a collective agreement which accepted periods of military services as time during which the experience-based pay increase accrued, but not periods of maternity and parental leave, caused indirect sex discrimination. The clause that prevented taking maternity and parental leave into account as relevant for experience-based pay increase was therefore declared void. This is particularly interesting in the light of the CJEU decision in Österreichischer Gewerkschaftsbund,[187] which is nevertheless limited because the case only compares military service and parental leave.[188]

180 Greek Ombudsman's Annual Report 2017 pp. 203-204.
181 Greek Ombudsman's Annual Report 2017 pp. 203-204.
182 The following decisions concerned full-time parental leave in Germany: Federal Labour Court, judgment of 21 November 2013, 6 AZR 89/12, and judgment of 27 January 2011, 6 AZR 526/09; State Labour Court of Baden-Württemberg, judgment of 17 June 2009, 12 Sa 8/09; Labour Court of Heilbronn, judgment of 3 April 2007, 5 Ca 12/07.
183 Federal Labour Court, judgment of 12 April 2016, 6 AZR 731/13, http://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=en&nr=18716.
184 Germany: Bundesministerium für Familie, Senioren, Frauen und Jugend (2017) *Zweiter Gleichstellungsbericht der Bundesregierung* (Second Equality Report of the Federal Government), pp. 120-121, available under https://www.gleichstellungsbericht.de/, accessed 26 August 2018.
185 German Administrative Court of Schleswig-Holstein, judgment of 19 February 2018, 12 B 39/17.
186 Case 595/12, *Loredana Napoli v Ministero della Giustizia – Dipartimento dell'Amministrazione penitenziaria* ECLI:EU:C:2014:128.
187 Case C328/13 *Österreichischer Gewerkschaftsbund v Wirtschaftskammer Österreich* – Fachverband Autobus-, Luftfahrt- und Schifffahrtsunternehmungen. ECLI:EU:C:2014:2197.
188 See also Case C-313/02 *Nicole Wippel v Peek & Cloppenburg GmbH & Co. KG*. ECLI:EU:C:2004:308.

2.2.4 Payment during parental leave

The payment of workers during the period of parental leave is not guaranteed by the Parental Leave Directive. However, Clause 5(2) guarantees that acquired rights are to be maintained during the leave.[189] This leads to issues in relation to entitlement to bonuses in some Member States.

In **Belgium**, various collective agreements make entitlement to a Christmas bonus conditional on the employee's effective performance of his/her duties during the entire year, without regard to adoption leave or parental leave or, indeed, maternity leave as periods of effective work. Some remedy could be found through interpretation of the existing legal provisions in conformity with EU law, but the lack of any relevant case law suggests that workers and legal practitioners are not even aware of the issue.[190]

In **Italy**, although periods of parental leave count towards the length of service, they do not count as regards paid or unpaid holidays and Christmas bonuses.[191] Moreover, **Italy** does not have an explicit provision to guarantee that all rights acquired or in the process of being acquired by the worker on the date on which parental leave starts are maintained as they stand until the end of the parental leave.

In **Latvia**, a study conducted by the Ombudsperson's Office[192] reveals that only a minority of employers provides private health insurance to employees, and that when it is provided it excludes pregnancy and childbirth services.[193] Statutory social insurance grants a parental allowance for parents who remain employed on a part-time basis (in a smaller amount than for those taking full-time leave).[194] An increasing number of fathers use the right to receive such allowance. However, in reality many fathers remain in full-time employment while mothers are providing full-time care. As a result, these mothers during such parenting periods lose their rights to social insurance.[195]

In addition, payment during maternity leave and parental leave, especially when women take consecutive periods of maternity leave and parental leave, may often result in the payment of benefits that are lower than if the woman had not used consecutive periods of leave in **Croatia**. The Croatian Health Insurance Institute calculates the amount of benefit as a percentage of previous benefits received, whereas the law states that the calculation is based on the average salary during the six months prior to taking the leave. The Croatian Ombudsperson for Gender Equality highlights that the information related to the right to be paid during parental leave is not easily accessible and that the interpretation of the law goes towards restricting access to payment.[196]

Also, the provisions related to adoption leave are not always fully implemented, requiring national law to be amended in stages. In **Bulgaria**, the law related to adoption leave was amended in 2018 following a case decided by the Commission for Protection from Discrimination in 2017. An adoptive mother of a 7-month-old baby complained that the long period of paid leave for adoptive mothers did not cover

189 See the relevant case law of the CJEU on this issue: Cases C-116/08 *Christel Meerts v Proost NV*. ECLI:EU:C:2009:645 and C-537/07 *Evangelina Gómez-Limón Sánchez-Camacho v Instituto Nacional de la Seguridad Social (INSS), Tesorería General de la Seguridad Social (TGSS) and Alcampo SA*. ECLI:EU:C:2009:462.

190 See Jacqmain J. (2014), 'Case note on Labour Court of Appeal in Brussels, judgment of 12 March 2013' *Chroniques de droit social*, p. 414 (a case of dismissal of a pregnant employee, which entailed the loss of a yearly bonus). See also Case C-333/97 *Susanne Lewen v Lothar Denda*. ECLI:EU:C:1999:512.

191 Art. 34 Decree No. 151/2001.

192 Latvian Ombudsperson, Annual Report 2017, pp. 241-244, available in Latvian at: http://www.tiesibsargs.lv/uploads/content/lapas/tiesibsarga_2017_gada_zinojums_1520515340.pdf, accessed 26 August 2018.

193 Pregnancy and child-birth services in general are covered by the State, but the privilege of private health insurance is that the same services might be provided with higher comfort (access to private medical sector, single room at a hospital).

194 Latvia: Article 10^4(2) of the Law on Maternity and Sickness Insurance (*Likums Par maternitātes un slimības apdrošināšanu*), Official Gazette No. 182, 23 November 1995, respective amendments Official Gazette No. 228, 22 November 2013.

195 Latvia: Cabinet of Ministers Regulation No. 230 'Regulation on mandatory state social insurance contributions from the state budget and statutory social insurance budget' (*Noteikumi par valsts sociālās apdrošināšanas obligātajām iemaksām no valsts pamatbudžeta un valsts sociālās apdrošināšanas speciālajiem budžetiem*), Official Gazette No. 91, 30 June 2001.

196 See the Croatian Ombudsperson for Gender Equality (2018), Annual Report for 2017, pp. 72-78, available at: http://www.prs.hr/attachments/article/2404/IZVJE%C5%A0%C4%86E_O_RADU_ZA_2017.pdf, accessed 25 August 2018.

children under the age of two. The Commission found that this was a case of indirect *discrimination based on age* vis-à-vis the child.[197]

2.2.5 Right to return to the same job[198]

The right to return to the same job has not been fully implemented in some countries (**Germany**, **Poland** and **Sweden**).

The **German** Federal Statute on Parental Leave and Parental Allowances does not explicitly cover the right to return to the former job or to an equivalent post,[199] which violates Directive 2010/18.

Dutch law does not include a formal provision that guarantees the right of an employee to return to his/her job or an equivalent job after adoption or parental leave. However, it is generally accepted that not allowing an employee to return to the same or equivalent job would constitute unfavourable treatment.[200]

In **Sweden**, employees in fixed-term employment are entitled to take parental leave. However, if the fixed-term employment ends during parental leave, they cannot make use of the right to return to work.

In contrast, the Supreme Court of the Republic of **Croatia**[201] held that the right to return to the same or equivalent post is violated when the employer hires another worker on an open-ended contract to replace the worker on maternity/parental leave and dismisses the employee when she returns to work.

2.2.6 Flexibility of parental leave

Parental-leave provisions are seen as too rigid and the process to access the right to parental leave is considered to be too complex in some countries (**Croatia**, **Estonia**, **Finland**, **Germany**, **Hungary**, **Spain** and the **United Kingdom**). The rigidity of the rules regarding access to parental leave means that parents are not always able to take the leave when they want or on a part-time basis. In addition, the regulations in order to allow both parents to take the leave are often complex. This means that the rights are not used or that they are disproportionately used by women compared to men.

In **Estonia** legal amendments were adopted in 2017 and 2018 with gradual implementation in order to introduce some flexibility within parental leave. While parental leave (36 months, of which 18 months are fully paid) is available to mothers and fathers, the rule predating the amendments required that only one parent at a time could take the leave and that it could not be taken on a part-time basis. These two requirements are being removed from the law.

Similarly, in **Finland**, juggling the various types of parental leave and other care leave is cumbersome. Parental leave has an income-related benefit but of a relatively short duration (158 weekdays), while care leave is available to parents until the child is three years old, covered only by a flat-rate benefit. Care leave is often used after parental leave. Fathers seldom take home-care leave, but may want to use their right to income-related leave that is earmarked for fathers. When this happens, mothers need to return to work for a relatively short period while the father uses his right, before going on home-care leave. Both parents and employers find this requirement cumbersome.

197 See also Case C-149/10 *Zoi Chatzi v Ipourgos Ikonomikon*. ECLI:EU:C:2010:407.
198 Clause 5(1) of the Parental Leave Directive: 'At the end of parental leave, workers shall have the right to return to the same job or, if that is not possible, to an equivalent or similar job consistent with their employment contract or employment relationship.'
199 See Nassibi, G. et al. (2012), 'Geschlechtergleichstellung durch Arbeitszeitsouveränität' (Gender Equality and Working Time Sovereignty), *Zeitschrift des Deutschen Juristinnenbundes*, pp. 111-116.
200 See Case C-252/13 *European Commission v Kingdom of the Netherlands*. ECLI:EU:C:2014:2312.
201 Croatia: Revr-1150/12.

In the **United Kingdom**, parental leave lacks flexibility as it must be taken in blocks of one week[202] and can be postponed by the employer for up to six months if they have a good business reason.[203]

In **Croatia**, there is a similar lack of flexibility. Parents who already have the recognised status of parent or caretaker for a disabled child and who have another child, miss out on one of the types of leave. When they take maternity or parental leave, their status as a parent or caretaker is discontinued during maternity/parental leave as the two types of leave cannot be cumulated.

Until October 2018, neither the regulations on parental leave nor those on carers' leave contained rules for an adjustment of employment relationships in the re-entry situation in **Germany**.[204] There had only been a statutory entitlement to reduce working time but not to return to full-time, or to extend part-time work. Thus, caring employees could (and still can) work part-time during parental or carers leave but they had no statutory right to return to full-time work after the leave. On 18 October 2018, however, the Law on the Further Development of Part-Time Work Regulations was adopted by the Federal Parliament.[205] Entering into force on 1 January 2019, the law provides for a statutory entitlement to fixed-term part-time work, specifically covering a statutory entitlement to return to full-time work after having reduced working time to part-time work for a certain period. The entitlement to so-called 'bridge part-time work' applies to enterprises with at least 45 employees. After at least six months working for such an employer, an employee can demand for a fixed-term reduction of the working time for a duration between one and five years. After this period, the employee returns to the former working time, meaning full-time work or remains on part-time work but with more hours. The employee is not entitled to work for more hours per week than before but can only return to the former working hours. The so-called 'bridge part-time work' is a great success but cannot solve the problems of female employees involuntarily working part-time before any wish to take family or carers leave is in sight.

In **Italy**, workers returning from parental leave are not entitled to change their working hours and/or work patterns for a set period of time based on the leave or their situation as parents. In addition, employers are not obliged to consider and respond to requests for flexible working arrangements. However, Clause 6(1) of the Parental Leave Directive is probably complied with in practice, because during the leave period employers and employees can, if necessary, make arrangements for appropriate reintegration measures, taking into account the provision of collective agreements.[206] Such arrangements might include working-time patterns.

In **Latvia**, many mothers say that after returning from parental leave they faced problems combining work and family obligations.[207]

Periods of parental leave are also in conflict at times when the employers desire to have a flexible workforce. This was illustrated in a decision from the **Dutch** equality body,[208] in a case where a woman was not given an employment agreement because she planned to take parental leave after her pregnancy leave and therefore could not meet the wish of the employer that she would work flexible hours. The

202 See *Rodway v South West trains* [2005] IRLR 583: the UK Employment Appeal Tribunal held that under the statutory parental leave scheme, leave could only be taken in blocks of one week, and that an employee who was disciplined for taking parental leave of one day without permission had not suffered a detriment under Section 47C of Employment Relations Act 1996.

203 UK: Women and Equalities Committee (2018) *Fathers and the Workplace Report*: the reasons for the poor take-up of parental leave is explained by the overly cumbersome and complex nature of the provision; the narrative of it being a 'maternal transfer' (i.e. taking of leave that belongs to the mother); and the lack of awareness of the right and low rate of pay.

204 Germany: Bundesministerium für Familie, Senioren, Frauen und Jugend (2017) *Zweiter Gleichstellungsbericht der Bundesregierung* (Second Equality Report of the Federal Government), p. 103, available at: https://www.gleichstellungsbericht.de/, accessed 26 August 2018.

205 For further information see https://www.bmas.de/DE/Schwerpunkte/Brueckenteilzeit/brueckenteilzeit.html.

206 Italy: Article 32 of Decree No. 151/2001.

207 Latvian Ombudsperson Annual Report 2017, pp. 241-244, available in Latvian at: http://www.tiesibsargs.lv/uploads/content/lapas/tiesibsarga_2017_gada_zinojums_1520515340.pdf, accessed 26 August 2018.

208 Dutch Equality Body Opinion 2013-29.

equality body ruled that this constituted indirect discrimination on the ground of sex, since parental leave is mainly taken by women.

Although both parents have an individual right to take parental leave in **Hungary**, only one of them is entitled to social security payments and *only mothers* are entitled to job protection, if both parents were to take parental leave.[209]

In **Spain**, the 2012 law reform[210] caused a decrease in employees' autonomy in relation to working time while at the same time increasing employers' powers to change terms and conditions of employment. The law also provides a wider role for collective agreements to include conditions for flexible working arrangements. Arguably, this reform has contributed to an increase in the vulnerability of workers with care responsibilities.

2.2.7 Enforcement in courts

Despite the existence of formal law prohibiting discrimination and unfavourable treatment based on parental leave, in practice the law is frequently violated. However, few cases are taken to court. In a number of countries, there is no case law whatsoever (**Czech Republic**, **Liechtenstein**, **Lithuania** and **Luxembourg**) or only a few cases (**Denmark**, **Ireland**, **Italy**, **Latvia**, **Portugal** and **Slovakia**) on the enforcement of the provisions regarding of parental leave and adoption leave. In **Italy** for instance, the few cases relating to the enforcement of parental leave concern the relationship between the leave and the employer's organisation. Such issues include, for example, the refusal to allow parental leave to be divided into small fractions because it would not be compatible with the employer's organisation[211]

However, in **Portugal**, discrimination and unfavourable treatment on the ground of parental leave are closely monitored by the labour inspectorate and the two national equality bodies that play an active role in monitoring and granting the practical enforcement on non-discrimination provisions.[212]

2.2.8 Sanctions and remedies

As is true for pregnancy and maternity, the remedies and sanctions for the breach of the protection against discrimination and unfavourable treatment based on parental leave is generally considered to be insufficient and ineffective.

In **Spain** and **Ireland**, there are no effective remedies.

In **Spain**, effective reparation for damages is not properly guaranteed because the right to 'any' compensation was denied to a worker that had the right to a working-time reduction because of family reasons that she could not actually use, since by that time the child was too old for that. For instance, in *Garcia Mateos v Spain*, the European Court of Human Rights established that Spain had to pay EUR 16 000 in compensation for damages to the worker who was unable to benefit from parental leave because Spanish judges did not recognize the right to a compensation for damages when the right, that had been recognized in a judgment, could not be claimed given the age of the child.[213]

209 Article 65 (3) c and 66 (6) of the Hungarian Labour Code.
210 Spanish Law 3/2012 of 6 July 2012 on Urgent Measures for the Reform of the Labour Market, available at: https://www.boe.es/buscar/act.php?id=BOE-A-2012-9110, accessed 27 May 2018.
211 Tribunal of Trieste, 13-07-2007. This decision is contrary to the Constitutional Court ruling that organization cannot interfere with the enjoyment of parental leave, as this is specifically targeted to children care (*C. Stato, sez. VI, 08-05-2008, n. 2112; C. Stato, sez. VI, 25-06-2007, n. 3564*). Such decision was confirmed by the Court of Cassation, which held that parental leave is aimed to support the care of children (*Cass. civ., sez. lav., 16-06-2008, n. 16207*).
212 See Section 5.1 on national equality bodies below.
213 Judgment of the European Court of Human Rights of 19 February 2013, application number 38285/09, available at: http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-116739, accessed 27 May 2018.

In **Ireland**, the breach of the protection against discrimination or unfavourable treatment based on parental or adoption leave may bring an award of compensation of up to 20 weeks' remuneration.[214] However, this represents a poor level of compensation compared to the award of up to two years' compensation if the employee instead brought such a claim under employment equality legislation.

2.2.9 The gender effect of parental leave

The take-up of parental leave by fathers across all of the countries under review is relatively low. Reasons put forward to explain the disproportionately low number of fathers taking parental leave include: discrimination (perceived and real), structural organisation of society (men often remain the main breadwinner), the persistent gender pay gap, the non-existent or low level of payment during the period of parental leave, and gender stereotypes (women continue to be seen as the primary caretaker).

In **Greece**, the take-up of parental leave by fathers employed in the private sector is less than 10 % and has further decreased after 2008 due to growing job insecurity, the non-existent income substitution (parental leave is unpaid in the private sector) and the structure of the Greek economy, dominated by very small enterprises. The take-up of parental leave by fathers corresponds only to 1.9-6 % of the parental leave taken by women.[215]

In **Estonia**, vertical gender segregation of the labour market together with gender-role expectations and gender stereotypes means that few men take parental leave. In 2016, only 9 % of the fathers had used parental leave.

In **Bulgaria**, 44 % of the fathers take parental leave.[216] Although they are entitled to take the leave at any point until the child is six years old, only a very small number of fathers take parental leave after the child is six months old.[217] Many fathers believe that parental leave impacts negatively on their career. In contrast, the 15-day paid paternity leave is taken more often by fathers.

In **France**, parental leave is usually taken by the parent who has the lower salary, generally the mother because of the structure of the allowance, which is a flat rate but varies according to the number of children in the family. In the majority of cases parental leave is taken by mothers, but a trend towards an increase of fathers taking parental leave is slowly emerging.[218] However, this trend is restrained because parental leave is not compulsory for men, which means that many choose not to take this leave because fathers often fear for their job when they take such leave. Provisions that would make parental leave compulsory for men or would at the least encourage men to take the leave and financial incentives are more likely to lead to a better distribution of the take-up of parental leave across genders.

To encourage fathers to take parental leave, **Italy** has increased the maximum total length of the leave from ten to eleven months if the father uses at least three months. In **Norway,** the father's part of the parental leave (15 weeks) is lost if the father does not take parental leave. The father's part of the leave cannot be transferred to the mother, unless it is a case of *force majeure* such as serious sickness making

214 The Irish Parental Leave Act 1998 (as amended) and Adoptive Leave Act 1995 (as amended). In the event of a dismissal, there may be an order of reinstatement or re-engagement or up to two years' remuneration under the Unfair Dismissals Act 1977.

215 Alipranti-Maratou Laoura, Katsis Athanassios, Papadimitriou Pyrros, (2016) '(Un)balance between work and personal life – A quantitative research in Greece at crisis', Family and Childcare Centre, Athens.

216 The figure takes into account the take up of paternity leave.

217 Bulgarian Network (2016) 'To be a father' (Mencare-Bulgaria).

218 A survey of the French National Institute of Statistics in June 2013 showed that more than 50 % mothers of children under eight stopped working or had temporarily reduced their working time. Only 12 % of fathers had changed their working time beyond their paternity leave. The letter from the National Observatory on Early Childhood, led by the National Family Allowance Fund (CNAF), however, shows a spectacular increase in percentage (52 % compared to 2014) but low in volume (1 480 fathers in 2015, compared to 970 in 2014), of the number of fathers of children under 3 covered by the allowance. The proportion of fathers covered by these benefits corresponding to parental leave has thus increased from 3.3 % in 2014 to 5.1 % in 2015.

the father unable to provide care. As a result, more than 90 percent of all fathers take parental leave, and mothers and employers have been trained to accept that it is as normal for men to take parental leave as it is for women. The fact remains however, that women still take the remainder of the period of parental leave that is not reserved to the father.

In 2017 **Luxembourg** introduced a completely new system.[219] It grants an income-related benefit to the recipient, replacing a lump-sum regime. Its lower limit is equal to the social minimum wage for non-qualified workers and its upper limit is equal to the social minimum wage increased by two thirds. The aim of the reform was to remove any financial disadvantage for employees with wages between these limits. Statistics show that requests for parental leave have raised by 70 % and that fathers represent 44 % of the recipients in 2017 against 25 % in 2016 (under the former regime).

The low take-up of parental leave by fathers is also explained by the fact that fathers face discrimination and less favourable treatment. In some cases, fathers are treated less favourably than mothers when it comes to parental leave (**Austria**, **Greece**, the **Netherlands**). The **Austrian** Senate 1 of the Equal Treatment Commission for the Private Sector regularly states that adverse effects of paternity leave and of parental leave taken by fathers constitute gender-based discrimination.[220] In the **Netherlands**, many employees are reluctant to claim parental leave because it might influence their job position. This is especially an issue for men.

In some countries, mothers are treated less favourably than fathers when they take parental leave. In particular, paid parental leave can result in disparate compensation for fathers and mothers. In **Bulgaria**, for instance, fathers receive on average 30 % more compensation than mothers when taking parental leave.[221]

2.2.10 Impact on employers

Parental leave is reported to affect businesses negatively because it takes employees away from work for periods of time that are considered too long (**Ireland** and **Italy**). In turn, the negative view of parental leave by some businesses contributes to increase discrimination.

Italy has adopted measures to reduce the negative effects of parental leave on the organisation or business. Employers can offer fixed-term contracts, by way of exception from the regulation on employment law. Such fixed-term contracts can start one month before the parental leave begins (or longer if provided by collective bargaining), so that the worker going on leave can train the employee who will replace the employee. In addition, small companies (employing fewer than 20 workers) are granted a 50 % reduction in contributions for the recruitment of persons replacing workers on parental leave.[222]

2.2.11 Adoption leave

In most countries, adoption leave is shorter than parental leave and a complimentary leave to parental leave. In **Estonia** for instance, the period of adoption leave is only 70 days from the date of entry into force of the court judgment approving the adoption when the adopted child is under ten. If there is a specific adoption leave, parental leave is also available, in addition to adoption leave. Where adoption leave is available it is protected at least at the same level and under the same conditions as parental

219 Law of 3 November 2016 on parental leave, Memorial A N°224 of 10 November 2016 p. 4202. http://data.legilux.public.lu/file/eli-etat-leg-memorial-2016-224-fr-pdf.pdf.

220 E.g. in a case concerning the termination of an employment after a period of family leave taken by a father in Austria, available at: https://www.bmgf.gv.at/cms/home/attachments/9/2/7/CH1603/CMS1467724043653/beendigung_des_arbeitsverhaeltnisses_vaeterkarenz_gbk_i_618_15.pdf, accessed 26 June 2018.

221 Statistical information from the National insurance (2016) available at: https://www.dnes.bg/obshtestvo/2018/03/01/u-doma-s-bebeto-395-tatkovci-v-bashtinstvo-vzimat-poveche-ot-maikite.369390, accessed 26 August 2018.

222 Italy: Article 4 Decree no. 151/2001.

leave. In **Italy**, although adoption leave is granted on the same conditions as parental leave, there are no additional measures to address the specific needs of adoptive parents. A formal adoption might be necessary for the adoption leave to be granted. In **Poland** for example, adoption leave can only be granted following the formal decision of adoption by a family court.

2.2.12 Time off from work on grounds of force majeure[223]

The concept of *force majeure* has needed clarification in **Ireland**. As the need to take the leave must be urgent, this would imply that if the employee had given notice of the illness or the requirement to be present sufficiently in advance, the employee should take annual leave instead. The need to be present with the relative (as defined) must be 'urgent', 'immediate' and 'indispensable.' However, the court held that urgency and indispensability should not be judged in hindsight (i.e. whether the illness was indeed serious) but instead must be looked at by the employee at the time of the crisis. In addition, the employee could not be assumed to have medical knowledge.[224]

In **Liechtenstein**, the meaning of *force majeure* is interpreted strictly and covers only the time until other care is organized and is not applicable if a child is for example in hospital and the care is provided for there.[225]

Clause 7 of the Parental Leave Directive has not been fully implemented in **Spain**, where the leave for *force majeure* is not completely guaranteed by law. Although it provides a two-day paid leave for the death of a second-degree relative, an accident, a serious illness, the need to be hospitalised or the need to undergo a surgical intervention that does not require hospitalisation also for a second-degree relative, there is no recognised right, not even unpaid, to take leave 'that makes the immediate presence of the worker indispensable' in cases of sickness or accident.

2.3 Paternity leave

EU law does not yet guarantee the right to paternity leave.[226] However, Article 16 of the Recast Directive provides that in countries that have adopted such leave, workers who take up paternity or adoption leave must be protected against dismissal based on those rights. Workers who take up paternity or adoption leave are also granted the right to return to work to the same or a similar job.

Almost all the countries under review offer a period of paternity leave. Only **Austria**, **Croatia**, **Germany**, **Liechtenstein** and **Slovakia** do not have a legal provision for paternity leave. However, in **Austria**, federal civil servants and workers in several industrial sectors can claim a period of paternity leave. In addition, workers in the private sector can rely on several collective agreements which include paternity leave. The **Slovakian** Government has proposed an amendment to the labour code to provide ten days of paid paternity leave.

Paternity leave is a very recent right in a number of countries (**Cyprus** since 2017; **Czech Republic** since 2018).

2.3.1 Personal scope of the right to paternity leave

In some countries, paternity leave is reserved to fathers only (**Bulgaria**, **Cyprus**, **Finland**, **Luxembourg**, **Poland**, and **Portugal**), which fails to acknowledge the reality of the diversity of families. In **the**

223 Clause 7 of the Parental Leave Directive.
224 Carey v Penn Racquet Sports Ltd. [2001] 3 IR 32.
225 Paragraph 1173(a) Article 29(5) ABGB (Civil Code).
226 However, the proposed Directive on work-life balance envisages such right: Proposed Directive on Work-life balance COM (2017) 253 final, Article 4.

Netherlands, a bill which grants five days of paid birth leave either to the father of the child or to the partner of the mother from 2019, as well as five weeks of parental leave, paid at 70 % of the salary, from 1 July 2020, was adopted by the Second Chamber of Parliament on 2 October 2018.[227]

In other countries, paternity leave is open to a broader range of parents (**Belgium**, **France**, **Iceland**, **Ireland**, **Spain**, **Sweden**, and the **United Kingdom**). Whether same-sex partners remain a minority, or a stronger involvement of 'fathers' in the tasks and responsibilities resulting from the birth of a child is a worthy objective to be pursued, there is a risk of gender discrimination against the female spouse or life partner of the mother if 'paternity leave' is reserved exclusively for fathers.[228] In **Belgium**, social law refers to 'birth leave' as the leave is available to the other member of a parental couple, who may be another woman. In **Ireland** and **Spain**, the leave is available for same-sex couples. In **Iceland** and **Sweden**, the leave is available to the 'other parent' in a same-sex relationship.

Further restrictions might also apply regarding marital status:

Parents must be married or live together in cohabitation with the mother in **Bulgaria.**

Parents must be married or have entered into a civil partnership in **Cyprus**. However, from 2018, the leave will be open to men (insured employees) regardless of their marital status from 2018.

In **France**, paternity leave can be taken by the husband or the partner of the mother, even if s/he is not the child's father, since 2012.

Paternity leave is granted to adoptive fathers in **Bulgaria**, **Cyprus**, **Greece**, **Iceland**, **Italy**, **Luxembourg** and **Spain**. In these countries adoption is equalled to birth and all the leave arrangements available to parents upon the birth of a child are also available to adoptive parents.

Paternity leave is granted to intended fathers from surrogacy in **Cyprus** and to foster parents in **Italy** and **Spain**.

In **Belgium**, an employee who delivers a stillborn child (as opposed to a case of miscarriage) remains entitled to maternity leave. The question has been raised as to whether the other member of the couple has a right to birth leave. Equally, the question has been raised as to whether the other member of the couple has a right to compassionate leave (3 days in the private sector, 4 in the public sector) which is available after the death of a close relative. The regulations have been interpreted generously by the competent administrative services, but their phrasing may be a source of difficulties (e.g. a stable common-law [as opposed to registered] partner is entitled to birth leave, but not to compassionate leave). Thus, the Council for Equal Opportunities recommended various amendments[229] in order to clarify the conditions of access to these rights.

227 Information on the Dutch paternity leave, available at: https://www.rijksoverheid.nl/documenten/kamerstukken/2018/06/14/wetsvoorstel-invoering-extra-geboorteverlof-incl.-memorie-van-toelichting, accessed 26 August 2018.

228 As illustrated in *Hallier and Others v France* (Application No. 46386/10), where the European Court of Human Rights considered the inability of a lesbian to obtain paternity leave following the birth of her partner's child. The couple had lived together for many years and were in a civil partnership. Despite the fact that their application was found inadmissible, the Court noted that, under a new Law of 17 December 2012, the mother's partner was entitled to carers' leave under the same conditions as paternity leave if s/he was not the child's biological parent.

229 In Opinion n°154 of 8 December 2017.

2.3.2 Material scope of the right to paternity leave

2.3.2.1 The length of the leave

In the countries where paternity leave exists, its duration varies across the countries but remains short overall:

- 1 day (**Malta**, 5 days in the public service);[230]
- 2 days (**Greece**, in both the private and the public sector; 5 days for the military)
- 3 days taken as an alternative to maternity leave (**Italy**);
- 2 days of paid leave and 3 days of unpaid leave (the **Netherlands**; fathers also have a right to attend the birth of their child);[231]
- 5 days (**Hungary** or 7 working days in case of multiple births, **Romania**[232] or 10 days if the father has completed a parental course);
- 1 week (**Czech Republic**);
- 10 days (**Belgium**,[233] **Estonia**,[234] **Luxembourg**, **Latvia**, **Sweden** and the **United Kingdom**);
- 11 consecutive days (**France** or 18 days in case of multiple births);
- 14 days (**Poland**);
- 2 weeks (**Ireland);**
- 15 days (**Bulgaria**, **Cyprus**, **Denmark**, **Greece**, **Ireland**, **Norway** and **Portugal**); in **Norway**, these 15 days are related to the birth of the child and are in addition to the father's part of the parental leave.
- 5 weeks (**Spain** and extended in the case of multiple births);
- 30 days (**Lithuania** and **Slovenia**);
- 3 months (**Iceland**);
- 54 days (**Finland**).

In **Sweden**, the 'other parent' is also eligible for half of the days of parental-leave benefit (240 days). Of these days, 90 days are reserved for each parent and cannot be transferred to the other parent. In addition, in December 2017, the Swedish Government proposed to abolish the 10 days in connection with childbirth, and provide a longer period of parental leave (5 months) to be reserved for each parent.[235]

Similarly, in **Iceland**, parents each have an independent entitlement to maternity/paternity leave for up to three months upon the birth of a child, the primary adoption or the reception of a child in permanent

230 Malta regulation on paternity leave in the public service, available at: https://publicservice.gov.mt/en/Documents/Public%20Service%20Management%20Code/PSMC%20Manuals/Manual_on_Work-Life_Balance_Measures.pdf, accessed 31 May 2018.

231 The Netherlands: Article 4:1(2)(a) Work and Care Act. As of 1 January 2019, the leave will be extended to five fully paid days and as of 1 July 2020 if wil be extended to five weeks of paid parental leave paid at 70% of the average salary will be added. See the previous paragraph.

232 In Romania, a proposal to amend the paternity leave law to double the period of paternity leave to 10 days for each birth of a child was rejected by Parliament in February 2017 on the grounds that it represents an unreasonable burden on employers. Details of the amendment: PL-x nr. 873/2015 Proiect de Lege pentru modificarea Legii concediului paternal nr.210/1999 (*PL-x No. 873/2015 Bill for the amendment of the Law 210/1999 on paternity leave*), available at: http://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?cam=2&idp=15401, accessed 6 June 2018. For details on the grounds of rejection: Romanian Parliament, Commission on Labour and Social Protection, Report No. 4c-7/455 of 8 June 2016, available at: http://www.cdep.ro/comisii/munca/pdf/2016/ri873_15;1.pdf, accessed 6 June 2018.

233 In Belgium, 10 proposals are currently pending in the House of Representatives (the federal Parliament). There is no indication that any of them will be processed in time before the general elections in 2019, available at: http://www.lachambre.be (French) or www.dekamer.be (Dutch), accessed 30 May 27. Six of these proposals aim at amending the extended birth leave for paid workers: n° 54-0991 and 54-2166 (making the 10-day leave compulsory); n°54-1678 and 54-1833 (extending the leave to 15 days, compulsory); 54-0027 (extending the leave to 20 days, 3 of them compulsory); 54-2075 adopts an entirely different angle and proposes to allow the mother to transfer the facultative part of the maternity leave to her spouse/partner. The other four proposals aim at creating a birth leave for self-employed persons: n°54-0191 of 5 days; 54-2037, 54-2128 and 54-3067 of 10 days. Given that for that category of workers, the maternity leave itself is optional, the proposed birth leave is optional too in all proposals.

234 Estonia will have a 30-day paternity leave from 2020.

235 Swedish Government Report SOU 2017:101.

foster care.[236] The entitlement is not assignable. In addition, the parents have a joint entitlement to an additional three months, which either parent may draw in its entirety or the parents may divide between them.

On 14 of May of 2018, the **Spanish** Constitutional Court admitted the application filed by a father who alleged that he had been discriminated against on the grounds of sex since his paternity leave (four weeks at the time) was significantly lower than the maternity leave (16 weeks). The Constitutional Court will decide on the constitutionality of Spanish legislation establishing different durations for maternity and paternity leave.[237] It should be expected that such differential treatment is allowed under EU law as pregnancy and maternity rights represent measures of substantial equality for women.[238]

2.3.2.2 Start of the period of paternity leave

Paternity leave is restricted to the time of the birth. In most countries, the entitlement to the leave starts with the birth of the child. In **Bulgaria**, the leave starts from the time that the child is brought home from the hospital.

The leave may be used after the birth within:

- 15 days in **Bulgaria**;
- 4 weeks in the **Netherlands** and **Portugal**;
- 2 months in **Luxembourg** and **Latvia**;
- 56 days in the **United Kingdom** which must be taken in one go;
- 8 weeks in **Romania**.
- 3 months in **Lithuania** (doubled in cases of multiple births);
- 14 weeks in **Denmark**;
- 4 months in **Belgium**, **Cyprus**, and **France**;
- 5 months in **Italy**;
- 6 months in **Ireland**;
- 14 months in **Iceland**;
- 2 years in **Poland**.

In **Greece**, there is no provision for the period within which paternity leave should be taken. However, the 5-day paternity leave for the military has to be taken within a reasonable time period after the birth and, in any event, before the child is two months old. The leave can generally be taken at the same time as the maternity leave.

In **Estonia**, the leave can be taken at any time from the two-month period prior to the expected birth of the child until the two-month period following the birth of the child.

In **Finland**, the maximum right to paternity leave depends on the father taking paternity leave at the time the mother is not simultaneously on maternity or parental leave. 18 days of paternity leave may be taken simultaneously with mother's leave.
In **Italy**, paternity leave can be granted to the father for the whole length of the maternity leave or for the remaining period, in special cases: if the mother, including a professional and self-employed mother, dies or becomes seriously ill, in the event of the abandonment of the child, or if the child is in the exclusive custody of the father, he is entitled to the same period of leave as the mother.[239]

236 Iceland Act on Maternity/Paternity Leave and Parental Leave No. 95/2000.
237 On the Details of the Spanish case see: https://elpais.com/economia/2018/05/14/actualidad/1526316425_349839.html, accessed 25 May 2018.
238 As provided by Article 28 of the Recast Directive.
239 Italy: Article 28 of Decree No. 151/2001.

In addition to paternity leave, which is 2 weeks starting from the birth of the child, **Norway** provides a 'father's quota' of 10 weeks as part of the overall 12 months of parental leave,[240] paid by the national insurance fund (NAV). A recent amendment has expanded the father's and mother's quota from 10 to 15 weeks reserved to each of the parents.[241]

In **Slovenia**, of the 30 days of paternity leave, 15 days have to be used at any time from the birth until one month after the end of parental leave in a continuous series of days on a full-time or a part-time basis. The other 15 days must be used before the child finishes the first year of primary school in a continuous series of days on a full-time or part-time basis.

2.3.2.3 Conditions of application

In some countries, there are conditions of application:

- The worker must notify the employer in writing of his/her making use of the leave (**Belgium** and **Luxembourg**). In **Luxembourg** the father must inform the employer at least 2 months before the due date for the birth.
- A medical certificate must be produced (**Luxembourg**).
- In the **United Kingdom**, to qualify for paternity leave, an employee must have at least 26 weeks' employment at the end of the week immediately preceding the 14th week before the expected week of the child's birth.

2.3.2.4 Remuneration during paternity leave

In many countries, a social security allowance equivalent to that of sick leave is granted to the parent who takes the leave (**Finland**, **France**, **Iceland**, **Ireland, Italy**, **Slovenia** and the **United Kingdom**). However, in some countries the benefit can be more generous. In **Belgium**, where a worker receives 100 % remuneration of their usual salary during the first 3 days, the same social security benefits as that applying at the beginning of maternity leave are available during the following 7 days. In **Cyprus**, paternity allowance is equal to 72 % of the employees' insurable earnings over the previous year and can be increased proportionally to the number of his dependents. The weekly amount of the basic benefit is increased to 80 % if the father has one dependent, to 90 % if he has two dependents and to 100 % if he has three or more dependents. In **Luxembourg**, the benefit is capped at 5 times the social minimum wage. In **Latvia**, paternity pay is at the same level as maternity pay which is 80 % of the average statutory insurance salary.[242] In **Slovenia**, paternity leave benefit is equal to 90 % of the father's average salary or 100 % of the average salary over the 12 months immediately prior to the date on which the benefit was claimed if it does not exceed EUR 763.06 per month. While the sick leave covers 60% of the daily salary, in the **Czech Republic**, paternity leave, like maternity leave is 70% of the daily salary. In **Denmark**, **Estonia**, **Lithuania**, **Poland** and **Portugal**, paternity leave is fully remunerated by the State. In **Poland**, workers receive 100 % of their remuneration, under the same rules that apply to holiday pay. In **Greece** and **Romania**, paternity leave is paid in full by the employer.

Paternity leave is unpaid in **Norway**, although some employers offer pay during the leave on a voluntary basis or pay can be covered under collective agreements.

240 Norway: NIA Section 15-9.
241 Norway: NIA LOV-1997-02-28-19. Available at: https://www.regjeringen.no/no/dokumenter/prop.-74-l-20172018/id2596487/?q=tredeling%20av%20foreldrepermisjon, accessed 26 August 2018. The amendments came into force on 1 July 2018.
242 The Latvian Law on Maternity and Sickness Insurance (*Likums Par maternitates un slimības apdrošināšanu*), Official Gazette No. 182, 23 November 1995.

The EFTA Surveillance Authority (the Authority) opened a formal investigation in relation to the **Norwegian** provisions concerning the right to parental leave in 2016.[243] The main issue is that a father's right to paid parental leave depends on the mother being qualified for paid parental leave based on previous paid work during six of the ten months before the birth. The Authority's preliminary conclusion is that this constitutes unequal treatment of men and women in breach of the EEA Agreement, as the provisions in the Norwegian legislation do not seem to comply with the Parental Leave Directive and the Equal Treatment Directive. The Norwegian Government considers that Norwegian law regarding the right to parental leave is compatible with EEA law.

2.3.3 Protection against discrimination, unfavourable treatment and dismissal

In most of the countries under review, when paternity leave is offered, protection against discrimination, unfavourable treatment and dismissal is framed in the same ways as maternity leave (**Belgium**, **Bulgaria**, **Cyprus**, **Iceland**, **Ireland**, **Italy**, **Poland** and **Portugal**) or parental leave (**Czech Republic**). As a result, the enforcement problems highlighted with regard to pregnancy and maternity are also applicable when it comes to paternity leave. However, there is no specific provision prohibiting discrimination based on paternity leave in **Austria**, **Belgium**, **Lithuania** and the **Netherlands**, where a claimant would have to use the instruments available within the existing gender discrimination legal framework.

2.3.4 Judicial enforcement

Despite the existence of formal law prohibiting discrimination and unfavourable treatment based on paternity leave, very few cases are taken to court. There is no case law whatsoever (**Belgium**, **Cyprus**, **Greece**, **Italy**, **Latvia**, **Lithuania**, **Luxembourg**, the **Netherlands** and **Poland**) or few cases (**Denmark** and **Ireland**) concerned with paternity leave, which is often explained by the fact that the leave is relatively short and unlikely to cause specific discrimination (**Hungary** and **Ireland**). In addition, paternity leave is a relatively new right in many countries; therefore, it has not yet been tested (**Ireland** and **Portugal**).

In **Iceland**, a 2010 case decided by the Supreme Court set a dangerous precedent for those intending to go on paternity leave. Despite the clear legal provision[244] prohibiting the dismissal of workers taking maternity, paternity or parental leave, the Supreme Court held that given the financial difficulties of the bank in the wake of the 2008 financial collapse and due to the necessity of reorganising the business, the bank was acting in its lawful capacity in dismissing a man who was taking paternity leave.[245]

2.3.5 Gender impact of paternity leave

The take-up of paternity leave is low in some of the countries under review (**Bulgaria**, **Denmark**, **Hungary**, **Poland**, **Spain** and the **United Kingdom**) or is decreasing (**Iceland**). This low rate of take-up can be explained by various factors, including the existence of discrimination, unfavourable treatment, the complexity of the requirements, the rigidity of the leave's format, the low level of compensation, and the fact that the leave is not mandatory.

In **Denmark** only 45 % of the fathers eligible for unemployment benefits take the two weeks of paternity leave. Nevertheless, in a 2016 survey conducted by the Danish Institute for Human Rights, 20 % of the fathers stated that they would have liked a longer period of paternity leave. The same survey also reveals

243 For details regarding the EFTA Surveillance Authority on the formal study in relation to the Norwegian provisions concerning the right to parental leave in 2016, see: https://www.stortinget.no/no/Hva-skjer-pa-Stortinget/EU-EOS-informasjon/EU-EOS-nytt/2016/eueos-nytt---19.-oktober-2016/#fedrekvote, accessed 18 May 2018.

244 Icelandic Act No. 95/2000 Article 30 states: 'It is not permitted to dismiss an employee due to the fact that she/he has given notice of intended maternity/paternity leave or parental leave under Articles 9 or 26 or during her/his maternity/paternity leave or parental leave, without reasonable cause, and in such a case, the dismissal shall be accompanied by written arguments. The same rule shall apply to pregnant women, and women who have recently given birth'.

245 Supreme Court judgment No. 11/2010.

that nearly a quarter of the interviewed men experienced discrimination and unfavourable treatment related to paternity leave and the fact that they had become fathers. Similarly, in **Norway**, the Equality Ombud conducted a survey in 2015 which showed that 22 % of men who used their paternity/parental leave had experienced discrimination.[246]

In **Bulgaria**, only 40 % of fathers used paternity leave in 2017. Difficulties in taking paternity leave are linked to the high level of formality and complexity of the required documentation. It is argued that the process would benefit from simplification to make the leave more accessible to fathers.

Similarly, in **Spain**, the low take-up of paternity leave could be explained by the fact that the current paternity leave is too rigid. Paternity leave has to be taken concurrently with maternity leave or immediately after the mother has taken her maternity leave. Paternity leave can only be taken on a part-time basis (as a reduction of working time) if it is established in the collective agreement or by agreement with the employer, and only if the reduction in working hours is greater than 50 %. It may be argued that more flexibility in the condition of application would enhance its use.

In **France**, paternity leave is taken by 7 out of 10 fathers.

The low level of pay is a problem in the **United Kingdom**, where a report by the Father's Institute demonstrates that low-income fathers are half as likely as better-paid fathers to take statutory paternity leave and less likely to receive financial help to take leave from employers.[247]

Cultural views also contribute to keeping fathers from taking paternity leave. **Polish** sociologists unanimously note that the take-up of parental rights by fathers is less socially accepted than the take-up by mothers.[248] In **Hungary**, public opinion considers that it is the responsibility of the women to take care of children and the elderly.[249] It is likely that this public opinion might be manifest in companies, developing an internal culture which pressurizes men not to take up paternal leave.

There is evidence in the **United Kingdom** that 'more than one in four men who became fathers in 2016 (over 157 000 new fathers) did not qualify for paternity leave or pay because they had not been working for their employer for long enough.'[250] Moreover, the right to paternity leave is not accessible to fathers in precarious employment, such as agency work, zero-hours contracts or casual-hours contracts.
In **Poland**, a lack of awareness of this right means that it is not often used.

According to information from the Confederation of State and Municipal Employees (BSRB) in **Iceland**, the number of fathers who take their paternity leave is quickly decreasing, and those who take the leave do so for a shorter time period than before. At the same time, mothers are using the whole period of the leave (their three months and the additional three months that the parents may divide between them). One reason for this is that in the wake of the financial collapse in 2008 the maximum payments from the maternity/paternity leave fund were cut and subsequently the percentage of men using their paternity leave (which is non-assignable) fell from 90 % in 2008 to 74 % in 2017.[251]

246 Norwegian Equality Ombud survey (2015), available at: http://www.ldo.no/nyheiter-og-fag/nyheiter/nyheiter-2015/gravide-diskrimineres/, accessed 26 August 2018.
247 UK: Fatherhood Institute (2017) *Cash or Carry? Fathers combining work and care in the UK,* available at: http://www.fatherhoodinstitute.org/wp-content/uploads/2017/12/Cash-and-carry-Full-Report-PDF.pdf, accessed 19 May 2018.
248 Poland: *Rola ojca i postawy Polaków wobec ojcostwa w świetle badań społecznych* the role of father and attitudes of Poles towards paternity in the light of social reserches), available at: https://www.senat.gov.pl/gfx/senat/pl/senateksperty zy/2415/plik/oe_211_.pdf, accessed 1 June 2018.
249 Gregor, Aniko and Kovats, Eszter: Women's Affairs 2018 Societal Problems and Solution Strategies in Hungary, May 2018, Friedrich Ebert Stiftung, Budapest, available at: http://library.fes.de/pdf-files/bueros/budapest/14462.pdf, accessed 27 August 2018.
250 See UK Women and Equalities Committee (2018) *Fathers and the Workplace Report* para 41 available at: https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/358/358.pdf, accessed 19 May 2018.
251 The story is available at: https://kjarninn.is/skyring/2017-04-05-enn-faerri-fedur-taka-faedingarorlof, accessed 10 July 2018.

In contrast, it should be noted that paternity leave is commonly taken in **Portugal**. Paternity leave in Portugal is partly compulsory, however. The first 15 days following the birth are compulsory leave for the father; five days are to be taken when the mother gives birth, and the other 10 days must be taken in the first month of the child. The remaining 10 days are not compulsory and can be enjoyed while the mother is on maternity leave. Paternity leave is paid by social security on the basis of 100 % of the average salary of the father. According to the latest statistics available, that do not go beyond 2013, in that year, 65.4 % of fathers used the compulsory period of the paternity, and 57.3 % also used the non-compulsory leave.[252]

2.4 Carers' leave

The EU does not yet guarantee periods of leave to people who have caring responsibilities for others than children in the form of maternity, parental and adoption leave. The proposed Directive on work-life balance for Parents and Carers[253] would introduce carers' leave into EU law for the first time. It introduces the right for workers to take at least five working days of paid leave per year to care for dependent or seriously ill relatives.[254] In addition, the proposed Directive also provides the right to take time off work for urgent family reasons in case of *force majeure* to all workers, not just to parents or care-givers.[255]

The right to take carers' leave is usually planned in advance. It can be distinguished from the right to take time off for urgent family reasons in case of *force majeure*, which would usually be needed in cases of emergency, usually for a very short and impromptu occasion. Existing EU Directives and the proposed Directive address the need of workers who care for others by providing flexibility around working time and leave from work. As a result, such provisions allow workers to care while they remain in the labour market. In contrast, policies encouraging the development of care services, such as childcare or elderly care, allow people who care to enter and remain in the labour market.

Many countries already provide for some form of carers' leave. However, where it exists, carers' leave is not homogeneous across the countries under review as the meaning of carers' leave is broad and covers at times children, disabled persons, elderly relatives and/or other urgent family reasons in various combinations. The purpose of carers' leave, personal and material scope, the length, the conditions of application, the payment and the level of protection against dismissal and discrimination and unfavourable treatment are all variable across the countries under review. In many countries (**Belgium**, **Croatia**, **France**, **Greece**, **Hungary**, **Italy**, **Slovenia**, **Spain** and **Sweden**) a variety of carers' leave exists, which each have specific personal and material scopes as well as specific conditions of application.

In **Iceland**, **Latvia**, **Romania**, **Slovakia** and the **United Kingdom**, there is no right to carers' leave. However, **Slovakia** and the **United Kingdom** guarantee some form of time off on grounds of *force majeure* for urgent family reasons. In **Romania**, leave for exceptional family events or to resolve personal matters can only be granted when this is provided under the applicable internal regulations or in a collective agreement.[256] In **Iceland**, the right to care leave is regulated by collective agreements.

2.4.1 Personal scope of the right to carers' leave

Where it is offered, carers' leave is not universal. The leave can be restricted to some specific workers for example according to the sectors in which they work or the marital status of the worker.

252 Source: Portuguese Commission for Equality in Employment (CITE): http://cite.gov.pt/assts_scratches/Evol_licen_parent_2005_2015.pdf, accessed on 19 October 2018.
253 Proposed Directive on Work-life balance COM (2017) 253 final.
254 Proposed Directive on Work-life balance COM (2017) 253 final, Article 6.
255 Proposed Directive on Work-life balance COM (2017) 253 final, Article 7.
256 Article 153 of the Romanian Labour Code.

In some countries, the availability and types of carers' leave vary according to whether the worker is employed in the public or private sector (**Belgium**, **France** and **Malta**).

In **Luxembourg**[257] and **Poland** the leave on the ground of *force majeure* for family reasons can only be granted to one of the parents. In **Estonia**, carers' leave is available to mothers or fathers, guardians or carers appointed by the local authority but partners living in cohabitation are not eligible. There might be a requirement for carers to live in the same household (**Belgium** and **Liechtenstein**). In **Estonia**, carers' leave has been set up in a spirit of solidarity between workers. In **France**, since 2014, an employee may, on certain conditions, waive all or part of his days of rest not taken for the benefit of a colleague whose child is seriously ill. This donation of days of rest allows the employee who benefits from it to be paid during his absence. In addition, since 2018,[258] it is also possible for carers of a close relative to donate their untaken rest days.

2.4.2 Material scope of the right to carers' leave

2.4.2.1 The length of the leave

The period of carers' leave ranges between from 1 to 3 days in **Liechtenstein** to an unlimited period of leave in **Hungary**. In the **Netherlands**, it is even possible to obtain a few hours leave on the grounds of *force majeure*. In **Sweden**, 120 days of temporary parental leave, which can be used to take care of a sick child or may be used to take care of the child if the ordinary caregiver is sick, is granted per year for every child under the age of 12. The length of carers' leave is not clear-cut in many countries which provide a range according to the type of leave or the personal scope. For example: the length of time might vary for a given country depending on whether the leave is to care for an infant or an older child. The length of the leave may also vary according to the personal situation of the worker. In **Germany** and in **Norway**,[259] for example, single parents are granted twice the amount of leave compared to that of parents who are part of a couple.

Below, the length of carers' leave in the countries under review is outlined from shortest to longest period of leave:

- 1 to 3 days in **Liechtenstein**;
- 3 days in **Ireland;**[260]
- 3 to 5 days in **France** for sick children, 310 for a serious disease per child, 1 year to help a close relative who is or has become disabled;
- 3 to 6 days paid leave for children under the age of 14 in **Estonia**;
- 4 days per year in **Belgium**, in the public sector, paid, when the presence at home is required because of the sickness of a spouse/partner, child or relative residing at the same address.
- 5 days unpaid leave for caring for an adult close relative with a serious disability in **Estonia**; 5 days in **Italy**;
- 7 days in **Cyprus** and **Slovakia**;
- 7 working days of leave to care for a close family member in **Slovenia**, 15 working days of leave for children under the age of 7 or older children moderately or seriously mentally or physically handicapped;
- One week of paid leave in **Austria** for workers in all sectors in case of sickness of a close relative living in the same household and 2 weeks for children until the age of 12.[261] Workers in the private

257 Article L. 234-50 to 234-55 of the Luxembourg Labour Code and Article 9 §2 Social Security Code.
258 Law of 31 January 2018.
259 Norway: WEA Section 12-9 (5).
260 In Ireland, an employee can take-off up to two years' carer's leave from employment under the Carer's Leave Act 2001; such leave is paid through the social security system.
261 Paragraph 16 of the Austrian Paid Leave Act (*Urlaubsgesetz, UrlG*), available at: https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40144616/NOR40144616.pdf, accessed 11 June 2018.

sector can agree with their employer to take unpaid leave of between 3 and 6 months in order to care for dying relatives[262] or for seriously ill children[263] (similar provisions apply to public-sector workers);
- 10 days in **Germany** for each child to a maximum of 25 days;
- 10 days in **Norway**;
- 10 days of unpaid leave for a child until the age of 14 or a disabled child until the age of 18 in **Estonia**;
- 12 days for a child, who is under 4 in **Luxembourg**; 18 days for a child over 4 and under 13; 5 days for a child over 13 and under 18 (in cases of hospitalization). In **Iceland**, the general collective agreement of 2015 provides for 12 days of leave to care for a sick child under the age of 13;
- 30 days in **Portugal**;
- 60 days per year in **Poland** for taking care of a sick child until the age of 14, and 14 days for a sick child older than 14 or an adult relative;
- 60 days per year for taking care of a sick child in **Bulgaria** and may be up to 10 calendar days per year for taking care of an adult relative;
- In **Croatia**, 60 days per year per illness for a child younger than 7, 40 days per illness for a child between 7 and 18 and 20 days per illness for a child older than 18 or a spouse;
- 3 months in the **Czech Republic**;
- 120 days per year in **Lithuania** and **Sweden**.

The leave can be taken on a part-time basis in **Croatia** on certain conditions,[264] and in **Germany** and in **Hungary** with the authorisation of the employer. In **Spain**, workers and civil servants can ask for a reduction of their working time to care for a relative (until second degree) because of their age or for reason of an illness.

2.4.2.2 Carers' leave to care for whom?

Carers' leave is available in most countries under review for the purpose of caring for children, although the duration of the leave might differ and/or the conditions of its application might depend on the age of the child. For example, in **Luxembourg**, the period of carers' leave varies according to the age of the child (12 days for a child under 4, 18 days for a child between 4 and 13, and 5 days for a child between the age of 13 and 18 in cases of hospitalization).[265]

The leave is also broadly available to care for a spouse/partner or close relative in **Belgium**, **Bulgaria**, **Croatia** and **Estonia**. In most cases, 'close relative' means: spouse, child, mother or father. However, the definition of close relative is not provided in this report and it is assumed that it varies from country to country. In some countries this concept is interpreted broadly. For example, in **Estonia**, the concept of close relative is interpreted to include parent, grandparent, sister and stepsister, brother and stepbrother, child, or grandchild. In **Hungary**, the term relative covers spouses, direct descendants and ascendants, adopted, step and foster children, adoptive parents, step-parents, foster parents, siblings, and domestic partners, spouses of the direct descendants and ascendants, a spouse's direct descendants and ascendants and siblings, and the spouses of siblings.

Carers' leave is also available to care for other categories:

- Disabilities/severe illness (**Belgium**, **Croatia**, **Denmark**, **France**, **Germany**, **Italy**, **Liechtenstein**, **Slovenia**, **Spain** and **Sweden**);

262 '*Sterbebegleitung*', Paragraph 14a Work Contract Accommodations Act (*Arbeitsvertragsrechtsanpassungsgesetz, AVRAG*), https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40151314/NOR40151314.pdf, accessed 11 June 2018.
263 'Begleitung von schwersterkrankten Kindern', Paragraph 14b Work Contract Accommodations Act (Arbeitsvertragsrechtsanpassungsgesetz, AVRAG), accessed 11 June 2018.
264 When there is an increased need to care for a child under the age of three for health and developmental reasons.
265 Article L. 234-50 to 234-55 of the Luxembourg Labour Code and Article 9 §2 Social Security Code.

- Elderly people (**Belgium**, **France**, **Germany**, **Malta** and **Sweden**);
- Member of the family up to the second degree of kinship (**Belgium**, **Estonia** and **Spain**);
- Terminally ill members of the family/end of life situations (**Belgium**, **Germany**, **Luxembourg**, **Spain** and **Sweden**). In **France,** this leave is called leave of family solidarity and is granted to assist a close relative at the end of his/her life. In **Germany**, the leave can be extended further to care for a terminally ill relative.
- Foster family (**Bulgaria**);
- Short-term leave is also available for IVF treatment in **Hungary**;
- For general work-life balance reasons in **Malta**, but only for the public sector; in the event of unforeseen closure of the nursery, kindergarten or school[266] in **Poland**.

2.4.2.3 Conditions of applications

Carers' leave can be subject to conditions of application and restrictions that limit the way the leave can be taken.

Carers' leave can be subject to a medical certificate being produced by the worker, showing that the care recipient is indeed in need of care because of an illness or accident (**Croatia** and **Liechtenstein**). In the **Netherlands**, carers' leave is granted for 'necessary care' for persons who belong to the household of the employee, family members in the second degree (siblings, grandparents and grandchildren) and others with whom the employee has a social relationship (friends, neighbours). The last group has been included because there is an increasing number of people who do not have direct family members or persons in their household to help them.

In the **Czech Republic**, an employer can refuse to grant long-term care leave if there are serious operational reasons. In contrast, in the **Netherlands**, if it concerns a temporary problem (for example, a sick child) then urgent leave (*calamiteitenverlof*) is available and cannot be refused by the employer.[267]

2.4.2.4 Remuneration of carers' leave

In most countries, carers' leave is remunerated under the social security system (**Belgium** in the public service, **Bulgaria**, **Croatia**, **Czech Republic**, **Denmark**, **Estonia**, **Finland**, **Germany**, **Hungary**, **Liechtenstein**, **Luxembourg**, **Norway**, **Slovenia** and **Sweden**). The benefit varies between 100 % of the wage in **Croatia**[268] and the minimum wage in **Estonia**. In **Finland**, the flat-rate benefit provided for municipal day care for children under the age of three is relatively low but higher than the benefit paid to parents who use other services than municipal day-care services. In **Belgium**, carers' leave is paid in the public sector but unpaid in the private sector. In **Liechtenstein**, the payment is only available for workers who have been employed for more than three months. In **Sweden**, it can be paid not only to the parents, but also to someone outside the family who is eligible within the social insurance system. In **Austria**, short-term periods of carer's leave are paid in full by the employer while benefits for long-term carer's leave are paid from public revenue and are equivalent to the amounts that would be collected as unemployment benefits. The leave is unpaid in **Cyprus**, **France**, **Portugal** and **Spain**. In **Hungary**, the worker who is on care leave can work four hours daily while receiving this care allowance.

In **Iceland**, where there is no national legal right to carers' leave, unless it is provided by collective agreement, the law still provides for payments to parents of disabled and chronically ill children.[269]

266 As well as sickness of a contracted nanny employed on the basis of the Polish Law of 4 February 2011 on care of the child under the age of three, JoL 2013, Item 1457 or family member who normally takes care of such child.
267 Article 4.1 of the Dutch Work and Care Act.
268 In Croatia, 100% of the wage is payable only in case of a care for a child under three years old.
269 Article 4 of the Icelandic Social Assistance Act No. 99/2007 on home-care allowance.

2.4.3 Difficulties in the enforcement of the prohibition of discrimination and/or unfavourable treatment due to the take-up of carers' leave

Although most countries provide for some form of carers' leave, the protection against discrimination, unfavourable treatment or dismissal based on the take-up of this leave is not always guaranteed. Similarly, other associated rights, such as the right to return to the same or to an equivalent post, are not always guaranteed.

A number of countries do not have specific laws prohibiting discrimination or unfavourable treatment on the ground of carers' leave. Discrimination cases would need to be brought under the rules of equal treatment legislation (**Austria**, **Germany**, **Lithuania** and **the Netherlands**). While there is no provision related to discrimination or unfavourable treatment in **Germany**, there is an explicit prohibition of dismissal.

In **Croatia**, there are no specific guarantees (i.e. prohibition of dismissal, right to return to the same or equivalent post, etc.) in relation to carers' leave, apart from the special leave for parents of children with a disability or a long-term illness. In all other cases, carers' leave is treated as a type of sick leave. In addition, a parent is not entitled to sick leave to take care of a child under the age of 18 years if the other parent is unemployed, or if he/she simultaneously uses the same right for another child or has the status of parent caretaker in accordance with a special act (for children with a disability). However, the Croatian Health Insurance Institute has in practice allowed such an employed parent to take sick leave, even if the other parent is unemployed, if the unemployed parent is unfit to take care of a child, with the requirement to provide a formal statement.

In **Italy**, there is no specific anti-discrimination legal provision protecting caregivers of disabled persons. However, a tribunal in Pavia[270] held that unpaid leave for serious family reasons must count towards the length of service. To exclude this period from the length of service is unconstitutional and in breach of Directive 2000/78/EC as interpreted by the Court of Justice in *Coleman*.[271]

The lack of legal protection against discrimination and unfavourable treatment also means that there is little or no case law (**Belgium**, **Greece**, **Liechtenstein**, **Latvia**, **Lithuania**, **Luxembourg**, the **Netherlands** and **Poland**) concerning any issues that would not result in dismissal, even though discrimination and unfavourable treatment are experienced by parents (**Croatia**). The few cases relating to carers' leave in **Denmark** frequently raise questions about the calculation level for the care benefit. However, the questions are rarely framed as a discrimination issue even though this is an issue faced disproportionately by women.

The right to return to the same or a similar post after a period of care leave is guaranteed in **Finland**. However, such right is not guaranteed in **Germany**, and not all rights and entitlements obtained before taking the leave are maintained.[272]

Some of the difficulties associated with carers' leave are linked to the formality and the rigidity of the leave as well as the complexity of the conditions of application. In **Bulgaria**, medical certificates are required and cause delays in accessing the leave. In **Germany**, the complexity and lack of transparency of the regulations of the Law on Home Care Leave and the Law on Family Home Care Leave contributes to a small number of persons taking care leave.[273] National law could be amended to make the rules

270 Italy: T. Pavia, 19-09-2009.
271 In Case C-303/06 *Coleman v Attridge Law* ECLI:EU:C:2008:415, the CJEU held that the prohibition of discrimination on ground of disability applies to both the disabled person and the care givers of the disabled person.
272 Bundesministerium für Familie, Senioren, Frauen und Jugend (2017) *Zweiter Gleichstellungsbericht der Bundesregierung* (Second Equality Report of the Federal Government), pp. 120-121, available at: https://www.gleichstellungsbericht.de/, accessed 27 August 2018.
273 Ibid, p. 113.

more concise and manageable. Transparency is also an issue in **Poland**, where there is a general lack of awareness of the right to carers' leave.

2.4.4 The gender impact of carers' leave

Carers' leave is drafted in gender-neutral terms. However, in practice women make disproportionate use of care leave in **Bulgaria**, **Denmark**, **Finland** and **Luxembourg**. Carers' leave is mostly taken by women because such leave is typically unpaid (**Cyprus**) or compensated at a low level (**Bulgaria**, **Hungary** and **Norway**). In turn, this reinforces negative stereotypes of women who are seen as non-reliable workers. It also means that some employers are reluctant to grant the leave even if it is due by law. Many employers are suspicious of workers taking carers' leave, as these workers are considered to be taking too many and too long periods of sick/care leave, which is seen as an abuse of the system (**Bulgaria**). In **Latvia**, employers are frequently concerned with the use of sick leave to care for children, although such leave is fully compensated by statutory social security. In Latvia, employees indicate that employers make frequent oral remarks or refuse to pay bonuses based on the take-up of carers' leave.[274] In **Hungary**, research concluded in 2018 shows that while there is some tolerance for child-caring responsibilities, such is not the case for leave to care for the elderly.[275] In **Finland**, care leave has been under debate, as it is considered one of the reasons for young women's relatively low presence in the labour market, and an obstacle to women's access to the labour market and career opportunities. The present Government discussed shortening the right to care leave for these reasons, but the reform was dropped due to disagreements between the parties in the Government.

2.5 Self-employed persons (Directive 2010/41/EU)[276]

Directive 2010/41/EU sets out the principle of equal treatment between men and women engaged in an activity in a self-employed capacity. Article 8(1) of Directive 2010/41/EU provides that Member States must grant self-employed workers and 'assisting spouses' maternity benefits for a period similar to the duration of maternity leave for employees currently in place at Union level (14 weeks). Maternity benefits can be granted either on a mandatory or voluntary basis.[277]

Article 8(1) of Directive 2010/41/EU has not sufficiently been transposed in some countries (**Cyprus**, **Finland**, **France**, **Greece**, **Hungary**, **Portugal**, **Romania** and **Spain**). In **Hungary**, self-employed persons are granted the rights set out by the Directive under the general rules of gender equality, without addressing the specific issues of social protection and the unequal treatment of self-employed women. This means that in practice, it is difficult for self-employed women to claim the benefit of these rights.

In **Portugal**, the law provides that self-employed persons have a right to maternity, paternity or parental allowances 'during the period in which the worker remains unfit to work'[278] which does not cover the minimum period of 14 weeks of time off established by Article 8(1) of the Pregnant Workers Directive. As a result, independent workers tend to use the time off and of the correspondent allowances for much shorter periods than subordinate workers.[279]

274 Latvian Ombudsperson Annual Report 2017, pp. 241-244, available in Latvian at: http://www.tiesibsargs.lv/uploads/content/lapas/tiesibsarga_2017_gada_zinojums_1520515340.pdf, accessed 27 August 2018.

275 Gregor, Aniko and Kovats, Eszter: Women's Affairs 2018 Societal Problems and Solution Strategies in Hungary, May 2018, Friedrich Ebert Stiftung, Budapest, available at: http://library.fes.de/pdf-files/bueros/budapest/14462.pdf, accessed 27 August 2018.

276 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 L180, 15.7.2010, pp. 1-6.

277 Article 8(2) of Directive 2010/41/EU. See generally, Barnard, C. and Blackham, A., European network of legal experts in the field of gender equality (2015), *Self-employed. The implementation of Directive 2010/41/EU on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity*, available at: https://www.equalitylaw.eu/downloads/2732-self-employed-en, accessed 19 August 2018.

278 Article 40(b) of Portuguese Law No. 91/2009, of 9 April 2009.

279 It is worth noting that self-employment is seldom compatible with long absences from work in any case.

In **Romania**, self-employed workers can only benefit from maternity leave and maternity allowance if they have paid an additional optional contribution called 'contribution for leave and allowances' equalling 0.85 % of their income.[280]

2.5.1 Personal scope[281]

Maternity leave should be granted not only to female self-employed workers, but, according to Article 2(b) of Directive 2010/41/EU, also to '*the spouses of self-employed workers or, when and in so far as recognised by national law, the life partners of self-employed workers, not being employees or business partners, where they habitually, under the conditions laid down by national law, participate in the activities of the self-employed worker and perform the same tasks or ancillary tasks.*' However, a number of countries have only granted this right to self-employed women, and national law does not cover spouses or life partners of self-employed men (**Greece**, **Hungary**, **Lithuania** and **Portugal**).

In some countries, the personal right to maternity leave and benefit for self-employed workers is applied broadly. In **Greece** the allowance is granted to self-employed commissioning or surrogate mothers and to mothers who adopt a child up to the age of 2.

French law grants allowance for paternity leave (11 days) to self-employed workers and for working partners. Self-employed mothers on average take a longer period of leave than self-employed fathers.[282]

2.5.2 Maternity allowance[283]

Article 8(2) and (3) of Directive 2010/48 requires that women should be granted a maternity allowance (of at least 14 weeks). The calculation method of the maternity allowance for self-employed parents poses problems in a number of countries.

In **Croatia**, self-employed persons are entitled to the same rights as employed persons concerning all maternity and parental benefits. There are some differences concerning the base for calculation of salary compensation during maternity, parental or related types of leave, but in any case, the Croatian Health Insurance Institute bears these costs.
In **Estonia**, the amount of maternity allowance or parental benefit paid during maternity leave depends on an annual payment of social tax for the year before childbirth. However, self-employed persons have to declare their annual earnings within a certain time limit, which means that the maternity allowance or parental benefit could be smaller than what they are entitled to.

In **Greece**, the monthly allowance during the four months of leave to which self-employed women are entitled varies according to their insurance provider. In any case, the level of these allowances is considered to be so low that it cannot be considered 'sufficient,' as required by Article 8(1) and (3) of Directive 2010/41/EU.

In **Latvia**, self-employed persons have an obligation to make statutory social insurance contributions. However, in reality such contributions are not always made, which means that many self-employed persons are not entitled to social insurance allowance.

280 Romania: Emergency Ordinance No. 158/2005.
281 The personal scope of Directive 2010/48 is explored in particular detail by Barnard, C. and Blackham, A., European network of legal experts in the field of gender equality (2015), *Self-employed. The implementation of Directive 2010/41/EU on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity*, pp. 3-8, available at: https://www.equalitylaw.eu/downloads/2732-self-employed-en, accessed 19 August 2018.
282 French Défenseur des Droits (Equality body) with the National Federation of young barristers and solicitors (FNUJA) 2018, available at: https://www.defenseurdesdroits.fr/sites/default/files/atoms/files/rapp-enq-avocats-a4-num-02.05.2018.pdf, accessed 19 August 2018.
283 Article 8(2) and (3) of Directive 2010/48.

In some countries the definition of self-employment is unclear or too complex, which makes it difficult for individuals to be identified as self-employed and therefore to claim their rights (**France**, **Hungary** and **Lithuania**).

In **France**, the allowance for self-employed parents varies according to the profession of the parents, resulting in a complex system of maternity allowance regimes. The Government has promised to unify the regime for all women, but the decision has been postponed to 2019 as the cost would be significant, and the question who will pay has yet to be answered. Some of the regimes do not comply with Directive 2010/41/EU. This is the case in particular for self-employed women in craft, commerce and manufacturing and liberal professions. For these self-employed workers, an allowance is provided following the birth of their child to a maximum of 74 days. The allowance, however, is only paid when the annual income of the individual self-employed worker is over EUR 3 862.80 and covers 10 months of activity. This means that many independent workers do not fulfil the conditions and therefore fail to qualify for the allowance.

In **Germany**, the new Maternity Protection Act does not terminate the unequal treatment of self-employed persons and therefore fails to meet the requirements of Directive 2010/41/EU.[284] Since April 2017, the financial situation has improved for some self-employed women who are pregnant or have given birth. For self-employed women who have an insurance for daily sickness benefit, the insurer is obliged to replace the loss of earnings with the contractually agreed daily sickness benefit not only in case of illness, but also during the maternity protection periods (including the delivery date) if there is no other appropriate compensation for the loss of earnings. In other words, if a self-employed worker has no insurance, there is no compensation.

Between 1 August 2004 and 4 June 2008, the **Netherlands** did not provide a maternity benefit for self-employed women who gave birth. Several proceedings involving *inter alia* the Dutch Supreme Court, the CEDAW Committee and the Administrative High Court resulted in the adoption of compensation for the self-employed women involved, who can apply for compensation between 15 May 2018 and 30 September 2018. The compensation is not very generous, and as it has not been advertised broadly, there is doubt that it will reach a sufficient number of women. On 4 June 2008, a maternity benefit for self-employed women was re-introduced and since that time no difficulties have arisen.

2.5.3 Services supplying temporary replacements or relevant national social services

Article 8(4) of the Self-Employed Directive provides that in order to take the specificities of self-employed activities into account, female self-employed workers and assisting spouses (or when recognised at national level, assisting life partners of self-employed workers) should be given access to any existing services supplying temporary replacement that enable interruptions in their occupational activity owing to pregnancy or motherhood, or access to any existing national social services. Access to those services can be an alternative to or part of the maternity allowance. This article has not been transposed in a number of countries. In **Greece**, **Finland**, **Ireland**, **Spain**, and **Lithuania** there are no services supplying temporary replacements or relevant national social services or other kinds of social services. In **Finland**, agricultural entrepreneurs (in most cases farmers on family farms) are the only group of self-employed workers to be entitled to temporary replacement services.

Nevertheless, in **Spain**, a reduction in the social security contribution to be paid by the self-employed woman is allowed if the self-employed woman hires someone to replace her during her maternity leave or during the time devoted to the care of children.

284 See German Women Lawyers Association, https://www.djb.de/verein/Kom-u-AS/K1/st16-05/.

2.5.4 Difficulties in the enforcement of the maternity rights for self-employed workers

Overall, very few self-employment related issues are taken to court. Issues related to pregnancy and maternity are rare.

No case law or reports of the national equality body exist on the situation of self-employed workers in some of the countries under review (**Austria**, **Cyprus** and **Hungary**), indicating that this issue is not high on the agenda.

In **Italy**, the Court of Cassation has clarified that the ban on the dismissal of employed women on maternity leave cannot be extended to self-employed women.[285]

In March 2018, the **Norwegian** Government proposed changing the rules regarding the right of self-employed fishers to parental leave and the right to time off for nursing with a view to ensure that the period of leave does not interfere with fishing quotas/licenses.[286]

In addition, the legal monitoring of the protection of self-employed workers is often rendered difficult because the institutions that are traditionally concerned with issues of pregnancy and maternity discrimination do not have competence over such workers.

In **Portugal**, for instance, the enforcement of maternity and paternity non-discrimination provisions in relation to self-employed workers does not fall under the scope of the Labour Inspectorate Services and of the National Equality Body (CITE), as the field of action of both these bodies is limited to employment relations. As a result, the situation in relation to this increasing group of workers is not monitored at all in practice.

285 Cass. civ., sez. lav., 26-05-2004, n. 10179.
286 https://www.regjeringen.no/no/aktuelt/vil-ha-bedre-foreldrepermisjon-for-fiskekvinner/id2593100/.

3 Enforcement of the protection against dismissal due to the take-up of family-related leave

3.1 Pregnancy and maternity leave

3.1.1 The legal implementation of the protection against dismissal

Article 10(1) and (2) of Directive 92/85/EEC provides that (1) 'Member States shall take the necessary measures to prohibit the dismissal of workers [...] during the period from the beginning of their pregnancy to the end of the maternity leave [...], save in exceptional cases not connected with their condition which are permitted under national legislation and/or practice and, where applicable, provided that the competent authority has given its consent' and (2) 'if a worker [...] is dismissed during the period referred to in point 1, the employer must cite duly substantiated grounds for her dismissal in writing.' Article 14(1) (c) of the Recast Directive also prohibits the direct or indirect discrimination based on pregnancy and maternity such as the dismissal of pregnant workers.

The dismissal of workers on the ground of pregnancy or maternity is prohibited in **all countries under review**. The formal legal protection against dismissal on the ground of pregnancy or maternity is strong in **most** countries. In some countries, national law exceeds the requirements set out in Article 10 of Directive 92/85/EEC with regard to both the protection period and the sanction for non-observance (**Greece** and **Italy**).

A number of recent national studies highlights that despite the existence of formal provisions, dismissal of pregnant workers and workers on maternity leave continues to take place very frequently.

A 2012 study conducted by the **Croatian** Ombudsperson for Gender Equality shows many instances of discrimination and unfavourable treatment.[287] Over 55 % of the women surveyed who were pregnant and/or were on maternity leave had lost their jobs. Within this group, 34.1 % of women were on fixed-term contracts which expired during their maternity leave, and 21.2 % of women were dismissed due to pregnancy or use of some of the maternity leave.

Often, the employers do not directly dismiss the pregnant worker; instead they use bullying techniques and change their conditions of work so that in fact, a dismissal occurs at the end of the leave, because the worker cannot accept the new conditions (**Bulgaria**, **France**, **Greece**, **Hungary**, **Poland**, **Romania**). It is common for employers to create reasons for dismissal which are unconnected to the pregnancy and the difficulty is to prove that in reality the dismissal was connected to pregnancy or maternity. When challenged in court, these techniques are found to constitute unlawful direct sex discrimination. However, few cases are brought to court in general. The small number of complaints submitted to courts, to the national equality body or to the Equality Inspectors is not indicative of the extent of the phenomenon (**Belgium**, **Cyprus**, **Czech Republic** and **Poland**).[288]

In **Romania** and in **Poland**, some judges remain confused about the principle that the dismissal of a worker on the grounds of pregnancy or maternity constitutes unlawful direct sex discrimination. While the National Council for Combating Discrimination (*Consiliul Național pentru Combaterea Discriminării (CNCD)*) in **Romania** has developed substantial case law that sanctions employers for the unlawful

287 Croatian Ombudsperson for Gender Equality (2012), '*Položaj trudnica i majki s malom djecom na tržištu rada*', available at: https://www.prs.hr/attachments/article/633/Polo%C5%BEaj%20trudnica%20i%20majki%20sa%20malom%20djecom%20na%20tr%C5%BEi%C5%A1tu%20rada%20WEB.pdf, accessed 28 August 2018.

288 In Poland, this work is done by the Labour Inspectors working at the State Labour Inspectorate (governmental administrative body).

dismissal of women on the ground of pregnancy as direct sex discrimination,[289] many courts (including the Court of Appeal) continue to overturn certain decisions of the CNCD in this field.[290] The courts who examine these cases fail to take into account the fact that discrimination based on pregnancy or maternity is direct sex discrimination. In particular, they often find that the ground of 'sex' is not applicable because there is no evidence that the employee had been treated that way because she is a woman. In at least one of these cases, the High Court of Cassation and Justice overturned the Court of Appeal judgment and upheld the CNCD decision, confirming that the unlawful dismissal of women on the ground of pregnancy is sex discrimination.[291] The CNCD is continuing its jurisprudential line.[292] However, there is no follow-up standard procedure of decisions of the CNCD. Very often, the CNCD does not follow up on its decisions.

In **Cyprus**, based on information provided by the Trade Union and complaints lodged with the Industrial Disputes Tribunal, dismissals on the ground of pregnancy/maternity occur more frequently in the private sector than in the public sector.

3.1.2 Justification of the dismissal on economic grounds

Dismissal on the ground of pregnancy is direct sex discrimination and cannot be justified, except for reasons unconnected to the pregnancy or the maternity as specified by national law.[293]

Often the dismissal of pregnant workers or women on maternity leave will be justified if it is legitimately related to the business. Therefore, justification on the ground of economic reasons or due to specific circumstances of the company or institution is often advanced by employers. The difficulty is that the dismissal might in reality be based on pregnancy or maternity but the reasons formally presented by the employer are justified by business-related factors. It therefore becomes difficult for the employee to prove direct discrimination. The Court of Justice has held that no other interest, not even economic interest, can prevail over the protection of pregnancy and maternity leave.[294]

A difficulty arises in cases of redundancy, which are based on economic or environmental issues. An undertaking might cease its activities because it is bankrupt, the factory might have been destroyed by a natural catastrophe or the business may have been restructured. In these cases, some or all workers might have to be made redundant. The choice of who is to be made redundant must not be linked to the pregnancy or the maternity leave of a worker. However, this is not always easy to prove for the employee.

The termination of the contract of employment of a pregnant worker or a worker on maternity leave because of redundancy based on the undertaking's restructuration, economic or environmental problems is generally accepted by national law. Recently in *Guisado*,[295] the CJEU specifically considered the justification of the dismissal of a pregnant employee under a collective redundancy scheme. Ultimately, the CJEU accepts the employer's justification of dismissal.

289 Romanian Consiliul Naţional pentru Combaterea Discriminării (CNCD), Decision No. 417 of 15 December 2010, Decision No. 28 of 18 January 2012, and Decision No. 61 of 6 February 2013.

290 Romania: Court of Appeal of Bucharest, Judgment Nos. 3918 of 9 December 2013 (File No. 3785/2/2013), 1712 of 27 May 2013, and 4585 of 24 July 2012.

291 Romania: High Court of Cassation and Justice, Decision No. 3177 of 15.10.2015 in File No. 3785/2/2013.

292 Romania: CNCD, Decision No. 264 of 14.05.2014 (a case of discrimination upon return from parental leave was sanctioned with an administrative fine of EUR 666 (RON 3 000)). See also CNCD, Decision No. 56 of 25.02.2016 (a case of a dismissal based on pregnancy was sanctioned with an administrative fine of EUR 2 222 (RON 10 000)), CNCD Decision No. 88 of 03.02.2016 (a case of discrimination upon return from parental leave was sanctioned with an administrative fine of EUR 444 (RON 2 000)).

293 Article 10 of the Pregnant Workers Directive.

294 Case C-177/88 *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus*. ECLI:EU:C:1990:383; Case 179/88 *Handels- og Kontorfunktionaerernes Forbund i Danmark v Dansk Arbejdsgiverforening. (Hertz)* ECLI:EU:C:1990:384 and Case C-207/98 *Silke-Karin Mahlburg v Land Mecklenburg-Vorpommern*. ECLI:EU:C:2000:64 at Paragraph 29.

295 Case C-103/16 *Jessica Porras Guisado v Bankia SA and Others* EU:C:2018:68.

In **Denmark**, in the majority of cases, the Equality Board finds that dismissal of protected workers on the ground of redundancy is justified. In the **Netherlands**, around half the cases regarding dismissal of pregnant workers are justified on the basis of business operations. If the employer has not referred to the pregnancy at all, but has only stated that the performance of the employee or business reasons are the reason for not extending, the employee is unlikely to win the case.

In some countries, the courts do not require employers to provide an explanation relating to the choice of the person to be made redundant, leaving the possibility that hidden discrimination has taken place (**Czech Republic**, **Poland** and **Spain**). This means that workers who may have been discriminated against, particularly because of being pregnant or being on maternity leave, have no way of knowing the reasons for their particular dismissal (why they were chosen to be dismissed). As a result, they are unable to access the necessary information in order to challenge the employer's decision. In **Poland**, the imprecise formulation of the exceptions for dismissing a pregnant worker means that it is difficult for the employee to show that an unlawful dismissal has taken place.[296]

In most countries, dismissal of a pregnant worker or a worker on maternity leave is possible in case of bankruptcy or cessation of the activities of the employer. However, in **Estonia** and **Finland**, national law clearly states that the employer's economic difficulties or the reorganisation of the enterprise are not acceptable justifications for dismissal of pregnant employees or workers on maternity leave. In **Estonia**, the law provides that in cases of redundancy, employees on maternity and parental leave should be kept on. However, in case of bankruptcy or total cessation of the activities of the employer, employees who have a child under three can be dismissed. In **Finland**, employers are not entitled to terminate the employment contract of an employee who is pregnant or on parental leave and there are no exceptions. In the event of dismissal due to economic or production reasons, the employer is to explain the grounds of dismissal, but there is no explicit requirement of this being done in writing. If an employer dismisses a pregnant employee or an employee on family-related leave, the dismissal is assumed to have been caused by pregnancy or by the use of family-related leave, unless the employer shows another reason. An employer may dismiss a pregnant employee or an employee on family-related leave using normal grounds of dismissal only if the employer ceases all operations.

In **Norway**, a dismissal is only permitted where an enterprise is forced to downsize due to economic conditions or if there is a lack of sufficient work to maintain the business. Where an employee is lawfully dismissed during her maternity leave, the notice is still valid but is extended until the end of the maternity leave and the paid maternity leave does not cease.[297] In **Romania**, the dismissal of pregnant workers is permitted by law if the employer is dissolved or goes bankrupt.[298] When an employee is made redundant during her maternity leave, the payment for maternity leave does not cease if the woman concerned was dismissed due to no fault of her own.[299] In **Croatia**, the contract of employment can be terminated upon the death of the employer who is a natural person, upon the termination of a small business by virtue of law or by the deregistration of a sole trader, upon the termination of the business or if the business becomes insolvent.

Pregnant workers and workers on maternity leave cannot be made redundant in **France** and **Italy**. In **France**, a dismissal is only possible in case of gross misconduct not connected to her condition or if the employer cannot maintain the contract of employment for a reason not connected to her condition. In any case, the dismissal cannot be notified during the periods of the suspension of the contract of employment.

296 The Polish Law of 13 March 2003 on specific rules regarding the termination of employment relationships for reasons beyond the employees' control. Consolidated text: JoL 2016 Item 1474.
297 Norway: WEA Section 15-9 (2).
298 Article 21(3) of the Romanian Governmental Emergency Ordinance No. 96/2003.
299 Article 23 of the Romanian Government Emergency Ordinance No. 158/2005.

This means that an employee cannot be made redundant during maternity leave.[300] In **Italy**, a pregnant worker can only be made redundant in the event of total cessation of activity of the undertaking.[301]

In the **United Kingdom**, an employee who is made redundant during maternity leave is entitled to any existing suitable alternative work in preference to other employees, including those at risk of redundancy.[302] Many feel that this is not adequate and that the protection should be stronger.[303]

Despite the existence of strong formal provisions prohibiting the dismissal of pregnant workers and workers on maternity leave, many dismissals based on pregnancy/maternity continue to take place (**Belgium**, **Cyprus**, **Czech Republic**, **France**, **Hungary**, **Poland**, **Slovakia** and the **United Kingdom**). Indeed, there is evidence that the number of dismissals of workers on the ground of their pregnancy has not decreased over the years (**Belgium** and **Slovakia**).

3.1.3 The length of the protection

Article 10 of Directive 92/85/EEC provides that the protection against dismissal applies from the beginning of their pregnancy to the end of the maternity leave. However, the beginning of the pregnancy is not a certain date. The employer might not know that the worker is pregnant for some time and until the employee decides to inform him/her of the pregnancy. In addition, the Court of Justice has made it clear that employees have no obligation to reveal their pregnancy to the employer.[304] In **France**, the prohibition of dismissal runs from the notification of the pregnancy to the employer until 10 weeks after the end of the period of the maternity leave. Proving that the employer knew about the pregnancy is a difficult issue. How can an employee prove that the employer was aware of the pregnancy if she has not informed the employer of her pregnancy?

The case law of the CJEU is not entirely clear on this issue. Although the CJEU accepts that Article 10 only applies when the information requirement set by Article 2(a) is satisfied, the procedural obligations linked to this information requirement, even though left to national regulation, are not absolute. This is especially true if it can be demonstrated that the employer knew of the pregnancy through other channels (through colleagues[305] or notification of IVF treatment[306] for example), so as to ensure effective protection of pregnant workers. Even though there is no clear-cut answer from the CJEU on this point, it appears that the information requirement is interpreted as a *bona fide* issue and a practical way to check whether a dismissal decision has been made *based on* the pregnancy. The question is whether the employer knew of the pregnancy, and if so, the effective protection of pregnant workers is privileged, even though it must be balanced with principles of legal certainty.[307]

The necessity for the employer to be aware of the pregnancy at the time of the decision to dismiss/discriminate in order to be liable is also problematic in the **United Kingdom**, where the onus is on the

300 Article L 1225-4 of the French Labour Code.
301 Italy: Article 54 of Decree No. 151/2001.
302 Regulation 10 of the UK Maternity and Parental Leave Regulations 1999.
303 See Women and Equalities Committee Report (2015) available at: https://www.parliament.uk/business/committees/committees-a-z/commons-select/women-and-equalities-committee/inquiries/parliament-2015/pregnancy-and-maternity-discrimination-15-16/, accessed 26 August 2018.
304 Case C-320/01 *Wiebke Busch v Klinikum Neustadt GmbH & Co. Betriebs-KG*. ECLI:EU:C:2003:114 and Case C-32/93 *Carole Louise Webb v EMO Air Cargo (UK) Ltd*. ECLI:EU:C:1994:300.
305 C-103/16 *Jessica Porras Guisado v Bankia SA and Others* EU:C:2018:68 at Paragraphs 36 and 37; C-232/09 *Dita Danosa v LKB Līzings SIA* EU:C:2010:674 at Paragraph 55.
306 C-506/06 Sabine Mayr v Bäckerei und Konditorei Gerhard Flöckner OHG EU:C:2008:119 at Paragraphs 53-54.
307 See also C-116/06 Sari Kiiski v Tampereen kaupunki EU:C:2007:536, at Paragraphs 33; C-109/00 Tele Danmark A/S v Handels- og Kontorfunktionærernes Forbund i Danmark (HK). ECLI:EU:C:2001:513, at Paragraphs 11-34.

individual woman to prove that her employer[308] had the requisite knowledge at the requisite time, where it is contested.[309]

In contrast, in **Italy**, the protection against dismissal runs from the beginning of the pregnancy, regardless of whether the employer has been informed or not, for a period of 12 months following the date of confinement. The dismissal of a pregnant women is null and void even in case of illegal employment and even if the employer has not been informed of the pregnancy.[310]

The protection ends at the end of the period of maternity leave.[311] In **Croatia**, the protection applies until 15 days following the end of the leave. In **Germany**, pregnant workers must not be dismissed during their pregnancy and four months after childbirth, and the new regulations cover the same protection against dismissal for women who suffer a miscarriage after the 12th week of pregnancy.

In *Paquay*,[312] the Court ruled that the prohibition to dismiss pregnant women or women who are on maternity leave as determined in the Pregnant Workers Directive is not limited to the notification of a decision to dismiss but it also includes the steps leading up to such a decision during that protected period. Therefore, the dismissal of a woman that takes place almost immediately after returning from maternity leave is considered to fall within the protected period. Some employers bypass the prohibition of dismissal by dismissing workers shortly after the end of the protected period of maternity leave. In **Greece**, the SCPC Civil Section has held that a dismissal three days after the 18-month protection period is not abusive *per se.*[313] However, it held in another case that a dismissal shortly after the expiry of the period of protection, on the ground of the woman's longer absence due to a pregnancy-related illness, was an abuse of rights, and therefore null and void.[314]

3.1.4 The burden of proof

The rules relating to sex discrimination in the EU apply in cases of dismissal of pregnant workers, including the shift of the burden of proof.

In **Belgium**, the burden of proof is on the worker to show that at the time of dismissal, the employer had been informed (by whatever means) of her pregnancy. This requirement is compatible with Article 2(a) of Directive 92/85/EEC. However, as dismissals related to pregnancy/maternity may be challenged in court both as a breach of the protection and as gender discrimination, if the worker cannot prove that the employer knew about the pregnancy, both claims of pregnancy/maternity discrimination and sex discrimination are dismissed. Neither Directive 2006/54/EC nor the CJEU's case law[315] consider that there is a necessary connection between the employer's awareness of the pregnancy and the situation of sex discrimination.[316]

308 *Eildon Ltd v Sharkey* [2004] UK/EAT/0109/03.
309 Del Monte Foods v Mundon (1980) IRLR 224 UK/EAT. See also Really Easy Car Credit Ltd v Thomson (2018) EAT. See James, G (2009) The Legal Regulation of Pregnancy and Parenting in the Labour Market Routledge, London pp. 70-76 which considered many employment tribunal decisions where the employer claims to have been unaware of the pregnancy finding that it was a heavy evidential burden.
310 Italy: Cass. civ., sez. lav., 20-07-2012, n. 12693; Cass. civ., sez. lav., 03-07-2015, n. 13692.
311 If the worker is absent after her period of maternity leave for reasons of illness, even if the illness is pregnancy related, the special protection no longer applies but she can claim treatment that is equal to that of a sick male worker. C-394/96 *Mary Brown* v *Rentokil Ltd.* ECLI:EU:C:1998:331 in Paragraph 16.
312 Case C-460/06 *Paquay v Societe d'architectes Hoet and Minne SPRL* ECLI:EU:C:2007:601.
313 Greece: SCPC (Civil Section) 179/2016.
314 Greece: SCPC (Civil Section) 1591/2010.
315 Case C-32/93 *Carole Louise Webb v EMO Air Cargo (UK) Ltd*. ECLI:EU:C:1994:300.
316 See also Case C-320/01 *Wiebke Busch v Klinikum Neustadt GmbH & Co. Betriebs-KG*. ECLI:EU:C:2003:114.

3.1.5 Fixed-term contract of employment[317]

The Court of Justice has held that the refusal to renew a fixed-term contract of employment of a pregnant worker constitutes direct sex discrimination.[318] However, in many countries, the non-renewal of the fixed-term contract of pregnant employees remains a contentious issue (**Belgium**, **Croatia**, **Finland**, **France**, **Greece**, **Hungary**, **Italy**, the **Netherlands**, **Norway**, **Poland**, **Portugal**, **Slovenia** and **Sweden**). Since the contract ends automatically at the end of the term, and no specific justification for such termination is required from the employer, most contracts simply end like this and are not renewed. However, people rarely decide to take legal action to enforce their rights against their employers. This is an issue that is compounded by the increase of precarious employment contracts. Fixed-term contracts are becoming the norm in **Finland** and **Slovenia**. In **Finland**, fixed-term contracts are used especially for women of childbearing age, typically used in female-dominated sectors.

The main difficulty is to prove direct sex discrimination in relation to the non-renewal of a fixed-term contract.

In **Croatia**, fixed-term contracts are often used to circumvent employment protection, such as prohibition of dismissal or the right to return to work following a period of maternity leave. Indeed, the non-renewal of a fixed-term contract due to pregnancy has become employers' usual practice. Once a fixed-term employment contract expires, the contract is often terminated and there is no obligation on the employer to offer another contract. This is the case even when it is evident that the employer has not offered the continuation of the employment relationship because of pregnancy or maternity. This is standard practice in Croatia, and despite the existence of remedies, workers are not willing to initiate discrimination claims before courts (due to associated costs, length of procedure, uncertain prospects of success, etc.), even when the facts of the case are such that the existence of direct discrimination based on pregnancy is fairly obvious, and therefore contrary to EU law.

Similarly, when a fixed-term contract comes to an end during maternity leave in **France**, the worker ends up without employment protection during part of the maternity leave. During maternity leave, she cannot be employed by another employer, but she continues to receive the allowances from social security schemes.

In the **Netherlands**, temporary contracts often are not renewed in the case of pregnancy. In most cases, no reference is made to the pregnancy, but the employee is told that there is a shortage of work or that she did not perform well. If it becomes clear that the real reason is the pregnancy, the employee involved is entitled to compensation.[319] According to the rule on the reversal of the burden of proof, it should be for the employer to show that the employment agreement would have been extended if the employee had not been pregnant. However, the courts do not systematically apply the rule on the reversal of the burden of proof.[320] The Dutch courts' interpretation with regard to the reversal of the burden of proof is not always consistent, and the fact that the Netherlands has a very high percentage of so-called flex workers does not help this group of employees.

317 See also generally, Burri, S. and Aune, H., European network of legal experts in gender equality and non-discrimination (2013) *Sex discrimination in relation to part-time and fixed-term work. The application of EU and national law in practice in 33 European countries*, available at: https://www.equalitylaw.eu/downloads/2804-sex-discrimination-en, accessed 19 August 2018.

318 Case C-109/00 *Tele Danmark A/S v Handels- og Kontorfunktionærernes Forbund i Danmark (HK)*. ECLI:EU:C:2001:513 and *C-438/99 Maria Luisa Jiménez Melgar v Ayuntamiento de Los Barrios* ECLI:EU:C:2001:509.

319 See for instance in the Netherlands, a decision of the Zwolle District Court: *JAR* 2016/143. See Vegter, M.S.A. (2016) on a judgment by the Zwolle District Court of 26 April 2016, *JAR* 2016/143.

320 The Netherlands: ECLI:NL:RBDHA:2018:3423.

In **Poland**, there is no legal obstacle to prevent the employer from refusing the renewal of a fixed-term employment contract when the worker is entitled to maternity/parental leave.[321] The employer is under no obligation to provide an explanation for the termination of fixed-term contracts, which facilitates quick and easy dismissals of such employees.[322]

The Supreme Court of the Republic of **Croatia**[323] has confirmed that the protection against dismissal does not cover other cases of termination of the employment relationship, notably the expiration of a fixed-term employment contract. The fact that a worker is on maternity leave does not prevent the expiration of a fixed-term employment contract.

In **Greece**, unfavourable treatment linked to the use of fixed-term contracts appears to be institutionalised. For instance, there are specific problems of discrimination on the grounds of maternity against substitute state school teachers. As these teachers are fixed-term state employees, they are not granted the Civil Servants Code (CSC)[324] maternity leave in contrast to their permanent colleagues and they are excluded from a range of pregnancy and maternity rights. As a result, substitute state school teachers have fewer rights than the permanent teachers with regard to paid maternity leave, paid sick leave in cases of pregnancy-related illness, and parental leave.[325] In addition, in the private sector, workers can be granted a 6-month special leave, which is independent of both maternity and parental leave, is granted to women only in addition to maternity leave and cannot be shared with the father. The personal scope of this special leave restricts its availability to workers with indefinite terms of employment, and excludes large categories of female fixed-term workers in a private-law employment relationship in the public sector, such as substitute teachers and junior hospital doctors.

Moreover, the extent of the protection is unclear in **Greece**, where the SCPC's Civil Section held that the protection against dismissal due to the take-up of maternity leave covers fixed-term contracts, but does not extend beyond the expiry of the term,[326] which is contrary to CJEU case law.[327] However, some lower courts have held that when a fixed-term contract ends within the 18-month protection period, the end of the relationship is suspended until the end of the 18-month protection period.[328]

In contrast, the **Finnish** Equality Ombudsman decided that there is an assumption of discrimination if the fixed-term contract of a pregnant worker is not renewed.[329]

To prevent the non-renewal of fixed-term contracts based on pregnancy and maternity in **Portugal**, employers have a duty to inform the National Equality Body (CITE) about the motives underpinning the non-renewal of the fixed-term contract of pregnant workers or of workers who have recently given birth.[330] The absence of such information constitutes grounds for a fine.[331] However, the possible action by the CITE in relation to this procedure remains unclear, and in practice it is very difficult to prove that the refusal to renew the contract is solely based on the fact that the worker is pregnant or is taking maternity

321 Although according to Article 177[3] of the Polish Labour Code a fixed-term contract, or a contract for a trial period exceeding one month, which would expire after the third month of pregnancy, shall be extended until the day of delivery.
322 Results of investigation on the layoffs of persons returning from maternity, paternity, and parental leave and the observance of other employee rights, State Inspectorate of Labour (2014), available at: https://www.pip.gov.pl/pl/f/v/100996/sprawozdanie2013.pdf, accessed 28 August 2018.
323 Croatia: Revr-211/06.
324 Greek Civil Servants Code: Act 3528/2007, OJ A 26/09.02.2007.
325 Greece: Γ΄ ΕΛΜΕ Θεσσαλονίκης (3rd Federation of High School Teachers of Thessaloniki), Communication dated 29 November 2016, available at: http://www.alfavita.gr/arthron/anakoinoseis/g-elme-thessalonikis-pliris-prostasia-tis-kyisis-kai-tis-mitrotitas-gia-tis#ixzz4Sc2jKlub, accessed 12 May 2018.
326 Greece: SPCC (Civil Section) 1341/2005. See also Larissa ACA 68/2013.
327 Case C-109/00 *Tele Danmark A/S v Handels- og Kontorfunktionærernes Forbund i Danmark (HK).* ECLI:EU:C:2001:513 and *C-438/99 Maria Luisa Jiménez Melgar* v *Ayuntamiento de Los Barrios* ECLI:EU:C:2001:509.
328 Athens Court of Appeal 644/2017; Larissa Court of Appeal 9/2014. See also in the case of fixed-term contracts of teachers in private schools: SPCC (Civil Section) 317/2011, Athens Court of Appeal 3260/2009.
329 In accordance with C-438/99 Maria Luisa Jiménez Melgar v Ayuntamiento de Los Barrios ECLI:EU:C:2001:509.
330 Article 144 No. 3 of the Potuguese Labour Code.
331 Article 144 No. 5 of the Portuguese Labour Code.

leave. In practice, this is a major problem since most employment relationships with young workers (e.g. that will most likely become parents) are based on fixed-term contracts.

3.1.6 Dismissal during the probation period

According to Article 10(1) of Directive 92/85/EEC, the dismissal of a pregnant worker would be possible during probationary work, for reasons unrelated to her pregnancy, but only based on her performance during the probationary period. In some countries, the protection of pregnant workers and women on maternity leave against dismissal during the probationary period is unclear (**Croatia**, **Hungary**, **Spanish** and **Sweden**).

In **Croatia**, there is no special protection in relation to pregnancy/maternity during the probation period. The **Spanish** Constitutional Court ruled that the dismissal of a pregnant woman during the probationary period is not automatically considered null and void if the employer demonstrates that he/she did not have knowledge of the pregnancy.[332]

In **Hungary**, pregnant workers on a probationary period are often dismissed without any explanation or they are sometimes offered the option to terminate the employment by mutual consent as a way of circumventing the protection against dismissal of pregnant workers.[333] Women often have little choice but to accept this offer, and these cases almost never reach the courts.

In **Italy**, the worker can be dismissed if the probation report has been negative, providing that the reason for the termination is not based on the pregnancy or maternity.[334] The employer must show that s/he did not know about the worker's pregnancy and must present the objective reasons justifying the negative evaluation of the probationary period, in order to disprove that the reason for the dismissal was the woman's pregnancy.[335]

Under **Swedish** law, an employer has the right at any time to terminate a probationary employment without presenting any reasons.[336] This right is not affected by the fact that the employee is pregnant or on maternity leave. The employer must be prepared, however, to explain the decision before the court, should the employee contest the termination for being discriminatory. This means that the **Swedish** implementation of the Pregnant Workers Directive seems to be insufficient in this respect.[337]

3.1.7 The issue of 'blank resignation' and supervision procedures

The Network's 2012 report highlighted the practice of so-called 'blank resignation',[338] which refers to an undated resignation letter signed by a worker at the time of recruitment so as to be used by the employer to force the worker's resignation when needed, for example if the worker becomes pregnant. Often the

332 Judgment of the Spanish Constitutional Court 173/2013 of 10 October 2013, available at: http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/23619, accessed 24 May 2018.

333 For example in 2017 in Hungary: EBH/71/2017, available at: http://www.egyenlobanasmod.hu/index.php/hu/jogeset/ebh712017, accessed 5 May 2018), in 2016: EBH/182/2016, http://www.egyenlobanasmod.hu/hu/jogeset/ebh1822016; EBH/19/2016, http://www.egyenlobanasmod.hu/hu/jogeset/ebh192016; EBH/481/2016, http://www.egyenlobanasmod.hu/hu/jogeset/ebh4812016; EBH/360/2016, http://www.egyenlobanasmod.hu/hu/jogeset/ebh3602016, accessed 6 June 2018.

334 Italy: Article 54 of Decree No. 151/2001.

335 Italian Constitutional Court 27.5.1996, No. 172.

336 Swedish Employment Protection Act (1982:80) Section 6.

337 See also the wide interpretation of the CJEU regarding the concept of dismissal within the meaning of the Equal Treatment Directive Case 19/81 *Arthur Burton v British Railways Board*. ECLI:EU:C:1982:58, Case 151/84 *Joan Roberts v Tate & Lyle Industries Limited*. ECLI:EU:C:1986:83, and Case 152/84 *M. H. Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)*. ECLI:EU:C:1986:84.

338 Masselot, A., Caracciolo Di Torella, E. and Burri, S., European Network of Legal Experts in the Field of Gender Equality (2013), *Fighting discrimination on the grounds of pregnancy, maternity and parenthood. The application of EU and national law in practice in 33 European countries*, available at: https://www.equalitylaw.eu/downloads/2805-discrimination-pregnancy-maternity-parenthood-en, accessed 19 August 2018.

employer makes recruitment conditional on signing such a letter. The issue was highlighted specifically in **Italy** but the practice was also found to take place in **Portugal** and **Greece**.

In response to this issue, **Italy** amended its legislation[339] to require that mutual termination of the contract of employment or resignations of working mothers be signed before an inspector of the Minister of Labour from the beginning of the pregnancy until the child reaches the age of three. The same rule applies to adoptive and foster parents. While law provides that the non-confirmed resignation is null and void, it only provides that the resignation is suspended until it is signed before the Labour Inspectorate. There are fears that this could mean that the resignation could lawfully produce its effect after the period of three years.

The Italian courts have also reinforced the protection against 'blank resignation' by undertaking factual assessments surrounding the resignation,[340] including a check on whether the employee has been pressured or blackmailed into resigning.

A local initiative to attempt to counteract 'blank resignation' in **Italy** is worth mentioning. The Department of the Ministry of Labour of Pistoia in Tuscany has run a campaign against 'blank resignation' in local newspapers, on the radio and in businesses as well, trying to inform workers and inviting them to denounce this unlawful practice.

The issue of 'blank' or forced resignation is not exclusively found in **Italy**. A 2017 study conducted by the Ombudsperson's Office in **Latvia** shows that 43 female respondents and 2 male respondents were forced to sign mutual agreements with the employers on voluntary termination of the employment relationship after they informed the employer of their intention to take parental leave.[341]

In **Portugal** and **Germany**, the dismissal of protected workers must be supervised. In **Germany**, the dismissal of pregnant workers is authorised under exceptional circumstances not related to the pregnancy or to giving birth and with the special approval of the supervising authority. In **Portugal**, the dismissal of a worker on the grounds of pregnancy and maternity is null and void and he/she[342] has the right to be reinstated, but if he/she decides not to go back, he/she has the right to accrued damage compensation (calculated at double the basis of 15 to 45 days per year of the employment contract).[343] In addition, the national equality body must be called upon by the employers for the purposes of authorising the dismissal of a pregnant worker or workers (father or mother) during maternity or parental leave.[344]

3.1.8 Remedies and sanctions

Most national laws have implemented provisions regarding damages in compliance with EU law.[345] In **Belgium** the standard and fixed damage is six months' remuneration. However, these standard damages do not appear to deter employers from dismissing pregnant workers. It is argued that such damages are in any case too weak to represent a serious deterrent to discrimination, unfavourable treatment or dismissal (**Belgium** and the **Netherlands**). In the **Czech Republic**, the standards of remedies are considered too low and therefore not compliant with EU law. Therefore, such remedies are also too weak to deter the dismissal of pregnant workers.

339 Italian Act No. 92/2012 changed Article 55, Paragraph 4 of Decree No. 151/2012.
340 T. Arezzo 21.10.2008.
341 Latvian Ombudsperson, Annual Report (2017), pp. 241-244, available in Latvian at: http://www.tiesibsargs.lv/uploads/content/lapas/tiesibsarga_2017_gada_zinojums_1520515340.pdf, accessed 28 August 2018.
342 In Portugal, only a small part of maternity leave is compulsorily reserved to the mother (the first 6 weeks after giving birth), and the rest of the leave can be divided between both parents, so the protection against dismissal also covers both parents.
343 Articles 63(8) and 392(1) of the Portuguese Labour Code.
344 Article 63 of the Portuguese Labour Code.
345 Case C-460/06 *Paquay v Societe d'architectes Hoet and Minne SPRL* ECLI:EU:C:2007:601.

In the **Netherlands**, the damages awarded vary considerably[346] and the courts do not systematically award an amount for non-pecuniary damage, because the employee does not always clarify the type of psychological damage suffered as a result of pregnancy discrimination.[347] It may be argued that because discrimination violates human dignity, entitlement to compensation should be automatic without further requirements. Moreover, in cases of discrimination in the Netherlands, the extent of compensation for loss of income is not always consistently applied because it is difficult to assess how long an employment agreement would have lasted without the discrimination.

In cases where the employer was undisputedly informed of the pregnancy and does not convincingly demonstrate that the grounds for dismissal were unrelated to the employee's pregnancy or maternity, courts often deny the possibility to combine fixed damages available under the protection against dismissal on the base of pregnancy/maternity and under sex discrimination protection (**Belgium**).

3.2 Parental and adoption leave

Dismissal on the ground of the take-up of parental leave or adoption leave is generally prohibited in national law in accordance with the Parental Leave Directive. However, in **Hungary**, the protection against dismissal for taking parental leave is only provided to mothers, in breach of the Parental Leave Directive and Article 14(1)(c) of the Recast Directive 2006/54/EC in cases of indirect discrimination on grounds of sex. Fathers are only granted protection against dismissal if they are *single* fathers caring for a child because the mother has died or left the family.

Overall, there is little case law concerning the dismissal of workers on the basis of adoption leave as adoption has become increasingly rare.

Also, there are few cases concerning the dismissal of workers on the basis of parental leave. However, the low number of cases does not reflect the reality on the ground. On the contrary, there seems to be a large number of instances of discrimination against employees based on the take-up of parental leave but there are few legal actions (**Germany**, **Hungary**, **Italy** and **Poland**). Some data in **Hungary** suggests that as it is usually mothers who take parental leave, they are disproportionately dismissed as a consequence.[348] Moreover, dismissal on the ground of parental leave is rarely studied in general and specifically by the national equality bodies (**Germany**). The main problem may be argued to lie in the fact that there is a lack of information about individual rights and a lack of support from trade unions or other services that could build workers' confidence and accompany them to discuss the issue with employers (**Romania**). The pressure from the employer is often so strong that women agree to give up their rights – by quitting their job or not returning to work after leave because they face a hostile working environment that does not respect their family choices. In addition, filing complaints with labour inspectors or starting litigation in court requires a large variety of resources, both financial and emotional, which many workers do not have.

Some countries provide a broad array of justifications for dismissing workers who are taking parental leave. In **Spain** for example, employers may dismiss workers for their lack of attendance at work if they exceed a certain number of days of absence from work. Given that there is no legal provision for workers to take leave for *force majeure* in cases of sickness or accident of a child 'that makes the immediate presence of the worker indispensable,' this could result in a dismissal for lack of attendance.

In contrast, **Germany** has a provision against dismissal based on parental leave.[349] Employees must not be dismissed except under special circumstances such as a threat to the employing company's existence

346 From approx. EUR 1 000 to approx. EUR 10 000.
347 Art. 6:106(1)(b) of the Dutch Civil Code. See Section 2.1.12 above.
348 Koncz, K. (2006), 'Munkahelyi diszkrimináció' (Discrimination at the workplace), *Munkaügyi Szemle,* Part I, pp. 11-14 and Part II, pp. 16-19.
349 Section 18 of the German Federal Statute on Parental Leave and Parental Allowances.

or its complete or partial closure[350] and with the approval of the supervising authority; however, serious operational reasons such as the closure of a medical practice could justify a dismissal during parental leave.[351]

Under **Portuguese** law, dismissal during parental leave and adoption leave is unlawful and forbidden.[352] If any form of dismissal (e.g. collective dismissal or other objectively motivated dismissal) occurs while the worker is on leave, the dismissal is presumed unlawful and has to follow a different procedure involving the National Equality Body (CITE), which has to approve the dismissal in advance.[353]

3.3 Paternity leave

The provision of a period of paternity leave does not necessarily come with the protection against dismissal based on the take-up of such leave.

In **Hungary** and **Slovenia** there is no protection against dismissal during paternity leave in breach of Article 16 of the Recast Directive.

In **Austria**, there is no general right to paternity leave, but paternity leave can be agreed on a contractual basis or it can be provided under the terms of a collective agreement. In these cases there is no specific provision protecting workers who take paternity leave against dismissal, but such dismissal claims have to be based on the general equal treatment act. As the right to paternity leave in Austria has not been enacted in the context of maternity-protection rules or of parental-leave legislation, the rules for protection against dismissal do not apply to fathers on paternity leave. Employees who lose their jobs because they take paternity leave can request re-instatement under the rule of equal treatment legislation if they can demonstrate that the termination was based on gender discrimination. The employer can counter by offering proof that other motives were more decisive for the dismissal than the paternity leave.

In contrast, **Bulgaria**, **Greece**, **Italy**, **Poland** and **Portugal** have specifically included paternity leave in the protection against dismissal on the grounds of pregnancy/maternity. Moreover, in **Italy**, the protection against the 'blank resignation' of mothers[354] also applies to fathers,[355] but only if the father is on paternity leave.[356]

There is no case law regarding paternity leave in **Belgium**, **Hungary**, **Greece**, **Luxembourg**, the **Netherlands** and **Poland**. It is argued that as the leave is short there is little risk that fathers are dismissed for taking paternity leave (**Hungary**). There are no real enforcement problems at present, probably because there is hardly any right tko be enforced (the **Netherlands**). In the **Czech Republic**, the legislation on paternity leave is too recent for any difficulties to be observed. The dismissal of employees because they take paternity leave is unknown in **Lithuania**.

3.4 Carers' leave

The provision of periods of carers' leave is not necessarily combined with a protection against dismissal based on the take-up of such leave.

350 Germany: Due to the Administrative Court of Oldenburg, judgment of 20 February 2012, 13 A 451/11, the restructuring of an employing company or parts thereof may be equated with a partial closure. This decision gives employers additional latitude to dismiss caring parents, especially in times of economic crisis.
351 Germany: State Administrative Court of North Rhine-Westphalia, judgment of 12 January 2017, 12 E 896/16.
352 Article 53 of the Portuguese Constitution, and Articles 338 and 63(2) of the Labour Code.
353 Article 53 of the Portuguese Constitution, and Articles 338 and 63(2) of the Labour Code.
354 See Section 3.1.7 above.
355 Italy: Article 55, Paragraph 4 of Decree No. 151/2012.
356 Italy: Cass. civ., sez. lav., 11-07-2012, n. 11676.

In a few countries such leave is protected extensively. **Bulgaria**, **Germany** and **Portugal,** for example, have a specific legal provision prohibiting the dismissal of a worker due to the take-up of carers' leave, to the same level as pregnancy and maternity leave.

Difficulties may arise in relation to the period that is protected. In **Germany** the protection starts from the moment that the worker applies for carers' leave (but not more than 12 weeks before the leave starts)[357] up to the end of the carers' leave.

Under **Portuguese** law, the dismissal of a worker on carers' leave is subject to severe restrictions. All forms of dismissal (including disciplinary dismissal, collective dismissal or other objectively motivated dismissal) must have substantiated grounds, which need to be communicated to the worker in writing, and every form of dismissal must respect a specific and strict procedure. The absence of an adequate motive or the lack of adequate procedure established by law renders the dismissal null and void and grants the employee the right to reinstatement.[358] The only 'exception' to this rule are fixed-term contracts, where the termination of such contracts by the end of the agreed term is not considered a form of dismissal and it is therefore free to either party to decide that this represents the end of the contract. In reality, as more women than men are carers, the non-renewal of a fixed-term contract might constitute indirect sex discrimination.[359]

In contrast, in **Austria** and **Italy**, there is no specific provision protecting workers who take carers' leave against dismissal. Such claims must be based on the general equal treatment act or on the general rules governing the protection against termination. However, this protection does not apply to care givers of disabled persons. In the **Netherlands**, the prohibition against dismissal because of taking up carers' leave[360] only refers to short-term or long-term care leave and not to urgent leave. However, the view is generally taken that this represents an oversight by the legislator and that the prohibition applies to urgent leave as well.

There is no case law on this issue in **Belgium**, **Greece**, **Luxembourg**, and **Poland**. In the **Czech Republic**, the legislation on carers' leave is too recent for any difficulties to be observed. In **Belgium**, cases concerned with the 'special schemes' drafted on the general career breaks or time credits schemes are usually focussed on the application of the protection and the motives of dismissal, but not on the eventuality of discrimination.

The dismissal of employees because they take carers' leave is unknown in **Lithuania**.

In **Belgium**, the Constitutional Court found[361] that refusing to calculate indemnity in lieu of notice period on the grounds of full-time remuneration when taking part-time carers' leave was incompatible with the general principle of equality under the law,[362] but the Court only mentioned the very short duration of the disputed leave (up to 2 months). The Court applied *Meerts*[363] to carers' leave beyond parental leave but failed to admit this in its judgment.

357 Until 31 December 2014, German Law did not contain any restrictions concerning the beginning of the special protection against dismissal other than the announcement of the intention to take carers' leave by the employee. The State Labour Court of Thuringia, judgment of 2 October 2014, 6 Sa 345/13, decided that protection against dismissal started with the announcement of the employee and that there was no restriction under the respective law and no restriction could be concluded from other laws, e.g. on parental leave. Since 1 January 2015, due to amendments of the respective law, the special protection against dismissal does not begin more than 12 weeks before the leave starts.

358 Articles 351 *et seq*. and 381 *et seq*. of the Portuguese Labour Code.

359 See the case law on the non-renewal of fixed-term contract of employment in general: Case C-109/00 *Tele Danmark A/S v Handels- og Kontorfunktionærernes Forbund i Danmark (HK)*. ECLI:EU:C:2001:513 and C-438/99 *Maria Luisa Jiménez Melgar v Ayuntamiento de Los Barrios* ECLI:EU:C:2001:509.

360 The Netherlands: Article 7:670(7) DCC.

361 Belgium: Judgment n°164/2013 of 5 December 2013, *Chroniques de droit social*, 2014, p.317 with J. Jacqmain's case note.

362 Articles 10 and 11 of the Belgian Constitution.

363 Case C-116/08 *Christel Meerts v Proost NV*. ECLI:EU:C:2009:645.

4 Access to justice and effective enforcement

This report specifically discusses the issue of enforcement relating to pregnancy, maternity, paternity, parental, adoption and carers' leave. Workers taking such leave are in a vulnerable position, in that they are trying to reconcile their employment obligations with their care duties. The stress related to the need to balance the two issues is not to be understated. Women who are pregnant or who have recently given birth face physical and emotional tension related to becoming a mother. Other workers who also take family leave may face similar tension. Such tension may easily increase if the employment relationship is difficult. As a result, such workers are unlikely to take legal action against an employer as the emotional, physical and financial burden of such action might be too much for them.[364]

The situation with respect to the access to justice and effective enforcement of the prohibition of dismissal and discrimination and unfavourable treatment based on pregnancy, maternity, paternity, parental, adoption and carers' leave is not homogenous across the countries under review. The number of cases taken to court is not a reflection of the reality on the ground. A number of reasons explaining why individuals appear to be reluctant to go to court have been presented.

In general, a good level of awareness of rights leads to a higher degree of enforcement and effectiveness. In contrast, it is suggested that low awareness, including low awareness of procedural EU rules, such as the rules on the standing of organisations or the burden of proof, leads to fewer cases. Awareness of rights is necessary for both the employee and the employer. In the **United Kingdom**, a 2016 study revealed that there is a discrepancy between employers' understanding of discrimination and the extent of its occurrence.

However, awareness is far from the only factor in good enforcement of rights and effectiveness. Workers, especially when they are young and therefore potential parents, tend to refrain from exercising their individual right to pregnancy and maternity leave and other family-related leave because they are afraid of the potential consequences, particularly those employed under fixed-term contracts, working in temporary positions or in any kind of precarious employment, as they fear that their contract might not be renewed. Many workers fear being victimised or labelled trouble-makers during times of economic crisis.[365] The financial crisis has particularly exacerbated this situation which *de facto* deprives these individuals of the choice to exercise their rights (**Greece**, **Italy** and **Spain**). Large numbers of workers are in a precarious position in **Spain**, where almost 30 % of the workers are on temporary contracts of employment and unemployment is high. As a result, many are discouraged from seeking judicial redress for fear of losing their jobs. In addition, trade unions are particularly weak in this context and the national equality body is not a relevant actor in this matter.

In addition, a number of EU legal concepts are not always applied correctly or understood properly by national courts. This is the case for the concept of indirect discrimination which continues to cause difficulties in particular in **Hungary** and **Greece**.[366] The rules on the reversal of the burden of proof are also applied with difficulty in a number of countries.[367]

Below is supplementary range of reasons can explain the reasons why individuals are reluctant to go to court.

364 See generally: Masselot, A., Caracciolo Di Torella, E. and Burri, S., European Network of Legal Experts in the Field of Gender Equality (2013), *Fighting discrimination on the grounds of pregnancy, maternity and parenthood. The application of EU and national law in practice in 33 European countries*, available at: https://www.equalitylaw.eu/downloads/2805-discrimination-pregnancy-maternity-parenthood-en, accessed 19 August 2018.

365 For an account on victimisation and the fear of victimisation, see above section 2.1.8 in this report.

366 For an account on the difficulties relating to the concept of indirect discrimination, see above section 2.1.11 in this report.

367 For an account on the difficulties relating to the rules on the reversal of th eburden of proof, see above section 2.1.12 in this report.

It should be pointed out that access to the justice system is costly, prohibitively so for individuals in **Croatia**, **Czech Republic**, **Estonia**, **Greece**, the **Netherlands**, **Poland**, **Norway**, the **United Kingdom**. In the **Netherlands**, the legal costs often do not outweigh the possible gains.

In **Norway**, in addition to using the normal and costly judicial system, individuals may file a complaint to the Equality and Anti-Discrimination Tribunal, which is free of charge.

Many people cannot afford the legal fees required to access the courts in **Cyprus**. Legal fees required to be paid by all claimants to the employment tribunal were banned by a Supreme Court ruling in 2017[368] in the **United Kingdom**.

Since access to justice is expensive, legal aid is inadequate and difficult to obtain in **Greece** and **Poland**.

Another deterrent is that legal proceedings are considered to be too long to provide an adequate solution for individuals (**Greece**, **Croatia**, **Cyprus**, **Italy**, **Poland** and **Slovakia**). The delay between the discrimination claim and the granting of a legal decision discourages individuals from proceeding legally. In **Croatia** for instance, the majority of discrimination court proceedings take longer than 12 months.[369] In **Poland**, 2017 data from the Ministry of Justice shows that the average duration of proceedings in all discrimination cases amounted to approximately 19 months.[370] In **Cyprus**, cases are reported to take approximately one year to be decided by the Industrial Disputes Tribunal and if the case goes to the Supreme Court or District Court there is typically a delay of 2 to 6 years. In **Slovakia**, legal proceedings rarely take less than several years.

Legal procedures can also be complex and therefore represent a hurdle for individuals to pursue legal claims (e.g. **Cyprus** and **Germany**). Conditions to apply for legal action can be difficult to meet. In particular, a short time limit for submitting a case is reported to impair victims' ability to claim discrimination. In **Croatia** for instance, the time limit for bringing legal action is very short. The employee only has 15 days to notify the employers of the breach of the right, or following the day when the worker gained knowledge of such violation. The worker is entitled to initiate court proceedings within another 15 days. Failure of a worker to request protection of rights within the prescribed period results in the worker losing the right to initiate court proceedings. In the **United Kingdom**, there is a three-month time limit for bringing an action to an employment tribunal in the event of unfavourable treatment. In addition to a short time limit to bring proceedings, in **Germany**, the double structure of access to court in case of dismissal during maternity protection contributes to the complexity of the legal system.[371] Employees enjoying maternity protection can only be dismissed with the special approval of the supervising authority. Such employees therefore have to challenge their dismissal simultaneously before the labour courts and the administrative courts. This complex process raises concerns with regard to effective enforcement.

It is reported that the small number of court cases can also be explained by the fact that some workers have little faith in the court system or the ability of the court to provide an unbiased outcome (**Czech Republic, Croatia**, **Latvia, Poland** and **Slovakia**). In **Poland** and **Slovakia**, judges are ill-informed regarding anti-discrimination issues and the proper application of the law in practice. In turn, this means that judgment in cases relating to gender and particularly multiple discrimination remains inconsistent and often flawed.

368 R (on the application of UNISON) (Appellant) v Lord Chancellor (Respondent), [2017] UK Supreme Court 51.

369 Kesonja, D., Šimonović Einwalter, T. (2017) Analysis of case law in anti-discrimination claims before the Croatian courts (*Analiza sudske prakse u postupcima pred hrvatskim sudovima pokrenutima zbog diskriminacije*) CES, available at: https://www.cms.hr/system/publication/pdf/104/Analiza_sudske_prakse_u_postupcima_pred_hrvatskim_sudovima_pokrenutima_zbog_diskriminacije.pdf, accessed 28 August 2018.

370 For comparison: other labour-law cases are handled on average in approximately 9.4 months.

371 Germany: Administrative Court of Mainz, judgment of 26 October 2017, 1 K 1061/16.MZ.

The complexity and the multiple forms of leave make it difficult to apply the rights effectively. In **Ireland**, such a complicated structure has prompted the Government to announce a consolidation of family-leave legislation into one piece of legislation to be entitled the Family Leave Act.[372]

372 The Irish amendment to the Family Leave Act is available at: https://www.taoiseach.gov.ie/DOT/eng/News/Government_Press_Releases/Government_Legislation_Program_Spring_Summer_2018.html, accessed 4 June 2018.

5 Role of other actors in the enforcement of the protection against discrimination, unfavourable treatment and/or dismissal due to the take-up of family-related leave

In addition to courts, a number of other actors contribute to the enforcement of these rights. These actors operate within the legal and political system of each country. Therefore leadership on these issues is important.

In this context, there appears to be a lack of political will to engage in the area of gender equality in general, and family leave in particular, where few or no public actors are active (in particular **Bulgaria**, **Denmark** and the **United Kingdom**). In **Bulgaria**, the lack of public action is explained by the fact that legislation appears to be well-structured and no serious problems in implementation seem to arise from it. In the **United Kingdom**, the 2016 report from the House of Commons Women and Equalities Committee states that '[t]he Government's approach to improving compliance with pregnancy and maternity discrimination law is disjointed and contradictory. It has stated that it is important to focus on enforcement and yet its main focus is on awareness-raising and persuasion. It has voiced concern about the low numbers of women taking enforcement action against their employer, but has rejected the EHRC's recommendations to remove barriers to justice and has no plans to ease the burden of enforcement on women. It has acknowledged that it does not know why so few women take enforcement action, but is unwilling to allocate resources to working out how best to encourage and enable more women to do so.'[373] In **Lithuania**, the main reason explaining why the ombudsman, labour inspectorates, and social partners refrain from taking active enforcement measures is linked to the difficulties in bringing forward evidence. The possible cases of misuse of the employer's discretional power are very latent and difficult to prove. This fact discourages victims from bringing claims before the court or making complaints to the state inspectorate or ombudsman.

5.1 National equality bodies

Article 20 of Recast Directive 2006/54/EC provides that Member States and EEA countries must designate national equality bodies, whose task it is to promote, analyse, monitor and support equal treatment of all persons without discrimination on grounds of sex. These bodies must have the competence to provide independent assistance to victims of gender discrimination, to conduct independent surveys concerning gender discrimination and to publish independent reports and make recommendations. Neither the Pregnant Workers Directive nor the Parental Leave Directive explicitly mention the use of national equality bodies. Nevertheless, these bodies are competent to enforce gender equality issues related to pregnancy, maternity and parental leave.

5.1.1 The power of equality bodies

In some countries, the decisions of national equality bodies are not legally binding (**Czech Republic**, **Finland**, **Germany**, **Greece**, **Luxembourg**, **Malta**, the **Netherlands**, **Poland**, **Spain**, **Slovakia** and **Sweden**). This may represent a difficulty in enforcing the prohibition of discrimination against pregnant workers and workers taking family-related leave, especially in countries where accessing more formal judicial proceedings is problematic.[374]

Competences of national equality bodies are wide and not necessarily connected specifically to the enforcement of pregnancy and parental rights. It can be argued that as a result, equality bodies do

373 *House of Commons Women and Equalities Committee 'Pregnancy and Maternity Discrimination' Report of 2016* (W&Eq Com, 2016) Annex 1 p. 49 Paragraph 162, available at: https://www.parliament.uk/business/committees/committees-a-z/commons-select/women-and-equalities-committee/inquiries/parliament-2015/pregnancy-and-maternity-discrimination-15-16/, accessed 19 August 2018.

374 See above Section 3 in this report.

not always have sufficient focus on pregnancy and parental issues (**Czech Republic**).[375] This might further weaken the ability of the national body to contribute to the enforcement of the prohibition of discrimination on the ground of pregnancy and family-related leave. However, this might also depend on the number of cases an equality body would have to deal with.

However, even non-binding decisions can contribute to the enforcement of issues related to pregnancy, maternity and parental leave. Despite not being able to make binding decisions, the decisions of some national equality bodies can be used in courts as evidential or persuasive material in **Finland**, the **Netherlands** and **Slovakia**.

In the **Netherlands**, for example, the national equality body (the NIHR) can hear discrimination cases and has a good track record in managing to convince employers to take measures to redress the discriminatory situation by, for instance, encouraging the payment of compensation to the employee; adopting internal measures to prevent discrimination in the future; or, in the case of a temporary agency, trying to find another job for the employee. Opinions by the NIHR are not binding, but if an active follow-up takes place, it is sometimes possible to reach a good result for the employee.[376]

Despite not being competent to issue a legally binding decision, some equality bodies have autonomous standing in courts and can represent a client in front of the courts or intervene in proceedings. The **Slovakian** National Centre for Human Rights has competence to represent victims in court proceedings relating to the violation of the principle of equal treatment. In **Sweden**, the Equality Ombudsman has brought a number of cases to court, which has resulted in instructive case law clarifying how the protective rules should be interpreted.

National equality bodies also influence the outcome of cases in practice. In **Croatia**, junior resident doctors were obliged to continue working for a given period after completion of their specialisation at the institution that had financed their specialisation. One hospital required junior residents to sign a contract, which required them to extend the period of work obligation if during that time they were absent from work more than 30 days per year due to 'maternity, parental leave or other circumstances.' Thus, junior resident doctors were practically 'punished' for using pregnancy/maternity/parenthood-related rights. This was clearly an example of unfavourable treatment based on pregnancy and parental responsibilities and was therefore prohibited. After the recommendation of the Ombudsperson for Gender Equality, however,[377] the hospital changed this practice.

In **Greece**, the national equality body, the Ombudsman, has contributed to raising awareness in relation to the impact of gender stereotypes on the take-up of family-related leave. Fathers in the public sector were not granted cumulative paid leave (as an alternative to daily working-time reduction, amounting to the total number of hours by which the daily working time would be reduced) because it was perceived to be a mother's right. The Ombudsman also proposed that male single parents (fathers) should by analogy be granted the special leave granted to mothers for six months after the maternity leave (which is independent of both maternity and parental leave, is granted to women only, applies in addition to maternity leave, and cannot be shared with the father).

In contrast, some national equality bodies have enforcement powers (**Croatia**, **Ireland**, **Latvia**, **Lithuania** and **Portugal**). Complaints about discrimination related to pregnancy/maternity and/or parental leave in the field of employment and work made to the **Croatian** Ombudsperson for Gender Equality are quite

375 Šabatová, A., Hampl, S., Maříková, H., Urbániková, M., Kvasnicová, J. Slaďování pracovního, osobního a rodinného života na ministerstvech ČR, Kancelář VOP: Brno. 2015, p. 10, available at: https://www.ochrance.cz/fileadmin/user_upload/ESO/101-2017-DIS-JKV-vyzkumna_zprava.pdf, accessed 28 August 2018.

376 The opinions of the Dutch NIHR can be found on https://mensenrechten.nl. See also the 'Monitor Discrimination Cases 2017': file:///C:/Users/Gebruiker/Downloads/Discriminatiemonitor%202017%20(2).pdf.

377 PRS-01-06/17-03.

common.[378] This Ombudsperson has been particularly active in relation to the problem of non-renewal of fixed-term contracts due to pregnancy.[379] As workers are not willing to initiate discrimination claims before courts because of the associated costs, length of procedure, uncertain prospects of success, etc., even when the facts of the case are such that the existence of direct discrimination based on pregnancy is fairly obvious, the **Croatian** Ombudsperson for Gender Equality represents a good alternative to obtain justice. However, the powers of the national equality body have met resistance. In **Greece** the national equality body (the Ombudsman),[380] in its Annual Reports stresses that public entities systematically refuse to take into account maternity leave as service time.[381] This has an indirect negative effect on the career of female employees.

Even where the national equality body has power to take legally binding decision, few cases are brought forward. The Ombudsperson's office in **Latvia** only rarely receives individual complaints on the violation of the rights relating to pregnancy/maternity/paternity leave. Such complaints mainly relate to the insufficient financial support during the leave as well as conditions under which financial support is paid (allowances) under the social security system.

In **Lithuania**, the procedure for legal redress is quick, free of charge and implies active involvement of representatives of social partners, but few cases are initiated. The victims are discouraged from making complaints since they do not see any examples of successful similar complaints. Neither the Equal Opportunities Ombudsperson, nor NGOs or trade unions is stepping up to bring such actions on behalf of victims to the court because of a lack of leadership on these issues.

A lack of activity from national equality bodies in relation to family-related leave is noticeable in some countries (**Slovakia**, **Spain**, **Slovenia**). The **Spanish** Woman´s Institute for Equal Opportunities has not organised any activities in relation to family-related leave. In **Slovakia**, the lack of activity by the national equality body is blamed on its lack of resources as well as its broad scope.

5.1.2 Good practices brought forward by national equality bodies

National equality bodies in **Croatia**, **Cyprus**, the **Netherlands** and **Norway** contribute generously to the dissemination of information, research, monitoring of dismissal, and discrimination and unfavourable treatment based on family-related leave. In **Cyprus**, the Gender Equality in Employment and Vocational Training Committee has produced a booklet on Cypriot legislation and case law regarding the protection regarding maternity and sexual harassment in 2018. The Committee, which presented this publication at a press conference, hopes that it will become an important reference tool for practitioners and trade union representatives. The Committee also produced a publication[382] entitled 'Good Practices for the promotion of the Gender Equality in Employment' largely covering the subject of family-related leave. The **Croatian** Ombudsperson for Gender Equality is very active in conducting and publishing studies in relation to family-related leave. For instance, it published a study in cooperation with the Croatian Employment Service and CSO 'Roda' on the 'Position of pregnant women and mothers with toddlers on the Croatian labour market' in 2012.[383]

378 See the Croatian Annual Reports of the Ombudsperson for Gender Equality, available at http://www.prs.hr/, accessed 22 October 2018.
379 See above in this report section 3.1.5.
380 Founded by the Greek Act 3094/2003, OJ A 10/22.01.2003, http://www.synigoros.gr, accessed 12 April 2018.
381 C-136/95 Caisse nationale d'assurance vieillesse des travailleurs salariés v Thibault. ECLI:EU:C:1998:178.
382 Cyprus Gender Equality in Employment and Vocational Training Committee, Good Practices for the promotion of the Gender Equality in Employment, 2011, p. 13-42, at http://www.eif.gov.cy/mlsi/dl/genderequality.nsf/5A8EA302041882A1C22579BA00371ABC/$file/ΤΕΛΙΚΗ%20ΜΕΛΕΤΗ-KALES%20PRAKTIKES.pdf, accessed 22 october 2018.
383 Criatian Ombudsperson for Gender Equality (2012), "*Položaj trudnica i majki s malom djecom na tržištu rada*", available at: https://www.prs.hr/attachments/article/633/Polo%C5%BEaj%20trudnica%20i%20majki%20sa%20malom%20djecom%20na%20tr%C5%BEi%C5%A1tu%20rada%20WEB.pdf, accessed 22 October 2018.

In the **Czech Republic** and **Italy**, however, the national equality body is deemed to provide general information which is not specific enough, thus making it difficult to access information and data.

National equality bodies are also a good source of good practices. The Institute for Equality of women and men in **Belgium** has also undertaken to develop a network in order to encourage the exchange of good practices between enterprises which take gender equality seriously. This has revealed the existence of companies with 'mother-friendly' policies.[384]

National equality bodies also stimulate the enforcement of family leave. The Institute for Equality of women and men in **Belgium** in 2017 developed an information campaign on the issue of maternity at work,[385] which resulted in the institute filing about 150 individual complaints against dismissal on the unlawful grounds of pregnancy/maternity. The **Swedish** Equality Ombudsman (*inter alia* together with trade unions, employers' organisations, the Swedish Social Insurance Agency) have brought a number of cases to court in the area of work-family reconciliation. Its activities and reports are not merely a matter of enforcement, but a matter of how to promote equal sharing of the parental leave between men and women.

The national equality bodies have also been instrumental in contributing to the development of the law. The **Cypriot** Commissioner for Administration and Human Rights, the Ombudsman, in her competence as the national equality body, was instrumental in the adoption of the right to paternity leave. The law was adopted following the Ombudsman's Report,[386] in which she recommended to the Minister of Labour, Welfare and Social Insurance the adoption of the paternity leave. Moreover, the **Cypriot** Commissioner recommended[387] that the period during which the maternity benefit is paid should be in line with the period of the maternity leave, irrespective of whether the birth was early. As a result, the Social Insurance Department amended the law so that the application for the maternity benefit can be submitted from the beginning of the 6th month (25th week) of the pregnancy, therefore covering early births.

In the **Netherlands**, the national equality body (NIHR)[388] has been giving input for the 'Action plan on pregnancy discrimination' that was launched by the Government in March 2017, and which contains *various* measures designed to enforce the application of family leave. In particular, raising awareness on pregnancy and maternity rights will be done by labour inspectors when visiting workplaces as well as other organisations, such as social-security agencies, health organisations and midwives and extensive public campaigns will be developed. It has also created a website and conducted research in this area.[389]

In **Italy**, the national equality body's Equality Advisors and labour-law inspectors have teamed up in cooperation agreements to take initiatives to implement gender equality and to prevent discrimination. These agreements represent important steps in maintaining and improving the coordination of activities between provincial inspectorates and local Equality Advisors for the purpose of implementing gender equality and monitoring the labour market from the perspective of the gender dimension.

The work of the **Greek** Ombudsman should also be highlighted, as it has been instrumental in reducing abusive dismissal practices. In the private sectors, it often occurred that as soon as the employer became aware of the pregnancy, s/he often would compel the worker to resign by using adverse treatment or

384 See Belgian Institute for Equality of women and men, data bank on good practices, at http://www.iefh-action.be, accessed 27 May 2018.

385 See Institute for Equality of Women and Men, *Grossesse au travail* or *Zwanger aan het werk*, 2017, at http://igvmiefh.belgium.be/fr/publications/grossesse_au_travail_experiences_de_candidates_demployees_et_de_travailleuses, accessed 27 May 2018.

386 No. A.K.I. 26/2015 http://www.ombudsman.gov.cy/Ombudsman/ombudsman.nsf/All/E7190C5F1F54EE15C225803D0021E7A3/$file/%CE%91%CE%9A%CE%9926_2015_09092016.doc?OpenElement.

387 Following complaints No. A.K.I. 79/2011 and No. A.K.I. 57/2012:

388 The opinions of the NIHR can be found on https://mensenrechten.nl. See also the 'Monitor Discrimination Cases 2017': file:///C:/Users/Gebruiker/Downloads/Discriminatiemonitor%202017%20(2).pdf.

389 See: https://www.mensenrechten.nl/nl/toegelicht/zwangerschapsdiscriminatie.

harassment. For example, the employer would modify the woman's working conditions, such as working time or workplace. Alternatively, the employer would often dismiss the pregnant worker without notifying her of the dismissal, while declaring to the Ministry of Labour and the Agency of Manpower Employment (OAED) responsible for registering the unemployed and paying unemployment benefits that the woman had resigned of her own will. The Ombudsman initiated a legal proposal to abolish these repeated abusive practices,[390] which has been adopted by law in 2018[391] and provides that the letter of resignation must be submitted by the employer to OAED within 4 days of the dismissal and must bear the employee's signature.

In **Portugal**, discrimination and unfavourable treatment based on family-related leave are closely followed by three agencies that play an active role in monitoring and contribute to practical enforcement on non-discrimination provisions:

- The Labour Inspection Services ('*Autoridade para as Condições de Trabalho*' ACT), which regularly conducts inspections and surveys in the companies that allow for the monitoring of the practical implementation of non-discrimination provisions in this area.
- The national equality body that deals with gender discrimination in employment (CITE – '*Comissão para a Igualdade no Trabalho e no Emprego*'), which is entitled to receive complaints in this area and may redirect them to the ACT for the purpose of starting a formal procedure against the employers, or to the public prosecutor, for judicial purposes.
- The national equality and citizenship agency (CIG – '*Comissão para a Igualdade e Cidadania'*), which regularly conducts studies and surveys on the practical implementation of equality provisions in this field.

5.2 The role of other government bodies

Some government bodies help unpack the complexity of the law by publishing materials for the public and the legal profession. For example, the **Cypriot** Gender Equality in Employment and Vocational Training Committee has published documents explaining pregnancy/maternity rights for the public, practitioners and trade union representatives. Similarly, the **Cypriot** Department of Labour Relations has also drafted a number of handbooks regarding types of family-related leave.

5.2.1 Ombudsperson

In most countries, the national equality body and the ombudsperson are the same office.

In some countries, the ombudsperson has judicial powers (**Malta**, the **Netherlands**). In the **Netherlands**, the power of the ombudsperson is limited in that it is not authorized to deal with complaints about private employers. It can only can deal with complaints from citizens about public bodies. Employees in the public sector can contact the ombudsman, but hardly ever do so, likely because other actors, such as the national equality body, are more adequate.

In **Malta**, the ombudsman has been involved in only one case, regarding a casual social assistant who complained that she had lost the opportunity of full-time employment as a public officer because she had previously been forced to resign when her request for parental leave was unjustly refused.[392] In this case, the ombudsman recommended that the grievance of the complainant be redressed.

390 Ombudsman's Annual Report 2016, available at: https://www.synigoros.gr/resources/ee2016-00-stp.pdf, accessed 29 May 2018.
391 Article 38 Act 4488/2017 (OJ A 137/13.09.2018).
392 Maltese ombudsman, at https://www.ombudsman.org.mt/casual-assistant-resigned-from-employment-after-refusal-or-parental-leave/ accessed 31 May 2018.

5.2.2 Labour inspectorate

Labour inspectors are a good source of monitoring discrimination information in **Estonia**, **France**, **Italy**, the **Netherlands**, **Norway** and **Poland**. In **Poland** in practice claimants often achieve more through direct contact between the Labour Inspectorate and the employer, than by going to court.[393] This public body can impose administrative sanctions (mainly financial ones) and penalties for violations of employee rights. In case of suspicion of a criminal offence, the labour inspectors can direct a case to court.

The power of the labour inspectors can be wide and inquisitorial. Indeed, in **Belgium**, the labour inspectorates may investigate discrimination in recruitment by posing as pretend applicant in order to establish the existence of discriminatory practices. Labour inspectors are also active in solving labour disputes relating to family-related leave in **Estonia**. In **Croatia**, the Ombudsperson for Gender Equality often informs the Labour Inspectorate of any observed violations of gender equality, so that the Labour Inspectorate can take action such as issuing a warning, sanctioning, and starting legal proceedings regarding misdemeanour.[394] In the **Netherlands**, employees and/or work councils can ask the Labour Inspectorate to carry out an investigation. If the request is made by the works councils or by a trade union, the Labour Inspectorate is obliged to comply with the request. If an employer does not comply with the applicable rules, the Labour Inspectorate can impose a fine.

The labour inspectorates publish their annual report in **Croatia**, the **Czech Republic**[395] and **Poland**. Although these reports include all activities of regional labour inspectorates, they are too general to draw any concrete information on the enforcement of family-related leave.

In **Spain**, by contrast, it is not possible to obtain specific data on the activities of Labour Inspectorate with respect to family-related leave because this information is not made public. In **Luxembourg**, the Labour Inspectorate did not address family-related leave in its annual report in 2017.[396] Similarly, the **Slovenian** Labour Inspectorate does not publish information relating to the enforcement of family-related leave.

5.3 Trade unions and social partners

Trade unions are also typically active in contributing to the enforcement of pregnancy/maternity and parental rights (**Austria**, **Belgium**, **Bulgaria**, **France**, **Cyprus**, **Greece**, **Hungary**, **Italy**, the **Netherlands** and **Sweden**). Trade unions are providers of information and legal advice and/or legal representation to their members. Trade unions help unpack the complexity of the law by publishing material for their members and the public. The **Cypriot** trade unions have produced publications, research and campaigns related to maternity rights and work-life balance. In **Austria**, trade unions and the Chambers of Labour (statutory organisations for the representation of workers' interests with mandatory membership for all employees and unemployed persons) give free advice and free legal representation to all their members. In **Italy**, trade unions are also able to represent their members in legal actions involving discrimination. However, the social partners' sensitivity with regard to these issues is still not uniform in all Italian regions and sectors. In the **Netherlands**, social partners inform their members on the rights and obligations of employers and employees with respect to pregnancy at work and other forms of leave, and take cases to court on behalf of their members, if necessary. In **Hungary**, the social partners have the right to provide legal representation to a member, to file an *actio popularis*, and to participate in different policy-making bodies. In **Finland**, social partners show very different levels of activism in terms of informing their

393 The report indicates *inter alia* that in cases of violation of the law, employees rarely go to court. Even in cases where the inspectors themselves referred matters to the court, the persons concerned often backed out of the proceedings and cases were frequently remitted. See: https://www.pip.gov.pl/pl/f/v/100996/sprawozdanie2013.pdf, accessed 20 May 2014.

394 See for instance the Croatian Ombudsperson for Gender Equality (2017), Annual Report for 2016, p. 46-47, available at http://www.prs.hr/attachments/article/2188/IZVJESCE_2016_Pravobraniteljica_za_ravnopravnost_spolova_CJELOVITO.pdf accessed 22 October 2018.

395 Czech Republic, Labour Inspectorate annual reports, available at www.suip.cz, accessed 22 October 2018.

396 Luxembourg Labour Inspectorate annual report (2017) at http://www.itm.lu/home/itm/rapport-annuel.html accessed 22 October 2018.

members, assisting members in court cases and in promoting reform. The trade unions that have the greater majority of female members are more active in the area of family-related leave than unions with male members. In **France**, collective agreements play an important role in the enforcement of family-related leave, although trade unions are facing an increasing lack of resources.

Employers' organisations can also represent a good source of information in relation to family-related leave (**Cyprus**, **Sweden**). The **Cypriot** Employers and Industrialists Federation, for example, provides advice on the implementation of the Cypriot labour law and practices, *inter alia*, for the protection of maternity, the termination of employment, the annual leaves, the health and safety regulations and the equal treatment of men and women.

Trade unions are also a source of influence on the development of the law. In **Belgium,** trade unions in the public service have contributed to blocking changes in legislation that were likely to produce adverse effects in relation to maternity leave or parental leave (e.g. when entitlement to a new allowance should become conditional on the effective performance of duties). In **Greece**, maternity and parental protection has often been strengthened by collective agreements, most of which have subsequently been sanctioned by legislative provisions.

However, it should also be noted that in some counties trade unions are not active in the area of family-related issues (**Portugal**, **Spain**, **Romania**, **Slovakia**). In **Portugal** and **Spain** social partners do not seem to give much attention to this area. Similarly, in **Belgium**, in the private sector, the unions have a policy of leaving the national equality body to deal with all issues concerned with family-related issues. In **Romania**, workers are not informed about their rights and they do not have any support from trade unions or other easy-to-access services that should build their confidence and guide them in contesting employers' violation of their family-related rights.

5.4 The role of Non-Governmental Organisations (NGO), civil society and charities

In some countries, NGOs also contribute to improving the enforcement of pregnancy and parental-leave rights by publishing materials for the public and the legal profession (**Bulgaria**, **Cyprus**, **Italy**, **Poland** and the **United Kingdom**). For example, the **Cypriot** Gender Equality Observatory[397] has produced a number of publications, research and campaigns relating to maternity rights and work-life balance.

Sometimes, NGOs are also engaged in legal actions. Occasionally in the **United Kingdom**, for instance, charities support a case for it to be taken to court.[398] In **Italy**, associations and organizations promoting the respect for equal treatment between male and female workers are entitled to act on the worker's behalf.[399]

The involvement of NGOs in court proceedings is difficult in **Greece** because of procedural difficulties for NGOs to engage in litigation. Indeed, national law requires the wronged person's 'consent', in contrast to the directives, which require the wronged person's 'approval'. Under Greek law, this 'consent' must be given before the initiation of proceedings, while the 'approval' can be given afterwards.[400] Moreover, this rule is not incorporated into the procedural codes. Nevertheless, at least one action was successfully taken to court by the Greek League for Women's Rights. This NGO was successful in seeking the annulment of a

397 See for example, the Cypriot Gender Equality Observatory latest research on work-life balance done in the context of the framework of EU funded programme (2018) at http://www.pik.org.cy/files/download/policies+on+reconciliation.pdf, accessed 22 October 2018.
398 Working Families in *Ali vs Capita Customer Management (UKEAT/0161/17/BA)*.
399 Italy Article 38 of Decree No. 198/2006.
400 See Articles 236-238 of the Greek Civil Code for the meaning of 'consent' and 'approval'.

decision made by the Minister of Education to exclude periods of maternity and parental leave from the period required for teachers to apply for the post of school director and school counsel.[401]

However, the lack of resources made available in this sector limits the level of activity which NGOs, civil society and charities might potentially have. The total lack of funding for the NGO sector in **Latvia** explains the lack of activity. The lack of resources in general for this area was also notable in **Greece**. In **Romania**, a number of short-term projects funded by external donors on information or legal assistance for women has been carried out. However, they did not turn into permanent services for women provided by trade unions or professional organisations.

401 CS 4875/2012 annulling this decision; see European Network of Legal Experts in the Field of Gender Equality, S. Koukoulis-Spiliotopoulos, (2013) 'Greece', *European Gender Equality Law Review 1*, pp. 72-74, available at: http://ec.europa.eu/justice/gender-equality/document/index_en.htm#rights, accessed 25 March 2017.

6 Additional enforcement problems

6.1 The meaning of 'family'

The meaning of 'family' under the law is important to define the scope of pregnancy, maternity, parental and paternity rights. The term 'family' is not always used consistently in the various legal acts. This has implications for the application of pregnancy, maternity, paternity and parental rights. Biological, adoptive, surrogate, intended and foster parents are not always recognised as parents for the purpose of pregnancy, maternity, paternity and parental rights.

There might also be differential treatment according to the relationship of the parents, whether they are married, in a partnership or cohabitating. For example, in order to benefit from the right to paternity leave, the parents must be married in **Bulgaria** and **Cyprus**. The concept of extended family is not always used and contrasted to the core family made up of parents' direct ascendants and descendants. Carers' leave in particular is often restricted to the direct ascendants/descendants when in reality the right could be open to carers in general. This is different in the **Netherlands** where carers' leave cannot only be used to care for direct relatives and household members, but also for people with whom the employee has a social relationship, such as friends and neighbours. Same-sex partners and same-sex spouses are not always recognised for the purpose of the application of pregnancy, maternity, paternity and parental rights. For instance, in **Bulgaria**, **Cyprus**, **Finland**, **Luxembourg**, **Poland**, and **Portugal** paternity leave is reserved to fathers only and exclude same-sex families from this right.

6.2 Childcare facilities as a complement to maternity/parental leave

In 2002, the European Council adopted the Barcelona targets,[402] which are a series of objectives aimed at removing the obstacles for women's participation in the labour market. In particular, Member States have been encouraged, along with their competent authorities at national, regional and local levels and their social partners, to ensure that by the year 2010 access to quality childcare facilities affordable to everyone are provided for 90 % of children over three years old until they reach school age and, for 33 % of children under the age of three. Reviews of the Barcelona targets in 2008[403] and in 2013[404] showed that until recently most Member States had failed to reach such targets. However, the 2018 review of the Barcelona targets shows that the target for children from 0 to 3 has now finally been reached on average in the EU-28.[405] The overall rate reached in 2016 was 32.9 %, despite the fact that huge differences remain among the Member States. The target of 33 % had largely been reached in 12 Member States in 2016: **Belgium**, **Denmark**, **Finland**, **France**, **Germany**, **Italy**, **Luxembourg**, the **Netherlands**, **Portugal**, **Slovenia**, **Spain** and **Sweden**. In the remaining 16 Member States, 6 EU Member States (**Cyprus**, **Estonia**, **Ireland**, **Latvia**, **Malta** and the **United Kingdom**) between 25 % and 33 % of children aged 0 to 3 had access to childcare. In 10 Member States, less than 25 % of children in the youngest age group had access to childcare, including the **Czech Republic**, **Greece**, **Poland**, and **Slovakia** with a rate of less than 10 %. The Barcelona targets had not been reached for children from 3 to mandatory school-going age. Only 86.3 % of children from 3 to the mandatory school-going age had access to formal childcare or attended preschool in 2016.

402 Presidency Conclusions SN 100/1/02 REV.

403 Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Implementation of the Barcelona objectives concerning childcare facilities for pre-school-age children (COM (2008) 638).

404 European Commission. (2013). Social investment package: Key facts and figures. Luxembourg: Publication Office of the European Union. See also European Council. (2010). Conclusions on A new European Strategy for jobs and growth. EUCO13/10.

405 Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the development of childcare facilities for young children with a view to increase female labour participation, strike a work-life balance for working parents and bring about sustainable and inclusive growth in Europe (the "Barcelona objectives"), COM/2018/273 final, at https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:52018DC0273, accessed 22 October 2018.

The **Estonia** Supreme Court held that local municipalities have to guarantee nursery school place within a reasonable timeframe.[406] Unfortunately, as the reasonable timeframe is an undefined legal concept, nursery schools for children between eighteen months and seven years are struggling to create places in some Estonian municipalities.

In **Iceland**, following the period of 9 months of maternity and paternity leave, parents experience difficulties in securing childcare for the child. The option is to use paid services of the so-called 'day mothers', but securing a place for the child in the municipality's day-care centres with professional staff is very difficult and the waiting list is long.

In **Italy**, paid vouchers for baby-sitting services have been introduced as an alternative to parental leave.[407] These vouchers are exclusively available to mothers from the end of compulsory maternity leave for the following eleven months in place of parental leave. As fathers cannot benefit from such vouchers, they neither improve gender equality nor contribute to challenging traditional family structures, ultimately entrenching traditional gender stereotypes.

6.3 Flexible working arrangements

Flexible working arrangements, including the possibility to work part-time, flexitime or telework, are not common in **Bulgaria**, **Cyprus**, and the **Czech Republic**, where part-time employment and other forms of flexible work are rare.[408] In **Spain**, there is no right to request flexible working arrangements, unless it is expressly established in a collective agreement or it is accepted by the employer. In **Cyprus**, part-time work is very recent and not an option in the public sector. The scarce possibilities for part-time employment in **Bulgaria**, especially of mothers, represent an obstacle for mothers to take part in the labour market.

In **France**, the Government and Parliament are discussing the introduction of a statutory entitlement to part-time work, especially covering a statutory entitlement to return to full-time work after having reduced working time to work part-time for a certain period. This entitlement to 'bridge part-time work' could reduce disadvantages for employees choosing to work part-time to raise children or care for close relatives in need. At the moment, there is only a statutory entitlement to reduce working time and not to return to full-time. Whether the new regulations (yet to be introduced) will become effective for employees taking parental leave and employees taking carers' leave by working part-time remains to be seen.

It is hoped that the Proposed Directive on Work-Life Balance will contribute to change in these areas, as it provides for a right to request flexible working hours not only to parents of children but to all carers.[409] This provision introduces the possibility for these workers to make use of (i) reduction in working hours, (ii) flexible work schedules, and (iii) teleworking possibilities.

6.4 Gendered culture

Care work is still generally seen as a women-only task in most countries. In **Germany**, for example, the division of tasks between women staying home with children and men earning the money, and the culture of restricting childcare to private places and of understanding family life only as a disturbance

406 Judgment of the Constitutional Review Chamber of the Supreme Court No. 3-4-1-63-13 of 19 March 2013, available in Estonian at https://www.riigikohus.ee/lahendid?asjaNr=3-4-1-63-13.

407 Art. 4, par. 24, b), of Act No. 92/2012 (as modified by Art. 1, par. 282 and 283 of Act No. 208/2015 and by Art. 1, Act No. 232/2016).

408 For a general overview of work-life balance and flexible working arrangements in the EU see: Eurofound, (2017) Work-life balance and flexible working arrangements in the European Union at https://www.eurofound.europa.eu/publications/customised-report/2017/work-life-balance-and-flexible-working-arrangements-in-the-european-union, accessed 22 October 2018.

409 Proposed Directive on Work-life balance COM (2017) 253 final, Article 9.

of working routines is the result of historical circumstances. In the Western part of Germany, there is a history of generally accepted and widespread discrimination of women due to pregnancy, maternity, and motherhood in working life which would need very forward-thinking legal action, legislation, case law and awareness raising for it to be overcome. However, recent evolution can be noted, even in the Western parts of Germany: Every child is now statutorily entitled to a place in a kindergarten; public childcare infrastructure has expanded drastically and an increasing number of fathers take at least a minor part of the parental leave. In **Hungary**, a very recent study shows that care work is clearly considered to be the primary responsibility of women. As a result, women expect help only from other female family members, and few believe that men and/or the state/municipalities should help.[410]

Despite active discussions taking place in the media and at public conferences in **Liechtenstein**, it is difficult to change the deep-rooted traditional roles for women and men, mothers and fathers in society. Despite the existence of formal anti-discrimination law, in reality the structural framework of society frames the choices people make. A number of preconditions need to be addressed to guarantee the successful reconciliation of family work and professional work. A number of obstacles must be highlighted: pay inequalities and the gender pay gap frame who stays at home with the children;[411] the lack of available, affordable and quality childcare facilities prevents some women from being able to access employment, since school timetables and working hours are not compatible; public transport is not always available at reasonable prices or frequently enough; and part-time work remains underpaid and is restricted to areas that are not always interesting and/or conducive professional career development.

410 Gregor, A. and Kovats, E. 'Women's Affairs 2018 Societal Problems and Solution Strategies in Hungary', May 2018, Friedrich Ebert Stiftung, Budapest, available at: https://library.fes.de/pdf-files/bueros/budapest/14462.pdf, accessed 28 August 2018.

411 The insufficiency of benefits/compensation for care work is also a problem repeatedly highlighted by gender equality scholars. In a recent piece, Julie Suk argues that raising pay for care work would be an efficient way to transform traditional gender roles. See Suk, J. (2018). Gender Equality and the Protection of Motherhood in Global Constitutionalism. *The Law & Ethics of Human Rights*, *12*(1), 151-180.

7 Good practices

Some companies seriously attempted to turn themselves into 'paradises for pregnant workers' but these examples remain far too few, and for some, this is only window dressing (**Belgium**, **Czech Republic**).

The **Cypriot** National Machinery for Women's Rights under the auspices of the Cypriot Ministry of Justice and Public Order certifies companies implementing practices and policies that ensure gender equality, equal opportunities on promotion, work-life balance and equal pay of men and women.

In cooperation with stakeholders from the public and private sector, the **Cypriot** Ministry of Justice and Public Order has implemented a three-year strategic plan on gender equality, which includes actions related, *inter alia*, to the efficient promotion of gender equality, the modernization and improvement of the legal framework, the economic independence of women and the fight against stereotypes and social prejudices.

In **Bulgaria**, the Ministry of Labour and Social Policy and the Agency for Social Protection have run two major projects to enhance the rights of new parents. The first project, 'At work again' 2011-2013, aimed to support mothers on maternity and childcare leave with knowledge and skills in order to equip them with certificates and develop opportunities for them to find a job at the end of the leave period. The second project, 'Parents at work' 2017-2020, aims to provide working parents with children up to 5 years old with support at home. The Government pays for an assistant and/or a carer for up to 8 hours a day for up to 18 months. Priority is given to deprived families, single parents, etc.

The **Dutch** Government is quite active in the area of discrimination as illustrated by the adoption of the action plan on pregnancy discrimination (started in 2017).[412] Other examples of government activity in the area include the action plan on labour-market discrimination in general (2014) and the National Programme against discrimination (2016). The plans contain a mix of measures, varying from awareness raising to the introduction of various websites to attract more attention to maintaining the relevant legislation. Doubts however can be raised with regard to the efficiency of soft provisions and instead one might favour legally binding, clear statutory rights and strict sanctions in case of violation.

In the **United Kingdom**, a pilot study is currently being funded by the equality body, the Equality and Human Rights Commission (EHRC) (and undertaken by Maternity Action and the Employment Settlement Service (YESS)) which offers individual casework/peer-support service to women experiencing pregnancy and maternity discrimination at work. The preliminary findings are that this combination 'significantly increases the likelihood of women exercising their rights.'[413] Also in the **United Kingdom**, a website 'PregnantThenScrewed'[414] set up by Joeli Brearley, who experienced horrific pregnancy-related discrimination, provides 'a place for women to tell their stories anonymously, give victims a voice, while demonstrating how systematic the problem really is.' Brearley and her collaborators also offer free legal advice.

In **Latvia**, the Ministry of Welfare is running some pilot projects connected with the development of childcare infrastructure, including the provision of childcare facilities for parents with non-standard working hours.

In **Spain**, all parental-leave provisions (with the exception of the so-called breastfeeding leave which in fact is a type of parental leave) are granted on an individual basis. This means that parental leave can be taken indistinctly and in full by women or men. This could in theory represent a good practice because

412 See Section 5.1.2 above.
413 Pilot study from the Equality and Human Rights Commission (2018) p. 4, available at: http://senedd.assembly.wales/documents/s74322/ELGC5-11-18%20Paper%202%20-%20Maternity%20Action.pdf, accessed 28 August 2018.
414 http://pregnantthenscrewed.com/.

it might increase co-responsibility and gender equality. However, in reality, most of the parental leave is taken only by women.

Italy is reported not to have cultivated a culture of good practices yet. Since there is no systematic collection of data on good practices, it is difficult to promote and improve any good practice.

8 Other related issues: the birth of a stillborn child, Assisted Reproductive Technology (ART), including IVF and surrogacy

8.1 The protection in cases of stillbirth

In **Croatia**, **Greece** and **Hungary**, the protection against dismissal on the ground of pregnancy and maternity also applies to parents who have a stillborn child. In **Greece**, the full period of maternity leave and maternity benefits are granted, irrespective of whether the child was stillborn or survived the birth. In **Hungary**, in the case of a stillborn child, maternity leave must not be shorter than 6 weeks following labour.[415] If the child dies during the period of leave, the maternity and parental leave end 15 days following the death of the child, but must not be shorter than 6 weeks following labour.[416]

In **Croatia**, an employed or self-employed mother who gives birth to a stillborn child before the start of her maternity leave is entitled to a maternity leave of three months. Similarly, if a child dies before the end of the maternity or parental leave, she is entitled to the continuation of the maternity or the parental leave, following the death of the child.[417]

8.2 Miscarriage

In contrast to the birth of a stillborn baby, miscarriages are not always considered as a case of pregnancy/maternity. Although anti-discrimination law applies in most cases, access to pregnancy and maternity rights such as paid leave does not apply in **Belgium**. The correct legal response to such situations would be an extension of the protective provisions.[418]

8.3 Fostering children

Fostering children is not covered under Directive 92/85/EEC. However, in **Belgium**, **Bulgaria** and **Greece** such activity is considered to be equivalent to the situation of adoption. Foster parents are therefore entitled to adoption leave.[419] Indeed, the need to establish a relationship with the child is the same as for adoptive parents. The protection of foster parents through EU law would therefore be a welcome development.

8.4 IVF

The CJEU held that in cases of in-vitro fertilization before ova have been transferred, an employee's dismissal may only be challenged as sex discrimination (*Mayr*).[420] Accordingly, in **Germany**, in the case of pregnancy due to fertilisation outside the body (in-vitro fertilisation), the prohibition of dismissal under the Maternity Protection Act applies from the time that a fertilised egg is inserted into the uterus (embryo transfer).[421]

However, in **Bulgaria** and **Hungary**, workers who undergo IVF treatment are protected against dismissal, discrimination or unfavourable treatment. In **Bulgaria**, female workers and employees who are at an advanced stage of in-vitro treatment, corresponding to the period up to 20 days from the aspiration of the

415 Article 129 (1)a (2) of the Hungarian Labour Code.
416 Article 129 (1)b (2) of the Labour Code.
417 Article 17 Act on Maternity and Parental Benefits.
418 See Council of Equal Opportunities, Opinion n°148 of 9 October 2015.
419 In Belgium: Article 36*ter* of the Royal Decree of 19 November 1998 concerning types of leave and furlough in the federal public services. In Bulgaria: Article 164b LC.
420 Case C-506/06 *Sabine Mayr v Bäckerei und Konditorei Gerhard Flöckner* OHG.ECLI:EU:C:2008:119.
421 German Federal Labour Court, judgment of 26 March 2015, 2 AZR 237/14.

ova until the transfer of the embryo, are guaranteed protection equivalent to that of pregnant women.[422] In **Hungary**, women undergoing IVF treatment enjoy protection against dismissal for six months.[423]

There is a fine line between IVF treatment offering protection against sex discrimination[424] and offering protection against discrimination based on pregnancy. In **Belgium**, court judgments are inconsistent and sometimes find it could be a case of sex discrimination in cases such as *Mayr*. In **Croatia** and **Italy**, the implementation of a procedure of medically assisted fertilization is deemed to be a medical treatment for which a worker is entitled to sick leave. In **Croatia**, a worker who had entered into an employment relationship at a time when she was aware of her pregnancy following an IVF treatment was judged to have a false employment relationship concluded solely for the purpose of accessing the right to maternity allowance.[425] It might have been better for such a case to be addressed as a case of discrimination on the ground of pregnancy.[426] In **Italy**, however, the dismissal of a worker who had declared her intention to undergo IVF has been held to constitute unlawful sex discrimination.[427]

8.5 Surrogacy

The CJEU has twice considered the rights of surrogate parents: in *Z v A*[428] and in *C.D v S.T.*[429] The cases were concerned with the denial of a maternity leave by an employer to an employee who had become a mother through a surrogacy arrangement. The *CD* case concerned a British woman who was the commissioning mother of a child who was genetically fathered by her partner, while the *Z* case concerned an Irish woman who was the commissioning mother of a child who was genetically hers and her husband's. In both cases, a surrogate mother carried and gave birth to the child. The employees complained of discrimination on the basis of her sex and her disability. The Court held, however, that the Pregnant Workers Directive can only apply where the *same* woman becomes pregnant, gives birth and then takes maternity leave as regards a new-born baby (or babies). The Recast Directive could not apply because a commissioning father would be treated the same as a commissioning mother. Finally, the Court took the view that there was no discrimination based on disability. It held that Directive 2000/78/EC[430] only applied to discrimination relating to employment, but as Ms. Z's condition did not affect her access to employment, there was no discrimination.[431]

Surrogacy is not recognised in a number of countries and as a result, no specific right is granted to intended parents in **Bulgaria**, **Croatia**, **Ireland** and **Italy**.

In contrast, the **Cypriot** legislation for the Protection of Maternity was amended in 2017[432] to grant a period of 14 weeks of maternity leave to the surrogate who gives birth and a period of 18 weeks of maternity leave to the intended mother of the child who was born through surrogacy. In **Cyprus** and **Greece**, the protection against dismissal on the ground of pregnancy and maternity also applies to surrogate mothers and the commissioning parents.

422 Paragraph 1 p. 13 of the Additional provisions of the Bulgarian Labour Code and p. 16 Paragraph 1 of the Additional provisions of the Anti-Discrimination Law.
423 Article 65(3)(e) of the Hungarian Labour Code.
424 Case C-506/06 *Sabine Mayr v Bäckerei und Konditorei Gerhard Flöckner OHG*. ECLI:EU:C:2008:119.
425 Constitutional Court of the Republic of Croatia, U-III-1152/2013.
426 Case C-32/93 *Carole Louise Webb v EMO Air Cargo (UK) Ltd*. ECLI:EU:C:1994:300; Case C-109/00 *Tele Danmark A/S v Handels- og Kontorfunktionærernes Forbund i Danmark (HK)*. ECLI:EU:C:2001:513; Case C-320/01 *Wiebke Busch v Klinikum Neustadt GmbH & Co. Betriebs-KG*. ECLI:EU:C:2003:114.
427 Cass. civ., sez. lav., 05-04-2016, No. 6575.
428 C-363/12 *Z. v A Government department and the Board of management of a community school* EU:C:2014:159.
429 Case 167/12 *C.D. v S.T.* ECLI:EU:C:2014:169.
430 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 02/12/2000 pp. 16-22.
431 See Caracciolo Di Torella, E and P *Foubert* (2014), '*Maternity Rights* for Intended Mothers? *Surrogacy* Puts the *EU* Legal Framework to the Test' *European* Gender Equality *Law Review* Vol. 2, pp. 5–11.
432 Articles 3 and 4 of the Cypriot Protection of Maternity Law.

9 Conclusions / recommendations

This report has considered enforcement issues in relation to potential dismissal, discrimination and unfavourable treatment in the context of types of family-related leave, including pregnancy, maternity and parental leave as well as paternity, adoption and carers' leave. It has included issues of compensation, reparation and sanctions, as well as considered the role of the courts and the national equality bodies, in the 28 Member States and three EEA countries. The report has revealed that despite the existence of clear formal statutory rights implementing at domestic level the rights laid out in EU law, in practice many individuals continue to experience such discrimination. Dismissal, discrimination and unfavourable treatment on the bases of the pregnancy and family-related leave appears to be systemic and widespread and not decreasing across the countries under review. On the contrary, studies conducted at national level[433] reveal that the law which has been in place for decades has not reached its objectives. Moreover, the law has not sufficiently contributed to changing the traditional gender division of labour in the private sphere. Women continue to carry the main burden of the unpaid care and, as a result, tend to be the primary target of dismissal, discrimination and unfavourable treatment based on family leave. The men who take family-related leave are also found to be the target of dismissal, discrimination and unfavourable treatment. It is hoped that as more men take part in unpaid care activities, women are likely to face less discrimination.

Despite the fact that the rights relating to **pregnancy and maternity leave** have been on the agenda of the EU for decades, these rights are not effectively enforced. EU law on pregnancy and maternity leave is generally well transposed into domestic law and the rights at national level go well beyond the requirements set under the Pregnant Workers Directive. But these rights on the whole are not an issue. Their enforcement, however, is cruelly lacking. National studies and statistics show that pregnancy and maternity rights are violated across the board and women are often being dismissed, discriminated against and treated unfavourably in relation to pregnancy and maternity leave. A number of enforcement issues remain salient in relation to pregnancy and maternity rights. In particular, workers on a fixed-term contract of employment often experience the non-renewal of their contract when they become pregnant. Pregnant workers are often dismissed during the probationary period without justification. Generally, workers in precarious jobs are more vulnerable to dismissal, discrimination and unfavourable treatment on the ground of pregnancy and maternity but they are also the least likely to enforce their rights for fear of jeopardising their jobs, due to lack of awareness of their right and/or because they cannot afford access to justice. Self-employed workers are another category of workers experiencing difficulties in relation to pregnancy and maternity. In this context, some domestic law has not fully implemented EU obligations. Even where domestic law properly implements the rights of self-employed workers in relation to pregnancy and maternity leave, these rights are not effectively enforced in practice due to the complexity of the law. Moreover, women also face discrimination on the basis that, because of their child-bearing age, they might become pregnant and in need of taking up family-related leave in the future. Some of the legal concepts such as indirect discrimination or the rule of the reversal of the burden of proof continue to present difficulties of application in a number of the countries under review. Often, the protection against dismissal, discrimination and unfavourable treatment on the basis on pregnancy and maternity leave is not respected by the employers, who disregard the law and are not afraid of the consequences, either because workers do not take legal action or because they know that even if found to have violated the law in courts, the sanction they face is no deterrent.

Taking legal action is not an easy or cheap step for most employees, but during pregnancy and/or maternity, it represents an extra burden for women who are already faced with the need to look after a baby, are recovering from giving birth and are generally vulnerable financially due to low maternity payments. The failures in adequate enforcement of the rights to pregnancy and maternity leave reveal that European society remains deeply gendered overall, where women are considered to primarily be mothers and not workers in their own right.

433 For a full overview of the existing statistics, see Section 2.1.3 above.

Parental leave rights are more recent, but they also continue to encounter serious problems of enforcement in the countries under review. Similar to the enforcement of the rights related to pregnancy and maternity, the enforcement of parental leave reveals deeply gendered behaviour reinforced by the fact that women take parental leave more often than men. Women more often than men take parental leave because the leave is not paid or paid at such a low level that it does not enable both parents to make equal use of their entitlements. In particular, fathers have been making insufficient use of their rights to parental leave, meaning that in turn the existing Parental Leave Directive has failed to adequately promote greater involvement of fathers in care responsibilities. The guarantee of paid parental leave envisaged in the Proposed Directive on work-life balance[434] would go some way to encourage men to take parental leave. Even though the proposed level of remuneration is not full pay, this would be a step towards paid parental leave. This in addition to the establishment of a minimum period of parental leave of at least four months of parental leave which could not be transferred between parents should contribute to increasing fathers' take-up of parental leave and in turn to making sure that men are involved in care responsibilities. Moreover, the report shows that the take-up rate of parental leave by both men and women is hindered by its lack of flexibility. By allowing workers to take parental leave on a full-time or part-time basis, or in other flexible forms, the Proposed Directive would also contribute to raising the number of parents and especially fathers who can take the leave. This report also shows that dismissal and discrimination on the basis of parental leave are persistent and not limited only to women. As for pregnancy and maternity rights, the number of court cases is small, however, for similar reasons.

There are few issues with regard to **adoption leave**. At present there are few cases and few difficulties. The extension of adoption leave to include foster families in a number of countries is seen as a welcome development for diverse forms of families.

As **paternity leave** is a very recent right in many of the countries under review and as it is not yet guaranteed by EU law, the protection against dismissal, discrimination and unfavourable treatment is therefore difficult to assess at domestic level. The Proposed Directive on work-life balance[435] will introduce a right for fathers to take paternity leave in the form of a short period of leave of a minimum of 10 working days to be taken around the time of the birth of their child. Ultimately, it is hoped that such a provision will contribute to parents better sharing the care following the birth of a child. The majority of countries under review have already adopted some form of paternity leave and, at least by law, that there is some form of protection against dismissal and/or discrimination and/or unfavourable treatment (with some rare exceptions). Where it exists, paternity leave is generally not long, sometimes it is not or badly remunerated and in many countries the right to paternity leave is weakly protected against discrimination and dismissal. National provisions on 'paternity leave' are too often reserved to men, and exclude the situation of same-sex couples. Also, in some countries paternity leave depends on being married or having entered into a civil partnership. The proposed Directive should remedy these difficulties by providing that the right to paternity leave should be without prejudice to marital or family status. At present, paternity leave is also not massively taken by men, arguably due to the lack of adequate payment, but also due to deeply entrenched stereotypes on gender roles. In many countries, women continue to be considered the primary carers for children, while for fathers caring is only considered as an option. Such a frame of mind contributes to a lack of balance in care responsibilities between men and women around the time of the birth of a child, which hopefully the adoption of the Proposed Directive will challenge.

Carers' leave is not yet guaranteed by EU law. The Proposed Directive on work-life balance envisages introducing the right to a period of leave for workers to take care of a relative in the event of serious illness or dependency with some guarantees against dismissal and discrimination.[436] Despite the lack of an EU obligation, carers' leave already exists in the majority of the countries under review and some form of protection against dismissal and/or discrimination on the basis of carers' leave also already

434 Article 5 of the Proposed Directive on work-life balance, COM (2017) 253.
435 Article 4 of the Proposed Directive on work-life balance, COM (2017) 253.
436 Article 5 of the Proposed Directive on work-life balance, COM (2017) 253.

exists, albeit not systematically or comprehensively. Indeed, although carers' leave and its protection is not homogeneous across the States under review, the protection against dismissal and discrimination remains weak overall. Assessing the enforcement of these rights is difficult because of their lack of homogeneity with regard to their personal or material scopes. In addition, in some countries, carers' leave has only very recently been adopted at national level and the assessment of their enforcement is not yet available. Nevertheless, the experience in the countries where such leave already exists indicates patterns of enforcement similar to that of pregnancy, maternity and parental leave, which are well-established EU rights. The issues include common violation of the protection against dismissal, discrimination and unfavourable treatment while at the same time a general lack of willingness of individuals to seek redress when these rights have been violated. In addition, carers' leave is deeply gendered. For this reason, women, who disproportionately take carers' leave also face most of the dismissal, discrimination and unfavourable treatment.

This report has identified some of the barriers to the enforcement of pregnancy, maternity, paternity, parental, adoption and carers' leave. Such barriers can be linked to a lack of awareness and access to information. Enhancing the enforcement of these rights might require supporting awareness-raising campaigns. In the same vein, further education of judges, lawyers, labour inspectors and other practitioners would help improve the application of some perceived complex legal concepts such as the reversal of the burden of proof or indirect sex discrimination. In addition, detailed judgments and other decisions made by national equality bodies are not always available and should be made accessible. While in some of the countries under review studies have been conducted in the area of the enforcement of pregnancy and maternity rights,[437] it should be pointed out that there are not enough current studies both regarding national and EU law to improve the understanding of problems related to the enforcement of family-related leave. The lack of sufficient data and studies in some countries exacerbates difficulties in enforcing pregnancy, maternity and parental rights.

Other barriers to the efficient implementation of these rights are not strictly legal and are therefore more difficult to fully assess and fight using solely legislative instruments. Although the traditional gender roles are increasingly challenged, traditional ideas and cultural ideologies, where women continue to be considered to be fully responsible for the day-to-day care of their children remain widespread. It should also be pointed out that the fact that the lack of relevant services, such as nurseries and kindergartens, strengthens this strict division of roles within the family. It is submitted that there should be support for campaigns to eradicate stereotypes, as well as for increased compensation/pay of care work in order to raise both its economic and social valorisation and attractiveness for men. This would also help change cultural and ideological schemes about gender roles.

The 2008 financial crisis and the accompanying austerity measures which have been adopted as a result, have further weakened anyentitlement to family-related leave rights and their enforcement in many countries. The sweeping reforms in the employment and social security area since 2010 in **Greece** have had a disproportionately negative impact on women. When economic difficulties arise, the enforcement of family-leave rights is not effectively enforced (**Bulgaria**, **Cyprus**, **Spain**, **Estonia**, **Hungary**, **Iceland**, **Italy**, **Lithuania**, **Slovakia** and the **United Kingdom**). In contrast, in **Ireland** where there is economic growth and therefore virtually full employment, there are fewer difficulties in the enforcement of rights related to family leave. The fact that these rights are only enforced when the economic situation is good, is worrisome as such rights are fundamental EU rights, and not just guaranteed during periods of economic growth.

Where individuals actually go to court, remedies, although generally compliant with EU law, remain inefficient because they often fail to represent a sufficient deterrent against dismissal, discrimination or unfavourable treatment. More effective remedies, including stronger pecuniary sanctions, are a powerful enforcement tool. In the same vein, providing better, cheaper and easier access to justice for victims,

437 See the list of relevant studies at the end of this report.

for example, by reducing the costs of legal procedures or by banning courts fees for access to court. Another issue which has been raised in this report involves the existence of a time limit for bringing legal actions to courts and tribunals. Woman who are pregnant or who are on maternity leave might need more time to bring a legal claim in cases involving pregnancy and maternity discrimination because they are under increased pressure given that they are caring for a new-born and may possibly be particularly vulnerable at that time. There might be value in complementing individual rights with systematic top-down monitoring at national level. Such monitoring at national level might involve setting targets and could include effective and pecuniary sanctions for violation of the rights associated with family leave.

A more holistic approach is needed to effectively enforce the protection against dismissal, discrimination and unfavourable treatment of family-related leave. Hard law on family leave is clearly insufficient to change and challenge gender stereotypes and improve enforcement of the rights to family leave. This report also shows that there are interrelations between family leave, flexible working arrangements and access to childcare. In this context, the European Pillar of Social Rights represents a step in the right direction because – along with the work-life balance proposal, including the Communication to support work-life balance for working parents and carers[438]– it considers measures additional to family-leave arrangements, including the improvement of access to childcare facilities and the combat against gender stereotyping. Such complementary measures go a long way to support the framework for work-family reconciliation.[439] It remains to be seen, however, to what extent these measures will eventually be effective given the fact that they are not envisaged as a legally binding tool.

438 Communication to support work-life balance for working parents and carers, COM (2017) 252 final: The Commission will notably support the enforcement of the existing Pregnant Workers Directive 92/85/EEC:, p. 11.

439 Caracciolo di Torella, E. and Masselot, A. (2010), *Reconciling Work and Family Life in EU Law and Policy*. London: Palgrave Macmillan.

List of references

Austria

Karin Burger-Ehrenhofer, Bettina Schrittwieser, Martina Thomasberger, *Kommentar Mutterschutzzgesetz und Väterkarenzgesetz,* Wien, 2013.

Belgium

Jean Jacqmain, *Protection de la maternité*, Kluwer, « Etudes pratiques de droit social », 2012.

Bulgaria

Bulgarian Commission Publication http://www.kzd-nondiscrimination.com.

Croatia

Dobrotić, I., Pećnik, N., Baran, J. (2015) Needs of parents and services for parents who raise their children in difficult circumstances (*Potrebe roditelja i pružanje usluga roditeljima koji podižu djecu u otežanim okolnostima*), RODA, available at: http://www.roda.hr/media/attachments/udruga/projekti/vizije/roditelji_koji_podizu_djecu_u_otezanim_okolnostima.pdf.

Frntić, D. F. et al. (2017) Detailed Commentary of the Labour Act (*Detaljni komentar Zakona o radu*), Radno parvo.

Kesonja, D., Šimonović Einwalter, T. (2017) Analysis of case law in anti-discrimination claims before the Croatian courts (*Analiza sudske prakse u postupcima pred hrvatskim sudovima pokrenutima zbog diskriminacije*) CES, available at https://www.cms.hr/system/publication/pdf/104/Analiza_sudske_prakse_u_postupcima_pred_hrvatskim_sudovima_pokrenutima_zbog_diskriminacije.pdf.

Ombudsperson for Gender Equality (2018) Annual Report for 2017, available at http://www.prs.hr/attachments/article/2404/IZVJE%C5%A0%C4%86E_O_RADU_ZA_2017.pdf.

Ombudsperson for Gender Equality (2015) Use of breastfeeding break (*Korištenje prava na stanku za dojenje djeteta*), available at: http://www.prs.hr/attachments/article/1987/Istra%C5%BEivanje%20o%20kori%C5%A1tenju%20prava%20na%20stanku%20za%20dojenje%20djeteta,%202015.pdf.

Ombudsperson for Gender Equality (2012) Position of pregnant workers and mother with toddlers in the Croatian labour market (*Položaj trudnica i majki s malom djecom na tržištu rada*), available at: https://www.prs.hr/attachments/article/633/Polo%C5%BEaj%20trudnica%20i%20majki%20sa%20malom%20djecom%20na%20tr%C5%BEi%C5%A1tu%20rada%20WEB.pdf.

Czech Republic

Kalíšková, K., Münich, D. Češky: nevyužitý potenciál země, IDEA and CERGE : Praha 2012 available at https://idea.cerge-ei.cz/documents/kratka_studie_2012_03.pdf.

Discrimination in the Czech Republic: victim of discrimination and barriers to access to justice, final report from a survey conducted by the Public Defender of Rights. Brno. 2015. available at https://www.ochrance.cz/fileadmin/user_upload/ESO/CZ_Diskriminace_v_CR_vyzkum_01.pdf.

Polák, P., Kvasnicová, J., Tichá, I. Slaďování soukromého a pracovního života, Kancelář VOP: Brno. 2015, available at https://www.ochrance.cz/fileadmin/user_upload/DISKRIMINACE/Knihovna/sbornik_II_2015_CZ.pdf.

Šabatová, A., Hampl, S., Maříková, H., Urbániková, M., Kvasnicová, J. Slaďování pracovního, osobního a rodinného života na ministerstvech ČR, Kancelář VOP: Brno. 2015, available at https://www.ochrance.cz/fileadmin/user_upload/ESO/101-2017-DIS-JKV-vyzkumna_zprava.pdf.

Estonia

Pall, K. (2017) 'Estonia country note', in: Blum S., Koslowski A., and Moss P. (eds.) International Review of Leave Policies and Research 2017. Available at: http://www.leavenetwork.org/lp_and_r_reports/.

Biin, H. (2017), Estonia: Reform of the parental leave and benefit system to better reconcile work and family life. ESPN Flash Report 2017/62, ec.europa.eu/social/BlobServlet?docId=18228&langId=en.

Biin, H., Karu, M., Masso, M. and Veldre, V. (2013), Eesti vanemapuhkuste süsteemi analüüs (Analysis of the Estonian Parental Leave System), Tallinn: Poliitikauuringute Keskus Praxis.

Uring, M. (2014). Lastega perede toetamise õiguslik reguleerimine Eestis ja selle vastavus rahvusvahelistele nõuetele (The legal regulation of supporting families with children in Estonia and its compliance with international standards), Master thesis, University of Tartu, https://dspace.ut.ee/bitstream/handle/10062/42657/uring_mailis.pdf?sequence=1&isAllowed=y.

Lõhmus, A. https://www.postimees.ee/1752059/emapalga-esimese-viisaastaku-aruanne-75-000-last-ja-4-7-miljardit-krooni.

Karu, M. (2012), Parental Leave in Estonia: Does Familisation of Fathers Lead to Defamilisation of Mothers?, *Nordic Journal of Women s Studies (NORA),* 20(2):94-108, https://www.researchgate.net/publication/261207557_Parental_Leave_in_Estonia_Does_Familisation_of_Fathers_Lead_to_Defamilisation_of_Mothers.

Denmark

Danish Institute for Human Rights (2016), *Discrimination of Parents,* Kenn Warming et al. https://menneskeret.dk/sites/menneskeret.dk/files/media/dokumenter/udgivelser/ligebehandling_2016/diskrimination_af_foraeldre_2016.pdf.

France

Inspection Générale des Affaires sociales (IGAS) Rapport sur l'égal accès des femmes et des hommes aux responsabilités professionnelles et familiales sous la direction de B. Grésy (2011) http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/114000300.pdf.

Agence Nationale pour l'amélioration des conditions de travail.

Etat des lieux de la situation des femmes enceintes et de ses spécificités dans la grande distribution (April 2017) https://www.anact.fr/recommandations-pour-mieux-concilier-grossesse-et-travail.

Helene Perivier, 2017, Reduire les inégalités professionnelles en réformant le congé paternité" OFCE *policy brief* 11, 12 January https://www.ofce.sciences-po.fr/pdf-articles/actu/OFCE-Reduire-les-inegalites-professionnelles.pdf.

Defenseur des Droits https://juridique.defenseurdesdroits.fr/doc_num.php?explnum_id=1529 and https://www.defenseurdesdroits.fr/sites/default/files/atoms/files/rapp-enq-avocats-a4-num-02.05.2018.pdf.

Germany

Bundesministerium für Familie, Senioren, Frauen und Jugend (2017) *Zweiter Gleichstellungsbericht der Bundesregierung* (Second Equality Report of the Federal Government), available under https://www.gleichstellungsbericht.de/.

Deutscher Juristinnenbund / Kommission für Arbeits-, Gleichstellungs- und Wirtschaftsrecht, Konzept für ein Wahlarbeitszeitgesetz, in: djbZ 3/2015, S. 121-129, available under https://www.rewi.europa-uni.de/de/lehrstuhl/br/arbeitsrecht/Aktuelles/index.html. [German Women Lawyers' Association / Commission for Labour Law, Equality Law and Commercial Law: Concept for a Law on Employees' Decision and Choice concerning Working Times.]

Eva Kocher, Zeit zum Leben für alle Geschlechter, Neue Gesellschaft / Frankfurter Hefte 9/2015, S. 37-40, also available under http://www.schattenblick.de/infopool/politik/soziales/psdis022.html. [Eva Kocher: Time to Life / Quality Time for All Genders.]

Ghazaleh Nassibi, Johanna Wenckebach, Nadine Zeibig, Geschlechtergleichstellung durch Arbeitszeitsouveränität – Arbeits- und sozialrechtliche Regulierung für Übergänge im Lebenslauf, in: djbZ 2012, S. 111-116. [Ghazaleh Nassibi, Johanna Wenckebach & Nadine Zeibig: Gender Equality through Working Time Sovereignty – labour and social law regulation for transitions in the curriculum vitae.]

Nathalie Oberthür, Die neue Brückenteilzeit, in: Der Arbeits-Rechts-Berater 2018, S. 239-242. [Nathalie Oberthür: The New Regulations on ‚Bridging Part-Time'].

Greece

Alipranti-Maratou, L., Katsis, A., Papadimitriou, P. (2016), (Αν)ισορροπία εργασίας και προσωπικής ζωής – Μια ποσοτική έρευνα στην Ελλάδα τη κρίσης (*(Un)balance between work and personal life – A quantitative research in Greece at crisis),* Κέντρο Μέριμνας Οικογένειας και Παιδιού – ΚΜΟΠ*) (*Family and Childcare Centre – KMOP), Athens.

Greek Ombudsman *Annual Report 2014* (Special Report '*Gender and Employment Relationships'*): available at: http://www.synigoros.gr/resources/docs/ee2014-13-fylo.pdf, accessed 30 May 2018.

Greek Ombudsman *Annual Report 2015* (Special Report '*Gender and Employment Relationships'*): available at: http://www.synigoros.gr/?i=isotita-ton-fylon.el.files.366798, accessed 30 May 2018.

Greek Ombudsman *Annual Report 2016* (Special Report '*Gender and Employment Relationships'*): available at: https://www.synigoros.gr/resources/docs/ee2016-15-fylo.pdf, accessed 30 May 2018.

Greek Ombudsman *Annual Report 2017* (Special Report '*Gender and Employment Relationships'*): available at: https://www.synigoros.gr/?i=stp.el.annreports.487901, accessed 30 May 2018.

Greek Ombudsman *Summary of Intervention `Parental leave for military fathers whose wife does not work'*, April 2016: available at: http://www.synigoros.gr/resources/docs/sinopsidiamesolavisis--2.pdf, accessed 15 May 2018.

ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) Observations on Conventions 100 (equal remuneration) and 111 (discrimination (employment and occupation)), Greece: 101st (2012), 102nd (2013), 104th (2015), 106th (2017) ILC sessions, available at: http://www.ilo.org/dyn/normlex/en/f?p=1000:11110:0::NO:11110:P11110_COUNTRY_ID:102658, accessed 29 May 2018.

Petini-Pinioti, C. (2017), `Δικαιώματα εγκύων και τεκουσών γυναικών' (The rights of pregnant and breastfeeding women), Δελτίον Εργατικής Νομοθεσίας (*Bulletin of Labour Law*) 2017, p. 1531.

Rapanakis, P. (2016), *'Ειδικές άδειες εργαζομένων'* ('Specific types of leave of employees'), *Επιχείρηση* (The Undertaking), pp. 753 et. s.

Koukoulis-Spiliotopoulos, S., Petroglou, A., Petroglou, P. (1993), Greek Report in the research project `Sex Equality Litigation in the Member States of the European Community – A comparative Study' led by Barry Fitzpatrick.

Koukoulis-Spiliotopoulos, S. (2008), 'Gender equality in Greece and effective judicial protection – issues of general relevance in employment relationships', Neue Zeitschrift für Arbeitsrecht NZA-Beilage 2/2008, pp. 74-82.

Koukoulis-Spiliotopoulos, S. (2009), 'Συνταξιοδότηση και εναρμόνιση οικογένειας και εργασίας – Ζητήματα ουσιαστικής ισότητας των φύλων και δικαστικής προστασίας (με αφορμή τη Δ.Ε.Κ. 26.3.2009 C-559/07)' ('Retirement and harmonization of family and work – Issues of substantive gender equality and judicial protection (on the occasion of ECJ 26.3.2009 C-559/07'), Επιθεώρησις Δικαίου Κοινωνικής Ασφαλίσεως *(Social Security Law Review),* pp. 753-785 (780-785).

Thanopoulou, M., Tsiganou, J. (2016), *Gender in Science without Numbers – From academia to work-life balance, Main results of case studies*, Εθνικό Κέντρο Κοινωνικών Ερευνών (National Centre for Social Research), Athens.

Thanopoulou, M., Tsiganou, J. (2016), Γυναίκες ανάμεσα στην εργασία και την οικογένεια εν μέσω κρίσης – Μελέτες περίπτωσης (*Women between work and family. Case studies*), Εθνικό Κέντρο Κοινωνικών Ερευνών (National Centre for Social Research), Athens.

Thanopoulou, M., Tsiganou, J.(2016), Γυναίκες στα νομικά επαγγέλματα την εποχή της κρίσης. Ανάμεσα στην εργασία και την οικογένεια. Μελέτες περίπτωσης (*Women in legal professions in times of crisis. Between work and family. Case studies*), Εθνικό Κέντρο Κοινωνικών Ερευνών (National Centre for Social Research), Athens.

Vlastou, M. (2016), 'Ειδική προστασία εγκύου εργαζομένης στον ιδιωτικό τομέα' ('Specific protection of a pregnant worker in the private sector', *Επιχείρηση* (*The Undertaking*), pp. 777 et s.

Hungary

Gregor, Aniko and Kovats, Eszter: Women's Affairs 2018 Societal Problems and Solution Strategies in Hungary, May 2018, Friedrich Ebert Stiftung, Budapest, http://library.fes.de/pdf-files/bueros/budapest/14462.pdf.

Simonovits, Bori – Koltai, Júlia: Employee selection practice in the mirror of discrimination. http://www.egyenlobanasmod.hu/tamop/data/2.2_english_summary.pdf.

Az egyenlő bánásmód követelményének megsértésével kapcsolatos munkaügyi bírósági gyakorlat Összefoglaló vélemény, Kuria, Joggyakorlat-elemzo csoport, (The case law of labour courts on violation of the obligation of equal treatment. Summary opinion. Kuria, Case law analysis group. 2017. http://www.kuria-birosag.hu/sites/default/files/joggyak/osszefoglalo_velemeny_-_egyenlo_banasmod.pdf.

Ireland

Irish Employment Legislation, A. Kerr, ed., Round Hall Sweet & Maxwell.

Bolger, M., Bruton, C., Kimber, C. (2013), *Employment Equality Law,* Dublin, Round Hall Thomson Reuters.

Meenan, F. (2014), *Employment Law,* Dublin, Round Hall Thomson Reuters.

Meenan, F. (2015), *Employment Law First Supplement to the First Edition,* Dublin, Round Hall Thomson Reuters.

Meenan, F. Employment Law, Dublin, Round Hall Thomson Reuters – 2018 in preparation.

Italy

E. Ales, *Maternità e congedi parentali* (Motherhood and parental leaves), Enciclopedia del diritto-Annali, vol. IX, p. 531, Milano, Giuffrè 2016.

M. Barbera *Il nuovo diritto antidiscriminatorio* (The new anti-discrimination legislation) Milano, Giuffrè 2007.

L. Calafà, *Unioni civili, convivenze di fatto e modello lavoristico di tutela dei diritti dei genitori-lavoratori* (Civil partnerships, cohabitation and legislative models of protection of working parents), Lavoro nella giurisprudenza (2016) p. 962.

L. Calafà, *Il sostegno della genitorialità dopo il jobs act* (Parental leaves after the Jobs Act), Lavoro nella giurisprudenza (2015) p. 877.

L. Calafà *Paternità e lavoro* (Fatherhood and work) Bologna, Il Mulino 2007.

L. Calafà *Congedi e rapporto di lavoro* (Leaves and Work) Padova, Cedam 2004.

M. Catelli 'La normativa sui congedi parentali nella giurisprudenza costituzionale e comunitaria' (Parental leaves in constitutional and European Union case law), *Economia e lavoro* No. 1 (2006) p. 105.

G. De Simone *Dai principi alle regole. Eguaglianza e divieti di discriminazione nella disciplina dei rapporti di lavoro* (From principles to rules. Equality and bans of discriminations in working relatiosnships) Torino, Giappichelli 2001.

R. Garofalo, *Congedo parentale ed esigenze organizzative del datore di lavoro* (Parental leave and employer organization), Lavoro nella giurisprudenza (2008) p. 135.

D. Gottardi 'La tutela della maternità e della paternità' (Maternity and paternity rights), L. Lenti (ed.) *Tutela civile del minore e diritto sociale della famiglia* vol. VI, p. 491 Milano, Giuffrè 2002.

D. Gottardi, *Norme sulla tutela della genitorialità* (Protection of parenthood), Libro dell'anno del diritto-Enciclopedia giuridica Treccani, Roma 2013.

D. Izzi *Eguaglianza e differenze nei rapporti di lavoro* (Equality and differences in working relationships) Napoli, Jovene 2005.

M. Miscione, *I congedi di maternità, paternità e parentali* (Maternity, paternity and parental leaves), Lavoro nella giurisprudenza (2006) p. 837.

R. Nunin, I congedi parentali dopo il d.leg. 15 giugno 2015 n. 80 (Parental leaves after Decree No. 80/2015), Lavoro nella giurisprudenza (2016) p. 14.

C. Valentini *O i figli o ol lavoro* (Children or work?) Milano, Feltrinelli 2012.

T. Vettor, *Congedo di maternità, di paternità e parentale tra orientamenti giurisprudenziali e recenti novità legislative* (Maternity, paternity and parental leaves: case law and new legislation), Argomenti di diritto del lavoro (2013) p. 717.

Liechtenstein

Patricia M. Schiess Rütimann, *Geschlechtergleichheit, Care-Arbeit und Familienpolitik in Liechtenstein*, in: Jusletter 5. Februar 2018.

Norway

Aune, H. (2013), 'Fedrekvoten. Normer og stereotype kjønnsroller. – Noen ganger kan jussen være en spydspiss i rettsutviklingen' (The father's quota. Norms and gender stereotypes – Sometimes the law may serve as an arrow in the development), *Festskrift til Asbjørn Kjønstad 70 år*, Universitetsforlaget 2013.

Aune, H., Nylander, G. (2015), 'Barseltid et faktum. Barseltid en rettslig sannhet' (Maternity time a fact. Maternity leave a legal truth), *Nordisk tidsskrift for Sosialrett*, 20 September.

Poland

Kacprzak A., Żemigała M., *Wyzwania stojące przed rodzicami w miejscu pracy* [Challenges faced by parents in the workplace], [in:] D. Walczak-Duraj (ed.), *Humanizacja pracy. Jakość życia pracownika w perspektywie work-life balance?* [Huminisation of work. Quality of employees' life in the context of work-life balance?], No. 4 (274) (XLVI), Płock 2013.

Latos-Miłkowska M., *Przemiany stosunku pracy związane z rodzicielstwem* [Changes in employment relationship related to parenthood], [in:] L. Florek, Ł. Pisarczyk (eds.), *Współczesne problemy prawa pracy i ubezpieczeń społecznych* [Contemporary labour and social security law problems], LexisNexis, Warsaw 2011.

Muczyński M., 2011: Dostosowanie systemu instytucjonalnej opieki nad małym dzieckiem do potrzeb pracujących rodziców, (w:) Sadowska-Snarska C., (red.): Godzenie życia zawodowego i rodzinnego w Polsce.

Białystok: Wydawnictwo Wyższej Szkoły Ekonomicznej w Białymstoku.

Rycak M., Parental leaves as a form of protection of family life under the labour law in Poland and selected European Union member states. IUSNOVUM 2017, no 2. https://sip.legalis.pl/document, accessed 20 May 2018.

Portugal

Palma-Ramalho, M. do Rosário (2018), *Tempo de trabalho e conciliação entre a vida profissional e a vida familiar, in* R. PALMA RAMALHO /T. COELHO MOREIRA (Coord.), *Tempo de Trabalho e Tempos de Não Trabalho,* Estudos APODIT 4, Lisboa, 2018, 101-116.

Palma-Ramalho, M. do Rosário (2016) (2015) (2014), *Tratado de Direito do Trabalho* (Treaty on Labour Law), I – *Dogmática Geral* (Fundamentals on Labour Law), 4th edition), Coimbra (Almedina Ed.), 2015, II – *Situações Laborais Individuais* (Employment Contract), 6th edition, Coimbra (Almedina Ed.), 2016, and III – *Situações Laborais Colectivas* (Industrial Relations), 2nd edition, Coimbra (Almedina Ed.), 2015.

Palma-Ramalho, M. do Rosário (2015), *The Implementation of the Parental Leave Directive 2010/18/EU, with Reflections on a Harmonized Approach to the Maternity and Parental Leave*, Research Paper for the European Parliament (November 2015), http://www.emeeting.europarl.europa.eu/committees/agenda/201511/EMPL/EMPL(2015)1110_1P/sitt-2200937.

Palma-Ramalho, M. do Rosário (2009), *Reconciling Family and Professional Life and the Gender Equality Principle in Employment*, European Gender Equality Law Review (EGELR), 2009/2, 7-15.

Palma-Ramalho, M. do Rosário / Coelho Moreira, Teresa (2016), *Equality, Non-Discrimination and Work-Life Balance in Portugal – Comparative Labor Law Dossier on Equality, Non-Discrimination and Work-Life Balance*, IUSLabor Revista Electrónica de Dret del Trabali I de la Seguretat Social de la Universidad Pompeu-Fabra, Barcelona) 2/2016, 46-58, in https://www.upf.edu./iusLabor/.

Slovakia

Bednárik,R., Slovakia: Incentives for men to take time off for family life https://www.eurofound.europa.eu/observatories/eurwork/articles/slovakia-incentives-for-men-to-take-time-off-work-for-family-life, accessed 5 June 2018.

Barinková, M, Maternity and Parental leave: Present and Perspectives of Legal Tools for Harmonizing Professional and Family Life in Slovakia European Scientific Journal December 2015 /SPECIAL/ edition Vol.1 ISSN: 1857 – 7881 (Print) e – ISSN 1857-7431 https://eujournal.org/index.php/esj/article/viewFile/6685/6418, accessed 5 June 2018.

Olšovskává, A.,Laclaviková, M. Termination of Employment under the Slovak Legislation, 2015, http://sei.iuridica.truni.sk/archive/2015/03/SEI-2015-03-Studies-Olsovska-Andrea-Laclavikova-Miriam.pdf accessed 5 June 2018.

Spain

BALLESTER PASTOR, M.A. *Retos y perspectivas de la discriminación laboral por razón de género (Challenges and perspectives of gender labour discrimination),* Valencia, 2017.

BALLESTER PASTOR, M.A. 'Legal Effects of the Economic Crisis on Gender Equality in Spain: Effects on the Right to Reconciliate Work and Family after the 2012 Labour Law Reform', European Gender Equality Law review, 2, 2012, https://www.equalitylaw.eu/downloads/2799-european-gender-equality-law-review-2-2012.

BALLESTER PASTOR, M.A. 'La efectividad en España de la normativa antidiscriminatoria de la Unión Europea (la dimensión desconocida de las cláusulas horizontales)' (The effectiveness in Spain of the nos discrimination European Union Legislation (the unknown dimensión of the horizontal clauses), Derecho de las relaciones Laborales, 10, 2016.

NUÑEZ-CORTÉS CONTRERAS P. and LOUSADA AROCHENA, F. *Jornada de trabajo y derechos de conciliación (*Hours of work and rights of reconciliation)*,* Madrid, 2015.

Sweden

Eek F, Axmon A (2013) Attitude and flexibility are the most important work place factors for working parents' mental wellbeing, stress, and work engagement. Scandinavian Journal of Public Health 41(7): 692–705.

Evertsson M, Duvander AZ (2011) Parental Leave–Possibility or Trap? Does Family Leave Length Effect Swedish Women's Labour Market Opportunities? European Sociological Review 27(4): 435-450.

Julén Votinius J (2011) Troublesome Transformation. In: Rönnmar M (ed.) *Labour Law, Fundamental Rights and Social Europe. Swedish Studies in European Law 4*. Oxford: Hart.

Julén Votinius J (2013) Parenthood Meets Market Functionalism – Parental Rights in the Labour Market and the Importance of the Gender Dimension. In: Numhauser-Henning A and M Rönnmar (eds.) *Normative Patterns and Legal Developments in the Social Dimension of the EU*. Oxford: Hart.

Julén Votinius J (2018) Normative Distortions in Labour Law: Exploring the field of parental rights in working life, *Social & Legal Studies*, First Published 1 February 2018 https://doi.org/10.1177/0964663917753724.

Magnusson C (2010) Why is there a gender wage gap according to occupational prestige? An analysis of the gender wage gap by occupational prestige and family obligations in Sweden. Acta Sociologica 53(2): 99–116.

Magnusson C, Nermo M (2017) Gender, parenthood and wage differences: The importance of time-consuming job characteristics. Social Indicators Research 131(2): 797-816.

Swedish Employment Service (2009) A Working Life Suitable for Families. Innovative Working Arrangements in Sweden.

The United Kingdom

Dickens, L (2012) (ed) *Making Employment Rights Effective: Issues of Enforcement and Compliance* Hart Publising, Oxford.

James, G (2009) *The Legal Regulation of Pregnancy and Parenting in the Labour Market* Routledge, London (a bit dated but a chapter on 'the mechanics' of the employment dispute resolution and tribunal system).

James, G (2016) 'Family-Friendly employment laws (re)assessed: the potential of care ethics' *Industrial Law Journal* 45(4) 477-502. (esp. 486-494 where issues with dispute resolution procedures are discussed).

Annex

Questionnaire for the national experts of 31 countries (28 Member States and Iceland, Liechtenstein and Norway).

Questions

1. Enforcement of the protection against discrimination and unfavourable treatment[1] due to the take up of family related leaves at national level

1.1 Pregnancy and maternity leave

Please describe specific difficulties – if any – in the enforcement of the prohibition of discrimination and/or unfavourable treatment (both direct[2] and/or indirect sex discrimination) due to the take up of pregnancy and maternity leave in your country, in particular:

- in legislation (i.e. specific provisions on the protection against discrimination and/or unfavourable treatment, see for example Articles 2 (2)(c), 14 and 15 of the Recast Directive 2006/54/EC);
- in case law by courts (i.e. case law illustrating enforcement issues such as the burden of proof, victimisation, remedies and/or sanctions);
- in decisions by the national equality body (i.e. decisions illustrating enforcement issues such as the burden of proof, victimisation, remedies and/or sanctions);
- as highlighted by studies, annual reports etc. conducted by the national equality body in relation to enforcement issues such as:
  - access to information and prevention of discrimination
  - access to equality bodies, their competences, procedural rules etc.
  - the burden of proof
  - victimisation
  - remedies and sanctions
  - follow-up of decisions of equality bodies
- as highlighted in other existing studies on problems with enforcement in practice if available (please provide a short description of the main problems).

1.2 Parental and adoption[3] leave

Please describe specific difficulties – if any – in the enforcement of the prohibition of discrimination and/or unfavourable treatment (in particular indirect sex discrimination) due to the take up of parental and/or adoption leave in your country, in particular:

- in legislation (i.e. specific provisions on the protection against discrimination and/or unfavourable treatment, see for example Articles 14 and 16 of the Recast Directive 2006/54/EC; Clauses 5 and 6 of the Parental Leave Directive 2010/18/EU and Articles 10 and 11 of the work-life balance proposal (COM (2017) 253));
- in case law by courts (i.e. case law illustrating enforcement issues such as the burden of proof, victimisation, remedies and/or sanctions);
- in decisions by the national equality body (i.e. decisions illustrating enforcement issues such as the burden of proof, victimisation, remedies and/or sanctions);
- as highlighted by studies, annual reports etc. conducted by the national equality body in relation to enforcement issues such as:

1 Please note that the issue of protection against dismissal is dealt with in the second Section of this questionnaire below.
2 For example: the non-renewal of a fixed-term contract relating to pregnancy.
3 In case a statutory adoption leave exists in your country.

  - access to information and prevention of discrimination;
  - access to equality bodies, their competences, procedural rules etc.;
  - the burden of proof;
  - victimisation;
  - remedies and sanctions;
  - follow-up of decisions of equality bodies.
- as highlighted in other existing studies on problems with enforcement in practice if available (please provide a short description of the main problems).

1.3 Paternity leave

1.3.1 Does your country have a statutory paternity leave?

Yes/No

If yes, please describe in short the content of the relevant provision(s) and provide a reference to the legislation.

1.3.2 Is a proposal on (the amendment of) paternity leave pending?

Yes/No

If yes, please describe in short the content of the proposal and provide the reference.

1.3.3 In case a paternity leave exists in statutory legislation in your country, please describe specific difficulties – if any – in the enforcement of the prohibition of discrimination and/or unfavourable treatment due to the take up of paternity leave in your country, in particular:

- in legislation (i.e. specific provisions on the protection against discrimination and/or unfavourable treatment, see for example Article 14 and 16 of the Recast Directive 2006/54/EC and Articles 10 and 11 of the work-life balance proposal (COM (2017) 253));
- in case law by courts (i.e. case law illustrating enforcement issues such as the burden of proof, victimisation, remedies and/or sanctions);
- in decisions by the national equality body (i.e. decisions illustrating enforcement issues such as the burden of proof, victimisation, remedies and/or sanctions);
- as highlighted by studies, annual reports etc. conducted by the national equality body in relation to enforcement issues such as:
  - access to information and prevention of discrimination;
  - access to equality bodies, their competences, procedural rules etc.;
  - the burden of proof;
  - victimisation;
  - remedies and sanctions;
  - follow-up of decisions of equality bodies.
- as highlighted in other existing studies on problems with enforcement in practice if available (please provide a short description of the main problems).

1.4 Carers' leave

1.4.1 Does your country have a statutory carers' leave?

Yes/No

If yes, please describe in short the content of the relevant provision(s) and provide a reference to the legislation.

1.4.2 Is a proposal on (the amendment of) carers' leave pending?

Yes/No

If yes, please describe in short the content of the proposal and provide the reference.

1.4.3 In case a carers' leave exists in statutory legislation in your country, please describe specific difficulties – if any – in the enforcement of the prohibition of discrimination and/or unfavourable treatment due to the take up of the carers' leave in your country, in particular:

- in legislation (i.e. specific provisions on the protection against discrimination and/or unfavourable treatment, see for example Article 14 of the Recast Directive 2006/54/EC and Articles 10 and 11 of the work-life balance proposal (COM (2017) 253));
- in case law by courts (i.e. case law illustrating enforcement issues such as the burden of proof, victimisation, remedies and/or sanctions);
- in decisions by the national equality body (i.e. decisions illustrating enforcement issues such as the burden of proof, victimisation, remedies and/or sanctions);
- as highlighted by studies, annual reports etc. conducted by the national equality body in relation to enforcement issues such as:
  - access to information and prevention of discrimination;
  - access to equality bodies, their competences, procedural rules etc.;
  - the burden of proof;
  - victimisation;
  - remedies and sanctions;
  - follow-up of decisions of equality bodies.
- as highlighted in other existing studies on problems with enforcement in practice if available (please provide a short description of the main problems).

1.5 Self-employed persons

Please describe specific difficulties – if any – in the enforcement of the prohibition of discrimination and/or unfavourable treatment in relation to the rights to a sufficient maternity allowance enabling interruptions of the occupational activities of female self-employed workers and female spouses and life partners according to Article 8 of Directive 2010/41/EU. Please pay attention to legislation, case law by courts, decision by the national equality body and studies, if available.

2. Enforcement of the protection against dismissal due to the take up of family related leaves at national level

2.1 Pregnancy and maternity leave

Please describe specific difficulties – if any – in the enforcement of the protection against dismissal due to the take up of pregnancy and maternity leave in your country, in particular:

- in legislation (i.e. specific provisions on the protection against dismissal, see Article 10 of Directive 92/85/EEC);
- in case law by courts (i.e. case law illustrating enforcement issues such as the burden of proof, victimisation, remedies and/or sanctions);
- in decisions by the national equality body (i.e. decisions illustrating enforcement issues such as the burden of proof, victimisation, remedies and/or sanctions);

- as highlighted by studies, annual reports etc. conducted by the national equality body in relation to enforcement issues such as:
  - access to information and prevention of discrimination;
  - access to equality bodies, their competences, procedural rules etc.;
  - the burden of proof;
  - victimisation;
  - remedies and sanctions;
  - follow-up of decisions of equality bodies.
- as highlighted in other existing studies on problems with enforcement in practice if available (please provide a short description of the main problems).

2.2 Parental and adoption[4] leave

Please describe specific difficulties – if any – in the enforcement of the protection against dismissal due to the take up of parental and/or adoption leave in your country, in particular:

- in legislation (i.e. specific provisions on the protection against dismissal Clause 5(4) of the Parental Leave Directive 2010/18/EU and Article 12 of the work-life balance proposal (COM (2017) 253));
- in case law by courts (i.e. case law illustrating enforcement issues such as the burden of proof, victimisation, remedies and/or sanctions);
- in decisions by the national equality body (i.e. decisions illustrating enforcement issues such as the burden of proof, victimisation, remedies and/or sanctions);
- as highlighted by studies, annual reports etc. conducted by the national equality body in relation to enforcement issues such as:
  - access to information and prevention of discrimination;
  - access to equality bodies, their competences, procedural rules etc.;
  - the burden of proof;
  - victimisation;
  - remedies and sanctions;
  - follow-up of decisions of equality bodies.
- as highlighted in other existing studies on problems with enforcement in practice if available (please provide a short description of the main problems).

2.3 Paternity leave

In case a paternity leave exists in statutory legislation in your country, please describe specific difficulties – if any – in the enforcement of the protection against dismissal due to the take up of paternity leave in your country, in particular:

- in legislation (i.e. specific provisions on the protection against dismissal, see Article 12 of the work-life balance proposal (COM (2017) 253));
- in case law by courts (i.e. case law illustrating enforcement issues such as the burden of proof, victimisation, remedies and/or sanctions);
- in decisions by the national equality body (i.e. decisions illustrating enforcement issues such as the burden of proof, victimisation, remedies and/or sanctions);
- as highlighted by studies, annual reports etc. conducted by the national equality body in relation to enforcement issues such as:
  - access to information and prevention of discrimination;
  - access to equality bodies, their competences, procedural rules etc.;
  - the burden of proof;
  - victimisation;

4 In case a statutory adoption leave exists in your country.

  - remedies and sanctions;
  - follow-up of decisions of equality bodies.
- as highlighted in other existing studies on problems with enforcement in practice if available (please provide a short description of the main problems).

2.4 Carers' leave

In case a carers' leave exists in statutory legislation in your country, please describe specific difficulties – if any – in the enforcement of the protection against dismissal due to the take up of the carers' leave in your country, in particular:

- in legislation (i.e. specific provisions on the protection against dismissal, see for example Article 12 of the work-life balance proposal (COM (2017) 253));
- in case law by courts (i.e. case law illustrating enforcement issues such as the burden of proof, victimisation, remedies and/or sanctions);
- in decisions by the national equality body (i.e. decisions illustrating enforcement issues such as the burden of proof, victimisation, remedies and/or sanctions);
- as highlighted by studies, annual reports etc. conducted by the national equality body in relation to enforcement issues such as:
  - access to information and prevention of discrimination;
  - access to equality bodies, their competences, procedural rules etc.;
  - the burden of proof;
  - victimisation;
  - remedies and sanctions;
  - follow-up of decisions of equality bodies.
- as highlighted in other existing studies on problems with enforcement in practice if available (please provide a short description of the main problems).

3. Role of other actors in the enforcement of the protection against discrimination, unfavourable treatment and/or dismissal due to the taking up of family related leaves

Is any information available publicly on specific enforcement activities that have taken place by other actors such as an ombudsman, labour inspectorates, social partners for example in relation to the protection against discrimination, unfavourable treatment and/or dismissal due to the taking up of family related leaves?

If no, what might in your view the reason be for such lack of action?

If yes, please describe in short these enforcement activities.

4. Are you aware of any additional enforcement problems within the scope of this report in your country not yet mentioned above?

No/Yes

If yes, please describe these enforcement problems.

5. Are there good practices as regards the protection against discrimination, unfavourable treatment and/or dismissal within the scope of this report in your country worth mentioning?

If yes, please describe these good practices in short.

6. Is there any other issue that you consider relevant to address in the light of the scope and aim of this report, for example in relation to breastfeeding, the birth of a stillborn child, or Assisted Reproductive Technology (ART), including IVF and Surrogacy.

7. Please provide relevant bibliographic sources if available.

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