"A COMPARATIVE LEGAL ANALYSIS OF THE IMPLEMENTATION OF THE 1996 PARENTAL LEAVE DIRECTIVE IN THE UK AND POLAND"
(1983-2010)

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ABSTRACT

The Parental Leave Directive 96/34/EC is the only EU directive which was adopted with the specific aim of enabling working parents to reconcile work and family responsibilities thorough the use of parental leave and leave for urgent family reasons. This thesis consists of an exploration of this Directive in terms of how it shapes law at national level in the UK and Poland with references to selected Member States. The legal analysis undertaken in this thesis is informed by socio-legal methodologies and feminist perspectives. It aims to explore the legislative contribution of the EU to addressing the complex and diverse issues surrounding the interaction between work and caring responsibilities for children and adult dependants. At the core of this thesis is the concept of choice and the extent to which the Directive has assisted working parents in making genuine reconciliation choices.

As this Directive was the first reconciliation measure to be based on a framework agreement concluded by Social Partners, the legal basis for their involvement in the EU decision making process is explored and analysed. The thesis considers whether the change in the legislative process in favour of the involvement of Social Partners, has resulted in the adoption of the Directive on parental leave containing more stringent provisions than those envisaged in the Commission proposals for a Directive on parental leave blocked by the Council in the 1980s. It argues that the Directive has failed to provide workers with the effective rights to parental leave and leave for urgent family reasons which could enable them to make genuine reconciliation choices. This failure has been further reinforced by national legislators to the detriment of workers with caring responsibilities for children and adult dependants in the UK and Poland. The thesis uses a comparative legal approach in order explore the way forward for further development of the EU law by considering the approaches, rules and standards that should be adopted or reinforced in law in order to ensure that the discussed leave entitlements become more effective reconciliation tools.

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List of Abbreviations

BCC	British Chamber of Commerce
CA	Court of Appeal (UK)
CBI	Confederation of British Industry
CEEP	The European Centre of Enterprises with Public Participation.
CG	Coalition Government (UK)
Charter	European Charter of Fundamental Rights
CoJ	Court of Justice of the European Union
Constitution 1952	Constitution of the Polish People's Republic from 1952
Constitution 1997	Constitution of the Republic of Poland of 2nd April 1997
Council	The Council of the European Union
Draft 1983	First Commission proposal for a Directive regarding parental leave and leave for family reasons of November 1983.
Draft 1984	Proposal for a Council Directive on parental leave and leave for family reasons of November 1984.
DTI	Department of Trade and Industry (UK)
EA 2002	Employment Act 2002
EAT	Employment Appeal Tribunal
ECA	European Communities Act 1972
ECHR	European Convention on Human Rights
EEC	European Economic Community
EES	European Employment Strategy
EFTA	European Free Trade Area
EOC	Equal Opportunities Commission
EP	European Parliament
ERA 1999	Employment Relations Act 1999
ERA	Employment Rights Act 1996
ESC	European Economic and Social Committee
ET	Employment Tribunal
ETD	Equal Treatment Directive 76/207/EEC
ETUC	European Trade Union Confederation (now BUSINESSEUROPE)
EWC	European Works Council Directive (first proposal)
FaW	White Paper Fairness at Work (1998).
FWD	Fixed-term Workers Directive 99/70/EC
GWPCC	Green Paper, Work and Parents: Competitiveness and Choice.
HC	High Court (UK)
HL	House of Lords (UK)
ICTU	Irish Congress of Trade Unions
LC	Polish Labour Code 1974 (Kodeks Pracy 1974)
LG	Labour Government (UK)
MPLR	Maternity and Parental Leave etc. Regulations 1999
MS	EU Member States

MT	Maastricht Treaty 1992
NMS	New Member States
OMC	Open Method Coordination
QMV	Qualified Majority Voting
PCT	Polish Constitutional Tribunal
PLD	Framework Agreement on Parental Leave Directive as annexed to Council Directive (96/34/EC).
PLD 2010	Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave.
Poland	Republic of Poland
PSC	Polish Supreme Court
PTD	Part-time Workers Directive (97/81/EC).
PWD	Pregnant Workers Directive (92/85/EEC).
SMP	Statutory Maternity Pay
TEU	Treaty on European Union 1992
ToA	Treaty of Amsterdam 1997
TFEU	Treat on Functioning of the European Union 2007
ToL	Treaty of Lisbon 2007
ToN	Treaty of Nice 2000
ToR	Treaty of Rome 1957
TUC	Trade Unions Congress
UNICE	Union of Industrial and Employers' Confederations of Europe.
UK	United Kingdom
WEMS	Well-established Member States
WFA	Work and Families Act 2006.
WTD	Working Time Directive (93/104/EEC, 2003/88/EC).

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Chapter 1 Introduction

In recent years, social changes taking place in society have challenged traditional stereotypical views about the distribution of responsibilities within a family, and focused attention on the need to ensure more equality in how work and caring responsibilities are distributed within a family and society.[1] Although, it is accepted that stringent legislative measures cannot on their own effectively tackle the inherent conflict between family responsibilities and paid employment, the existence of effective legislative rights could influence workers' and employers' attitudes towards the distribution of work and family responsibilities. It could further contribute to challenging the well-established perceptions and expectations as to the accepted behaviour, and facilitate the development of new models of behaviour promoting more equality in how work and family responsibilities are distributed.[2]

The role EU and national legislators have in shaping attitudes towards the involvement of women and men in work and family responsibilities is of paramount importance. It is rooted in the task of providing workers with effective legislative rights that could contribute to helping them to make genuine choices as to how responsibilities are allocated within a family. Thus, enabling families to construct their own family model that best responds to their individual needs and expectations.[3] The law should therefore provide genuine alternatives to those families who are willing to move away from the traditional models of household arrangements in favour of those ensuring more equality in the distribution of caring and work responsibilities.[4] However, the absence of effective legislative rights, which are capable of enabling families to make genuine work-family choices or laws reaffirming stereotypical

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[1] The shift in fathers' attitudes towards caring responsibilities has been identified in E. Caracciolo di Torella (2007) `New Labour, New Dads — The Impact of Family Friendly Legislation on Fathers`, *Industrial Law Journal*, 36:318-328.

[2] E. Caracciolo di Torella and A. Masselot (2010) *Reconciling Work and Family Life in the EU Law and Policy*, London: Palgrave Macmillan pp.1-4.

[3] G. James (2009) *The Legal Regulation of Pregnancy and Parenting in the Labour Market*, London: Routlege-Cavendish, pp.105-109.

[4] G. James (2009a) `Mothers and fathers as parents and workers: family-friendly employment policies in an era of shifting identities`, *Journal of Social Welfare & Family Law*, 31(3): 271-283, at p. 275.

attitudes towards work and family responsibilities can hamper the promotion of social change and reaffirm the traditional ideologies of motherhood and fatherhood. Consequently, inadequate laws or their absence can contribute to legitimising the inequalities in the distribution of work and family responsibilities to the detriment of workers striving to balance the demands of work and family.

The existence of the burden deriving from balancing paid employment and family responsibilities has been recognised by EU makers of law and policy through the introduction of measures aimed at facilitating reconciliation between work and family life (reconciliation). Reconciliation can be defined as a set of constantly evolving policies and legal provisions which aim at addressing the inherent tension in juggling commitments deriving from paid employment and family responsibilities. Reconciliation policies and legal provisions should ensure the existence of adequate family resources enabling parents to make genuine work-family choices, and promote gender equality and employment opportunities for workers with caring responsibilities.[5]

The concept of reconciliation has gradually developed in the EU, and accompanying measures evolved from the soft law[6] to binding provisions. Reconciliation between work and family responsibilities did not fall within the competences of the *Treaty of Rome* (1957), which primarily focused on the economic development of the Community and social policy aspects were only considered if it was required for the proper functioning of the market. Although the measures which were introduced at this stage did not directly refer to the concept of reconciliation, the inclusion in Article 119 EEC[7] of the right to equal pay for equal work must be seen as laying down a

[5] OECD (2007), *Babies and Bosses – Reconciling Work and Family Life*, Paris: OECD.
[6] The concept of *soft law* has been developed and it applies among others to the provisions of recommendations and opinions (resolutions and declarations) that do not have full force of law. Soft law applies to rules of conduct that generally do not have legally binding force but may have practical effects and are used express views or issue guidelines on matters where the division of power between the EU and the Member States is not clear or is outside the power of a particular institution. Cf. F Snyder (1993) *The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques*, 56 MLR 19 in Butterworths *Expert Guide to European Union* (1996) p.277.
[7] Now Article 157 TFEU (former 141 EC)

foundation for the future expansion of equality rights, including the reconciliation principle.[8] The introduction of the right to equal pay reflects the recognition by the EEC that harmonised national social legislation was also crucial for the economic integration. Thus, the social legislation was born as the by-product of economic integration.[9] The *Equal Treatment Directive 76/207*[10] (the ETD) ensured more equality in treatment for men and women in access to employment.

Caracciolo di Torella and Masselot[11] recognise the importance of equality in pay under Article 119 EEC (now Art 157 TFEU) for the development of EU reconciliation policies. They suggest the effectiveness of reconciliation measures, and equality in the distribution of caring responsibilities within a family, are conditioned by equality in pay between men and women. The gender pay gap where women are paid less than men may prevent women from achieving reconciliation by making a mother's exit from the labour market more economically viable than the father's. The lower wages paid to women undermine the importance of women's work, their contribution to the labour market and hamper their career opportunities. It can also reinforce the traditional division of caring responsibilities within a family and discourage men's involvement in sharing of the family responsibilities. Despite the introduction of the right to equal pay in the EEC in 1950s, equality in pay between men and women has not been achieved as the gender pay gap exists across the EU and continues undermining reconciliation policies.[12]

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[8] C. Bernard (1996), `The Economic Objectives of Article 119 EC`, in T. Hervey and D. O'Keeffe (1996), *Sex Equality in European Union*, London: Wiley, pp.321-334. The right to equal pay was established purely in order to ensure fairer competition between different industries across the MSs and particularly industries, which predominantly employed women. The impetus to ensure equality in pay was fostered by the French government (France already implemented ILO Convention 100 on equal pay), which was concerned about the potential competitive disadvantage of the relatively high-paid female labour in France that could be undercut by lower-paid labour in other Member States. If there had been no economic benefits deriving from the right to equal pay it is very likely that the right to equal pay would not have been introduced. C. Hoskyns (1992), `The European Community's Policy on Women in the Context of 1992`, *Women Studies International Forum*, 15/1, pp.21-28.

[9] H. Macrae (2010), `The EU as a Gender Equal Polity: Myths and Realities`, *Journal of Common Market Studies*, 48(1):155-174.

[10] Council Directive 76/207/EEC (now also Consolidated Directive 2006/7) and Equal Pay Directive Council Directive 75/117/EEC. The Directive 2006/54 replaces Directive 76/207.

[11] E. Caracciolo di Torella and A. Masselot (2010) op. cit., pp.33-35.

[12] Cf. J. Rubery, D Grimshaw and H. Figueiredo (2005)`How to close the gender pay gap in Europe: towards the gender mainstreaming of pay policy`, *Industrial Relations Journal*, 36(3):184–213

The concept of reconciliation which initially merely recognised, and associated need for reconciliation with women has gradually developed to acknowledge that both male and female employees have caring and working responsibilities which need to be recognised (**Appendix**, **Table 1**). Caracciolo di Torella and Masselot[13] point out the existence of an obvious link between reconciliation measures and gender equality, which can be identified in the context of family responsibilities, and involvement in caring for young children that was traditionally seen as affecting men and women in different ways. This is primarily due to the existing stereotypes and cultural influences, which often view women as the natural carers for children and the elderly. The stereotyping of women's roles significantly disadvantages them in the labour market and has led to them being perceived as less effective workers.[14] The stereotyping issues surrounding the involvement of men and women in reconciliation continues to prevent gender equality from being achieved.

According to Hadj-Ayed and Masselot[15] the move towards the independent concept of reconciliation was possible because the EU had adopted a more substantive approach to equality rather then the formal equality.[16] The concept of reconciliation was understood as *sharing on equal terms* the responsibilities within a family by men and women, and implied the Aristotelian concept of equality, which ignores the existence of the inherent structural inequalities in society that place individuals in different positions, and wrongly assumes that free choices are made by individuals because a woman often neither chooses to stay at home nor to be in employment.[17] In the 1970s and 1980s reconciliation was merely regulated by the soft law provisions and a narrow concept of reconciliation was adopted, which focused on the

[13] E. Caracciolo di Torella and A. Masselot (2010) op. cit., p.35.
[14] Cf. Case C-409/95 *Marschal v. Land Nordrhein-Westfalen* [1997] ECR I-6363, para. 29.
[15] S.Hadj-Ayed and A. Masselot (2004) `Reconciliation between Work and Family Life in the EU: reshaping gendered structures?`, *Journal of Social Welfare and Family Law*, 26(3):325-338 p. 327.
[16] Communication from the Commission, `A New Community Action Programme on the promotion of equal opportunities for women (1982-1985)` COM(81) 758 final and Council Resolution of 12/07/1982 `On the promotion of equal opportunities for women,` OJ C186/3, 21/07/1982. Substantive equality allowed to address disadvantages encountered by women entering the labour market relating to the unequal job access and unequal pay.
[17] E. Caracciolo di Torella and A. Masselot (2010) op. cit., p.36.

reconciliation needs of parents with small children and ignored the needs of those caring for adult family members. At this stage the attempts to introduce legally binding policies on reconciliation had not succeeded. This can be seen in the context of failed proposals for a Directive on parental leave in 1980s.[18]

The change in the approach of the EU to social policy matters resulted in the introduction of the first legally binding, reconciliation provisions in *the Pregnant Workers Directive*.[19] Despite providing mothers with the unqualified right to fourteen weeks' maternity leave, the Directive failed to provide the leave takers with the right to remuneration whilst on leave and it did not recognise the importance of the role of fathers in caring for newborn babies. The relatively short duration of maternity leave can imply that the focus of the legislator was not on enhancing the national entitlements to leave but on harmonisation of the national policies across MSs as envisaged by Article 151 TFEU in order to ensure the proper functioning of the common market. The reluctance of the EU to provide workers with a longer duration of maternity leave and thereby enable them to better reconcile work and caring responsibilities for children has become evident in the recent failed attempt to amend the *Pregnant Workers Directive*.[20]

The *Working Time Directive*[21] constitutes another legislative measure that could help workers in reconciliation. Although the provisions of this Directive neither deal with issues related to equal opportunities in employment nor refer directly to reconciliation, it contains provisions that can aid reconciliation. By imposing restrictions on working time and providing workers with the right to an annual period of leave, the Directive ensures that workers can spend more time with their families both on a daily basis and during the period of annual leave. The enhanced involvement of European

[18] COM [83] 686 final, 22 November 1983 and COM (84) 631 final, 15 November 1984.
[19] Directive 92/85/EEC of 19/10/1992 on the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, OJ L348/1, 28/11/1992.
[20] Proposal (failed) for a Directive 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 breast feeding, COM (2008) 637. The failed proposal for the directive sought to extend the duration of maternity leave up to 20 weeks.
[21] Council Directive 93/104/EEC OJ, 307/18, 1993 and 2003/88/EC.

Social Partners[22] in the decision making process facilitated by Maastricht Treaty 1992 [23] resulted in the adoption of the legally binding reconciliation policies in 1996, 1997 and 1999. Thus, the Framework Agreements concluded by Social Partners brought about the adoption of Directives such as the *Parental Leave Directive*[24] (the PLD), the *Part-time Workers Directive* [25] and the *Fixed-term Workers Directive.*[26]

The high unemployment rates in 1990s[27] and the need to strengthen the competitive position of the EU by making the labour market active and flexible[28] also impacted on how reconciliation was perceived. A gradual shift from reconciliation perceived as an equality policy to reconciliation as a means of creating flexible employment took place. Consequently, the *Part-time Workers Directive* was introduced to promote flexible working arrangements by ensuring equality in treatment of part-time and full-time workers by introducing the non-discrimination principle. The quality in treatment of part-time and full-time workers also meant more equality for women in employment who often work on a part-time basis. The *Fixed-term Workers Directive* sought to encourage flexible working arrangements, removing discrimination against those employed on fixed-term contracts. Although, the adopted Directives attempted to ensure better reconciliation their provisions provided for the minimum requirements and did not seek to ensure the existence of the fully comprehensive reconciliation measures.[29] The limited number of legally binding provisions in the *Part-time*

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[22] The main negotiating parties recognised at the European level are the Union of Industrial and Employers' Confederations of Europe (UNICE) renamed to BUSINESSEUROPE in 2007, The European Centre of Enterprises with Public Participation (CEEP) and the European Trade Union Confederation (ETUC).

[23] Article 154 TFEU (former 138 EC) enhanced the involvement of Social Partners in the decision making process by providing them with the key role in consultation and negotiations that could result in adoption of the legally binding measures.

[24] Council Directive 96/34/EC of 3 June 1996 on the Framework Agreement on parental leave concluded by UNICE, CEEP and the ETUC, *Official Journal* L 145, 19/06/1996 P. 0004-0009 as amended by the *Council Directive 97/75/EC Official Journal* L 010, 16/01/1998 P. 0024-0024.

[25] Directive 97/81/EC, concerning the framework agreement on part-time work concluded by ETUC, UNICE and CEEP, OJ, L14/9, 1998.

[26] Directive 99/70/EC concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, OJ, L175/43, 1999.

[27] Employment in Europe 1993, COM (93) 314 final.

[28] White Paper on Growth Competitiveness and Employment, OJ C91/124, 28/03/1994.

[29] M. Stratigaki (2000), `The European Union and the Equal Opportunities Process`, in L. Hantrais (2000) Gendered Policies in Europe: Reconciling Employment and Family Life, London: Macmillan pp.41-44.

Workers Directive and *Fixed-term Workers Directive* indicate that these Directives seek to protect the interests of employers rather than reconciliation needs of working parents.[30]

Despite the developments in reconciliation policy the traditional concepts of equality prevailed in 1990s and equality objectives remained conditioned by the economic rationale. This, according to Caracciolo di Torella and Masselot[31] can be seen in the Commission Report[32] which saw promoting reconciliation as secondary to the economic role of women in the labour market. Stratigaki[33] also recognised that some of the EU policies which were presented as gender equality policies were primarily designed not to promote gender equality but to introduce more flexibility into the labour market in order to accommodate women's flexible and often temporary labour.

The concept of reconciliation as a means of job creation is rooted in *European Employment Strategy* (EES)[34] where creation of jobs for women was recognised as a priority.[35] The importance of EES was enhanced by the *Treaty of Amsterdam* (1997) which provided it with a Treaty basis for its action, and put employment in the centre of EU law. This Treaty did not directly address the reconciliation issues but it stated the promotion of equality was an objective of the Union.[36] It also introduced the concept of gender mainstreaming, which prohibited inequalities between men and women.[37] The adoption of a common employment policy was progressed by the *Treat of Amsterdam* (1997) in the *Agenda 2000.*[38] Following the *Treaty of Amsterdam* (1997), the Council accepted the Commission's proposal in the 1998

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[30] E. Caracciolo di Torella (2001), `The `Family-Friendly Workplace`: the EC Position`, The International Journal of Comparative Labour Law and Industrial Relations, 17(3):325-344 at pp. 332-333.
[31] E. Caracciolo di Torella and A. Masselot (2010) op. cit., pp.38-39.
[32] Interim Report of the Commission on `The Implementation of the Community Action Programme on Equal Opportunities for Men and Women (1996-2000)`, COM(98) 770 final.
[33] M. Stratigaki (2004), `The Co-optation of Gender Concepts in EU Policies: The Case of Reconciliation of Work and Family`, Social Politics, 11(1):30-56.
[34] Conclusions of the Essen European Council, 9th and 10th December 1994).
[35] S.Hadj-Ayed and A. Masselot (2004) op. cit., pp.328-329.
[36] Article 2 EC (now Art 3 TEU).
[37] Article 3 EC.
[38] This included a declaration that in future Member States would treat employment as a common concern, and would co-ordinate their actions in this sphere.

employment guidelines, which included reconciling, as one of the four pillars of the *Employment Tile* annexed to the Treaty.[39] This aimed at strengthening polices for equal opportunities, by removing gender pay gaps, by helping to reconcile work and family life, and by facilitating a return to work for those (especially women) who have been absent from the work force for some time.[40].

The key objective of the EU was to improve women's participation in the labour market.[41]. The Lisbon Strategy placed emphasis on the creation of new jobs, tackling social exclusion and improving women's participation in the labour market.[42] Barcelona (2002)[43] sought means of achieving the Lisbon (2000) targets on women's participation in the labour market and placed its emphasis on the availability of childcare, to enable women to adapt to the needs of businesses. The importance of reconciliation was also recognised in the Council Resolution (2000).[44] This Resolution is of particular importance for reconciliation as it made direct reference to equal sharing between working fathers and mothers of the caring responsibilities for children and other dependants which included the elderly and the disabled.[45]

The 2001 Employment Guidelines on reconciliation of work and family life contained the more precise approach of the European employment strategy towards

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[39] European Commission `The 1998 Employment Guidelines. Council Resolution of 15 December 1997 on the 1998 employment guidelines, Luxembourg: Office for Official Publications of the European Communities p.12, amended by Council Resolution of 22 February 1999 on the 1999 Employment Guidelines (OJ[1999] C69/2).

[40] The objective of strengthening the policies did not provide for the making of directives and was limited to the promulgation of guidelines, recommendations and adoption of incentive measures in the area family-friendly employment, V. Craig (1997) op. cit., p.6.

[41] Article 147 TFEU (former Article 127 EC)

[42] Lisbon European Council: Presidency Conclusions of 23rd and 24th March 2000. Target of 60 per cent by 2010.

[43] Barcelona European Council: Presidency Conclusions of 15th and 16th of March 2002.

[44] Resolution of the Council of 29 June 2000 on the balance participation of women and men in family and working life in Official Journal C218, 31/07/2000 p. 0005. The Resolution focused on the necessity of ensuring the application of the principle of equality between men and women in employment and the necessity of the balanced participation of women and men both in the labour market and family life.

[45] The balanced participation of men and women in work and family life was recognised as a necessity deriving from the development of society and that both women and men, without discrimination on the grounds of sex, had the right to reconcile family and working life. The Resolution had no legally binding force and merely recognised the necessity of facilitating the reconciliation. It emphasised the key role of Member States and national governments in reinforcing measures to encourage a balanced sharing between working parents.

reconciliation issues.[46] Issues concerning reconciliation were further addressed in the 2003 Guidelines[47] in the context of improving the adaptability mobility in the labour market and employment of those groups of employees who experience difficulties with entering the labour market.[48] Reconciliation policies were no longer seen as being associated with promoting gender equality and were also used as a means of utilising women's contribution to the labour market.[49]

The 2006, *European Pact for Gender Equality*,[50] is of significant importance for reconciliation as it recognised that in order to promote a better work-life balance for all there must be provision of childcare facilities and also the provision of care facilities for other dependants must be improved. In *2006 Roadmap for Equality*[51] reconciliation was seen as the key objective and the reconciliation policies were seen as facilitating flexible working patterns whilst improving equality between men and women in the labour market. The importance of care facilities was recognised in the context of participation in the labour market.

Reconciliation was further addressed by the Commission in the 2008 communication.[52] As Caracciolo di Torella and Masselot[53] observe, the 2008 communication indicates a change in the terminology used by the Commission. In contrast with the previously used terminology, which referred to *reconciling work and*

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[46] Council Decision 2001/63/EC OJ [2001] L22/18. The importance of policies on career breaks, parental leave, part-time work and flexible working arrangements were recognised as being of particular importance to employers and employees. The existence of good quality care for children and other dependants was seen ensuring continued participation of men and women in the labour market. An equal sharing of family responsibilities between working parents and was identified as a crucial equality factor and the returning to the labour market after an absence needed to be facilitated.
[47] The Council Decision of 22nd July 2003 on guidelines for the employment policies of the Member States in OJ L197, 05/08/2003 p.0013-0021.
[48] The Guidelines further recognised the necessity of giving particular attention to reconciling work and private life. This was to be achieved through the provision of care services for children and other dependants, encouraging the sharing of family and professional responsibilities and facilitating easier return to work after a period of absence.
[49] Commission from the Communication on improving equality of work COM (2003) 728 final.
[50] Presidency Conclusions, Brussels European Council, 23-24 March 2006, Annex II.
[51] Communication from the Commission, `A Roadmap for Equality between Women and Men 2006-2010`, COM (2006) 92 final.
[52] Communication from the Commission, `A better work-life balance: stronger support for reconciling professional, private and family life,` COM(2008) 635 final.
[53] E. Caracciolo di Torella and A. Masselot (2010) op. cit., pp.36-47.

family life the 2008, communication is more inclusive as it refers to reconciling *work, private and family life*. The emphasis on *work-life balance* and references to reconciling work and private life indicate the Commission's very ambitious intention to depict reconciliation as a universal right which is no longer associated with families. Despite the change in the terminology used by the Commission the approach to reconciliation remained unchanged as *a better work-life balance* continued to be primarily seen as a means of achieving the employment targets set by out by the Lisbon Strategy and reconciliation remained its' accessory.

The 2008 Communication played an important role in the context of the reconciliation policies as it proposed a new initiative aimed at improving reconciliation of family and professional life by extending entitlements to family related leave periods;[54] ensuring more equality in the treatment of the self-employed[55] and improving the availability of affordable and accessible childcare. Proposals were also made to amend the existing reconciliation Directives such as the *Pregnant Workers Directive*[56] and *Parental Leave Directive*.[57]

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[54] Adoption leave, paternity leave and filial leave.

[55] Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principal of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Directive 86/613/EEC (OJ L 180, 15.7.2010).

[56] Proposal (failed) for a Directive 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 breast feeding, COM (2008) 637. The failed proposal for the directive sought to extend the duration of maternity leave to 20 weeks.

[57] 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. It is of particular importance for this thesis to emphasise that the 2008 Communication identified the deficiencies of Directive 96/34/EC and proposed amendments which included the necessity of providing incentives for fathers to take parental leave; protection of employment rights and prohibition of discrimination; extending duration of the leave; payment, flexibility in taking the leave and the age of the child. Although, the undertaken thesis focuses on the current provisions of on parental and leave for family reasons, it must be acknowledged that the 2008 Communication contributed to the revision of provisions of Directive 96/34/EC and the introduction of new rights to parental leave and leave for family reasons by Directive 2010/18/EU, which should be in force by 8 March 2012 (the possibility of delaying the implementation until 2013).

The 2010 Communication from the Commission[58] recognised the necessity of offering genuine choices equally to men and women during the different stages of their lives.[59] The lack of focus of the EU policies on equality in the distribution of work within a family indicates that economic arguments and market participation arguments are more important for the EU policy makers than the equality objectives. Reconciliation policies are primarily seen in the context of their contribution to the labour market and not in the context of the pure equal opportunity matters. The EU is willing to pursue the reconciliation objectives only as far as there are economic benefits deriving from the flexible work arrangements and unemployment can be tackled by part-time employment.

Reconciliation was recognised as a fundamental principle by the European Court of Justice and in Article 33 of *the European Charter of Fundamental Rights (the Charter).*[60] In *Gerster* v *Freistaat Bayern*[61] reconciliation was held to be a principle of gender equality making working life more compatible with family life. This was further reaffirmed in *Hill and Stapleton v. The Revenue Commissioners and the Department of Finance*[62] where the protection of women and men within families and during employment was held to constitute a principle recognised by EU law. The Court of Justice held that the aim of EU policy was to encourage, and if possible adapt working conditions to family responsibilities. The EU reconciliation measures have been introduced in the form of soft law policies and legally binding Directives, and aim at addressing the difficulties experienced by families whilst coping with the demands of paid employment and family responsibilities.

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[58] Communication from the Commission on `Strategy for equality between women and men 2010-2015, Brussels, 21/09/2010, COM (2010) 491 final.

[59] It was recognised that parenthood continues restricting women's participation in the labour market and the equality in the division of work within a family remains to be achieved. Although the Communication recognised the differences in the impact of parenthood on women's and men's participation in the labour market, no strategy was proposed to address the lack of equality in the distribution of responsibilities within a family. Instead, the emphasis was placed on the increased women's participation in the labour market and the recently adopted directives. The availability of affordable high-equality care was identified as the area where further progress needed to be made in order to strengthen the reconciliation policies.

[60] European Charter of Fundamental Rights, OJ [2000] C364/1.

[61] Case C-1/95 *Gerster* v *Freistaat Bayern* [1997] ECR I-5253 para. 38.

[62] Case C-243/95 *Hill and Stapleton v. The Revenue Commissioners and the Department of Finance* [1998] 3 CMLR 81 at para 42.

The Treaties[63] which constitute the primary source of EU law do not make any direct references to the right of EU citizens to reconciliation. The use of primary sources of EU law for introducing and reinforcing the reconciliation policies would reaffirm the EU commitment to reconciliation. The lack of right to reconciliation in EU Treaties and thereby the lack of specific legal base for introducing reconciliation policies may significantly hamper the legislative process leading to the adoption of the EU reconciliation policies. Since Treaties do not directly provide the Council with authority to legislate on matters related to reconciliation, the legislative action involving reconciliation policies always requires the reliance on other legal basis. Consequently, the importance of reconciliation policies is undermined as they are always introduced in the background of another legislative right, which does not focus on the reconciliation attributes e.g. rights to parental and leave for urgent family reasons. This can be observed in the case of the *Parental Leave Directive* where the reconciliation attributes were introduced in the context of parental and leave for urgent family reasons. Under the *Treaty of Lisbon (*2007) the *Charter*[64] has been given the same legal effect as the Treaties; legal force before the European Court of Justice and the national courts, but it remains to be seen the extent to which the Courts will be prepared to rely on Article 33 of the *Charter.*

The informal approach of the EU to reconciliation policies became evident when use of the Open Method of Coordination was extended to cover social policy[65] and reaffirmed when it was used to regulate childcare facilities across Member States.[66] Unlike the provisions of *hard law* which need to be complied with and implemented, the Open Method Coordination merely promotes good practice by monitoring the progress in achieving the voluntarily agreed targets. The agreed targets are not legally binding and cannot be enforced at the EU level. The Open Method

[63] The Treaty on European Union and the Treaty on Functioning of the European Union.
[64] Article 6(1) TEU.
[65] European Council of Lisbon, 23-24 March 2000, Presidency Conclusions, SN100/1/02 REV 1.
[66] European Council of Barcelona, 15-16 March 2002, SN 100/1/02. The Council set the targets of providing childcare by 2010 to: at least 90% of children between 3 years old and the mandatory school age and at least 33% of children under 3 years of age.

Coordination is often seen as a process of cross national policy learning which does not aim at achieving a common policy in the desired areas but it puts in place the process for sharing policy experiences and good practice.[67] Caracciolo di Torella and Masselot recognise the suitability of Open Method Coordination for encouraging the development of reconciliation policies in areas where a formal approach is not appropriate or desirable (e.g. childcare) and point out that the importance of the soft law provisions for reconciliation has not been fully recognised by the legislator.[68]

Although Barcelona Council (2002) strived to provide improved childcare facilities by 2010, its soft law targets have not been met and there is no enforcement process to ensure that these targets are going to be implemented.[69] Disparities in the availability of childcare facilities across Member States indicate the ineffectiveness of Open Method Coordination in ensuring the availability of affordable childcare facilities across all Member States.[70] The existence of high quality and affordable childcare facilities is of paramount importance for the success of other reconciliation policies. Regrettably, the existence of care facilities for adult dependants has received very little attention from the EU legislator, and is not addressed in the Lisbon Strategy (2002). The *Commission Communication on Work-life Balance*[71] also does not fully recognise the importance of care facilities for adult dependants in reconciliation. The lack of affordable care facilities can defeat the objectives of other reconciliation policies, as workers may be unable to benefit from the leave provisions or achieve the desired flexibility in working arrangements.

The emergence of EU reconciliation polices has subsequently resulted in measures being introduced at national level (including Poland and the UK) in order to comply

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[67] G. Esping-Andersen, D. Gallie, A. Hemerijk and J. Miles (2001) `A New Welfare Architecture for Europe?,` Report submitted to the Belgian Presidency of the European Union, September 2001 in E. Caracciolo di Torella and A. Masselot (2010) op. cit., pp.28-29.
[68] E. Caracciolo di Torella and A. Masselot (2010) op. cit., p.28.
[69] European Commission Report, `On implementation of the Barcelona Objectives Concerning Facilities for Pre-school-Age Children,` COM(2008) 638.
[70] Fore the discussion on the role of Open Method Coordination see S. de la Rosa (2005) `The Open Method of Coordination in the New Member States – the Perspectives for its Use as a Tool of Soft Law`, *European Law Journal*, 11(5):618-640.
[71] COM(2008) 635.

with the requirements of the EU. Although the UK became a Member of the EU in 1973; initially, the UK had no obligation deriving from the EU to introduce reconciliation polices at national level because the Conservative government opted out from the provisions of the *Social Charter* that was annexed to the *Maastricht Treaty (*1992). Consequently, none of the EU measures concluded under the *Social Protocol Agreement* could have any legal effect in the UK because Section 1(2)(k) of the *European Communities Act* 1972 expressly excluded the *Protocol on Social Policy*. Thus, the act had to be amended so that EU Directives agreed by other Member States under the *Social Protocol Agreement* could be implemented in the UK.[72] Coming to power in 1997, the Labour government adopted a totally different approach towards employment regulation. This resulted in amendments to Section 1 (2)(k) of *ECA* and extending the provisions on social policy to the UK by the *Treaty of Amsterdam (*1997). Subsequently, the UK had to implement the EU reconciliation Directives. Poland became a member of the EU on 1st May 2004 and is required to comply with and implement all EU legislation, which include the reconciliation Directives.

Although, the legislative provisions on working time and the provisions on childcare play an important role in enabling workers to achieve the desired reconciliation, this thesis focuses on the leave provisions contained in the *Parental Leave Directive*. The uniqueness of this Directive as a reconciliation measure is rooted in that it provides workers with the gender neutral right to two distinct leave periods: parental leave and leave for urgent family reasons. These leave entitlements are of paramount importance for reconciliation, because if they are frequently used and equally shared within a family they could significantly contribute to enabling both working parents to make genuine reconciliation choices. Additionally, this is the only Directive, which has been adopted with the specific aim of enabling working parents to reconcile work and family responsibilities, and parental leave and leave for family reasons were recognised as the designated means of achieving this reconciliation. The uniqueness

[72] V. Craig (1997) `The Social Chapter`, *Employment Law Bulletin*, 22 December, pp.5-6.

of the Directive is also rooted in that this is the first Directive that has been based on a framework agreement concluded by the European Social Partners.

Bearing in mind the overall aim of the thesis consists of an exploration of the *Parental Leave Directive* (The Directive) in terms how it shapes law at the national level in the UK and Poland, the following objectives were set; to identify

(i) The legislative contribution of the EU in addressing the complex and diverse matters surrounding the interaction between work and caring responsibilities for children and adult dependants.

(ii) The impact of the change in the EU decision-making process in favour of the involvement of Social Partners on the content of provisions of the Directive.

(iii) The extent to which the Directive has been capable of meeting its reconciliation objective.

(iv) The contribution of the Directive to stimulating changes in the leave policies in the UK and Poland

(v) To examine the way forward for further development of EU law

This thesis is divided in three parts: Part I methodology (Chapter 2), Part II individual legal frameworks on parental leave and leave for urgent family reasons (Chapters 3-5), Part III conclusion, comparative analysis and the way forward (Chapter 6).

Chapter 2 outlines the methodology used, the theoretical framework adopted and the approach taken in this thesis. The legal analysis undertaken in this thesis is informed by socio-legal methodologies and feminist perspectives. The reliance on a socio-legal methodology is beneficial for this thesis as it enables a full discussion of the historical and political landscape that has shaped the legal discourse around the Directive.[73] This in particular will facilitate the evaluation of the Directive by

[73] M. Salter & J. Mason (2007) *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research,* England: Longman, G. Holborn (2006) *Butterworths Legal Research Guide*, 2nd Edition, Oxford: Oxford University Press and J. Knowles and Ph. Thomas (2006) *Effective legal research*, London: Sweet & Maxwell.

considering the unique accounts of Social Partners who actively participated in the discussions which preceded the adoption of the Directive. The adoption of post-modern feminist perspectives facilitate the analysis of provisions of the Directive, and its national equivalents on the practical implications of the legislative right to the leave periods, in particular for women who primarily care for children and adult dependants. This perspective focuses attention on whether the legislative right to the leave periods adequately caters for women's and men's diverse reconciliation needs.[74] The gender neutral rights in the Directive may offer the potential to address the disadvantages experienced by women in the distribution of caring responsibilities within a family given they are the ones who are primarily disadvantaged by the need to balance the demands of work and a family. The concept of choice is at the core of this thesis and the extent to which the Directive has facilitated the existence of national entitlements to parental leave and leave for family reasons enabling working parents to make unconstrained reconciliation choices in different contexts that they may find themselves.[75]

The comparative approach which is also adopted by this thesis primarily relates to the last part of the critique which looks ahead at how the law might be improved (Chapter 6). The chosen context for a comparative analysis of the Directive is the context of the national implementations of the Directive in the United Kingdom (a well-established Member State) and the Republic of Poland (a new Member State). In order to determine the positioning of the national implementations of provisions of the Directive in the UK and Poland references will also be made to other selected well-established[76] and new Member States.[77] The use of a comparative approach will allow the thesis to consider how the Directive shaped legislative rights to parental leave and leave for family reasons in the UK and Poland. It will provide insights into possible approaches that could be utilised in introducing effective rights to parental

[74] T. Stang Dahl (1987) *Women's Law*, Oslo, Norwegian University Press in E. Caracciolo di Torella and A. Masselot (2010) op. cit., p.20., C. Smart (1992), `The Women of Legal Discourse`, *Social and Legal Studies,* 1(29).
[75] R. Crompton (2006) *Employment and the Family, The Reconfiguration of Work and Family Life in Contemporary Societies*, Cambridge: Cambridge University Press p. 12.
[76] Belgium, the Republic of Ireland, Luxembourg and Sweden.
[77] Czech Republic, Hungary and Slovakia.

leave and leave for family reasons, which are capable of enabling workers to make genuine reconciliation choices.[78] The legal analysis will be informed by feminist perspectives, comparative and socio-legal approach in order to identify possible approaches to reconciliation and the policies that should be taken and at best might produce a model solution.

Chapter 3 explores the issues surrounding the emergence of EU policies on parental leave and leave for urgent family reasons and the adoption of the Directive. The issues surrounding the adoption of the Directive are considered via accounts from representatives of Social Partners who participated in the negotiations preceding the adoption of the Directive. As the existence of effective legislative measures can assist in enabling workers to make genuine reconciliation choices, this chapter considers the extent to which the Directive has been capable of meeting its reconciliation objective. The legal analysis of provisions of the Directive which is informed by social-legal methodologies and post-modern feminist perspectives seeks to determine whether the Directive contains the necessary provisions (the basis) for ensuring the development of stringent national policies on parental leave and leave for family reasons, which are capable of assisting EU workers with making real work-family choices. As parental leave and leave for family reasons have traditionally been taken by women, and the Directive seeks to assist equally both female and male workers in the reconciliation, the extent to which the leave arrangements set out in the Directive can contribute to helping different groups of women and men in making genuine reconciliation choices is considered.

Chapter 3 also considers the legislative commitment of the EU to introducing a reconciliation Directive capable of enabling workers to make genuine reconciliation choices. It outlines the legal framework for introducing EU reconciliation Directives and analyses its effectiveness. Since, the Directive was based on a framework agreement concluded by Social Partners, the legal basis for the involvement of Social

[78] H. Collins (1991), `Methods and Aims of Comparative Contract Law`, *Oxford Journal of Legal Studies*, 11(3), pp.396-406., O. Kahn-Freund (1974), `On Uses and Misuses of Comparative Law`, *The Modern Law Review*, 37(1):1-27.

Partners in the EU decision making process is explained and analysed. This will provide the necessary background information required to allow the thesis to consider whether the change in the legislative process in favour of the involvement of Social Partners, has helped to overcome the deficiencies associated with early Commission draft Directives and its consequences for reconciliation and choice.[79] Chapter 3 also seeks to contrast the provisions of the Commission draft Directive on parental leave (which failed to be adopted) with the provisions of the framework agreement on parental leave. This comparison will allow consideration of the issue as to whether the change in the legislative process used for introducing the reconciliation Directives in favour of the involvement of Social Partners has contributed to the introduction of the Directive containing more stringent provisions on parental leave and leave for urgent family reasons than those contained in the Commission early draft Directives, which followed the traditional legislative process.

The inherent feature of EU Directives is that they are not directly applicable and merely outline the minimum standards, which need to be implemented at the national level. The effectiveness of the Directive on parental leave in achieving its reconciliation objective will depend on its national implementation, and the desire of the national legislators to pursue the reconciliation objectives of the Directive. Consequently, the legislative contribution of the Directive to meeting its reconciliation objective must be considered in the context of the particular national measures, which implemented it, and the extent to which these have facilitated the existence of the effective rights to leave periods at the national level. An exploration of the Directive in terms of how it shapes law at national level in the UK and Poland is undertaken in Chapters 4 and 5. It considers the commitment of national legislators to introducing effective parental leave rights in the UK and Poland; the extent to which the national implementations of the Directive can help working parents in terms of their choice; whether the national leave entitlements enable fathers to play a more active role in

[79] The first Commission proposal for a directive regarding parental leave and leave for family reasons dates back to a draft directive submitted to the Council of Ministers in November 1983 COM [83] 686 final, 22 November 1983. (Draft 1983); a revised version of the proposal was submitted in November 1984 (Draft 1984) COM (84) 631 final, 15 November 1984.

the provision of care; it considers the extent to which the national leave arrangements respond to the needs of single parents and whether or not the national leave provisions perpetuate dominant theories of motherhood and parenthood. These issues are analysed in the context of relevant feminist critique and theories of choice.

The UK and Polish measures on parental leave and leave for urgent family reasons and their judicial interpretation are discussed separately in the chosen context of the well-established and new Member States. This enables the thesis to position the legislative commitment of UK and Polish legislators in introducing effective leave provisions in relation to selected well-established and new Member States. Chapters 4 and 5 presents the analysis of specific provisions of the national legislation with reference to the wide range of issues that a feminist and socio-legal approach requires. Thus, in evaluating the effectiveness of legislative rights to parental leave and leave for dependants in enabling workers to make genuine reconciliation choices references are made to political, social and economic factors which influence how the legal provisions are formed and influence workers' attitudes to the legislative right. The diverse reconciliation needs of women, men, families with many children, single parent families are considered in the evaluation of the legislative provisions. The UK and Polish legislative provisions regulating the leave periods are also considered in the context of the judicial interpretations which have been directly obtained from the employment tribunal's archives (UK) and the Polish Supreme Court.

Chapter 6 contains conclusions and comparative analysis of the national implementations of the Directive on parental leave in the UK and Poland and examines the way forward for introducing leave policies that could better respond to reconciliation needs of various groups of working parents. The comparative approach is used to evaluate the relevant UK and Polish statutory provisions and their judicial interpretation in order to determine their functionality in meeting the objectives that the law assigns to the discussed leave entitlements. The comparative analysis of the selected national provisions aims to determine the existence of similarities and differences between the national leave entitlements in the UK and Poland in order to

consider the parameters for further development of this area. The comparison seeks to consider whether the approach which has been taken by a legislator in one jurisdiction can offer functional solutions that can be implemented in another jurisdiction. Chapter 6 contrasts UK and Polish provisions covering the leave periods, identifies the good practice areas and considers the potential transplants in terms of a potential way forward. The comparative analysis considers whether and to what extent the provisions of the national laws implementing the requirements of the Directive can assist the reconciliation of different groups of workers, and so contribute to bringing about equality in the distribution of caring responsibilities within a family. As it is also the objective of this thesis to provide the way forward for further development of the EU law, Chapter 6 also considers the approaches, rules and standards that should be adopted or reinforced in EU and national law in order to ensure that the leave entitlements become more effective reconciliation tools.

PART I: METHODOLOGY & THEORETICAL FRAMEWORK

Chapter 2: Theoretical Framework, Approach and Methodology

2.1 Introduction

This chapter introduces the theoretical framework, approach and methodology adopted to meet the thesis objectives, outlined in Chapter 1. The legal analysis undertaken in this thesis is informed by post-modern feminist perspectives and debates on work and lifestyle 'choices'. It adopts a comparative law approach and a socio-legal methodology in order to analyse the national implementations of the Directive in the UK and Poland. This allows the thesis to analyse the effectiveness of the Directive on parental leave in shaping law at national level in Poland and the UK[80] by taking into account the complex issues surrounding the context in which reconciliation decisions are made by workers with responsibilities for children and adult dependants. The comparative approach is particularly relied upon when looking ahead at how the law might be improved.

2.2 Post-modern Feminisms & Concept of Choice

Post-modern feminism constitutes a recent addition to the equality/difference gender discourse. According to post-modern feminists, it is not possible to describe objectively, what is the essential woman (or a man). Therefore, they examine the particular reality of all individual women. Bartlett,[81] one of the leading post-modern feminists argues that a woman should be treated as a single analytic category, and encourages feminists to consider real life experiences that are influenced by each woman's race, class, age and sexual orientation. This approach towards sexual difference as Frug claims[82] will enable feminists to explore specific legal rules and doctrines, which are of interest to particular groups of women. Post-modern feminism does not rely on one single doctrinal standard in order to define equality. It

[80] This thesis only addresses legislation and decisional law applicable to England and Wales and it does not cover the legal regulation applicable to Scotland and Northern Ireland.
[81] K. Bartlett, *Feminist Legal Methods* in H. Barnett (1997), *Sourcebook on Feminist Jurisprudence*, London: Cavendish Publishing Limited, pp. 96-97.
[82] M. J. Frug (1992), *Postmodern Legal Feminism*, London: Routledge, pp.10-11.

seeks equality for women through law by questioning, recontextualising, and trying to unsettle the existing laws in different areas in order to provide practical and just solutions to real life problems (concrete situations).[83]

In the context of this thesis the post-modern feminist perspective will be particularly useful for analysing the Directive on parental leave and its implementation via national measures. Although the law may endeavour to provide both men and women with the same rights (except pregnancy) it does not attach any particular significance to the fact of *being a woman* (or a man).[84] The law appears to assume that there are no differences between how men and women lead their lives and how they make reconciliation choices. This assumption of the law creates a dichotomy between the legal right and the reality where men and women lead different types of life; have different expectations; needs, opportunities and make different work-family choices.[85] Consequently, the same legal rule may affect in different ways different groups of men and women. The feminist perspective seeks to analyse the impact of the law on women and how it relates to their reality.

This thesis relies on the feminist legal theory as a method of analysis[86] as it provides a critical method of interpretation of the legal provisions.[87] The post-modern thought can be found in the writing of Smart[88] who points out that whilst addressing the impact of the law on women, it must be acknowledged that there is no one single category of women (or men) because women's (or men's) positions are determined by their social and financial background or financial resources. This is particularly relevant to reconciliation policies (including parental leave) where the same

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[83] Ibid. pp.10-12.
[84] T. Stang Dahl (1987) *Women's Law*, Oslo, Norwegian University Press in E. Caracciolo di Torella and A. Masselot (2010) op. cit., p.20.
[85] S. McRae (2003) `Constraints and choices in mothers' employment careers: a consideration of Hakim's Preference Theory`, *British Journal of Sociology* 54(3):317–338.
[86] T. Stang Dahl (1987), `Fra kvinners rett til kvinneret`, *Retfoerd Juridisk Tidisskrift*, 37(1987), p.67 in E. Caracciolo di Torella and A. Masselot (2010) op. cit., p.20.
[87] T. Eckoff, (1988) `Can We Learn Anything From Women's Law?`, in *Methodology of Women's Law Studies* in Women's Law no. 27, Institute for offentlig retts skirft-eserie 7(38) in E. Caracciolo di Torella and A. Masselot (2010) op. cit., p.20.
[88] C. Smart (1992), `The Women of Legal Discourse`, *Social and Legal Studies*, 1(29).

legislative measure will be perceived and used differently by different groups of women or men. In the context of parental leave, the possibility of taking an unpaid parental leave in order to spend more time with children may not be a feasible option to women with limited financial resources but may be seen as offering the desired solution to women who can afford it. Thus, the effectiveness of Directive on parental leave and equivalent national laws in enabling workers to achieve the desired reconciliation will depend on the extent to which legislative rights recognise and cater for the individual needs of female and male workers.

The post-modern feminist approach is considered an appropriate perspective for this thesis because the rights to parental leave and leave for urgent family reasons outlined in the Directive are gender neutral rights which enable both women and men to exercise their right to leave periods. The reliance on the post-modern feminist perspective will allow this thesis to consider whether the rights to leave periods outlined in the Directive, and their implementations through national laws in the UK and Poland adequately respond to diverse reconciliation needs of various groups of women and men. The feminist perspective is therefore seen by Caracciolo di Torella and Masselot[89] as providing an appropriate critical tool for analysing the gender equality principle and constitutes the basis of a legal framework in the area of reconciliation which include parental leave and leave for urgent family reasons.

The importance of individual choice and responsibility in relation to who should be providing care to children and adult dependants; how caring responsibilities should be allocated, how reconciliation between work and family life can be achieved and the contribution of Directive on parental leave to assisting workers in the UK and Poland in making genuine reconciliation choices is at the heart of this thesis. Men and women have the freedom to choose their own values and life styles and are obliged to make their own choices as there are no fixed models of the good life.[90] There is no universally agreed view amongst women (or men) as to the level of their

[89] E. Caracciolo di Torella and A. Masselot (2010) op. cit., p.20.
[90] Giddens in R. Crompton (2006) *Employment and the Family, The Reconfiguration of Work and Family Life in Contemporary Societies*, Cambridge: Cambridge University Press p. 11.

involvement in childcare and whether or not they should be personally responsible for providing such care.[91] According to Hakim[92] contemporary changes in women's employment indicate women's capacity to exercise their choices in relation to their involvement in work and family responsibilities through part-time working. In her view, women's employment patters are different from those of men because of the choices which need to be made by different types of women. She distinguishes groupings of women and men such as home centred, adoptive and work centred women. For home centred women the priority are their families, adoptive women move their priorities between family and career, and work centred women focus on their employment careers. The proportion of home centred and work centred individuals is greater amongst women than men as women's employment patterns are different (fewer men are home centred or adoptive). More women than men work on a part-time basis and prioritise families over their employment careers and thereby they tend to be less successful in employment than men.

Hakim[93] argues that employment patterns that contemporary women choose derive from their individual choices and not from any constraints arising from the nature of employment or other structural factors. Women's self classification as a primary earner or as a secondary earner is determined by chosen identities and not by external circumstance or particular jobs. In her view preferences should be seen by legislators as the major guide when designing family policies and sex and gender will no longer be important factors because they are being replaced by lifestyle preferences, which constitute only factors differentiating characteristics in labour market. However, preferences can be a dangerous guide to the policy as they are likely to be shaped by habit, low expectations and unjust background conditions. Women may also want to seek mother-friendly employment given their conventionally assigned caring responsibilities and the enduring power of ideology of domesticity. Women may also prefer not to have to make a choice between marginalised mother

[91] Ibid. p.30.
[92] C. Hakim (2000) *Work-Lifestyle Choices in the 21st Century*, Oxford: Oxford University Press pp.223-258.
[93] Ibid. pp.274-276.

(family) friendly employment and standard worker/mother unfriendly employment.[94] Hakim has been criticized for stressing the heterogeneity of women's preferences and for not recognizing the existence various structural constraints, for example the possibilities created by the welfare state to combine work and family life.[95] McRae argues[96] that an explanation of women's labour market choices after childbirth, and the outcomes of those choices, depends on understanding of various constraints which differentially affect diverse groups of women and on understanding their personal preferences. Women's (men's) patterns of behaviour are not unconstrained as all women (men) face constraints when making decisions about their lives and all decisions involve opportunity costs (things that must be forgone) as well as real costs.

Crompton and Lyonette[97] argue that both structural and normative constraints and individual preferences play an important role in choices which are made by women. McRae[98] recognises that social structural/class differences, unjust background conditions influence and shape mothers' preferred employment choices and also may restrict their opportunities in the labour market and their goals and aspirations. Consequently policies based on preferences alone which do not take into account the unjust conditions in which workers may find themselves are likely to contribute to reaffirming inequality between men and women and also between different groups of women. According to Crompton[99] women do make choices in relation to their employment and their family lives and a crucial question is the basis upon which people make these choices, as *choices will be shaped (or constrained) by the context*

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[94] R. Crompton (2006) op. cit., p. 123.
[95] O. Kangas and T. Rostgaard (2007) `Preferences or institutions? Work–family life opportunities in seven European countries`, *Journal of European Social Policy* 2007 17: 240-256 at p.242.
[96] S. McRae (2003) op. cit., pp. 319-330.
[97] R. Crompton and C. Lyonette (2008) Mothers' employment, work-life conflict, careers and class. In: Scott J et al. (eds) *Women and Employment: Changing Lives and New Challenges*. Cheltenham: Edward Elgar, pp. 213–234. They refer to previous UK research which has indicated that mothers in professional/managerial occupations are more likely to work or stay at home following their own attitudes to women's involvement in employment and caring responsibilities, than women from lower occupational groupings.
[98] S. McRae (2003) 'Constraints and Choices in Mothers' Employment Careers: Consideration of Hakim's Preference Theory', *British Journal of Sociology* 54 (3): 317–38 at p. 329 and *R. Crompton(2006)* `Class and family`, *The Sociological Review*, 54:4, 658-677.
[99] R. Crompton (2006) op. cit., p. 11.

within which choice is being exercised. The EU and national policies on parental leave and leave for urgent family reasons, which aim to help working parents to reconcile work and family responsibilities can be seen as being able to contribute to raising the employment frequency amongst workers (in particular women and single parents) with caring responsibilities for children and adult dependants. These policies could contribute to ensuring more equality in the distribution of caring responsibilities within a family by encouraging men's enhanced participation in the family life. However, the effectiveness of leave policies in reconciliation is conditioned by whether rational economic workers perceive their legal entitlements to leave periods as adequately safeguarding their employment rights and economic interests.

What influences decisions which are made by workers with caring responsibilities as to their involvement in care and employment are also moral and socially negotiated views which outline what is right and proper and not merely focus on individual's self maximisation. Economic incentives or pressures to reconcile work and family responsibilities may have a limited effect on workers with caring responsibilities for whom caring for their children is their primary objective. This is because the patterns of division between employment and caring responsibilities have gradually developed in societies and integrate material; moral dimensions and do not merely operate on the basis of fixed rules.[100] The division of work and family responsibilities is also shaped by unique individual identities of a mother, father or carer which are developed by workers with caring responsibilities.[101] Thus, individuals make choices in relation to others which are influenced by normative frameworks (moral, legal) rather than on the basis of individually rational calculation alone.[102]

Couples' working arrangements can be influenced by certain factors (including attitudes), attitudes may also be influenced by contextual factors, including couples'

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[100] S. Ducan, R. Edwards, T. Reynolds and P. Alfred (2003) `Motherhood, paid work and parenting`, *Work, Employment and Society* 17(2):309-330 at p. 310.
[101] E.B Silva and C. Smart (1999) *The `new` family?,* London: Sage in in R. Crompton (2006) op. cit., p.13.
[102] R. Crompton (2006) op. cit., p. 13.

working arrangements.[103] Parents' working arrangements are shaped by institutional constraints in particular deriving from national working time and labour market regimes. Excessively long working hours accompanied by low remuneration may restrict father's choice as to the level of his involvement in the family life. The lack of flexibility in working arrangements could also prevent workers with caring responsibilities from making genuine reconciliation choices. Attitudes towards involvement in labour market are shaped by circumstances and attitudes towards employment of mothers and are conditioned by occupational class, and employment, partnership, family status and national variations. Individuals with lower occupational status were identified as being more `traditional` in their approach towards division of family and domestic responsibilities, and less educated women are less likely to remain in employment when their children are young. This class associated pattern of women's attitudes to employment may contribute to deepening class inequalities.[104] A primary responsibility for childcare and housework that women continue to retain constrains even well-paid and highly-qualified women in their decisions regarding work and care.[105]

Ideas about the right thing to do and preferences as to particular combinations of employment and caring will shape individual employment and family decision-making. There is evidence that women's attitudes (choices) towards employment and family responsibilities are conditioned by both context and stage in the family life cycle and therefore it is very difficult to unambiguously establish the existence of concrete and stable orientations to work amongst women and men.[106] Most women and ever increasing number of men would like to better balance the demands of work and caring responsibilities. According to Glover[107] how work-life balance is achieved will depend on individual preferences and other factors such as occupational and

[103] R. Crompton and C. Lyonette (2005) `The new gender essentialism – domestic and family 'choices' and their relation to attitudes`, *The British Journal of Sociology* 56(4):601-620 at p. 608.
[104] R. Crompton (2006) op. cit., p. 30.
[105] C. Lyonette, G. Kaufman and R. Crompton (2011) 'We both need to work' : maternal employment, childcare and health care in Britain and the USA, *Work Employment Society* 25:34-50 at p.35.
[106] R. Crompton (2006) op. cit., p. 51.
[107] J. Glover(2002) `The "balance model" theorising women's employment behaviour` in R. Crompton (2006) op. cit., p. 52.

geographical constraints, the social policy context and broader cultural and normative patterns as to acceptable work-family behaviours. McRae[108] recognises the importance of normative and structural constraints in shaping women's decisions as to their involvement in childcare and employment. Structural constraints include the immediate practicalities such as the availability of affordable childcare and the demands of a particular job. The underlying class process also influences women's behaviour and their attitude to employment. Regardless of their work-family preferences women may be forced to go back to work because of financial reasons. Himmelweit and Sigala[109] argue that either identities or behaviour are fixed, but adapt to each other in a process of positive (negative) feedback.

Despite the fact that men more involved in domestic work and childcare women remain primarily responsible for domestic work and caring. This prevents women from being fully involved in the labour market (building a career) and the demands of work often prevent men from enhancing their involvement in family life.[110] Most women do not experience career development in the same way as men and often have different priorities to those that most men have. The playing field between men and women competing as individuals in employment context has been levelled up by introduction of various equality measures but women as mothers and carers continue facing considerable difficulties. Although, as individuals women may be seen as equal in employment, the normative and cultural constructs still recognise women as primary carers for children and adult dependants. The constructs of gendered behaviour is rooted in societies where men had more cultural and economic power than women, which may constitute barriers to enabling women to succeed at the professional level.[111]

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[108] S. McRae (2003) `Constraints and choices in mothers' employment careers', *British Journal of Sociology* 53(3):317-38.
[109] S. Himmelweit and M. Sigala (2003) `Internal and external constraints on mothers' employment`, Working Paper no. 27, ESRC Future of Work Programme p. 30 in R. Crompton (2006) op. cit., p. 53.
[110] R. Crompton (2006) op. cit., p. 74.
[111] Ibid p. 85.

The individual choice is crucial for reconciliation but choices are constrained by (rather different) inequalities of gender and class.[112] Although the introduction of various measures such part-time working and flexible working can enable more women to participate in the labour market, full-time and longer employment hours are required to move up the employment ladder. Hence, mothers and carers (most women) are unable to compete on equal terms with most men. Men still occupy most of the higher level jobs and the UK remains half breadwinner rather than dual bread winner society. The UK retains the traditional social democratic goals of reduced inequality whilst embracing the demands of the labour market.[113] Men still occupy most of the higher level jobs also in Poland. Traditionally in Poland there has been the dual breadwinner society, however a shift can be observed towards the single male breadwinner model. This shift can be primarily attributed to the high unemployment rates among women and the fact that women are still perceived by society as being responsible for providing care to children and adult dependants.[114]

The choice within a family as to how breadwinning and caring responsibilities are allocated between parents is likely to come under increasing pressure where weak or negligible statutory or employment support is provided. State policies can affect the kinds of jobs which are available, their modalities and the possibilities of different family-friendly employment options. Consequently, the content of state policies such as policies on parental leave and leave for urgent family reasons can influence the manner in which families manage the articulation between employment and family life. The extent of welfare support which is offered by the state to families and the support given to different family models is also important for reconciliation choices. The state support in the form of childcare can also have a negative impact on father's involvement in the provision of care, as it may relieve fathers from the responsibility to be more involved in the family life. In the absence of external support men are

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[112] Ibid. p. 89.
[113] T.P. Larsen (2004) 'The UK – a test case for the liberal welfare state?' In: Taylor-Gooby P (ed.) *New Risks, New Welfare - The Transformation of the European Welfare State*. Oxford: Oxford University Press, pp.55–82.
[114] S. Saxonberg & D. Szelewa (2007). The continuing legacy of the communist legacy? The development of family policies in Poland and the Czech Republic, *Social Politics, 14*(3):351-379.

forced to help their partners with caring responsibilities. The balance between work and family can be further facilitated by lower levels of domestic traditionalism within a family, and the level of external state support which is available for dual earner families.[115] As there is not just one normative family model, workers should be able to choose the family pattern they want to follow and should not be penalised by the state for opting for the traditional division of responsibilities within a family.[116]

Women's (men's) employment patterns differ as they are made by different types of women. Although minority of women are predisposed to domesticity both women's attitudes and behaviour towards employment are influenced by a wide range of structural factors rather than the exercise of free choice alone. There are constraints on choices of employment for less-educated and less qualified working class women.[117] Women's choice can be influenced by poorly paid work opportunities which could be considered as being unattractive alternative to domesticity. Additionally, the limited availability of affordable childcare and poorly paid work opportunities may encourage mothers to leave the labour market. Policies on taxation and benefits can impact on the extent of inequalities of income and wealth and thereby influence how reconciliation choices are made within a family. Two-income, low wage families may avoid poverty but this may contribute to further deepening class inequalities (part-time work low pay and undervalued). The disadvantages between classes associated with balancing between the demands of work and family are likely to continue as long as policy-makers continue considering the family as belonging to a private sphere of life and the value of care is not fully recognised.[118]

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[115] R. Crompton (2006) op. cit., pp.125-127 and 160.

[116] M. Daly and K. Scheiwe (2010) `Individualisation and personal obligations - social policy, family policy, and law reform in Germany and the UK`, *International Journal of Law, Policy and the Family*, 24(2):177-197.

[117] R. Crompton (2006) op. cit., p. 163. Rates of employment, in particular amongst less educated mothers in less advantaged occupational groupings are lower than amongst other women. Such women (men) are more likely to hold more traditional or conservative views as to the division of responsibilities within a family and women's involvement in labour market. Working class parents are more likely to choose traditional divisions of responsibilities within a family which contributes to widening of material differences between occupational class groupings.

[118] Ibid. pp. 184-186.

Work-family choices which are made by women are not made in isolation from the family context and there is strong evidence that the husband's familial orientation influences the wife's choices of employment.[119] Choices which are made by women and men in terms of their involvement in work and family life are influenced by women's and men's diverse attitudes towards their gender roles and family life. Women's attitudes are different from those of men as women are more gender role liberal than men, and are less likely to be extrinsically orientated towards their employment. Women's unique capacities for biological reproduction and the existing long standing social norms and behaviour have always differentiated between sexes. Women and men have also different preferences for different modes of family living, kinds of relationship that they would like to experience and the amount of time they are prepared to devote to paid employment. Women (men) also differ from other women (men) as they may have different priorities and expectations for their lives.[120]

Consequently, the Directive on parental leave, and its implementations through national laws in the UK and Poland would need to provide workers with genuine reconciliation choices in order to adequately respond to diverse reconciliation needs of various groups of female and male workers. The choice as to how leave periods are used by female and male workers will also be conditioned by the extent to which unconstrained access to flexible leave arrangements is assured; whether the sufficient duration of the leave is provided and the absence of disadvantages associated with the taking of the leave e.g. lack of pay, limited employment security, lack of full protection from detriment or dismissal prior, during and after the leave has ended and negative impact on career of the leave taker.

[119] O. Kangas and T. Rostgaard (2007) op. cit., p.254.
[120] R. Crompton (2006) op. cit., p.203.

2.3 Comparative Law Approach

This study also uses a comparative law approach when looking ahead. Comparative studies are well-established and contribute immensely to legal education and research. There is no universally recognised meaning of the term *comparative law*. Watson[121] defines comparative law as the study of the relationship of one legal system and its rules to another. The task of a comparative lawyer is the examination of the reception of legal rules deriving from one legal system in another or the imposition of legal rules on one legal system by another. In his view, comparative law focuses on historical analysis, examines the nature of law or legal development. However, the comparison of individual rules or branches of law is not to be understood as comparative law. According to Bogdan[122] comparative law compares different legal systems in view of determining similarities and differences between the compared legal systems. It aims to explain the origin of the identified similarities and differences; evaluate the solutions used in different legal systems and identify how legal systems are organised or seek the *common core of the legal systems*. Collins[123] recognises that the term *comparative law* can be applicable to different types of study. Comparative law can be used and has been used in order to search for a natural law of contracts or obligations or can be used for the unification of private law. It may help to understand forces and mechanisms of bringing about changes in legal systems and societies. Comparative law can be relied upon when searching for the best solutions to legal problems and it can use *legal transplants* to implement the solutions. It may be used in order to improve the understanding of one's own legal system. Thus, comparative studies can be used in order to explain the development of a specific piece of legislation and allow grouping of different legal systems in the same family in order to be able to determine how those systems evolved (similarities and differences).

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[121] A. Watson (1974), *Legal Transplants*, Edinburgh: Scots Academic Press.
[122] M. Bogdan (1994), *Comparative Law*, Oslo, Kluwer Nortsteds Juridik Tano, p.18 in E. Caracciolo di Torella and Annick Masselot (2010) op. cit., p.21.
[123] H. Collins (1991), 'Methods and Aims of Comparative Contract Law', *Oxford Journal of Legal Studies*, 11(3), pp.396-406.

The application of a comparative law approach also enables the thesis to see how a particular problem has been addressed and solved in a different legal system which may lead to identifying solutions transferable to other legal orders (legal transplant). Kahn-Freund[124] asserts that the degree of transferability of a legal norm is conditioned by factors present in the specific country, so that if the link between the law and its environment is too close then the legal norms cannot be transplanted into the system. These could be geographical factors (e.g. climate, size); sociological or economic (wealth of people, density of population, key economic activities); cultural factors (religion, customs) and the most important in his view the political factors. Thus, there must be some similarities or commonalities between the compared legal orders for the transferability of the legal norm to take place. Watson[125] does not fully agree that for a successful legal transplant to take place a detailed knowledge of the foreign political context and power structure are required. According to him the link between the legal institution and its environment may not always be relevant. Collins[126] argues that sensitive transplants of rules and techniques should be possible.

The relevance of the comparative method for this study derives from the analysed context in which the policies on parental leave and leave for urgent family reasons have evolved in the EU and how they were transposed into the domestic provisions of the UK and Poland. The comparative analysis focuses on the national implementation of the provisions of the Directive on parental leave in the UK (the context of well-established Member States) and Poland (the context of new Member States). In the context of the UK, references are made to other well-established Member States where previously there was no right to parental leave (Republic of Ireland and Luxembourg) and the existing right did not cover all employment sectors (Belgium). Additionally, references are made to well-established Member States with

[124] O. Kahn-Freund (1974), `On Uses and Misuses of Comparative Law`, *The Modern Law Review,* 37(1):1-27.
[125] A. Watson (1974), *Legal Transplants*, Edinburgh: Scots Academic Press p.95. See also the discussion in E. Stein (1978), `Uses, Misuses – and Nonuses of Comparative Law`, *Northwestern University Law Review*, 72(2):198-216.
[126] H. Collins (1991), `Methods and Aims of Comparative Contract Law`, *Oxford Journal of Legal Studies*, 11(3):398.

the longest tradition of providing social rights (Germany) and where it is commonly recognised as the most generous for workers social arrangements exist (Sweden). In the context of Poland, the references are made to other new Member States such as Hungry, Czech Republic and Slovakia.[127] The rationale for making references to the leave arrangements in those countries derives from that in the late 1980s Hungary and Czechoslovakia together with Sweden and France were considered as providing comprehensive (in terms of the range) and generous (in terms of benefits provided to families) family policies.[128] References to those Member States assist in identifying the positioning of the UK and Polish leave entitlements in relation to other Member States.

Since, reconciliation policies (including the discussed leave periods) at the EU level are introduced through Directives, EU law also largely reflects the positions of Member States and can influence the approach they take in their national implementations. The comparative analysis of the provisions of Directive on parental leave and implementation via national laws in the UK and Poland can provide valuable information as to the similarities and differences in approaches that have been taken by the national legislators to regulating parental leave and leave for urgent family reasons. A comparative analysis of the provisions of the national measures on leave periods also enhances the understanding of one's own legal system; stimulates critical legal thinking; encourages policy studies and innovation. An approach taken by a legislator in one jurisdiction to provide working parents with the right to the discussed leave periods can offer solutions that can be implemented in another jurisdiction. The comparison of the discussed provisions in the chosen context aims to determine the existence of similarities and differences between national entitlements in order to consider parameters for further development of this area.

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[127] For the background on Czech Republic, Hungry and Slovakia see M. Potucek (2004)` Accession and Social Policy: The Case of the Czech Republic`, *Journal of European Social Policy*, 14(3):253-266; Z. Ferge and G. Juhasz (2004), `Accession and Social Policy: The Case of Hungry`, *Journal of European Social Policy,* 14(3):233-251; D. Szalewa and M. Polakowski (2008) `Who Cares? Changing patters of childcare in Central and Eastern Europe`, *Journal of European Social Policy*, 18(2):115-131.

[128] J. Kocourkova (2002), `Leave Arrangements and childcare services in Central Europe: policies and practices before and after the transition`, *Community, Work & Family,* 5(3):302-306.

In accordance with the above discussed theories on transferability, this thesis assumes that the legal rules concerning parental leave and leave for urgent family reasons can at least to some extent be transferable between the discussed legal systems. The countries are all members of the EU; were obliged to implement the provisions of the Directive which ensures the existence of some common platform in the compared area. Caracciolo di Torella and Masselot[129] recognise difficulties associated with comparing national implementations of provisions of Directives and assessing the existence of substantial differences between Member States in order to set a common platform for developing this area. The difficulties which may render the comparison between Member States ineffective or misleading derive from different welfare systems; the access to different resources; the existing differences in cultural and traditional values which influence the development of the national policies and strategies in the relevant areas. The identified difficulties are of relevance to this thesis because the Directive merely ensured the existence of the broadly similar entitlements to the leave periods in the UK and Poland. The effectiveness of the discussed legislative entitlements in the reconciliation is conditioned by the cultural, traditional values and attitudes towards parental and care responsibilities within a family in each Member State, which must be taken into account.

2.4 Socio-legal Methodology

In order to meet its objectives this thesis adapts a socio-legal methodology[130] which draws on the core principles of social science and as Salter and Mason state:

"The approach of socio-legal studies reinstates the centrality of social scientific approaches, using both qualitative and quantitative research methods, to investigate the impact of law in action, and the key role played by ideological factors, including public policy."[131]

[129] E. Caracciolo di Torella and A. Masselot (2010) op. cit., p.21.
[130] M. Salter & J. Mason (2007) *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research,* England: Longman.
[131] Ibid. p. 119.

There are no fixed definitions for the socio-legal methodology. It takes on many different kinds of social science approaches which enhance legal research. According to Lacey[132] this form of legal methodology is now being slowly supported and has a wider recognition within law academia. Using a socio-legal methodology enables the thesis to provide a discussion of the historical and political landscape that has shaped the legal discourse around the Directive on parental leave and other pertinent equality legislation in the undertaken study.[133] Furthermore, it asks whether these anti-discrimination or equality instruments can address inequality in the workplace.

In order to meet its objectives this thesis consists of an examination and analysis of the relevant EU and national legislative measures, policy and interpretations of the relevant legislation by EU and national courts. The analysis of the UK and Polish legislation on parental leave and leave for dependants in this thesis will be enhanced by a reliance on judicial interpretations which have been directly obtained from the employment tribunal archives (UK)[134] and the *Polish Supreme Court*. Since, socio-legal research can cover a vast range of disciplinary contexts within the social sciences and law, this thesis draws on sources of information and data deriving from other disciplines which are key when considering the practical operation of the discussed legal provisions.

As socio-legal research can rely on the methods and techniques used by social scientists such as questionnaires and interviews, this thesis includes accounts from Social Partners who participated in the negotiations on the framework agreement on parental leave on which the *Parental Leave Directive* is based. These were obtained through the use of a questionnaire (responses are provided in **Appendix, Figures 1-**

[132] Cited in ibid. p.119.
[133] Ibid. p. 138. For further information on the sociolegal approach see G. Holborn (2006) *Butterworths Legal Research Guide*, Oxford: Oxford University Press and J. Knowles and Ph. Thomas (2006) *Effective legal research*, London: Sweet & Maxwell.
[134] The researched tribunal archives in Bury St Edmunds, it covered the period from 1999 up to 2011.

5).[135] This information is of paramount importance for this thesis as it provides insights (from a unique 'insider' perspective[136]) the involvement of Social Partners in the EU decision-making process, and facilitate the enhanced analysis of the provisions of the Directive.

A socio-legal methodology allows the research to focus on the issues surrounding the effectiveness of legal rules in meeting their stated objectives and the practical impact of law in action.[137] It enables the thesis to identify discrepancies between the actual operation of regulatory schemes and their ostensible aims. It also enables it to consider the instrumental efficiency of various regulatory models and broader issues concerning fairness and accountability.[138] It allows consideration of the need for change in legal doctrine where evidence of changes in social patterns, lifestyles, attitudes and economic circumstances renders policy out of touch with the actual needs in the area that it seeks to regulate.[139] Consequently, this methodology is deemed most appropriate for the consideration of the extent to which the Directive has been able to meet its reconciliation objective.

This thesis seeks to explore the Directive in terms of how it shapes law at national level in Poland and the UK in order to consider the extent to which the legal provisions on parental leave and leave for urgent family reasons have enabled workers to make genuine reconciliation choices. Thus, Chapter 3 provides an analysis of the provisions of the Directive and implementation via national laws in the UK and Poland are considered in Chapters 4 and 5.

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[135]The Questionnaire were sent via e-mail to representatives of Social Partners (the ETUC, UNICE and the CEEP) who participated in the negotiations on the framework agreement on parental leave and agreed to respond to the questionnaire. The questionnaire was sent out in May 2005 and responses were received by June 2006. The responses which have been received are provided in Appendix Figures 1-5 (5 out of 10 contacted representatives of Social Partners responded to the questionnaire).

[136] C. Costley, G. Elliott and P. Gibbs (2010) *Doing Work Based Research: Approaches to Enquiry for Insider-Researchers,* London: Sage.

[137] R. Mosgrove and A. Rowland (2002), 'Are the Woolf Reforms a Success?, *Socio-legal Newsletter,* 38(8)(2002).

[138] Carson (1982) *The Other Price of Britain's Oil* London: Martin Robertson in M. Salter & J. Mason (2007) op. cit., p.150.

[139] M. Salter & J. Mason (2007) op. cit., p.162.

Part II: INDIVIDUAL LEGAL FRAMEWORKS ON PARENTAL LEAVE AND LEAVE FOR FAMILY REASONS

Chapter 3 *Council Directive 96/34/EC on the Framework Agreement on Parental Leave* & Reconciliation and Choice.

3.1 Background

It was seen in Chapter 1 how EU reconciliation policies have gradually developed and that binding reconciliation measures were introduced through Directives (**Appendix**, **Table 1**). The framework agreement on parental leave and leave for urgent family reasons was implemented through a Council Directive 96/34/EC (the PLD), which was adopted unanimously without a debate on 3rd June 1996.[140] The deadline for its implementation expired on the 3rd June 1998 and Member States (the MS) were given a maximum additional period of one year in case of special difficulties in the implementation process[141]. This Directive is based on a framework agreement concluded by UNICE, CEEP and ETUC in negotiations under Article 155 TFEU. It sets out minimum provisions for parental leave and leave for urgent family reasons. The adoption of this Directive can be seen a major achievement because issues concerning entitlements to parental leave and leave for urgent family reasons address the difficult area of conflict between the demands of work and a family. Thus, it took 13 years of discussions in order to adopt the *Parental Leave Directive* with the aim of facilitating reconciliation and promoting equality of opportunities for men and women. The key stages in evolution of the Directive (1983-2010) are outlined in **Appendix, Table 2**.

[140] Political consensus was reached and Council Directive was signed on 29th March 1996. The delay in adoption of the Directive on parental leave was brought about by the necessity of the parliamentary approval in Germany.

[141] Articles 2-3 Council Directive 96/34/EC on the Framework Agreement on parental leave. 14 countries, at that time only Ireland, and Luxembourg had no law on parental leave and Belgium scheme did not cover all workers. The United Kingdom and Northern Ireland opted out from the 1989 Social Charter and the Agreement on social policy, and therefore were not covered by adopted Directive. On 15th December 1997, subsequent amendment by Council Directive 97/75/EC of the Council Directive 96/34/EC extended provisions of the Directive to the United Kingdom and Northern Ireland with the deadline for its implementation 15th December 1999. The UNICE tried to delay the implementation of the Directive by arguing that 2 years transposition period was insufficient in particular for Member States which had not provided for the right under existing national laws (Appendix, Table 4(7)).

According to the Commission, being able to adopt the agreement constituted a major success of the new procedure and it offered flexibility to national implementations.[142] According to Falkner[143] the success of the agreement is seen as having a positive impact on relationships between Social Partners and could even be considered as a first step toward Euro-corporatism. Schmidt[144] recognised the importance of the adoption of this Directive in terms of the first achievement of the social dialogue. The adopted Directive was expected to bring about improvements only in a few Member States (Ireland, United Kingdom and Luxembourg) as the vast majority of Member States already provided workers with the right to leave periods covered by this Directive (**Appendix, Table 3**).

Directives are not directly applicable and are binding as to the result to be achieved in Member States to which they are addressed.[145] As they have to be implemented by national legislation, they leave the choice of the form and methods used to the discretion of Member States.[146] The flexibility of Directives is enhanced by use of framework Directives (e.g. the *Parental Leave Directive*) which outline the minimum standards and leave to Member States and Social Partners the task of setting the details of their operation; through the use of Directives aiming at partial harmonisation[147] and use of Directives providing for the minimum standards that Member States can enhance at the national level.[148]

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[142] *Agence Europe*, 30 March 1996:7. Commissioner Flynn stated that the Directive on parental leave was of a great symbolic value and was considered as crucial for European industrial relations because it realised the conclusion of the first collective agreement that resulted in the adoption of the Directive in the Social Council.

[143] G. Falkner (1996) `The Maastricht Protocol on Social Policy: Theory and Practice`, *Journal of European Social Policy*, 6(1):1-16.

[144] M. Schmidt (1997), `Parental Leave: Contested Procedure, Credible Results`, *International Journal of Comparative Labour Law and Industrial Relations*, 13:113-126.

[145] Article 289 TFEU (ex 249 EC).

[146] Member States need to fulfil the obligation deriving from Article 4(3) TEU (ex 10 EC).

[147] E.g. Directive 2001/23/EC on transfers of undertakings (OJ [2001] L82/16).

[148] Directives adopted under Article 153 TFEU (137EC) such as Pregnant Workers Directive 92/85/EEC and the Working Time Directive 93/104/EEC and 2003/88/EC.

The function of Directives as providing for the minimum standards was outlined in the *Council Resolution*.[149] In view of the Council the gradual convergence of systems (alignment of national objectives) that takes account of the economic situation in each MS is preferred over the rigorous approximation of laws.[150] Thus, Directives are used in areas where the use of the legislative tools requiring the strict harmonisation of laws would not be desired and sanctioned by Member States. The contents of a Directive must be faithfully reflected in the relevant domestic legislation, it must be implemented before its deadline, and Member States must choose the most appropriate form and methods of incorporation.[151]

Although, Directives merely provide for the minimum standards Member States are encouraged to improve[152] their existing national policies and develop various national solutions. The minimum standards set out in Directives aim at encouraging Member States to compete with each other in enhancing protective standards.[153] However, Directives do not require Member States to compete with each other and merely force them to implement the minimum requirements set out in Directives. Thus, it is crucial for reconciliation that the *Parental Leave Directive* contains stringent provisions that respond to reconciliation needs of different groups of workers, as the lowest common denominator rules would not assist workers in making genuine reconciliation choices. The lowest common denominator provisions of the Directive would also reaffirm the lack of the EU commitment to introducing effective reconciliation laws.

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[149] Council Resolution on `Certain aspects for a European Union Social Policy: a contribution to economic and social convergence in the Union`, 6 December 1994 (OJ [1994] C368/6). It recognises that minimum standards set out in Directives constitute an appropriate instrument for achieving the gradual economic and social convergence while taking into account the economic capabilities of individual Member States. It further identifies Directives as meeting expectations of EU workers and calming fears about social dismantling and social dumping in the EU. The Resolution reflects the position of the Council which argues that the use of a comprehensive legislative programme on social policy matters is not necessary and instead the EU action should be based on building core minimum social standards in a pragmatic, flexible and balanced manner which neither imposes excessive requirements on Member States nor dismantles the existing social rights. On consideration of differences in national systems, it also recognises that unification of national systems through the rigorous approximation of laws is not a desirable method for introducing social policy measures as it would diminish chances of disadvantaged regions in the competition for location.

[150] Ibid. paras. 10,11 and 17-19.

[151] Article 4 TEU (ex 10 EC) requires Member States to fulfil specific obligations placed on them both by Treaties and secondary sources of EU law.

[152] Non-regression clauses in Directives prevent Member States from lowering existing standards.

[153] C. Barnard (2006) *EC Employment Law*, New York: Oxford University Press, pp.78-80.

It was emphasised during negotiations that the measure on parental leave was supposed to help workers to combine professional and parental responsibilities by eliminating workers' worries about their families and thereby making them more effective at work. However, the task of Social Partners was merely to conclude a framework agreement consisting of the minimum rules, which according to the social protocol, could become binding if ratified by Council.[154] After the failure of the *European Works Council Directive (EWD)*, Social Partners wanted to prove that they were able to reach binding agreements in the framework of negotiations.[155] The content of provisions of the Directive was influenced by determination on the part of Social Partners to conclude the Framework Agreement at all cost in order to show the Commission and Social Partners can effectively participate in the EU decision-making under Articles 154 and 155 TFEU (ex 138 and 139 EC).[156]

In areas not falling within the exclusive competence of the EU, (e.g. social policy) the EU's action is taken according to the principle of subsidiarity.[157] Additionally, in areas where this principle is used, EU action will be justified only if the objectives of the proposed action cannot be achieved satisfactorily at the national level and can better be achieved at the EU level. Member States prefer

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[154] Chair of the Belgian National Labour Council, chaired the first session. J. Walgrave (1995) `*Aide-memoire* on the first meeting held on 12th July 1995 (obtained directly from archives of the CEEP).`

[155] *Agence Europe* 13 July 1995:15.

[156] Response to questionnaire of 23/04/2006 from the CEEP's senior negotiator Appendix, Figure 4, pp. 1-3. She stated that Social Partners were determined to reach consensus and that they had learnt their lesson from the failed European Works Council Directive. Response to questionnaire of 05/05/2006 from the senior negotiator for the ETUC, Appendix, Figure 4, pp.1-4. Proposal for European Works Council Directive failed during the second stage of consultation because Social Partners were unable to reach a compromise on a controversial and highly politicised issue of European industrial relations, which was crucial both for the trade unions and the Commission. Response to questionnaire of 06/06/2006 from the senior negotiator representing in negotiations the Confederation of Netherlands Industry and Employers VNO-NCW (member of UNICE) Appendix, Figure 2, pp. 1-4. She indicated that the failure to agree on European Works Council Directive was one of the reasons to start negotiations on parental leave and ensure that a compromise is reached. She further emphasised that Social Partners took the initiative to draft the text for the Social Protocol that was annexed to Maastricht Treaty 1992 and that Social Partners felt responsible for making it work. According to her, the pressure on Social Partners deriving from the failure of European Works Council Directive was not really visible during the negotiation process, but it would have been if there had been a serious threat of failure during the negotiation process on parental leave.

[157] Article 5 TEU (ex 5 EC). It means that decisions taken by Member States in order to implement EU legislation must be taken as closely as possible to citizens affected by them.

legislation, which requires implementation according to the principle of subsidiarity to detailed legislation because the use of this principle allows them to decide on the details. The over-reliance on the principle of subsidiarity in Directives may significantly diminish the binding character of the adopted Directives and provide Member States with the excessive discretion as to the national implementations. This can be used to the detriment of workers striving to achieve reconciliation in Member States, where national governments are not willing to pursue the reconciliation attributes of Directives. In negotiations on the framework agreement on parental leave, the principle of subsidiarity was heavily relied upon by UNICE and CEEP in order to safeguard the interests of employers to the detriment of workers with reconciliation needs. Thus, the UNICE obtained a very flexible mandate, on condition that any concluded agreement would respect subsidiarity and should not impose unacceptable expense on employers.[158]

Steiner[159] argues that differences in national implementations brought about by the principle of subsidiarity may create barriers to free movement of goods, persons and services. Subsidiarity can also undermine competition within the EU by giving a competitive advantage to Member States with less rigorous standards. The EU rights to parental leave and leave for urgent family reasons as reconciliation policies have been introduced through Directives; in accordance with the principle of subsidiarity. Consequently, the use of Directives adopted in the spirit of subsidiarity for introducing the EU reconciliation policies indicates the lack of the legislative commitment on the part of the EU to introducing detailed reconciliation policies. It also shows that the task of introducing specific national reconciliation measures is left to the individual Member States, and as long as the minimum requirements of Directives have been correctly implemented the absence of comprehensive reconciliation policies at the national level cannot be challenged before EU institutions.

[158] Response to questionnaire of 30/05/2006 from the most senior official at UNICE at the time of the adoption of the framework agreement on parental leave, Appendix, Figure 1, pp. 1-5.
[159] J. Steiner, `Subsidiarity under the Maastricht Treaty` in D. O'Keeffe (1994) and P. Twomey (eds) *Legal Issues of the Maastricht Treaty*, London: Wiley Chancery Law, pp.49-51.

Should a Member State fail to implement a Directive correctly or not within the specified time, the enforcement proceeding could be brought by the Commission against the defaulting Member States.[160] If the breach is not remedied within the given time, the Commission will refer the matter to the CoJ that gives its judgement.[161] The legally binding character of the *hard law* provisions is further reinforced by principles of EU law such as direct applicability; direct effect;[162] indirect effect[163] and state liability[164] and supremacy of EU law over the national law.[165] Additionally, in order to assist where written sources of law are not sufficiently comprehensive general principle of EU law have been established on the basis of the Treaties.[166]

As this thesis consists of an exploration of the *Parental Leave Directive* in terms of how it shapes law at national level in Poland and the UK, this chapter addresses the issue of whether the Directive contains the necessary provisions (the basis) for ensuring the existence of effective national policies on parental leave and leave for urgent family reasons capable of enabling workers to make genuine reconciliation choices. It evaluates the legislative contribution of the EU to addressing the complex and diverse matters surrounding the interaction between work and caring responsibilities for children and adult dependants in the context of parental leave

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[160] Article 258 TFEU (ex 226 EC).

[161] If Court of Justice finds that a Member State is in breach of the Union obligations, it will issue a declaration requesting that the breach is to be immediately remedied. Additionally, appropriate fines could also be imposed against the defaulting Member States.

[162] Principle of direct effect of EU law was established in Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belagistingen*. It enables an individual to enforce EU law before national courts if following criteria have been fulfilled: the provision in question must be sufficiently clear and precise, must be unconditional and not subject to any further implementation either by Member States or the EU. Direct effect of Directives was addressed by CoJ in Case 148/78 *Pubblico Ministero v. Ratti* ECR 1629, Case 41/74 *Van Duyn v. Home Office* ECR 1337, Case C-91/92 *Faccini Dori v. Recreb Srl* (1994) ECR I-3325.

[163] Under this principle national courts are obliged to interpret national legislation in a way in which it complies with EU obligations (regardless of whether national law is passed before or after the relevant EU law). Cf. Case 14/83 *Von Colson and Kamann v. Land Nordrhein-Westfalen* ECR 1891 at 1908; Case 79/83 *Harz v. Deutsche Tradax* ECR 1921 at 1939 and Case C-106/89, *Marleasing SA v. La Comercial Internacional de Alimentaction SA* ECR I-4135 at 4157.

[164] Individuals fulfilling certain conditions are entitled to obtain compensation if their individual rights were infringed and the damage incurred due to Member State's failure to implement the Directive. The right to compensation is subject to the following criteria established in Cases C-6 and 9/90 *Francovich v Italy* and Case C-46/93 *Barasserie v Germany*, the rule of law infringed must be intended to confer rights on individuals, the breach must be sufficiently serious and there must be a direct causal link between the breach and the damage caused.

[165] Case 61/64 *Costa v ENEL*.

[166] For example the principle of non-discrimination and others have been developed by CoJ such as fundamental human rights, equality of treatment and proportionality.

and leave for urgent family reasons. Since, the Directive has been adopted with the clear aim of helping working parents to reconcile work and parental responsibilities, its provisions are evaluated in order to address the extent to which they are capable of meeting the reconciliation objective.

The undertaken legal analysis of provisions of the Directive is "informed by" socio-legal methodologies, post-modern feminist perspectives and various concepts of choice (discussed in Chapter 2). In accordance with the post-modern thought,[167] whilst evaluating the legislative contribution of the Directive to helping female and male workers to reconcile work and family responsibilities, it must be acknowledged that there is no one single category of female or male worker. Different categories of female and male workers exist as their positions are determined by their social and financial background or financial resources. Thus, it will be crucial to determine whether leave arrangements outlined in the Directive adequately consider various reconciliation needs of different groups of female and male workers (e.g. families with two parents, single parent families, needs of fathers (men)). Additionally, there is no universally agreed view amongst women (or men) as to the level of their involvement in the provision of care, and whether or not they should be personally responsible for providing such care.[168] Female and male workers may also have different preferences as to their involvement in work and family.[169] However, female and male workers' choices as to their involvement in work and family, and how caring responsibilities are allocated are also restricted, by various constraints, which differentially affect diverse groups of women and men.[170] The same legislative entitlement to parental leave or leave for urgent family reasons will be perceived and used differently by different groups of women or men.

[167] C. Smart (1992), `The Women of Legal Discourse`, *Social and Legal Studies,* 1(29).
[168] Ibid. p.30.
[169] C. Hakim (2000) *Work-Lifestyle Choices in the 21st Century*, Oxford: Oxford University Press pp.223-258.
[170] S. McRae (2003) op. cit., pp. 319-330.

In the legal analysis of the Directive both structural and normative constraints and individual preferences will be taken into account as they play an important role in work-family choices which are made by women and men.[171] Consequently, whilst evaluating the Directive, the issue of whether its provisions adequately respond to the needs of workers with caring responsibilities for children and adult dependants by enhancing their reconciliation choices will be addressed.

This Chapter also seeks to contrast the provisions of the Commission proposals for a Directive on parental leave and leave for family reasons (failed)[172] with the provisions of the framework agreement on parental leave. This comparison will allow consideration of the issue as to whether the change in the legislative process used for introducing the reconciliation Directives in favour of the involvement of Social Partners has contributed to the introduction of the Directive containing more stringent provisions on parental leave and leave for urgent family reasons than those contained in the Commission early draft Directives, which followed the traditional legislative process. It also addresses the issue of whether or not the change in the decision making process has helped to overcome the difficulties associated with the social Directives. Additionally, it considers whether the procedural changes which led to the adoption of the framework Directive have helped or not to provide workers with leave entitlements that better respond to the reconciliation needs of various groups of workers than the 1983 Commission proposal for a Directive on parental leave and leave for family reasons.

3.2 The Directive is Minimalist, Weak and Fails to Contain Adequate Legal Basis for Providing EU Workers with Genuine Reconciliation Choices.

3.2.1 The Directive Fails to Recognise Reconciliation Needs of All Workers

[171] R. Crompton and C. Lyonette (2008) Mothers' employment, work-life conflict, careers and class. In: Scott J et al. (eds) *Women and Employment: Changing Lives and New Challenges*. Cheltenham: Edward Elgar, pp. 213–234. They refer to previous UK research which indicated that mothers in professional/managerial occupations are more likely to work or stay at home following their own attitudes to women's involvement in employment and caring responsibilities, than women from lower occupational groupings.

[172] The first Commission proposal for a directive regarding parental leave and leave for family reasons dates back to a draft directive submitted to the Council of Ministers in November 1983 COM [83] 686 final, 22 November 1983; a revised version of the proposal was submitted in November 1984 COM (84) 631 final, 15 November 1984 OJ 27.11.84, No C316/7.

The scope of the Directive is stated in Clause 1(2), it specifies that the agreement applies to all male and female workers, who have an employment contract or employment relationship as defined by law, collective agreements or practices in force in each Member State. There are no excluded categories of professions or thresholds stated in the Directive.[173] This implies that provisions of the Directive cover all kinds of employment undertaken by working parents. The provisions of Directive equally apply to both female and male workers and therefore both working parents are expected to play active roles in bringing up children and paid employment. The right to parental leave is not to be confused with the distinct right to maternity leave.[174] In *Commission of the European Communities v. Grand Duchy of Luxembourg*[175] CoJ held it cannot be terminated or substituted by maternity leave. The right to parental leave in the Directive is an absolute right, which is not subject to the employer's discretion.[176] The CoJ found that replacing parental leave with maternity leave was in breach of the Directive, as maternity leave and parental leave had different purposes.[177] The difficulties in distinguishing between these two different leave entitlements can occur because parental leave must be taken when the child is still very young and it can be taken as an extension of maternity leave.

The right to parental leave is limited to workers, but the definition of a worker is not provided in the Directive. It outlines that this would be a person with an employment contract or employment relationship as defined by law, collective agreements or practices in force in particular Member State. Since the Directive does not distinguish between the public and private sector workers, all workers

[173] Greece had a threshold of 100 workers; Belgium's career break for personal reason also had a threshold of 100 workers threshold and could be refused, to those in *strategic* jobs; in Norway, fishermen and seafarers were excluded in ETUC press release of November 9, 1995, *Draft Agreement on Parental Leave*, in http://www.poptel.org.uk/aries/euroctzen/archive/msg00072.html accessed on 19/11/2003 accessed on 23/06/2005.

[174] Cf. Case C-292/04 *Carmen Sarkatzis Herrero v. Instituto Madrileño de la Salud (Imsalud)* Celex No. 604J0294 where Juzgado de lo Social of Madrid, asked Court of Justice for the preliminary ruling on matters related to maternity leave by invoking Clause 2(5) Council Directive 96/34/EC on the Framework Agreement on parental leave as the grounds for its decision. The reference for preliminary ruling was rejected on grounds of confusion between parental and maternity leave.

[175] Case C-519/03 *Commission of the European Communities v Grand Duchy of Luxembourg,* OJ C 35 of 07.02.2004.

[176] Ibid. para. 37.

[177] Ibid. para. 32. For the discussion on the purpose of maternity leave cf. Case C-366/99 *Griesmar v French Republic* [2001] ECR I-9383, para. 43.

with employment relationship are entitled to parental leave.[178] Under the Directive, the term worker has a wider definition than the term employee but the qualifying worker needs to have an employment contract or relationship which is subject to regulation in Member States.[179] Thus, primarily, employees have the right to benefit from the provisions of the agreement and self-employed workers are not as such covered by the Directive.

The issue of extending the right to parental leave to the self-employed was not discussed in the negotiations preceding the adoption of the Directive because it was assumed that this right should be guaranteed to employees.[180] Member States, in implementing the Directive national measures may choose to extend the legislative protection to self-employed workers. However, due to operational requirements of the business, potential burden on social funds of Member States and the lack of legislative initiative from the EU, it is very unlikely that the EU self-employed workers are going to benefit from the provisions of the agreement. The lack of the legislative right to leave periods covering all groups of workers indicates that it was not intended by the legislator to grant parental leave rights to self-employed working parents in order to assist them in reconciliation. As the self-employed cannot rely on leave periods in order to achieve the reconciliation their work-family choices are more limited than those of workers with employment contracts.

The Directive in Clause 2(1) provides both male and female workers with an individual right to (unpaid) parental leave that could be exercised on the grounds of the birth or adoption of a child with the aim of enabling parents to take care of

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[178] Case C-149/10 *Zoi Chatzi v.Ipourgos Ikonomikon*, para. 29.

[179] Cases 66/85 *Deborah Lawrie-Blum v Land Baden-Württemberg* [1986] ECR 2121, paras. 16 and 17; Case C-176/96 *Jyri Lehtonen and Castors Canada Dry Namur-Braine ASBL v Fédération royale belge des sociétés de basket-ball ASBL* (FRBSB) [2000] ECR I2681, para. 45; Case C-138/02 *Collins v Secretary of State for Work and Pensions* [2004] ECR I2703, para. 26; Case C-456/02 *Michel Trojani v Centre public d'aide sociale de Bruxelles* (CPAS) [2004] ECR I7573, para. 15 and Case C-392/05 *Georgios Alevizos v Ypourgos Oikonomikon* [2007] ECR I-000, para. 67. The nature of employment under national law has no consequence regarding employment status under EU law. Case 53/81 *D.M. Levin v Staatssecretaris van Justitie* [1982] ECR 1035, para. 16; Case 344/87 *I. Bettray v Staatssecretaris van Justitie* [1989] ECR 1621, paras. 15 and 16; Case C-188/00 *Bülent Kurz, né Yüce v Land Baden-Württemberg* [2002] ECR I-10691, para. 32 and Trojani para. 16.

[180] J. Walgrave (1995) `Chair's aid-memoire of the first meeting of Social Partners on 12th July 1995 to discuss measures on parental leave and leave for family reasons`.

that child.[181] In *Commission of the European Communities v Grand Duchy of Luxembourg*[182] the CoJ clarified the wording of Clause 2(1) of the Directive by stating that the right to parental is acquired by birth or adoption and it does not imply that the birth or adoption of the child must occur after the implementing date. This ruling is of vital importance as Member States such as Greece,[183] Luxembourg, Ireland and UK attempted to restrict the availability of parental leave only to children born after the Directive's implementation date.

Originally, the ETUC attempted to expand the scope of parental leave to include elderly dependants but this demand was rejected by representatives of employers.[184] The position of UNICE[185] and CEEP in this regard was that parental leave should only be granted to working parents following the birth of a child to allow for care of this child up to a given age. The extension of parental leave right to elderly dependants was blocked because representatives of employers felt that extending the scope of parental leave to elderly dependants would impose a significant burden on businesses, as parental leave could be taken both in relation to children and elderly dependants. In practice, this would imply that qualifying workers would spend more time away from their employment than desired by employers. This position further confirms that the restrictive scope of the reconciliation principle in Clause 1(1) of the Directive was fully intended. Not extending parental leave rights to elderly dependants was then and is still considered as a missed opportunity.[186]

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[181] Case C-519/03 *Commission of the European Communities v Grand Duchy of Luxembourg*, OJ C 35 of 07.02.2004, para. 31.

[182] Ibid. para. 47.

[183] Case C-548/07 *Commission of the European Communities v. Hellenic Republic*, OJ 2008/C22/68 where entitlement to parental leave was limited only to seamen's contracts which commenced after the entry into force the national collective agreements.

[184] Response to questionnaire of 05/05/2006 from the senior negotiator for the ETUC, Appendix, Figure 4, pp.1-4 and ETUC press release of November 9, 1995 op.cit., pp1-3.

[185] Response to questionnaire of 06/06/2006 from the senior negotiator representing in negotiations the Confederation of Netherlands Industry and Employers VNO-NCW (member of UNICE) Appendix, Figure 2, pp. 1-4.. This position of the representatives of employers was expressed during the first meeting of Social Partners held on 12th July 1995, remained unchanged and it is clearly reflected in the provisions of the Directive on parental leave.

[186] Response to questionnaire of 05/05/2006 from the senior negotiator for the ETUC, Appendix, Figure 4, pp.1-4. The compromise on this issue was reached by extending the right to leave on grounds of forced majeure to elderly dependents. It must be noted that originally this leave was intended to cover only urgent family reasons related to children. However, extending the right to leave for urgent family reasons to elderly dependants did not certainly offer the satisfactory right to time off from work in order to look after elderly dependants.

Currently there is no EU measure granting working parents with caring responsibilities for the elderly dependants the right to take a longer period off from work in order to provide elderly member(s) of their families with the needed care. Although, the Directive in Clause 3 provides workers with the right to time off from work for urgent family reasons this leave is too short to compensate for the lack of the entitlement to much longer parental leave. Considering demographic changes in contemporary ageing society, not extending parental leave to elderly dependants may significantly limit reconciliation choices of many workers with such responsibilities.

3.2.2 Short Parental Leave for Small Children Restricts Parents' Reconciliation Choices.

The duration of parental leave is set out in Clause 2(1) of the Directive where it is stated that the leave should be for at least three months and the detailed arrangements are to be defined by Member States and/or collective agreements. However, the duration of the leave under the national law may not depend on the availability of other forms of leave. Following the principle set out in *Merino Gomez*[187] in *Commission of the European Communities v. Grand Duchy of Luxembourg*[188] the CoJ reaffirmed that the duration of parental leave, which is guaranteed by the Directive to all working parents cannot be reduced when the leave is interrupted by other form of leave because parental leave is distinct from other leaves.[189]

During the negotiations on the Directive, the Commission and ETUC proposed that the duration of parental leave should be at least three months. This was contested by UNICE which insisted that the duration of parental leave at the

[187] Case C-342/01 *Merino Gomez* [2004] ECR I-0000 at para. 41 it was ruled that maternity leave could not affect the right to full annual leave.
[188] Case C-519/03 *Commission of the European Communities v Grand Duchy of Luxembourg*, OJ C 35 of 07.02.2004.
[189] Ibid. para. 33. The requirement under the national law that parental leave was terminated when it was interrupted by maternity or adoption leave, and that it was not possible to defer the outstanding portion of the leave was ruled not to implement correctly the provision of the Directive which provided all parents with parental leave of the duration not shorter than three months (para. 34).

European level should not exceed three months.[190] It was clear to UNICE that the period of parental leave would be three months and therefore this issue was not discussed further.[191] The compromise was reached on the basis that the minimum duration of parental leave would be three months. Social Partners believed that not precisely stating the actual duration of the leave could enable Member States to provide for longer duration of parental leave under national laws. Allowing Member States to introduce parental leave of a different duration could bring about significant differences in the duration of parental leave across Member States, which could hamper the law harmonisation process in the area of employment and social affairs. Additionally, specifying only the shortest period of parental leave (three months) indicates that the consensus between Social Partners on the duration of this leave was reached on the basis of the lowest common denominator.

The ETUC was satisfied with the agreed length of parental leave and even a shorter leave would have been acceptable as long as it was going to be a paid leave. The ETUC did not insist on a longer parental leave because they knew that if the leave was to be longer in its duration it would be more difficult to insist that the leave should paid.[192] Effectively, ETUC was unable to ensure that even the very short parental leave was going be paid for. This raises a question as to whether it was worth compromising on the short duration of the leave knowing that the chances of ensuring that parental leave would be paid for were very slim indeed. The Directive does not provide any specific measures indicating instances where the duration of parental leave could be extended and it does not provide for the longer duration of the leave if the leave is taken on a part-time basis.

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[190] Table 2, Parental Leave, Comparative table of UNICE and the ETUC positions, 10th July 1995.
[191] Response to questionnaire of 06/06/2006 from the senior negotiator representing in negotiations the Confederation of Netherlands Industry and Employers VNO-NCW (member of UNICE), Appendix, Figure 2, pp. 1-4.
[192] Response to questionnaire of 05/05/2006 from the senior negotiator for the ETUC, Appendix, Figure 4, pp.1-4.

According to Hantrais[193] the general nature of the key provision of the Directive on the duration of the leave may confirm the deficiency of this measure for the reconciliation. She further argues that despite EU commitment to transforming European working environment into family-friendly, the outcomes of the EU reconciliation polices, as implemented through Directives have been watered down to match the means of the slowest, or least willing partners, and therefore address only the lowest common denominator.[194] The true intention of the legislator was not to expand the rights of working parents in respect of parental leave but to secure the introduction of the minimum entitlements in Member States where the right did not exist.[195]

How reconciliation is achieved by working parents will depend on individual preferences and other factors which include legal constrains.[196] The short duration of parental leave clearly questions the reconciliation objective of the Directive, as it merely enables working parents to put into place the necessary care arrangements, and does not enable them to provide the long term personal care to the qualifying children, which may be needed to facilitate parents' reconciliation. The short duration of the leave under the Directive suggests that the right to parental leave may in fact be limited to three months' period as Member States are not obliged to provide for the longer duration of the leave. Thus, short duration of the leave under the Directive is too constraint to enable parents to care for their children and thereby does not to help working parents in making genuine reconciliation choices.

The duration of the entitlement to parental leave does not depend on the number of children who were born during the same birth because the right to the leave is granted to parents of the qualifying children with employment contract or employment relationship. Consequently, the Directive does not confer the right to parental leave on a child but on parents of the child. Although, Article 24 of the

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[193] L. Hantrais, (2000) *Social Policy in European Union,* 2nd edition, Macmillan Press Ltd, London pp.135-137.

[194] The duration of parental leave introduced by Directive 96/34/EC was even shorter than the least generous leave provision in Greece (Appendix, Table 1).

[195] The UK, Ireland and Luxembourg.

[196] J. Glover(2002) `The "balance model" theorising women's employment behaviour` in R. Crompton (2006) op. cit., p. 52.

Charter provides children with the right to protection and care which are necessary for their well-being, this does not provide children with the individual right to see parents and obtain parental leave. The right to parental leave is granted to parents who have the right and the duty to bring up their children; parents are best placed to decide how to perform their responsibilities and how to use their entitlement to parental leave. Since Clause 1(1) of the Directive aims at facilitating reconciliation for working parents, the duration of parental leave is not proportional to the number of children born during the same birth.[197] The importance of this ruling derives from the fact that the CoJ recognised that parental leave is a fundamental right under Article 33(2) of the Charter, and that parents of twins are in a special situation.

The CoJ adopted the wide interpretation of Clause 2(1) of the Directive to conclude that it imposes an obligation on the national legislators to ensure the existence of the leave arrangements ensuring that parents of twins receive treatment that takes appropriate account of their actual (reconciliation) needs. Furthermore, it was held to be the responsibility of the national courts to determine whether the national regulations adequately cater for the needs of those parents and to interpret the national laws in the conformity with the EU Law.[198] This ruling is of vital importance because it has recognised the need of providing parents of twins with the adequate leave arrangements (e.g. flexibility, simultaneous use) and not only with the extended duration of the leave. It has also confirmed that the Directive fails to adequately respond to reconciliation needs of parents where more than one child is born during the same birth by imposing unnecessary restrictions on the availability of the leave.

The right to parental leave is available up to child's eighth birthday, subject to national laws.[199] Initially the ETUC proposed that the age limit should be 12 or 14

[197] Case C-149/10 *Zoi Chatzi v. Ipourgos Ikonomikon*, paras. 31-40.
[198] Ibid. paras. 41-75.
[199] Clause 2(1) Council Directive 96/34/EC on the Framework Agreement on parental leave. The reason why the age limit requirement was inserted was to distinguish parental leave from maternity leave because in some Member States this differentiation was not that clear. For example in Finland, Italy, Greece and Portugal parental leave had to follow on immediately after the period of maternity leave, in Spain and Norway parental leave had to be taken before child's first birthday and in France and Germany before child's third birthday.

years but this was rejected by UNICE and CEEP.[200] The provision on the age limit at eight years was the most contested provision in the negotiations.[201] The difficulty in reaching the compromise was rooted in the views of UNICE and CEEP who saw the flexibility of the leave as imposing excessive burden on businesses. Under Clause 2(1) of the Directive Member States have the freedom to introduce significantly different national laws as long as they comply with the minimum requirements of the Directive. Therefore, in relation to the upper qualifying age limit as set out in the Directive, Member States have the power to adopt a significantly lower upper age limit. This would force working parents to exercise their right to parental leave immediately after the maternity leave or at the very early stages of the child's life. Allowing Member States to introduce different national provisions may have a destructive impact on law harmonisation process across Member States.

James[202] observes that the Directive limits the availability of the leave to parents of the small children under age of eight and ignores the reconciliation needs of working parents with children older than eight years of age. The Directive does not envisage the right to parental leave for older children and therefore it fails enhance work-family choices of parents with older children who still need help with reconciliation well beyond the age limit set out in the Directive. Thus, the Directive which merely requires Member States to provide working parents with the short and inflexible parental leave entitlement for small children does not help working parent with making real reconciliation choices.

3.2.3 The Directive Fails to Provide Parents with Flexible Parental Leave.

The feature of parental leave which is particularly important for the reconciliation and choice is that the leave could be taken in different forms such as full-time, part-time, fragmented or as time credit system. Working parents may have

[200]Response to questionnaire of 06/06/2006 from the senior negotiator representing in negotiations the Confederation of Netherlands Industry and Employers VNO-NCW (member of UNICE) Appendix, Figure 2, pp. 1-4.
[201] Response to questionnaire of 16/05/2006 from the most senior ETUC's negotiator, Appendix, Figure 3, pp. 1-4. It was difficult to reach a compromise on the possibility of a flexible implementation of the right in multiple periods over the years and not simply in one block.
[202] G. James (2009) op.cit.

different preferences as to the extent to which they want to be involved in employment and the provision of care.[203] Parents who provide care (often women) do make choices in relation to their employment and their family lives and their choices either influenced or constrained by the actual context within which choices are being made.[204] Thus, the leave arrangements set out in the Directive should be flexible enough to enable those parents who whish to remain in employment whilst caring for their children to reconcile work and family responsibilities through the use of parental leave. The national availability of the flexible leave arrangement is not guaranteed by the Directive as Clause 2(3) expressly provides that the conditions on access and specific rules in relation to applying for the leave will not be defined by the EU but the law and/or collective agreements in Member States. This clearly reflects the desire of UNICE to ensure that provisions of the Directive should respect subsidiarity and not impose a financial burden on employers. Clause 2(3) of the Directive was very important for UNICE because it leaves room for Member States and Social Partners to decide on the detailed conditions of access.[205] This implies that the existence of the flexible national entitlements to the leave will depend on the national legislator's willingness to provide for such flexibility. Thus, the practical effects of the Directive in Member States, which have very different systems of labour law, and gender relations appear to be questionable.[206]

It is up to the national governments to decide if the leave is granted on a full-time or part-time basis, in a piecemeal way, or in the form of credit system.[207] This provision clearly reflects the determination of the ETUC to ensure flexibility in the leave arrangements that could render the leave more accessible and better

[203] C. Hakim (2000) op. cit., pp.223-258.
[204] R. Crompton (2006) op. cit., p. 11.
[205] Response to questionnaire of 06/06/2006 from the senior negotiator representing in negotiations the Confederation of Netherlands Industry and Employers VNO-NCW (member of UNICE) Appendix, Figure 2, pp. 1-4.
[206] G. Falkner, M. Hartlapp, S. Leiber, O. Treib, *Transforming Social Policy in Europe? The EC's Parental Leave Directive and Misfit in the 15 Member States*, Paper for the 13th International Conference of Europeanists "Europe in the New Millennium: Enlarging, Experimenting, Evolving" http://www.mpi-Sg-koeln.mpg.de/people/ot/download/chicago2002.pdf accessed on July 22, 2002, pp.6
[207] Clause 2(3)(a) Council Directive 96/34/EC on the Framework Agreement on parental leave.

responding to the families' needs.[208] The Directive envisaged the desired flexibility in parental leave arrangements and this constitutes a significant progress towards making this leave more responsive to the needs of contemporary families. The provision in Clause 2(3) of the Directive is very general and it enables Member States to introduce virtually any national laws on parental leave on condition that the duration of the leave is at least three months, and the qualifying age is complied with. The Directive appears to assume that every Member State on its own would recognise the necessity of offering the flexible leave arrangements and it does not impose any obligation on Member States, which are unwilling to introduce national laws providing for the desired flexibility. The flexibility of the leave arrangements constitutes one of the key factors, which is likely to influence parents' attitudes towards taking the leave and who takes the leave. The lack of the right to working part-time whilst on parental leave despite negative effects on employment associated with it, can be seen as significantly restricting parents' (in particular mothers') reconciliation choices. Mothers' ability to work on a part-time basis is seen by Hakim as enabling them to reconcile work and family responsibilities.[209]

The general provision of the Directive in Clause 2(3)(a) which enabled Member States to make the leave available under different modalities does not protect an employee's contractual rights during the leave because it is regulated by Clause 2(4), 2(5), 2(6), 2(7) and implementing the national regulations. Unless national laws provide for the special regime in relation to those exercising their right to parental leave by working part-time or reducing the working hours, the leave-takers may be financially disadvantaged for the taking of the leave. This was reaffirmed by the CoJ in *Evangelina Gómez-Limón Sánchez-Camacho v. Instituto Nacional del la Seguridad Social (INNS), Tesoreria General dle la Seguridad Social (TGSS), Alcampo SA*[210] where the lower contributions to various Spanish

[208] At the time of the adoption of Directive 96/34/EC such flexibility existed in Italy where the leave could be taken on part-time basis. Splitting the leave was possible in Italy, Greece, Portugal and Spain and free time was available in Norway, the Netherlands, France and Austria,...). The ETUC press release of November 9, 1995, *Draft Agreement on Parental Leave*, in http://www.poptel.org.uk/aries/euroctzen/archive/msg00072.html accessed on 19/11/2003.
[209] C. Hakim (2000) op. cit., pp.223-258.
[210] Case C-537/07 *Evangelina Gómez-Limón Sánchez-Camacho v. Instituto Nacional del la Seguridad Social (INNS), Tesoreria General dle la Seguridad Social (TGSS), Alcampo SA*.

social funds during part-time parental leave resulted in the reductions in the future payments to employees who took parental leave.[211]

The issue of flexibility in parental leave arrangements was addressed by the CoJ *Sari Kiiski v Tampereen Kaupunki*[212] where the existence of national laws providing for complex and inflexible procedures in relation to an early return to work from the leave, accompanied by the requirement of the non-simultaneous use of the leave by both parents, prevented the Finish family from reconciling work and family responsibilities. The CoJ held that the aim of the Directive was to provide both working parents with the right to parental leave enabling them to care for the child and it was reasonable to allow the worker to be able to alter the agreed leave arrangements on the basis of the new events, which made it impossible for her to look after the child under the conditions originally foreseen.[213]

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[211] This decision is further explored in this Chapter in the context of the employment status whilst on parental leave.

[212] Case C-116/06 *Sari Kiiski v Tampereen Kaupunki,* Celex No. 606J0116, ECR [2007] 00000. Whilst on parental leave, having discovered that she was pregnant Ms Kiiski decided to change her previous leave arrangements and requested a reduction in the duration of childcare leave. Her request was denied because under the Finish implementing the Directive Collective Agreement and case law, the pregnancy did not constitute unforeseeable and justified ground for altering the duration of the leave (paras. 11 and 12 of Part V of the general municipal collective agreement governing the working conditions of officials and contractual agents 2003-2004 (Kunnallinen yleinen virka-ja työehtosopimus' 2003-2004). Her subsequent request to terminate the leave and start maternity leave was also rejected on the same grounds. The father of the first child was unable to obtain the leave because it could only be taken by one parent at a time. She brought an action against her employer claiming unlawful direct and indirect discrimination on grounds of sex resulting from the employer's failure to recognize her pregnancy as a sufficient ground for the alteration of her childcare leave which prevented her from returning to work and obtaining parental leave. It was difficult for her to base her claim on provisions of the Directive because Clause 2(3) and (7) provides that detailed conditions of access (including the right to an early return) and the status of employment contract are to be defined by Member States.

[213] *Sari Kiiski v Tampereen Kaupunki* op. cit., paras. 32-55. During the final period which preceded childbirth and in the first weeks following it, the changes took place which prevented her from looking after her child. In final stages of pregnancy the care which needed to be given to Ms Kiiski's first child required by the Directive constituted for the mother a multiple burden. It was reasonable to permit that such a burden is avoided by enabling the person concerned, on the basis of her pregnancy to alter the leave arrangements. It followed that the period of at least 14 weeks preceding and after childbirth was to be regarded as a situation restricting the achievement of the purpose of the Directive and constituted justified ground for an alteration of that leave. However, under the Finish law worker's pregnancy was not considered as the justified ground for allowing an early return to work. The Court of Justice ruled that the restrictions which could compromise the achievement of the aim of parental leave set out in the Directive were comparable to the justified grounds listed under Finish law such as the serious illness or death of the child, or of the other parent and divorce.

The case of *Sari Kiiski v Tampereen Kaupunki* proves that altering previously agreed parental leave arrangements may involve a complex process requiring compliance with the notice requirements and justifiable grounds provided for by national laws and not regulated by the Directive.

The difficulties faced by Ms Kiiski when trying to alter her leave arrangements because of genuine reasons related to her pregnancy and maternity indicate that in practice very few parents may be able to change their leave arrangements in order to accommodate the changes in the family circumstances. Although, Ms Kiiski succeeded in her claim, it must be emphasised that the ruling was justified on the basis that the discrimination could affect only women and therefore the lack of flexibility in the leave arrangements was in breach of the EU equality legislation and not the *Parental Leave Directive*.[214] Thus, the importance of the flexibility in parental leave arrangements was recognised albeit in relation to women only. Reconciliation choices are made in the context of each individual and restraints associated with the leave shape parents' attitudes to the leave. Consequently the disadvantages associated with taking the leave on a part-time basis and inflexible leave arrangements may prevent parents from achieving reconciliation through parental leave.

Member States have the power to make the entitlement to parental leave subject to qualifying periods or length of service requirements not exceeding one year.[215] The right to parental leave under the Directive is made subject to qualifying periods or length of service because during the negotiations UNICE and CEEP saw it as indispensable to protect the companies.[216] Member States have the power to introduce various qualifying periods on condition that those periods do not exceed one year. Permitting the introduction of the qualifying periods significantly limits the accessibility of the leave only to those parents who have the necessary qualifying period of employment. By making the right to the leave subject to the qualifying period, the legislator automatically excluded potentially a significant number of parents across Member States who will not be able to

[214] Ibid. at para. 14.
[215] Clause 2(3)(b) Council Directive 96/34/EC on the Framework Agreement on parental leave.
[216] J. Walgrave (1995) op.cit.

comply with the provision on the qualifying period. Consequently, the right to parental leave may in practice be available only to well-established employees with a proven continuity of employment.

However, to employees who do not qualify for parental leave, the Directive will be unhelpful in reconciliation. It therefore, will be perceived by the excluded working parents as another missed opportunity of adopting the effective reconciliation laws. The Directive also does not contain any specific provisions in relation to adopted children and delegates the responsibility of adopting particular measures to Member States. [217]

Member States have the power to introduce and specify notice requirements that have to be complied with in order to request or terminate the leave.[218] This implies that a worker willing to exercise his/her right to parental leave would need to apply for the leave following the procedures specified at the national level. Allowing the access to parental leave to become subject to various unspecified notice requirements regulated at national level, may foster the introduction of significantly different notice periods across Member States. Member States that are not supportive of reconciliation measures may introduce very complex application procedures which could effectively discourage working parents from taking the leave. The introduction of very complex application procedures at the national level would therefore diminish the desired flexibility of the leave and reduce its importance for the reconciliation. As various constraints shape parents' decisions as to their involvement in childcare and employment,[219] the complex and time consuming application process could discourage parents from applying for the leave and significantly restrict leave availability.

The Directive foresees the circumstances when it may be necessary by the employer due to some business operational reasons to postpone the granting of the leave and gives the responsibility to national governments to adopt particular measures in that respect. It is emphasised that this area will be regulated not by

[217] Clause 2(3)(c) Council Directive 96/34/EC on the Framework Agreement on parental leave.
[218] Clause 2(3)(d) Council Directive 96/34/EC on the Framework Agreement on parental leave.
[219] S. McRae (2003) op. cit., pp.317-38.

the EU but the national law and/or collective agreement of the Member States.[220] This provision clearly reflects compromise reached with UNICE which argued that the general arrangements on how the leave is granted should be regulated at national level. The UNICE insisted that the employer should be given the power to defer or even refuse granting of the leave to the employee.[221] The Directive applies to all companies and special arrangements also needed to be made by Member States in order to meet the organisational and operational requirements of small undertakings.[222] During the negotiations UNICE and CEEP insisted that the agreement should exclude companies with fewer than fifty employees. The ETUC opposed the setting of a threshold and proposed that conditions for application could be established accommodating the needs of small companies.[223]

The Directive provides examples of the situations when an employer could postpone granting of the leave. These cover situations where the work is of seasonal nature, where the replacement cannot be found within the notice period, where too many workers applied for parental leave at the same time. The most unclear is the last example concerning the situation where a specific function is of strategic importance to the business. The Directive does not provide the definition or the meaning of the terms *strategic importance to* business. It could be assumed that it will be the employer who has the power to decide if the employee's presence at work is (or is not) of the strategic importance to the business. This provision could effectively be used against the essential workers whose presence at work is indispensable for the proper functioning of the business.

The Directive does not clearly define the maximum period for which the granting of parental leave could be postponed. Allowing Member States to decide at national level on the maximum periods for which the granting of parental leave could be postponed may result in significant differences in the application process across

[220] Clause 2(3)(e) Council Directive 96/34/EC on the Framework Agreement on parental leave.
[221] See Appendix, Table 2.2.
[222] Clause 2(3)(f) Council Directive 96/34/EC on the Framework Agreement on parental leave and Commission Recommendation on `Small and medium-sized enterprises,` 96/280/EC of 3 April 1996.
[223] J. Walgrave (1995) op. cit.

Member States. Arguably, in Member States supportive of reconciliation measures, the application process would be very simple, and minimum postponement periods would be permitted. However, in Member States unwilling to assist working parents in reconciliation the application process could be very lengthy and complex, allowing employers to significantly postpone granting of the leave. McColgan[224] recognises the paramount importance of the flexible leave arrangements. Since an employer has the right to postpone granting of the leave substantially, this diminishes the flexibility of the leave and restricts parents' reconciliation choices by depriving them of the leave when it is most needed by the family.

3.2.4 The Right to Parental Leave for Workers Who Can Afford It.

Clause 2(1) of the Directive provides qualifying parents with the right to unpaid parental leave. Member States are given the freedom to introduce national laws providing for paid parental leave. The position of ETUC was that Member States were to ensure that allowances are provided in relation to parental leave. During the cause of the negotiations ETUC insisted that parental leave should be paid but the representatives of employers refused to deal expressly with the question of income during parental leave and therefore the issue of pay was left up to individual Member States to decide. It was reported[225] that the reason why the issue of pay was not discussed derives from the confrontation of Social Partners with the Council that strongly objected to Social Partners being able to conclude agreements imposing any financial burden on Member States. Should Social Partners have agreed on parental leave being paid, the payment would have to be made by the national social protection systems and not by employers. This was clearly understood in the course of negotiations and the position of ETUC was that if the leave was to be paid it should be paid from national social founds. This effectively took the pressure of the negotiating representatives of employers.[226]

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[224] A. McColgan (2000) op. cit., p. 142.
[225] Response to questionnaire of 16/05/2006 from the most senior ETUC's negotiator, Appendix, Figure 3, pp. 1-4.
[226] Response to questionnaire of 05/05/2006 from the senior negotiator for the ETUC, Appendix, Figure 4, pp.1-4.

It was also reported that parental leave which was to be paid by employers would have been a no go area for UNICE and that the ETUC was in favour of paid leave where the financial support would come from the state or social security authorities.[227] The employers' delegates argued that no provisions could be introduced on social security benefits for parental leave because that would make it impossible for the Council to approve the Directive transposing the agreement of Social Partners. The position of UNICE and CEEP was rather ambiguous on the matter of pay as they preferred to avoid direct confrontation by hiding behind the Council's position.[228] The main reason why Social Partners were unable to legislate on the pay issue derived from that the issue of pay is excluded from the legislative powers of Social Partners.[229] It was reported[230] that there was a fear among Social Partners about not being able to reach the agreement on the issue of pay. Not being able to reach a compromise on pay issue would imply the second failure of the legislative process involving Social Partners and this put the pressure on Social Partners to reach the compromise. It is argued [231] that the practical take-up of parental leave depended on whether the leave was paid or unpaid (minimum income guaranteed). According to ETUC, not being able to conclude the agreement providing for paid leave, constitutes the single major set back in the negotiating process that would in particular affect parents with modest income. During the negotiations ETUC called upon Member States to ensure that implementing the Directive national laws provide for a minimum income and/or parental allowance sufficient to ensure *sound* financial conditions enabling both male and female employees to take advantage of their entitlement to parental leave.[232]

The inadequacy of the Directive in providing workers with the effective rights enabling them to make genuine work-family choices deriving from the lack of the

[227] Response to questionnaire of 06/06/2006 from the senior negotiator representing in negotiations the Confederation of Netherlands Industry and Employers VNO-NCW (member of UNICE) Appendix, Figure 2, pp. 1-4.
[228] Response to questionnaire of 16/05/2006 from the most senior ETUC's negotiator Appendix, Figure 3, pp. 1-4.
[229] Article 153(5) TFEU (ex Article 137(5) EC).
[230] Response to questionnaire of 05/05/2006 from the senior negotiator for the ETUC, Appendix, Figure 4, pp.1-4.
[231] Response to the questionnaire of 16/05/2006 from the most senior ETUC's negotiator, Appendix, Figure 3, pp. 1-4.
[232] ETUC press release of November 9, 1995 op. cit.

right to pay whilst on the leave was recognised by the European Parliament (EP).[233] Despite the importance of providing working parents with the right to pay whilst on the leave, as a means of alleviating the disadvantages suffered by the leave takers, the recommendations of European Parliament were not taken into account in adoption of the Directive.[234] Thus, the question of pay is to be dealt with at the national not the EU level, and it is very doubtful that the recommendation of ETUC in relation to pay is going to be taken into consideration by Member States in implementing the Directive national measures.

Szyszczak[235] points out that the Directive, although very limited in its scope, constitutes the first step towards recognising the fact that women's caring responsibilities and men's bread-wining responsibilities very often prevent them from fully participating in private and economic life. McColgan[236] argues that the effectiveness of the agreement as a family-friendly measure which aims at facilitating reconciliation of work and family life is significantly hampered by the Directive providing only for unpaid parental leave. According to McGlynn,[237] in granting the rights to unpaid parental leave the agreement is only of a symbolic value and it will achieve very little as long as the leave remains unpaid. Caracciolo di Torella and Masselot[238] identify the lack of the right to financial compensation whilst on parental leave as the key deficiency of the Directive which will render the leave to be primarily taken by the parents who can afford it.

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[233] European Parliament, Commission on Social Affairs and Employment, 'Resolution on the Commission proposal for a Council Directive on the framework agreement concluded by UNICE, CEEP and the ETUC on parental leave' (COM(96) 0026 – C4-0138/96), O.J. C096, 01/04/1996 p.0284. It expressly stated that the provision on pay contained in the text of the draft agreement on parental leave was inadequate, as it did not guarantee sufficient financial support during parental leave. Additionally, the European Parliament stated that the right to social benefits during parental leave was not covered adequately and that rights enjoyed by workers while in an active employment should be equally applicable during the period of parental leave. In real terms, this would mean that both male and female workers should be entitled to receive their salary while on parental leave.

[234] European Parliament is excluded from the decision making process involving Social Partners and therefore its recommendations did not have to be taken into account.

[235] E. Szyszczak, (2000) *EC Labour Law*, London, Pearson Education Limited, p.178.

[236] A. McColgan, (2000) 'Family Friendly Frolics? The Maternity and Parental Leave etc. Regulations 1999', *Industrial law Journal* 29(2):125-143 at pp 139-140.

[237] C. McGlynn (2000), op. cit., p.44

[238] E. Caracciolo di Torella and A. Masselot (2010) op. cit., pp.78-79.

Parents have preferences as to their involvement in work and family life but they also make work-family choices which are either shaped or constrained by context within which the choices are being exercised.[239] The lack of the right to paid parental leave limits parents' reconciliation choices by making the leave available only to parents who can afford it. The loss of wage associated with the leave imposes significant restrictions on the availability of the leave and influences how reconciliation choices are made within families. The lack of paid parental leave will in particular affect families with low income by forcing them to divide family responsibilities not in accordance with their individual preferences but in a manner which helps them to alleviate the disadvantages associated with parental leave.

Arguably, the popularity of the leave will depend on whether parental leave is paid or unpaid. Therefore, the introduction of the right to parental leave may not make a big difference to working parents' lives in Member States where the national laws do not provide for the paid leave. Consequently, failing to provide for paid parental leave together with the existing gender pay gap may have the effect that the leave may be taken exclusively by women, and therefore it could not assist them in the reconciliation. Providing personal care to a child may prevent women from effectively competing in the labour market; reinforcing gender segregation and the gender pay gap. This in turn may also increase the incentives for some employers to discriminate against women of childbearing age and against mothers with young children. Hence, the right to unpaid parental leave provided under the Directive is worthless if parents cannot afford to claim it.

Additionally, all matters in relation to social security during the period of parental leave are to be determined at national level, taking into consideration the importance of the continuity of the entitlements to social security under various schemes and in particular in health care.[240] This provision was inserted to reflect the concern of ETUC to ensure the continuity of social protection during the period of parental leave for all risks (e.g. sickness, unemployment, pensions ...). The positions of UNICE and CEEP in relation to social security issues were similar because they argued that social security issues were outside the negotiating

[239] R. Crompton (2006) op. cit., p. 11.
[240] Clause 2(8) Council Directive 96/34/EC on the Framework Agreement on parental leave.

framework involving Social Partners[241] and that the framework agreement should not impose costs on companies.[242] The detailed provisions in relation to social-security protection including health care protection and pension rights will have to be determined at the national level. Thus, the effectiveness of parental leave in enabling parents to make real reconciliation choices will depend on whether parental leave is paid or unpaid and if the social security rights of the leave takers are adequately protected.

3.2.5 Taking Parental Leave Disadvantages Leave Takers

Under Clause 2(4) of the Directive Member States are to ensure that national laws are adopted, protecting workers against dismissal on the grounds of an application for, or the taking of parental leave. It requires Member States to introduce the detailed national laws ensuring protection against dismissal to workers who applied for or take parental leave. During the negotiations leading to the adoption of the Directive, the ETUC insisted that the protection against dismissal should be given to parents exercising their right to parental leave.[243] The level of the specific protection against detriment or dismissal on grounds of exercising the right to parental leave will depend on the national legislator's willingness to legislate in this area. Various constraints and individual preferences play an important role in choices which are made by working parents.[244] The employment rights detriments associated with the taking of the leave may render the leave to be taken by parents (mothers) not out of their personal choice but the necessity when other alternatives are not available. The Directive only requires that Member States introduce the basic level of protection against dismissal which covers the duration of three months. Although Member States can provide for a longer duration of the leave, the duration of the legislative protection from dismissal or detriment does not have to cover the full duration of the national leave entitlement if it exceeds the minimum duration of the leave set out in the Directive. This enables national legislators to provide workers with entitlements to the long duration of parental

[241] Articles 2(3), 2(6), and 4(2) Social Protocol.
[242] J. Walgrave (1995) op.cit.
[243] Appendix, Table 2.
[244] R. Crompton and C. Lyonette (2008) op. cit., pp. 213–234.

leave and the protection from dismissal which is limited to the period of three months' set out in the Directive.

The Directive is also silent as to the duration of the protection from dismissal on grounds of the taking of the leave in relation to parents who have been allowed to return to work at the end of the leave. The lack of the specific provision in the Directive extending the protection from dismissal to the period after the expiry of parental leave where parents have been allowed return to work constitutes a major deficiency of the Directive, which can disadvantage parents (in particular women) in the labour market. In the absence of the national legislative protection from dismissal, the workers who have been allowed to return to work after the expiry of the leave are not protected by the Directive, and can be dismissed from work following the standard procedures applicable to all workers. The protection from dismissal in Clause 2(4) of the Directive merely covers the period from when the application for parental leave is made until the day on which the parent returns to work. It does not require Member States to ensure the existence of the legislative protection from any detriment associated with the right to parental leave for parents who qualify for parental leave but have not requested it yet.

The lack of protection from detriment or dismissal prior to the request for parental leave is made constitutes a major deficiency of the Directive, which in the absence of more stringent national regulations may enable employers to terminate contracts of employment with parents who are likely to take parental leave or parents who may be discouraged from applying for the leave. Consequently, any additional level of protection at the national level will largely depend on whether the importance of the right to parental leave and reconciliation policies is fully recognised by the national legislators. The lack of adequate protection from dismissal or detriments associated with parental leave is likely to influence how caring responsibilities are allocated within a family. Thus, work-family responsibilities will not be allocated in accordance with parents' (mothers') individual preferences but so as to avoid employment security risks associated with the leave.

Clause 2(6) of the Directive provides that national measures would need to be introduced in order to ensure that rights acquired or in the process of being acquired by the worker on the date on which parental leave begins are maintained as they stand until the end of parental leave.[245] Those acquired rights shall apply at the end of parental leave subject to any changes arising from national law, collective agreements or practice. This provision is intended to prevent the loss or reduction of employment rights already acquired, or in the process of being acquired to which the worker is entitled at the start of the leave; and to ensure that at the end of the leave the worker finds himself/herself in the same situation as prior to the leave.[246] During the negotiation ETUC insisted that the worker's rights must be maintained during the period of the leave, including aspects such as promotion, length of service and access to in-house training, and trade union rights. The UNICE insisted that worker's acquired rights, or in the process of being acquired should be maintained only at the end of the leave.[247] The compromise in favour of employers was reached, which clearly reflects the argument of UNICE that the concluded agreement should respect subsidiarity and refrain from imposing an excessive burden on employers.

According to Clause 2(7) of the Directive the status of employment contract or employment relationship is to be defined by Member States and/or management and labour but the working relationship between the worker and his/her employer is to be maintained during the period of the leave.[248] The status of the employment relationship during the period of parental leave is not protected by provisions of the Directive but is subject to national legislation. The Directive does not contain any provisions in relation to the rights under the employment contract of those workers on parental leave who may decide to return to work before the end of the leave. Clause 2(8) of the Directive provides that all matters related to social security are to be regulated at the national level and that national law must

[245] Clause 2(6) Council Directive 96/34/EC on the Framework Agreement on parental leave can be relied upon by individuals before national courts see Case C-537/07 *Evangelina Gómez-Limón Sánchez-Camacho v. Instituto Nacional del la Seguridad Social (INNS), Tesoreria General dle la Seguridad Social (TGSS), Alcapo SA,* para. 1.
[246] Ibid. para. 39 and C-116/08 *Meerts v Proost NV*, [2009] All ER (D) 259 (Oct) para. 39.
[247] Appendix, Table 4.2.
[248] Case C-116/06 *Sari Kiiski v Tampereen Kaupunki*, ECR [2007] 00000 para. 32.

ensure the continuity of the social entitlements during the period of parental leave. The wording of Clause 2(8) indicates that as such it does not provide working parents on parental leave with the right to the continuity of their entitlements under various social security schemes, but it merely recommends that national legislators take into account the importance of the continuity of those entitlements, in particular to health care.

The Case of *Lewen v. Denda*,[249] where CoJ restrictively interpreted the scope of the Directive revealed the weaknesses of the general provisions of the Directive, which financially disadvantage those working parents who exercise their right to parental leave.[250] In this case, the contested matter was the right to payment of a Christmas bonus whilst on parental leave.[251] Considering its previous case law,[252] the CoJ concluded that a Christmas bonus is to be considered as payment according to Article 119 EEC (now 157 TFEU) even if it is paid on a voluntarily basis and as an incentive for future performance.[253] The voluntary payment of a bonus at Christmas by an employer to a worker during parental leave neither falls within the scope of Article 11(2) of the *Pregnant Workers Directive* (the PWD) which deals with maternity leave nor Clause 2(6) of the *Parental Leave Directive* because the bonus does not constitute a right acquired or in the process of being acquired by the worker on the date on which parental leave began since it is paid voluntarily after the start of the leave.[254]

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[249] Case C-333/97 *Lewen v. Denda* [2000] *All ER* (EC) 928.

[250] E. Caracciolo Di Torella (2000) `Childcare, Employment and Equality in the European Community: First (false) Steps of the Court`, *European Law Review* 2000, 25(3)310-316 and E. Ellis (2000) `The Recent Jurisprudence of the Court of Justice in the Field of Sex Equality`, *Common Market Law Review*, 37:1403-1426 at pp. 1421-1422.

[251] Mrs Lewen did not receive the bonus because she was on parental leave and her employer claimed that it was a voluntarily payment providing incentive for future work and loyalty to those employees who are in active employment at the time of the payment. Issues referred to the Court of Justice were: whether the contested bonus constituted payment within Article 119 EEC (now 157 TFEU) or Article 11(2) Pregnant Workers Directive, whether excluding a woman on parental leave from the right to the bonus without taking into account the work performed during the year in which it was paid was in breach of those articles and Clause 2(6) of Council Directive 96/34/EC on the Framework Agreement on parental leave and whether when granting the bonus the Employer is allowed to take into account periods of parental leave and maternity leave by way of prorate reduction.

[252] Case 80/70 *Gabrielle Defrenne v Belgian State* [1971] ECR 445, para.6, Case 12/81 *Eileen Garland v British Rail Engineering Limited* [1982] ECR 359, para.10 and Case C-262/88 *Douglas Harvey Barber v Guardian Royal Exchange Assurance Group* [1990] ECR I-1889, para.20.

[253] Case C-333/97 *Lewen v. Denda* at paras. 19, 20 and 21.

[254] Ibid. paras.30-32.

By stating that Christmas bonus was not the right which is provided for by Clause 2(6) of the Directive, CoJ has significantly weakened the legislative importance of this provision and effectively proved the limited level of protection which is provided by the Directive to all parents exercising their right to parental leave. The CoJ further stated that it was up to national courts to decide if the bonus is retroactive or not. Should the national court consider the bonus to be retroactive pay, not paying for the work actually done by Ms Lewen would amount to indirect sex discrimination in breach of Article 119 EEC (now 157 TFEU) as more women than men take parental leave. The refusal to pay the bonus to a woman on parental leave would not constitute discrimination if the national court did not classify the bonus as retroactive pay for the work performed in the course of the year but as an incentive for future productivity and loyalty.[255] There is no legal basis in Article 157 TFEU, Article 11(2) of the *Pregnant Workers Directive* or Clause 2(6) of the Directive on parental leave forcing an employer to pay such a bonus to a woman on parental leave where the bonus is subject to the condition that the worker must be in active employment when it is awarded.[256] Making the payment of a bonus subject to the condition that an employee must be in an active employment at the time when it is paid may deprive workers from the right to a bonus and influence have work-family choices are made by deterring workers with higher wage (often men) from taking parental leave. Considering that a Christmas bonus often constitutes a significant portion of a worker's annual wage that is indispensable to sustain the needs of a family, very few working parents will risk loosing their entitlement to the bonus.

Working parents could further be penalised for taking the leave because when calculating the amount of a bonus an employer is not prevented by the above provisions of EU law from reducing the amount of the bonus by the periods spent on parental leave.[257] This means that working parents whilst on the unpaid leave can further be penalised for the taking of the leave by their bonuses being reduced. It is disappointing that CoJ did not consider the entitlement to a Christmas bonus in the context of modern families and it failed to recognise the

[255] *Lewen* op. cit., paras. 27-29.
[256] Ibid. paras.38-44.
[257] Ibid. paras.45-50.

impact of childcare responsibilities on paid employment in the light of enabling both working parents to reconcile work and family responsibilities. The narrow interpretation of the Directive by CoJ in this case, indicates the reluctance of CoJ towards recognizing the importance of parenthood and achieving the needed reconciliation.

The lack of adequate legislative protection under the Directive may force working parents exercising their right to parental leave to seek protection under the EU equality laws rather than the Directive. This became evident in the case of *Krüger v. Kreiskrankenhous Edersberg*[258] where the entitlement to a Christmas bonus whilst on parental leave was not considered in the light of the Directive but on the basis of Article 119 EEC (now 157 TFEU). The disadvantage of enforcing parental leave rights under EU equality laws is that very few men will be able to establish indirect discrimination as the leave is predominately taken by women. The existence of adequate provisions on pay during parental leave in the Directive would ensure the appropriate level of protection at the national level, and would remove the necessity of relying on EU equality laws on issues related to parental leave. The lack of adequate legislative protection in the Directive may derive from the lack of the EU recognition of the importance of the childcare responsibilities, which was manifested by CoJ in *Gruber v. Silhouette International Schmied GmbH & Co KG.*[259] In this case the entitlement to employment termination payment of the Austrian worker who was forced to resign from her employment due to the lack of childcare facilities was reduced because the resignation was not for an important reason.[260]

This indicates that childcare responsibilities in contrast to the reasons related to working conditions are not to be regarded as important reasons for calculating the payments for termination of employment, and treated as resigning for reasons of personal convenience where various reductions apply. It is not in breach of Article

[258] Case C-218/97 *Krüger v. Kreiskrankenhous Edersberg.*
[259] Case C-249/97 *Gruber v. Silhouette International Schmied GmbH & Co KG.* [1999] All ER (D) 1013 decided on 14 September 1999.
[260] Ibid. paras. 27-35.

119 EEC (now 157 TFEU) for the national law to consider the lack of childcare facilities as not sufficiently important reason for providing parents forced to resign from employment in order to look after their children with the full payment for termination of employment. This decision revealed that despite the EU recognition of the importance of the reconciliation (see Chapter 1) CoJ failed to recognise the importance of childcare responsibilities, which often prevent working parents from achieving the reconciliation. The lack of this recognition may be attributed to what McGlyn[261] identified as deriving from CoJ's traditional perception of a family and family responsibilities where family life and employment cannot be reconciled. Although this appears to contradict the Directive where explicit references to the importance of parental leave in reconciliation have been made, the general provisions of the Directive may be of no assistance to workers like Ms Gruber because this area is regulated not by the Directive but the national laws.

The general provision in Clause 2(8) of the Directive that delegates to Member States the task of ensuring the existence of the entitlements to social security cover during the period of parental leave may create uncertainty among national legislators as to which entitlements under various schemes must be provided for. This is evidenced in the references for preliminary ruling which were made to CoJ by Spanish courts in *Ana Isabel Lopez Gil v. Instituto Nacional de Empleo (Inem)*[262]and *Emilia Flores Fanega v. Instituto Nacional de law Seguridad Social (INSS), Tesoresria General de Seguridad Social (TGSS) and Bolumburu* S.A[263] These references indicate that working parents who take parental leave in the form of reduced working hours and make lower contributions to the social security scheme during the leave could lose their entitlement to the full incapacity pension

[261] C. McGlynn (2000) op. cit., pp.28-44.
[262] Case C-309/03 *Ana Isabel Lopez Gil v. Instituto Nacional de Empleo (Inem)* OJ 203/C226/9. The so far unresolved matter concerned the reduced contributions for unemployed benefit resulting from the right to work reduced hours and lower salary which is paid to those exercising their right to parental leave. In absence of specific national measures offsetting lower contributions to the social security scheme, it would cause the worker's unemployment benefit to be reduced for working parents who exercised their right to parental leave. The question for Court of Justice was whether Directive 96/34/EC required Member States to adopt social security legislation offsetting the lower unemployment benefit contributions made by parents exercising their right to parental leave and thereby preserving their right to the full unemployment benefit.
[263] Case C-452/08 *Tesoresria General de Seguridad Social (TGSS) and Bolumburu* S.A OJ 2009/C6/23.

and other benefits. The matters surrounding continuity of the entitlement to social security schemes for parents who exercise their right to parental leave in the form of reduced working were recently addressed by the CoJ in *Evangelina Gómez-Limón Sánchez-Camacho v. Instituto Nacional del la Seguridad Social (INNS), Tesoreria General dle la Seguridad Social (TGSS), Alcampo SA*[264] In *Gomez* the referral covered similar issue to that raised in *Ana Isabel Lopez Gil v. Instituto Nacional de Empleo (Inem)* but in the context of the compatibility of the Spanish legislation with Clause 2(6) and (8) of the Directive. The contested matter concerned the reduction in the amount of invalidity pension that is paid because of the reduced contributions which are made by parents exercising their right to parental leave in the form of part-time or reduced working hours and whether this reduction is not in breach of *the Equal Treatment Directive 79/7* (the ETD).

The non-binding character of Clause 2(6) and (8) of the Directive (need to be interpreted pursuant to Clause 2(7)) enables national legislators (e.g. Spain) to legitimately penalise working parents exercising their right to parental leave by excluding them from some or all social security benefits. This deficiency of the Directive has been reaffirmed in the opinion of Advocate General Sharpston[265] and reinforced by the subsequent ruling of the CoJ.[266] The CoJ ruled that Clause 2(6) of the Directive merely covers the `rights acquired or in the process of being acquired` and it does not cover the new rights that can be acquired after the commencement of parental leave e.g. matters of social security rights such as the contested by Claimant invalidity pension because it is subject to Clause 2(8) of the Directive, which leaves all social security matters to the discretion of Member States/management and labour. The objective of the Directive was to ensure the availability of parental leave across all Member States and not to regulate matters of social security.

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[264] Case C-537/07 *Evangelina Gómez-Limón Sánchez-Camacho v. Instituto Nacional del la Seguridad Social (INNS), Tesoreria General dle la Seguridad Social (TGSS), Alcampo SA.*

[265] Opinion of Advocate General Sharpston delivered on 4 December 2008 Case C-537/07 *Evangelina Gómez-Limón Sánchez-Camacho v. Instituto Nacional del la Seguridad Social* (INNS), *Tesoreria General dle la Seguridad Social* (TGSS) and *Alcampo* SA, paras. 27-35.

[266] Case C-537/07 *Evangelina Gómez-Limón Sánchez-Camacho v. Instituto Nacional del la Seguridad Social (INNS), Tesoreria General dle la Seguridad Social (TGSS) and Alcampo SA*, 16/07/2009, [2009] All ER (D) 2008 (Aug).

Although Clause 2(6) of the Directive implies the protection of acquired rights and continuity of the social security rights, it does not require Member States to guarantee the right to acquire new rights whilst on parental leave. Consequently, Clauses 2(6) and (8) do not prevent the taking into account, in the calculation of an employee's permanent invalidity pension the period of part-time parental leave during, which lower contributions were made and assessing pension entitlements in proportion to the salary received.[267] Furthermore, Clause 2(8) of the Directive does not oblige Member States to legislate on all matters of social security covering the period of parental leave. It merely recommends that Member States consider the importance of the continuity of the entitlements to social security cover for those on parental leave. Clause 2(8) of the Directive does not require Member States to provide employees with continuing social benefits whilst on parental leave and it is not vertically directly effective.[268] The application of Clause 2(6) of the Directive to matters of social security would remove the existing disadvantages associated with the taking of the leave and force national legislators to provide working parents exercising their right to parental leave with the continuous social security protection.

Another, issue which was raised in the discussed case concerns the compatibility of the Spanish legislation, which provides for the reductions in invalidity pensions and accrual of social security entitlements during the period of the leave with the provisions on direct or indirect discrimination of Directive 79/7/EEC.[269] The opinion of the Advocate General[270] indicates that since the consequences of exercising the right to parental leave are the same for men and women Spanish law therefore does not directly discriminate on grounds of sex. In Spain parental leave is mainly taken by mothers and the above reductions mainly affect women, therefore this national law could indirectly discriminate against women and be in breach of the EU equality laws. In order to establish the existence of indirect

[267] Ibid. paras. 32-44.
[268] Ibid. paras. 46-51.
[269] OJ 1979, L6, p.24; EE 05/02, p.174. (social security and equal treatment).
[270] Opinion of Advocate General Sharpston delivered on 4 December 2008 op. cit., at paras. 37-47.

discrimination, the case law[271] requires the existence of the national provision that although worded in neutral terms, disadvantages a higher percentage of women than men, and the treatment cannot be justified by objective factors unrelated to any discrimination on grounds of sex. In determining whether Mrs Gomez-Limon was indirectly discriminated against, the Advocate General Sharpston relied on the ruling of CoJ in the case of *Grau-Hupka.*[272] In line with this ruling Advocate General Sharpston concluded[273] that since the EU law on equal treatment in matters of social security does not require Member States to take into account in calculating the statutory pension years spent bringing up children, therefore the same approach should be taken in relation to invalidity pensions. This opinion acknowledges that the taking of parental leave should be encouraged by not reducing entitlements to social security benefits for those on parental leave, and allowing employees on the leave to acquire the rights as if they were at work would improve the substantive equality between the sexes.

The CoJ held that this does not amount to indirect sex discrimination because an employee taking parental leave in the form of part-time working is in a specific situation, which cannot be compared to that of another full-time employee. In reaching this conclusion the CoJ[274] took into account the established case-law on sex discrimination[275] where discrimination was defined as consisting in the application of different rules to comparable situations or the same rules to different situations. Thus, as long as both male and female employees have the entitlement to parental leave there is no indirect sex discrimination if the same rule is applied in relation to both female and male employees. Additionally, the

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[271] Case C-226/98 *Jørgensen v Foreningen af Speciallæger and Sygesikringens Forhandlingsudvalg.*[2000] ECR I-2447, para. 29; Case C-25/02 *Rinke v Arztekammer Hamburg* [2003] ECR I-8349, para. 33; and Case C-313/02 *Nicole Wippel v Peek & Cloppenburg GmbH & Co. KG* [2004] ECR I-9483, para. 43.

[272] Case C-297/93 *Grau-Hupka v Stadtgemeinde Bremen* [1994] ECR I-5535, paras. 27-29. The Claimant argued that more women than men are absent from the labour market due to bringing up children and that reductions in retirement pension amounted to indirect sex discrimination. The Court of Justice held that the reduction in the retirement pension did not amount to indirect sex discrimination in breach of *Directive 79/7*, because this Directive does not require Member States to grant advantages in respect to pensions to persons who have brought up children or interrupted their employment in order to bring up children.

[273] Opinion of Advocate General Sharpston delivered on 4 December 2008 op. cit., paras. 41-56.

[274] Ibid. paras. 52-63.

[275] C-411/96 *Boyle v. Equal Opportunities Commission IRL 717,* para. 39 and Case C-333/97 *Lewen v. Denda* [2000] All ER (EC) 928, para. 36.

reduced social benefits resulting from taking parental leave do not breach the *Directive 79/7* that does not oblige Member States to provide social security advantages to individuals who have brought up their children. Article 7(1)(b) of that Directive enables Member States to exclude from its scope the acquiring of entitlements to social security benefits under the national statutory schemes following periods of interruption of employment deriving from the bringing up of children.

This ruling is of major importance as it is the first ruling of the CoJ on the highly contested matters covered by Clause 2(6) and (8) of the PLD. Although, the objective of the Directive refers to enabling working parents to reconcile work and family responsibilities by providing them with the right to parental leave, this ruling appears to have completely ignored this reconciliation objective and set a precedent for other cases reaffirming the legitimacy of financially disadvantaging working parents who use the leave in order achieve the needed reconciliation.

Considering the existing case law and the above discussed opinion of the Advocate General Sharpston, the CoJ's ruling in *Gómez* is very unlikely to expand the rights to social security of EU working parents exercising their right to parental leave as the provisions of the Directive do not impose such an obligation on Member States. It is very likely that the CoJ's ruling in *Gómez* will be applied to the recent reference for preliminary ruling of 16 October 2008 in the case of *Emilia Flores Fanega v. Instituto Nacional de law Seguridad Social (INSS), Tesoresria General de Seguridad Social (TGSS) and Bolumburu S.A.*[276] Thus, working parents who take parental leave in the form of reduced working hours and make lower contributions to the social security scheme during parental leave shall continue loosing their entitlement to the full incapacity pension. As parents' reconciliation choices are made in the context of detriments associated with the taking of the leave this will influence how caring responsibilities are allocated within a family.

[276] Case C-452/08 *Emilia Flores Fanega v. Instituto Nacional de law Seguridad Social (INSS), Tesoresria General de Seguridad Social (TGSS) and Bolumburu S.A.* OJ 2009/C6/23.

Although in *Gomez*[277] the CoJ ruled that Clause 2(6) and (7) of the Directive does not guarantee the full entitlement to the social security benefits to the parents who have taken parental leave, it also reaffirmed that Clause 2(6) of the Directive aims at preventing the loss or reduction in rights derived from an employment relationship (acquired or being acquired) to which the worker is entitled at the start/end of the leave and that at the end of the leave the worker finds himself/herself in the same situation (with regard to contractual rights) in which the worker was before the leave. This was further reaffirmed by the CoJ in the case of *Meerts v Proost NV*[278]. Ms Meerts challenged the amount of compensation that she was awarded for her dismissal arguing that the compensation should have been calculated on the basis of the full-time salary rather than on the basis of the reduced working hours taken in lieu of parental leave (Article 39)1) of the *Royal Degree* provides that the compensation should be assessed on the basis of the current salary). The Belgium government argued that there was no discrimination as at the time of the dismissal she was a part-time worker and therefore was treated in the same way as other part-time workers would have been. This argument was rejected by the CoJ who sated that although a part-time worker and a full-time worker do not work the same number of hours, this does not mean that these two workers are in different situations in relation to their initial contracts of employment.

The key factor which must be taken into consideration when assessing the amount of compensation for the dismissal is how the employment relationship is defined in the initial contract of employment and not the reduced working hours when the worker exercised his/her right to parental leave. It was further pointed out by the CoJ that under the national legislation of Belgium the full-time worker whilst on part-time parental leave continues acquiring years of service in the company, which is considered when calculating the statutory period of notice in the event of dismissal in the same way as if there had been no reduction in the working hours. Consequently, the CoJ ruled[279] that Clause 2(6) and (7) of the Directive prevents

[277] Case C-537/07 Evangelina Gómez-Limón Sánchez-Camacho v. Instituto Nacional del la Seguridad Social (INNS), Tesoreria General dle la Seguridad Social (TGSS) and Alcampo SA, 16/07/2009, [2009] All ER (D) 2008 (Aug) para. 39.
[278] C-116/08 *Meerts v Proost NV*, [2009] All ER (D) 259 (Oct) para. 39.
[279] Ibd. paras. 48-56.

the employer who unilaterally terminates a worker's full-time employment contract of indefinite duration, without urgent reason or without complying with the notice requirements from calculating the amount of compensation for the dismissal on the basis of the reduced income (at the time of dismissal) deriving from taking part-time parental leave.

This ruling is of vital importance to working parents as it has clarified the application of Clause 2(6) and (7) of the Directive to the employment contractual rights of those who exercise their right to parental leave in the form of reduced hours or part-time working. Thus, the rights acquired or in the process of being acquired under Clause 2(6) cover all the right and benefits both in cash and in kind which derive directly or indirectly from the employment relationship, which the worker is entitled to on the day when parental leave commences.[280] It is reassuring for the working parents that the CoJ clearly recognised[281] that allowing the employment contractual rights to be reduced because of taking parental leave could discourage workers from taking the leave; could encourage employers to dismiss workers who are on the leave rather than other workers and would effectively contradict the objective of helping working parents to reconcile work and family responsibilities set out in the Directive. In line with the above reasoning of CoJ, more recently Clause 2(6) of the Directive was held to cover the returning worker's right to paid annual leave accumulated prior to the taking of parental leave.[282]

3.2.6 No Absolute Right to Return to the Same Job

Another key provision is contained in Clause 2(5) of the Directive whereby Member States are to ensure that at the end of the leave parents have the right to return to the same job or equivalent. This provision despite granting some assurance it does not provide workers with an absolute right to return to the same job that they had performed before taking parental leave. During the negotiations ETUC insisted that the right to return to the held work post or an equivalent work

[280] Ibid. para. 49.
[281] Ibid. para. 47.
[282] Case C-486/08 *Zentralbetriebsrat der Landeskrankenhäuser Tirols v. Land Tirol* (22 April 2010) para. 56.

post needed to be legally guaranteed. The UNICE and CEEP maintained that the agreement should only guarantee worker's return to a post corresponding with the work contract.[283] The compromise was reached and it was added in Clause 2(5) of the Directive that in situations where it is not possible to return to the same work post, the worker maybe given an equivalent or similar job that is consistent with their employment contract or employment relationship. This provision like vast majority of other provisions of the Directive is very general and is subject to the detailed national laws. The Directive permits employers to offer returning workers other posts as long as they correspond with worker's individual work contract and it constitutes a significant deficiency of the Directive, which is going to influence parents' decisions as to how the right to the leave is used. The work corresponding with the worker's employment contract may be very different from the post held prior to taking of the leave as the returning parent could be offered additional training leading to gaining new qualifications and enabling the employer to require the work to perform significantly different work duties, which could still comply with his/her employment contract.

How work and family responsibilities are divided within a family is shaped by parents' unique individual identities[284]and their reconciliation choices are also influenced by legal frameworks.[285] The lack of the guaranteed right to return to the same work post constitutes a major deficiency of the Directive and may discourage working parents from taking parental leave as the employment risks associated with the leave may outweigh its benefits for reconciliation. The Directive fails to recognise the importance of enabling parents to make real reconciliation choices. It allows penalising parents who have taken the leave by preventing them from returning to their former jobs. Member States are neither obliged to provide workers with parental leave of the duration exceeding the minimum requirements of the Directive nor have to ensure the existence of the right to return to work reaching beyond the period duration of the leave set out in the Directive. In the absence of the national provisions ensuring the right to return

[283] Appendix, Table 2.2.
[284] E.B Silva and C. Smart (1999) *The 'new' family?,* London: Sage in in R. Crompton (2006) op. cit., p.13.
[285] R. Crompton (2006) op. cit., p. 13.

stretching beyond the period of three months', in Member States where longer national entitlements exist, parents (mainly mothers) who take parental leave of the duration longer than three months could forfeit their right to return to work. Hence, the effectiveness of the Directive as the reconciliation measure will depend on the extent to which national laws ensure employment security of the leave takers.

Despite providing for the limited right to return to work at the end of parental leave, the Directive is silent about the rights of those workers on parental leave who may wish or may be forced by the change in the individual circumstances to prematurely return to work. As the issues relating to the early return to work are not governed by the Directive but are left to be determined by the national policies, this may enable Member States not to allow parents to return to work prematurely. The lack of the right to an early return when the individual circumstances change significantly limits the flexibility of parental leave and restricts parents' reconciliation choices. Considering that the leave is unpaid, the lack of the right to an early return to work may prevent from returning back to work those parents who can no longer afford remain on the unpaid parental leave.

There could be circumstances where it would be undesirable for an employer to allow an early return to work, in particular when the employee is e.g. pregnant and where her return to work would impose financial burden on the employer in the form of the subsequent maternity allowance and the supplement paid by the employer. The issues surrounding the right to an early return from parental of a pregnant woman were explored in *Wiebke Bush v. Klinikum Neustadt GmbH & Co. Betriebs-KG.*[286] The general provisions of the Directive are silent about the rights of those who requested to return to work before the expiry of the leave and do not specify what information needs to be provided to an employer in the application for an early return back to work. This is to be regulated by national laws in compliance with the minimum requirements of the Directive. Since, Ms Busch was allowed to return to her previous job Clause 2(5) of the Directive was complied with. The refusal of the employer to pay her salary and the maternity allowance on

[286] Case C-320/01 *Wiebke Bush v. Klinikum Neustadt GmbH & Co. Betriebs-KG* [2003] ECR I-2041, Celex No. 601J0320.

the basis that she should have informed them of her condition before returning to work is not covered by the provisions of the Directive. The failure of the Directive to provide for detailed provisions covering all aspects of parental leave forced Ms Busch to rely on the non-discrimination principles contained in *Equal Treatment Directive* 76/207/EEC (ETD).[287] On the basis of Article 2(1) ETD the CoJ held that the employee who with the consent of the employer was allowed to return to work before the end of parental leave does not have to inform the employer about her pregnancy and that the employer could not take the employee's pregnancy into consideration when refusing to reinstate her before the expiry of her parental leave.[288] The necessity of reliance on the EU equality legislation in order to enforce the right to an early return from parental leave indicates the ineffectiveness of *Parental Leave Directive* in providing parents with adequate rights enabling them return to work when their individual circumstances change.

3.2.7 The Right to Leave for Urgent Family Reasons Neglects Reconciliation Needs of Workers with Adult Dependants.

Clause 3(1) of the Directive requires Member States to provide workers with an entitlement to time off work on grounds of force majeure for urgent family reasons in cases of sickness or accident making the immediate presence of the work indispensable. In contrast with the right to parental leave set out in Clause 2(1), Clause 3(1) of the Directive does not provide workers with the right to leave for urgent family reasons, as it merely requires Member States to provide workers with the entitlement to such leave. Thus, Member States may merely provide workers with the right to request the leave which in practice may not be granted at all or when it is most needed by workers. The lack of the unqualified right to the leave in the Directive significantly limits the effectiveness of this leave provision in enabling workers to balance the demands of work and caring responsibilities for older children and adult dependants as the requested leave may not have to be granted when it is needed by the worker. Consequently, the lack of the unqualified right to time off work when an emergency occurs may put at risk employment security when in the absence of the employer's permission to take the

[287] As amended by Council Directive 2002/73/EC and consolidating Directive 2006/54.
[288] Case C-320/01 *Wiebke Bush v. Klinikum Neustadt GmbH & Co. Betriebs-KG* [2003] ECR I-2041, Celex No. 601J0320, paras. 38-51.

time off the time off work needs to be taken in order to respond to the arising matters involving dependants. This indicates a major weakness of the Directive in providing workers with caring responsibilities for dependants with effective reconciliation rights, as the lack of an absolute right to leave for urgent family reasons restricts workers' work-family choices.

Originally, it was intended that the Directive should only cover parental leave but its scope was subsequently extended to cover the leave for urgent family reasons.[289] The provision on leave for urgent family reasons was a concession to the demands of ETUC. The compromise between the representatives of employees and employers was reached on the basis that the wording `force majeure`, `urgent family reasons` and `making the immediate presence of the worker indispensable` had to become an integral part of the provision on leave for urgent family reasons. Agreeing on the wording made this text acceptable to the employer's delegation that wanted to ensure that the right to leave for urgent family reasons would not be abused to the detriment of employers.[290] The novelty of this entitlement derives from the fact that prior to the introduction of the Directive there had been no EU right to time off work in order to respond to urgent matters involving family members. The existence of the entitlement in Clause 3 of the Directive is of a vital importance for reconciliation as it can provide parents with the additional time off work in order to respond to various family emergencies. Above all, the entitlement to the leave is not subject to any qualifying employment requirement or age restrictions. This significantly improves the availability of the leave to the workers with responsibilities for family members (particularly adults) who do not qualify for parental leave and in the absence of the entitlement to the leave for urgent family reasons would not have the right to time off work to respond to the emergencies involving older children and adult dependants.

[289] The scope of the framework agreement was extended to cover leave for urgent family reasons in order to compromise with the ETUC, which insisted that workers with caring responsibilities for elderly family members should also be provided with parental leave. The right to parental leave was not extended to cover the elderly because this was rejected by UNICE, which had no mandate to agree to expand the scope of parental leave to include elderly family members.

[290] Response to questionnaire of 06/06/2006 from the senior negotiator representing in negotiations the Confederation of Netherlands Industry and Employers VNO-NCW (member of UNICE) Appendix, Figure 2, pp. 1-4.

Caracciolo di Torella and Masselot[291] recognise the importance of the right to the leave as deriving from that it acknowledges the needs of parents with young families and family responsibilities, which extend beyond the periods of maternity, paternity and parental leave. In contrast with the right to parental leave, the entitlement to the leave for urgent family reasons is not restricted to parents but is available to all workers with family responsibilities. The focus of this leave period is on responding to the emergencies involving family members and not only children. Consequently, this is the only leave entitlement (EU) which can be taken by workers in relation to adult family members. The importance of this leave entitlement for reconciliation derives from its inclusive character and the focus on the needs of workers rather than the needs of parents.

The definition of leave on grounds of force majeure for urgent family reasons is not provided in the text of the Directive. The Directive in Clause 3(1) indicates that the leave should exclusively be granted because of urgent family reasons in cases of sickness or accident where the immediate presence of the worker is indispensable. The wording of this provision that insists on the necessity of immediate presence of a worker was considered as a crucial factor by UNICE, which insisted that this leave entitlement should not impose an additional burden on businesses.[292] However, it is not clearly stated in the Directive whether the leave applies exclusively to cases of sickness and accidents or it can cover other situations where the immediate presence of the worker is indispensable. As the task of introducing specific national regulations providing for the entitlement to the leave is left to Member States, the national legislators can introduce more stringent national leave entitlements extending the availability of the leave beyond the cases of sickness or accidents outlined in the Directive.

The focus of the leave as outlined in the Directive is on the indispensability of the immediate presence of the worker when responding to the emergency involving the family member. The criterion of the immediate indispensability of the worker's presence as a precondition for the right to the leave to occur indicates that the

[291] E. Caracciolo di Torella and A. Masselot (2010) op. cit., pp.81-82.
[292] Response to questionnaire of 30/05/2006 from the most senior official at UNICE at the time of the adoption of the Directive on parental leave Appendix, Figure 1, pp. 1-4.

leave is intended to be used merely to respond to the emergencies related to sickness or accidents when there will be no other family member available to respond to the arising emergency. The emphasis on indispensability and immediacy of the worker's presence indicates legislator's traditional perception of a family and the assumption that the relatives or other family members would be available to help when an emergency occurs. This does not reflect the needs of the contemporary families where often the help of relatives is unavailable and where the single parent families are left struggling to reconcile work and family responsibilities where matters involving dependants arise. Restricting the availability of the leave only to matters where the immediate presence of the worker is indispensable may deprive workers of the right to the leave in order to care for terminally ill or disabled adult dependants.

Although the wording of the Directive states that the leave applies to the situations involving the dependants when the immediate presence of the worker is indispensable, it does not refer to the leave as being available only to deal with unforeseen circumstances involving the dependants. This would indicate that the leave should be made available both to deal with the unforeseen and foreseen emergencies involving the dependants. Since, the Directive limits the availability of the leave to cases of sickness or accidents the indication is that the leave would primarily be available to deal with the unforeseen matters where the immediate of presence of the worker would be indispensable.

The deficiency of the right to emergency leave in the Directive can be observed in *Coleman v. Attridge Law*[293] where a mother of a disabled child was unable to take time off work in order to care for that child, she was forced to resign from work and needed to base her claim on the EU equality legislation[294] rather than the Directive on parental leave. Being the primary carer for her son, Ms Coleman was able to rely on Articles 1 and 1 of the Directive 2000/78. Although the ruling of CoJ reaffirmed that the Directive 2000/78 prohibited direct discrimination on grounds of disability even when the person who is discriminated against is not the disabled

[293] Case C-303/06 *Coleman v. Attridge Law* [2008] ECR I-5603.
[294] Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation OJ [2000] L303/16.

person, it also indicates how restrictive and ineffective the entitlement to the leave for urgent family reasons is in enabling workers to reconcile work and caring responsibilities for the dependants. As the Directive on parental leave does not provide for an effective remedy to workers with caring responsibilities for family members they may be forced to rely on the EU equality legislation.

The conditions in relation to access and detailed rules on how the leave is to be granted, entitlement and its annual duration are subject to national laws.[295] The Directive in Clause 4(1) enables Member States to apply or introduce more favourable provisions than those set out in the Directive but no particular areas in which more legislative protection should be granted were outlined by Social Partners in the text of the framework agreement. Member States are also reminded that the implementation of the Directive should not result in reducing the general level of protection given to workers in the areas covered by its provisions.[296] Member States and/or management and labour can develop different legislative, regulatory or contractual provisions, in the light of changing circumstances on condition that the national measures comply with the minimum requirements set out in the Directive. In Clause 4(2), the Directive provides an example to that effect indicating that Member States have the freedom to make the leave an individual, non-transferable right which could not be shared between parents. The lack of the requirement in the Directive that each worker should be provided with the individual, non-transferable entitlement to the leave may further reinforce inequalities in the distribution of caring responsibilities between female and male workers as the family entitlement to the leave would be primarily used my women.

The Directive does not contain any specific provisions in relation to the application for the leave and permits Member States to introduce specific national measures to this effect. The general nature of its provisions and the emphasis on the role of Member States in implementing the provisions of the Directive reflect the desire of UNICE to ensure that the concluded framework agreement would reflect the

[295] Clause 3(2) Council Directive 96/34/EC on the Framework Agreement on parental leave.
[296] Clause 4(2) Council Directive 96/34/EC on the Framework Agreement on parental leave.

principle of subsidiarity.[297] The Directive does not clearly define the duration of the leave and therefore it is left to be defined by Member States. Clause 3(1) of the Directive places emphasis on the necessity of the immediate presence of the worker as a condition for granting the leave which may imply a very short duration of the leave. This implies that the duration of the leave should only cater for the immediate presence of the worker. The criteria for assessing the necessity of immediate presence of a worker are not provided in the Directive. Not providing the clear criteria for assessing the necessity of worker's immediate presence at home may result in the situation that under the national law, an employer could be given the power to assess if worker's immediate presence at home is indispensable or not. Considering that employers put the interests of the business before the interests of workers, this could effectively enable employers not to grant the leave when it is most needed by the applicants. This effectively would hamper the role of this leave period in facilitating the reconciliation and prevent workers from making genuine work-family choices.

The Directive does not specify the duration of the leave and enables Member States to adopt significantly different national laws regulating leave for urgent family reasons. This could foster further differences in the leave entitlements across Member States. The lack of harmonised duration of the leave could have significant implications for the rights of workers exercising their right to free movement within the EU. The Directive also does not require Member States to introduce national laws clearly specifying the duration of the leave. Should Member States, in implementing the Directive national measures decide not to specify the duration of the leave, this would allow employers to determine the appropriate duration of the leave in the given circumstances. Allowing employers to determine the length of the leave could significantly disadvantage workers in terms of the availability and duration of the leave. The lack of compliance with an employer's decision as to the duration of the leave and when the worker must return to work could result in a fair dismissal, should the worker fail to return to work on the day requested by the employer. Workers who frequently request and

[297] Response to questionnaire of 30/05/2006 from the most senior official at UNICE at the time of the adoption of the framework agreement on parental leave, Appendix, Figure 1, pp. 1-4.

take the leave could be considered as less valuable workers or even victimised because of their caring responsibilities.

According to Hardy and Adnett,[298] the entitlement to time off work on the grounds of *force majeure* of which the duration has not been specified by the Directive provides parents with the time off work in order to look after a child or to make arrangements for the good of the child. The indispensability of the worker's presence for the entitlement to the leave to be justified indicates that the leave is designed to enable workers to put into place the needed caring arrangements rather than personally providing the needed care. This significantly limits workers' reconciliation choices as despite an arising need to provide long-term care to older children or adult dependants no such right is guaranteed by the Directive. This deficiency is amplified by lack of other leave entitlement which could be taken in order to care for adult family members.

The right to remuneration whilst on leave is of paramount importance, as it ensures the stability in income and allows the worker to concentrate on the emergency involving family members, which needs to be responded to. The Directive, apart from providing qualifying workers with the entitlement to the leave, does not contain any specific provisions in relation to pay during the period of the leave. In contrast with the right to parental leave where the lack of the entitlement to pay may prevent parents from the taking of the leave, the taking of leave for urgent family reasons may not be influenced by the lack of pay because the nature of the leave and its purpose do not depend on worker's individual choice but the situations beyond his/her control. Reconciliation choices which are made by workers are made in a particular context of each family, and are influenced by constraints associated with the taking of the leave. The lack of the right to remuneration and the existing gender pay gap may render the leave to be taken mainly by women. Thus, absence of the right to paid leave financially punishes workers for being involved in the provision of care and effectively prevents female workers in particular from making genuine reconciliation choices. The Directive is also silent about the extent of the legislative protection from dismissal or

[298] S. Hardy and N. Adnett (2002) `The Parental Leave Directive: Towards a `Family-Friendly` Social Europe?`, *European Journal of Industrial Relations*, 8(2):157-172 at p.163.

detriments associated with the taking of the leave. As this area is to be regulated by Member States, in absence of the legislative commitment of national legislators to ensuring adequate level of protection to leave takers, workers could further be penalised for taking the leave. Consequently, workers reconciliation choices could further be restricted in Member States where the inadequate legislative protection from dismissal or detriments associated with the taking of the leave is provided.

The lack of the right to paid leave reaffirms that the Directive was introduced in the spirit of subsidiarity ensuring that no financial burden is imposed on businesses. The provisions of the Directive that are modelled on the lowest common denominator and the negotiations which led to its adoption indicate that economic reasons still prevail over the social benefits deriving from reconciliation policies. Despite the reconciliation rhetoric employers still do not recognise the value of parenthood and the benefits deriving from reconciliation policies. The Directive recognises that measures aiming at reconciliation should make the working environment more suited to the changing needs of society and should encourage men to take on more family responsibilities. Despite recognising the importance of the need to improve social policy requirements the emphasis in the Directive is on enhancing the competitiveness of the EU economy and avoiding imposing any constraints on the creation and development of small and medium-sized undertaking.[299]

3.2.8 The Directive Perpetuates Dominant Theories of Motherhood & Parenthood.

In Clause 1(1), the purpose of the Directive is defined as introducing minimum requirements on the leave periods with the aim of facilitating the reconciliation of parental and professional responsibilities for both working parents. The importance of the Directive in reconciliation derives from the fact that parental leave constitutes the only leave period which is addressed to both parents and not only to women.[300] Hardy and Adnett[301] argue that the aim of the Directive as

[299] Preamble to Council Directive 96/34/EC on the Framework Agreement on parental leave. paras. 6-12.
[300] Case C-519/03 *Commission of the European Communities v Grand Duchy of Luxembourg*, OJ C 35 of 07.02.2004.
[301] S. Hardy and N. Adnett (2002), op. cit., pp.162-163.

defined in Clause 1 effectively acknowledged that the goal of the EU social policy was not only to ensure the greater participation of men and women in employment that is crucial to long term economic success. It also brought to attention new issues concerning social justice in employment in relation to sharing parental responsibilities between working parents.

Although the aim of the Directive is clearly defined as helping working parents in reconciliation through the leave entitlements, the Directive itself neither define the concept of reconciliation nor parental or family responsibilities. The concept of reconciliation was addressed by the Commission in the consultation document, which triggered the negotiations on the Directive.[302] The introduction of the right to leave periods sought to address the imbalance in the distribution of caring responsibilities within a family and the necessity of relieving women (in particular) from unreasonable and conflicting demands in their working and family lives. The extent of reconciliation objective of the Directive and whether it aims at enabling both parents to make reconciliation choices must be interpreted in line with a

[302] European Commission (1995), `The First Consultation on the proposed measure for parental leave and leave for urgent family reasons`, Brussels: European Commission Archives, pp.1-5. As outlined by Commission it is intended to promote equal opportunities in employment. The Commission clearly saw that it was not possible to secure equality for working men and women without introducing comprehensive reconciliation policy for all workers. The reason for adopting the measure on parental leave and leave for urgent family reasons derived from the necessity of relieving women in particular from unreasonable and conflicting demands in their working and family lives. The Commission perceived reconciling thorough introducing greater flexibility in employment as being able to open up new employment opportunities for men and women (especially). The reconciliation could be achieved by introducing parental leave and leave for urgent family reasons and reducing working hours. The Commission identified the importance of reconciliation in the family context. Therefore, it argued that the policy of reconciliation was intended to uphold family relationship and responsibilities. Benefits for workers able to achieve greater harmony between their professional and family life were recognised as being beneficial for the whole family too. In particular, parental leave as a measure facilitating reconciliation was to enable men to take a greater role in the raising of children and the care for other family members where the need arises. Additionally, the consultation document emphasised that reconciliation is a family support measure that offers much to society generally and denotes public recognition of the value of personal relationship. In the context of training and education, reconciliation was perceived as being able to take the form of training leave or sabbaticals. This as the Commission asserted should be an important component of any scheme designed to raise the level of professional ability within the EU.

fundamental right to reconciliation in *the European Charter of Fundamental Rights*[303] (*Charter*). The Charter was not intended to be legally binding[304] but the provisions of the *Treaty of Lisbon 2007(ToL)*[305], have incorporated the provisions of the Charter into the EU Law.[306]

The right to reconcile work and family life is spelled out in Article 33 of the Charter which states:

"1. The family shall enjoy legal, economic and social protection.
2. 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."

Although, Article 33(1) which is based on Article 8 ECHR makes clear references to a family, it does not provide any additional explanation as to the meaning of the concept of the family. Article 7 of the Charter refers to the concept of a family life, but it fails to define the type of the family that it refers to.[307] The extent of the scope of the term family is crucial for reconciliation because the narrow definition of a family could reinforce the traditional concepts of the family and exclude from the reconciliation all other types of families.[308] The definition of the family needs therefore to be determined on the basis of the existing legislation and case law. However, the existing legislation does not provide a clear definition of the family which would reflect the changes in society.[309] Moebius and Szyszczak[310] argue that the pattern of Court's jurisprudence applied in the provisions concerning free movement of workers is based on the idea of a male worker and the male breadwinner family. The EU law concerning the free movement of workers seems to encourage family models, which allow men's mobility at the expense of the

[303] European Charter of Fundamental Rights, OJ [2000] C364/1 which came into force in 2000.
[304] European Charter of Fundamental Rights was referred to by Advocates General e.g. Case C-173/99 *R v Secretary of State for Trade and Industry, ex p BECTU,* [2001] ECR I-4881; the General Court e.g. T-177/01 *Jego-Quere v Commission* [2002] ECR II-2365; and Court of Justice e.g. C-540/03 *Parliament v Council* [2006] ECR I-5769; Case C-432/05 *Unibet*[2007] ECR I-2271 and C-415/05 P, *Kadi v Council of the European Union* (2008) 3 CMLR 41.
[305] Treaty of Lisbon 2007 came into force on 1st December 2009.
[306] Article 6(1) TEU.
[307] C. McGlynn (2001)` Families and the European Union Charter of Fundamental Rights: progressive change or entrenching the status quo?`, *European Law Review*, 26(6):582-598.
[308] For the comprehensive discussion see E. Caracciolo di Torella and A Masselot (2004) `Under construction: EU family law`, *European Law Review*, 29(1):32-51.
[309] Regulation 1612/60 on the free movement of workers within the Union, OJ[1968] L257/2 and Citizenship and Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ [2004] L229/35.
[310] I. Moebius and E. Szyszczak in Clare McGlynn (2001) op.cit., p.42

availability of a full-time wife.[311] Accordingly, in the areas of sex equality law, which influences directly the relationship between child rearing and employment, especially social security law, the Court's jurisprudence as Harvey and Shaw[312] point out legitimates the traditional division of labour inside the home.

According to McGlynn[313] the Court in *Hill*[314] reaffirmed its dominant ideology of motherhood expressed in *Hofmann*[315]. This ideology privileges a particular family model where a mother has a primary responsibility for childcare, and in which employment is incompatible with motherhood. The main difficulty with a dominant ideology derives from that it reproduces stereotypes and norms for men, women and the family, which may not reflect the constantly changing reality. In *Hill*, the Court assumes a static position concerning family responsibilities, and aims at adopting working conditions that could meet the reality. This, according to McGlynn[316] implies promotion of a workplace in which traditionally male modes of working continue apart from some new adaptations enabling women to meet their family commitments. The Court[317] further held that EU policy is to protect men's role in family life. Although, the Court seems to promote the notion of equal opportunities between men and women and their roles in family life, it also limits the definition of the family to that of the dominant ideology of motherhood. McGlynn[318] claims that this confirms the Court's traditional conception of the role of men as primary breadwinners and fathers who are not involved in daily childcare, which is seen as mother's responsibility.

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[311] Scheiwe, (1994) `EC law Unequal Treatment of the Family: The Case Law of the European Court of Justice on Rules Prohibiting Discrimination on Grounds of Sex and Nationality, 3 *Social and Legal Studies* 243 at p. 251

[312] Tamara Harvey and Jo Shaw (1998) `Women Work and Care: Women's Dual Role and Double Burden in EC Sex Equality Law`, *Journal of European Social Policy*, 8(1):43-61 at p.50.

[313] C. McGlynn, (2000) `Ideologies of Motherhood in European Community Sex Equality Law`, *European Law Journal*, 6:28-44 at pp.36-41

[314] Case C-243/95 *Hill and Stapleton v. The Revenue Commissioners and the Department of Finance* [1998].

[315] Case 184/83 *Hofmann v. Barmer Ersatzkasse*, [1984] ECR 3047.

[316] C. McGlynn (2000) op. cit., p.41

[317] *Hill* op. cit., n 79 para. 42.

[318] C. McGlynn (2000) op.cit., p.42.

James[319] observes that the recent decisions of the CoJ in *Sari Kiiski v Tampereen Kaupunki*[320] and *Sabine Mayr v.Backrei*[321] extended the legal rights of women and also reaffirmed the CoJ's traditional perception of the distribution of responsibilities within a family by associating all aspects of childcare with women. In *Mayer v. Backerei*[322] the issue of family life has been taken to the previously uncharted level when the Court ruled that the dismissal of the female worker because she was undergoing in vitro fertilisation amounted to direct discrimination on grounds of sex. This may indicate the willingness of the Court to extend the protection from discrimination on grounds of pregnancy to those who are not yet pregnant but are trying for a family.[323] In *Roca Alvarez v Sesa Start Espana*[324] the role of fathers in the provision of care for small children has been reaffirmed when the CoJ held that a father's denial of right to breastfeeding leave amounted to unlawful sex discrimination. This ruling is of crucial importance for reconciliation and choice as it challenges traditional stereotypes about the division of responsibilities within a family where the role of men in the provision of care was seen to be subsidiary to that of women.

The focus in Clause 1(1) of the Directive is merely on helping working parents in the reconciliation and not all workers with caring responsibilities. This indicates a significant deficiency of the Directive as a reconciliation measure because despite providing all workers with the right to the leave for urgent family reasons, the reconciliation principle in the Directive fails to recognise the necessity of assisting all workers in reconciliation. The lack of explicit recognition of reconciliation needs of workers with responsibilities for adult dependants indicates a failure of the EU legislator to recognise the importance of the provision of care for adult dependants. This deficiency of the reconciliation objective of the Directive is reinforced by Article 33(2) of the *Charter* which indicates that the right to reconciliation is limited to maternity and parental leave and it can only be enforced

[319] G. James (2009) op. cit., pp.65-66.
[320] Case C-116/06 *Kiiski v Tampereen Kaupunki*, Celex No. 606J0116, ECR [2007] 00000.
[321] *Sabine Mayr v.Backrei und Konditorei Gerhard Flockener OHG* [2008] IRLR 378.
[322] Case C-506/06 *Sabine Mayr v. Backerei und Konditorei Gerhard Flockner* [2008] ECR I-1017 at para. 50.
[323] E. Caracciolo di Torella and A. Masselot (2010) op. cit., pp.44-45.
[324] Case C-104/09 *Roca Alvarez v Sesa Start Espana ETT SA*.

by the natural or adoptive parents. Consequently, only parents of small children would have the right to reconciliation. Caracciolo di Torella and Masselot[325] observe that the narrow scope of the term of responsibilities adopted by the *Charter* is more restrictive than the concept of reconciliation and responsibilities envisaged in the 2000 Council Resolution.[326] In Article 33(2) of the Charter, reconciliation is primarily recognised as being associated with maternity leave, and therefore the protection from dismissal is provided to those on maternity leave. Despite mentioning reconciliation in the context of parental leave, Article 33(2) does not provide parental leave takers either with protection from dismissal for reasons associated with the leave or refers to their right to return to the same or equivalent job, which is provided for by the Directive.[327] By not making any references to paternity leave this article also associates reconciliation with women and thereby reinforces gender assumptions.

The concept of reconciliation in the *Charter* merely refers to the leave periods and it covers neither work arrangements nor caring facilities for children and adult dependants. The role of leave for dependants in reconciliation is not recognised by the Charter as this leave period is not directly associated with reconciling work and family life in Article 33 of the *Charter*. The position of workers striving to achieve the reconciliation has been reinforced by the rulings of the CoJ, which recognised the importance of providing personal care to the dependants.[328] The future interpretations of Article 33 of the Charter by the CoJ will reveal the extent to which the Court is prepared to recognise the importance of the reconciling principle and how it interacts with the principle in Clause 1(1) of the Directive. The reconciliation objective of the Directive does not sufficiently articulate the gender neutral meaning of parental responsibilities and neglects the reconciliation needs of workers (mainly women) with caring responsibilities for adult dependants.

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[325] E. Caracciolo di Torella and A. Masselot (2010) op. cit., pp.42-43.

[326] Resolution of the Council of 29 June 2000 on `The Balanced Participation of Women and Men in Family and Working Life`, OJ [2000] C218/5.

[327] Clauses 2(4) and (5) Council Directive 96/34/EC on the Framework Agreement on parental leave.

[328] Case C-60/00 *Carpenter v. Secretary of State for Home Department* [2002] ECR I-6279; Case C-413/99 *Baumbast and R. v, Secretary of State for the Home Department* [2002] ECR I-7091; Case C-200/02, *Zhu and Chen v. Secretary of State for the Home Department* [2002] ECR I-6279 and Case C-303/06, *Sharon Coleman v. Attridge Law and Steve Law* [2008] ECR I-5603.

Consequently, it does not seek to enable all workers to make genuine reconciliation choices and merely reaffirms the dominant ideologies of parenthood and care, which disadvantage women in the labour market. It also fails to unambiguously recognise the necessity of men's involvement in the provision of care for children and adult dependants.

Considering that weak provisions of the Directive allow Member States to make parental leave subject to age limit significantly lower than outlined in the Directive, the leave, although distinct from maternity leave may be taken primarily by women as the continuation of maternity leave. The short duration of the leave together with the age limit up to the age of eight appear to contradict the reconciliation objective of the Directive. This is because the short leave entitlement, which is available in relation to young children could primarily be used by women as the continuation of maternity leave and thereby it would reinforce the traditional division of work within a family.

Clause 2(1) of the Directive provides each working parent with the individual entitlement to parental leave. The national legislation which confers the right to parental leave only on one of the parents would be in breach of the Directive.[329] The right to parental leave is a worker's individual entitlement rather than the family entitlement that could be shared by parents. The rationale for this is provided in Clause 2(2) of the Directive, which stresses that the right to parental leave is aimed at promoting equal opportunities and equal treatment between men and women not only in employment but also in their involvement in family life. In order to achieve this aim and encourage men to participate more effectively in family life, the right to parental leave is *in principle* to be granted on *a non-transferable basis*. The main reason behind encouraging the non-transferable right to parental leave derives from the fact it was seen as necessary to take legislative initiative to introduce more fairness into the distribution of caring responsibilities within a family. Traditionally, mainly female workers were involved

[329] Commission view in Case C-104/09 *Pedro Manuel Roca Álvarez v. Sesa Start España ETT SA* opinion of the Advocate General (6 May 2010) paras. 50-51 and the CoJ ruling (30 September 2010) para. 42.

in caring activities, and bringing up children was often seen as incompatible with the labour market.

Neither the Directive nor the rulings of the CoJ provide any clarification as to the meaning of the phrase *in principle*. The non-transferable basis can imply that each male and female worker should have his/her individual entitlement to at least three months of parental leave in respect of each born or adopted child. The wording of this provision which states that the right to parental leave should *in principle* be a non-transferable right implies that this is not a strict right of every qualifying worker, and Member States have the freedom to adopt national measures with transferable family right to parental leave.[330] The compromise on this issue which was reached by Social Partners was based on the assumption that transferability would be allowed for parental leave that goes beyond three months.[331] The provision in Clause 2(2) of the Directive reflects that it was not possible to achieve a full compromise on this issue with UNICE and CEEP and therefore working parents are not granted strictly an individual right to parental leave.

According to Bruning and Platenga[332] allowing Member States to enact national laws distinguishing between family and individual right to parental leave constitutes a major deficiency of the Directive as a reconciliation measure.

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[330] In this regard, positions of Commission and the ETUC were that this should be an individual right. This was opposed by UNICE representatives who argued that the possibility should be left open to individual negotiations between the employee and the employer. See appendix, Table 2, Parental Leave, Comparative table of UNICE and ETUC positions, 10th July 1995.

[331] The UNICE opposed the non-transferable parental leave because their mandate (maximum position) approved by the Board provided for transferability in the leave. The ETUC opposed transferable parental leave because it argued that transferability would put pressure on women to take the leave and would therefore create more inequality between men and women. The transferability was especially an issue in Scandinavian countries where longer periods of leave existed. Response to questionnaire of 06/06/2006 from the senior negotiator representing in negotiations the Confederation of Netherlands Industry and Employers VNO-NCW (member of UNICE) Appendix, Figure 2, pp. 1-4. The ETUC was clearly in favour of the non-transferable right as it was seen as facilitating a better distribution of family responsibilities between both working parents. It took some effort to convince the employer's side to take into consideration the need to better reconcile professional and family life. Agreeing that parental leave should in principle be non-transferable enabled the ETUC to reach the compromise on the issue with UNICE and the CEEP that insisted that Member States should be given the freedom in introducing national measures. Response to questionnaire of 16/05/2006 from the most senior ETUC's negotiator, Appendix, Figure 3, pp. 1-4.

[332] G. Bruning and J. Plantenga (1999) `Parental Leave and Equal Opportunities: Experiences in Eight European Countries`, *Journal of European Social Policy*, 9 (3):195-209 at p.196.

Permitting Member States to introduce national policies providing for the family right to parental leave may result in reinforcing the predominant care patterns where the leave is primarily taken by mothers and not stimulating the change in men's attitudes towards their involvement in sharing of caring responsibilities. Consequently, by stating that only *in principle* the right should be non-transferable, the Directive preserves the existing distribution of responsibilities within a family that often prevents mothers from making genuine work-family choices. As Member States are provided with the task of introducing the detailed leave arrangements, the lack of flexibility and complex leave application process could further reinforce the traditional perception of family and motherhood by discouraging men from using their leave entitlements.

Although, the transferable right to parental leave can further reinforce the traditional distribution of responsibilities within a family, insisting that the right should only be provided on a fully non-transferable basis could also prevent certain families from achieving the reconciliation. It must be remembered that the division of work and family responsibilities is shaped by unique individual identities of a mother, father or carer which are developed by workers with caring responsibilities.[333] As some families may wish to follow traditional patterns of care, the non-transferable right to parental leave could deprive those families of the leave entitlement where due to various factors either men or women do not wish to use their leave entitlement. This was fully recognised by ETUC in the negotiations which preceded the adoption of the Directive. The reason why the right to parental leave should only be non-transferable in *principle* derives from the fact that ETUC wanted to ensure that the agreement was not going to be used to reduce the rights of women. The ETUC recognised the importance of sharing parental responsibilities between working parents, and it was necessary to take into account different national circumstances across Member States. There was also the need for flexibility in the right to the leave in order to accommodate psychological aspects of the leave and social and domestic culture of each Member States. It was argued that the leave should be taken on a voluntary basis and therefore there was a need for national take-up campaigns, which could

[333] E.B Silva and C. Smart (1999) *The `new` family?*, London: Sage in in R. Crompton (2006) op. cit., p.13.

encourage men to use their entitlement to the leave. The ETUC recognised that the success of the right to parental leave in reconciliation required the change in men's attitudes towards their involvement in family life. Unless this happens, insisting that the right to parental leave should be non-transferable would result in the fact that a significant proportion of the family entitlement to parental leave could be lost if the allocated leave entitlement was not used by the father.[334]

According to McGlynn,[335] in granting the rights to unpaid parental leave the agreement is only of symbolic value. It will achieve very little as long as the leave remains unpaid, and the Court's possible interpretation of the Directive in due course remains based on the dominant ideology of motherhood. By depriving leave takers of the right to remuneration the Directive fails to address the impact of economic hierarchies on parental choices about employment and care.[336] Since mothers often earn less than fathers they are most likely to exit the labour market in order to care for children. Due to the loss of earnings caused by mothers' exit from the labour market, fathers may be forced to further limit their involvement in sharing of family responsibilities by undertaking additional employment and thereby compensating for the loss of mother's wage. Providing personal care to a child may prevent women from effectively competing in the labour market; reinforcing gender segregation and the gender pay gap. Additionally, other financial and employment security disadvantages associated with taking parental leave and leave for urgent family reasons could further discourage men from being actively involved in the provision of care. This could contribute to reinforcing dominant ideologies of motherhood, parenthood and care for dependents. Thus, as Caracciolo di Torella and Masselot[337] observe the basic rights under the Directive largely depend on their practical implementation by Member States and can either be progressive or reinforcing the existing stereotypes about the division of responsibilities within a family.

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[334] Response to questionnaire of 05/05/2006 from the senior negotiator for the ETUC, Appendix, Figure 4, pp.1-4.
[335] C. McGlynn (2000) op. cit., p.44.
[336] R. Guerrina (2002) `Mothering in Europe : Feminist Critique of European Policies on Motherhood and Employment`, *European Journal of Women's Studies,* 9:49-68 at pp.58-62.
[337] E. Caracciolo di Torella and A. Masselot (2010) op. cit., pp.74-75.

3.2.9 The Directive Fails to Recognise the Role of Fathers in Providing Care

The rising number of working mothers and enhanced fathers' involvement in the provision of care means that fathers increasingly are required to make difficult reconciliation decisions.[338] Despite identifying reconciliation needs of both parents as the purpose of the Directive; providing fathers with the right to parental leave and requiring Member States to provide both working parents with the entitlement to leave for urgent family reasons, it fails to recognise and outline any detailed leave arrangements, which could adequately address the imbalance in distribution of caring responsibilities within a family. The lowest common denominator provisions of the Directive largely delegate to Member States the task of introducing detailed leave arrangements. By not containing any specific provisions that aim at fathers (men), the Directive overlooks the fact that different groups of women and men have different preferences for different modes of family living, kinds of relationship that they would like to experience and the amount of time they are prepared to devote to paid employment. Women's attitudes towards gender roles and family life are different from those of men generally.[339] In recent years an increasing number of fathers have recognised the necessity of sharing family responsibilities with mothers. However, some fathers are still in favour of the traditional division of responsibilities within a family. The Directive is out of touch with men's attitudes towards leave entitlements as it does not provide for incentives encouraging father's enhanced involvement in the provision of care. Above all it contains measures that can effectively discourage fathers' involvement in the family life. The existence of the national transferable right to the leave, complex leave application process and inflexible leave arrangements could discourage fathers from taking the leave. McColgan[340] recognises the paramount importance of flexible leave arrangements in encouraging the leave uptake by men. Since an employer has the right to postpone granting of the leave substantially, this diminishes the flexibility of the leave and may discourage fathers from taking the leave.

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[338] C. Lyonette, G. Kaufman and R. Crompton (2011) 'We both need to work' : maternal employment, childcare and health care in Britain and the USA, *Work Employment Society* 2011 25:34-50 at p.36.
[339] R. Crompton (2006) op. cit., p.203 and R. Lister (2003) *Citizenship: Feminist Perspectives.* Basingstoke: Palgrave Macmillan.
[340] A. McColgan (2000) op. cit., p. 142.

Although the Directive aspires to enable both working parents to reconcile work and professional responsibilities through the use of leave entitlements it contradicts its reconciliation objective by allowing to financially penalise those who seek to benefit from rights under the Directive. Caracciolo di Torella and Masselot[341] identify the lack of the right to financial compensation whilst on parental leave as the key deficiency of the Directive which in particular will discourage fathers from taking parental leave and render the leave to be primarily taken by the parents who can afford it. In particular, low-paid fathers could not afford to exercise their right to unpaid parental leave. The lack of the right to remuneration whilst on parental leave and leave for urgent family reasons may in particular discourage fathers' personal involvement in the provision of care in Member States where the gender pay gap is still very high. It would be more economically viable for the male family member earning a higher wage to continue working and for the often lower paid female workers to provide care for children and adult dependants.

Since, parents' decisions as to whether the leave should, or should not been taken are not made in isolation but in the particular context of each individual, the disadvantages associated with leave entitlements will constitute the crucial consideration in fathers' decision making.[342] The loss of income during the leave could discourage fathers from taking the leave and prevent them from making work-family choices as loss of income associated with the mother being on the leave would need to be compensated by father's longer working hours. The lack of adequate protection from detriment or dismissal for reasons associated with exercising the right to leave periods, as well as the absence of an absolute right to return to the pervious job constitute significant restraints on fathers' work-family choices. As the identified risks associated with the taking of leave may outweigh its benefits, some fathers,[343] despite their willingness to be more involved in the provision of care may be prevented from making genuine reconciliation choices.

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[341] E. Caracciolo di Torella and A. Masselot (2010) op. cit., pp.78-79.
[342] O. Kangas and T. Rostgaard (2007) `Preferences or institutions? Work–family life opportunities in seven European countries`, *Journal of European Social Policy* 2007 17: 240-256.
[343] In particular those not well-educated with limited earning power.

The Directive enables Member States to introduce national leave arrangements that do not allow of changing the previously agreed parental leave arrangements.[344] This may prevent fathers from taking parental leave where simultaneous use of the leave is not possible, and the mother is unable to care for the children. As already seen in this Chapter, the lowest common denominator provisions of the Directive do not adequately safeguard the interest of leave takers and therefore they need to invoke the protection which is afforded to them by the EU equality legislation. The necessity of establishing the existence of sex discrimination would be particularly difficult for men exercising their right to parental leave or leave for urgent family reasons as fewer men than women take parental leave. Effectively in a comparable situation where a woman could succeed in her claim for sex discrimination a man could face major difficulties with establishing the existence of sex discrimination e.g. under Article 157 TFEU.[345] How legislative protection is afforded to leave takers could further influence family's decision as to how working and caring responsibilities are allocated within a family. This could further discourage working fathers (men) from exercising their right to leave periods. Despite recognising as its objective the necessity of ensuring more equality in how work and care responsibilities are distributed within a family, the Directive does not contain necessary measures that could enable fathers (men) to make real work-family choices and achieve the desired reconciliation through the use of leave entitlements.

3.2.10 The Directive Neglects Needs of Single Parents

The Directive neither contains the definition of a family nor makes references to single parent families. On the basis of the understanding of the family and work in jurisprudence of the Court of Justice, and after considering the provisions of the Directive, it could be argued that the Directive merely refers to the traditional concept of a family and neglect the needs of single parents and other non-standard families. It is astonishing to see that the Directive which aims at enabling working parents to achieve the reconciliation does not contain any specific

[344] *Sari Kiiski v Tampereen Kaupunki* op. cit.
[345] Case C-333/97 *Lewen v. Denda* [2000] *All ER* (EC) 928.

provisions covering single parent families for whom reconciliation is often as an impossible task. Lone parents are potentially worse off, as they have no partner with whom they could share the burden of brining up children. Consequently, whenever a child requires to be cared for, a lone parent (mainly mothers) has less freedom than a mother in a household with two adults. In particular lone mothers more than other mothers need to take time off in order to care for sick children and bear the costs associated with it. This often includes a loss of remuneration and negative impact on career prospects.[346] By not recognising the enhanced reconciliation needs of single parent families which due to social and cultural changes in society, are on increase, the Directive is out of touch with real reconciliation needs of workers.[347]

The Directive appears to assume that every Member State on its own would recognise the necessity of providing single parent families with legislative right to leave periods that could enable them to make genuine reconciliation choices. However, it does not impose any obligation on Member States, which are unwilling to introduce national laws providing for specific regimes in relation to single parent family or families with many children. As long as the minimum requirements of the Directive have been fully incorporated into national laws, Member States can legitimately ignore enhanced reconciliation needs of single parent family or families with many children. This undoubtedly indicates a very limited commitment of the EU to recognising diverse reconciliation needs of workers with caring responsibilities for children. Considering weak provisions of the Directive and the necessity of enforcing rights using EU equality legislation, single fathers who are the minority may face more difficulties than single mothers when establishing sex discrimination.

Hakim argues[348] that contemporary changes in women's employment indicate women's (men's) capacity to exercise their choices in relation to their involvement in work and family responsibilities. However, choices which are made by working parents, including single parent families can be (amongst other things) constrained

[346] A. Amilon (2010) op. cit., pp.32-33.
[347] P. Moss & F. Deven (eds.) (1999) op. cit., p.149.
[348] C. Hakim (2000) op.cit. pp.223-258.

by legislative rights which do not recognise their enhanced reconciliation needs.[349] Single parents may have a preference of being in full-time employment pursuing their careers but their caring responsibilities and the impossibility of sharing them with another parent may prevent them from making genuine reconciliation choices. However, lone parents take decisions relating to care and employment with reference to moral and socially negotiated views about behaviour that is right and proper and not a view that aims at individual (self) maximisation. Some female lone parents recognise their primary responsibility as providing care to their children, and therefore will not be interested in any economic incentives or pressures aiming at facilitating their involvement to the labour market.[350]

As state policies influence the manner in which families manage the articulation between employment and family life the family is likely to come under increasing pressure where weak or negligible statutory or employment support is provided.[351] The restrictive provisions of the Directive on parental leave which do not provide for flexible leave arrangements; do not extend leave entitlements for single parents; financially disadvantage leave takers; do not ensure adequate level of employment securing of leave takers and fail to provide them with an absolute right to return to the previous job may in particular prevent single parent families from making genuine reconciliation choices as they would need to bear all risks associated with the leave.

The lack of the right to paid parental leave could in particular impose constraints on choices of less well-educated less qualified single parents who in the absence of the income of their partner maybe forced not to use their leave entitlement.[352] As either identities or behaviour are fixed, but adapt to each other in a process of positive (negative) feedback, regardless of their work-family preferences single parents may be forced to go back to work because of financial reasons.[353] The lack of adequate employment security of leave takers and absence of an absolute

[349] R. Crompton (2006) op. cit., p. 13.
[350] R. Crompton(2006) `Class and family`, *The Sociological Review,* 54:4, 658-677 at p.670.
[351] R. Crompton (2006) op. cit., p. 125-127.
[352] Ibid. p. 163.
[353] S. Himmelweit and M. Sigala (2003) `Internal and external constraints on mothers' employment`, *Working Paper no. 27, ESRC Future of Work Programme* p. 30 in R. Crompton (2006) op. cit., p. 53.

right to return to previous job under the Directive may dissuade well-educated single parents with good jobs from taking the leave because of the negative impact of the leave on their career prospects.

The Directive does not provide working parents with the right to leave for urgent family reasons and it merely requires Member States to provide workers with the leave entitlement of an unspecified duration. The lack of clearly specified duration of the leave accompanied by the absence of adequate employment security of leave takers could in particular affect single parents who more often than other parents will be forced to use their entitlement to leave for family reasons. The lack of special regime in relation to single parent families constitutes a major deficiency of the Directive as due to the large caring burden lone parents might be less attractive in the labour market than partnered mothers/fathers or childless women.[354] Neither parental leave nor leave for urgent family reasons provide parents with sufficient time off work to care for their children which may prevent single parents from achieving the reconciliation. The Directive enabled Member States to limit the availability of parental leave to parents of small children. This deficiency of the Directive will in particular affect single parent families as older children also need to be cared for and all caring responsibilities will rest with one parent.

Structural constraints will also shape single parent's decisions as to their involvement in childcare and employment.[355] These constraints include the immediate practicalities such as the availability of affordable childcare and the demands of a particular job. The existence of high quality and affordable childcare facilities is of paramount importance for the success of the Directive in enabling single parents to make genuine reconciliation choices. The lack of affordable care facilities can force single parents out of the labour market as the loss of income associated with working part-time may not be a viable option to single parent families.[356]

[354] A. Amilon (2010) op. cit., pp.32-33.
[355] S. McRae (2003) op. cit.,317-38.
[356] O. Kangas and T. Rostgaard (2007) op. cit., p.248.

As discussed in Chapter 1, the availability of childcare across the EU is subject to the Open Method Coordination and soft law targets which so far have not been fully complied with. Therefore, it is up to individual Member States to ensure the availability of childcare and there is no enforcement process to ensure that adequate childcare facilities are provided at the national level. Thus, the effectiveness of the Directive and supporting it measures in enabling parents to make real reconciliation choices will depend on its national implementations, and the extent to which national legislators recognise the need of providing workers with effective reconciliation rights. The legislative contribution of the Directive to shaping law at national level in the UK[357] and Poland[358] is addressed in Chapters 4 and 5.

3.3 The Change in the Decision Making Process Reinforces the Difficulties Associated with the Commission Social Directives.

As already seen this Chapter, all proposals for a Commission Directive on parental leave which followed the traditional legislative process have failed because they were blocked by the Council as the unanimous vote was required in order to adopt the Directive (**Appendix, Table 2**). The EU legislative process provides for a number of legislative procedures which may be used, for the enactment of secondary legislation.[359] All those procedures vary and give significantly different powers to the EU main institutions such as the Council, Commission and the Parliament.

The contents of a Directive and its effectiveness as a legal instrument depend on the choice of a legal base which is used for the adoption of the Directive. The selection of the appropriate legal base for the proposed secondary legislation is crucial as it predetermines the voting procedure which is to be used in the Council. The EU competences derive from the Treaties and secondary legislation, the latter requires for its validity an appropriate legal base. All EU binding secondary

[357] With references to well-established Member States such as Belgium, Germany, Ireland Luxembourg and Sweden.
[358] With references to new Member States such as Czech Republic, Hungary and Slovakia.
[359] Following the Treaty of Lisbon 2007 the key law making procedures are the ordinary legislative procedure (formerly co-decision); special legislative procedure and the consent procedure (formerly assent procedure).

legislation is subject to the review by CoJ, which has the competence to judge its validity.[360] Therefore, it is paramount that appropriate procedures are followed when creating the secondary legislation because the failure to observe it may result in rendering the legislation invalid.[361] The secondary legislation can be validly enacted only by the EU legislators having the necessary authority to adopt the legislation. The necessary authority will derive from a Treaty article providing relevant institution(s) with necessary powers to legislate in a given area, which is known as the *legal base*[362]. The selection of the legal base depends on the subject matter of the proposed legislation.[363]

In cases where no specific law making powers are provided, the EU legislators must rely on the general powers to legislate as provided in Article 352 TFEU (ex 308 EC).[364] The Treaty article containing the legal base will also provide information as to the relevant legislative procedure, which needs to be followed. The reason to legislate may derive either from the implementation of a wide programme of the Union's action e.g. in the field of social policy or in response to the need to legislate in the specific area. The relevant Directorate-General, assisted by one of the Commission's advisory committees, will be given the task of preparing the first draft, that will initially be approved by the relevant Commissioner holding the relevant portfolio. Following that, the proposal will be considered by the Commission, which as a collegiate body acts on simple majority basis.[365] The proposal will then be submitted to the Council, which depending on the chosen legal base for the EU action may take decision by either of the following ways: simple majority,[366] qualified majority voting (QMV)[367] or take unanimous

[360] The position of Court of Justice is that the choice of base must be related to objective factors capable of judicial review e.g. Case 45/86 *Commission v Council* (1987) ECLR-1493.
[361] Cf. UK's challenge of the validity of Article 137 (former 118) EC used a base for the adoption of Working Time Directive 93/104/EEC, Case C-84/94 *UK v Commission* (1996) ECR I-5755.
[362] Article 296 TFEU (ex 253 EC).
[363] E.g. EU legislators wanting to legislate in the area of health and safety at work would need to base its measure on the legal base contained in Article 153 TFEU (ex 137 EC).
[364] Article 352 TFEU (ex 308 EC).
[365] The role of Commission as a having collegiate responsibility has been defined in Case C-137/92 *Commission v BASF and Others*.
[366] Simple majority voting system allocates one vote to each Member State, and the decision is taken in favour of largest number of votes cast. It is predominantly used for the establishment of sub-committees of the Council and for procedural matters.
[367] Qualified majority voting unlike the unanimous voting which requires the consent of all members of the Council, it constitutes a system of voting weighted according to the population size of the Member State as set out in Article 238 TFEU (ex 205 EC).

decision.[368] This traditional legislative procedure was used for the adoption of the failed Draft 1983 and other Commission social Directives such as the *Pregnant Workers Directive*[369] and *Working Time Directive* which are considered as reconciliation Directives.[370]

Unlike the Commission social Directives, the Directive on parental leave was adopted following the EU legislative process introduced by the protocol on social policy annexed to the *Maastricht Treaty* 1992.[371] Articles 3(3) and (4) of the *Maastricht Agreement on Social Policy* enabled Social Partners to actively participate in the decision-making process and it states:

"if at the occasion of consultations between the Commission and Social Partners on the possible direction of Community action or advisable Community action, the partners express the feeling that they would like to deal themselves with the involved problem, they can express to the Commission their wish to do so and initiate the procedure provided in Article 4. The duration of the procedure shall not exceed nine months, unless the management and labour concerned decide jointly to extend it"

The Agreement provided for adoption of collective agreements on social issues between the major interests groups. The concluded collective agreements under this procedure could later be introduced as a binding EU law by means of a Council Directive. The new roles of Social Partners as the consultative and negotiating body were reaffirmed are now defined in Articles 154 and 155 TFEU (ex 138 and 139 EC).[372]

Under Article 154 TFEU (ex 138 EC) the Commission was entrusted with the task of promoting the consultation of management and labour at the EU level, and shall adopt relevant measures in order to facilitate dialogue by ensuring balanced support for the parties. Consultation in view of adopting legislation involves two

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[368] Unanimous voting is used when the most important decisions are taken or in the areas where the Member States are least willing to surrender their national sovereignty. Under the unanimous voting system a Member State may exercise its right to veto in order to block the adoption of the unwanted measure. Abstention by representatives of Member States present or represented does not prevent the measure requiring unanimous voting from being adopted (Article 238 TFEU (ex 205(3) EC).

[369] Directive 92/85/EEC of 19/10/1992 on the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, OJ L348/1, 28/11/1992.

[370] Council Directive 93/104/EEC OJ, 307/18, 1993 and 2003/88/EC.

[371] Incorporated into the Treaty of Amsterdam 1997, the Treaty of Nice 2000 and the Treaty of Lisbon 2007.

[372] According to Craig the Social Charter which was revised by *Treaty of Amsterdam* 1997 encouraged dialogue and consultation between employers and trade unions or workers representatives. V. Craig (1997) op. cit., p.5.

stages. During the first stage, prior to submitting proposals for the social policy field, the Commission is required to consult management and labour about the possible direction of the Union's action.[373] In order for stage two to be triggered, following the consultation (up to six weeks)[374] the Commission must recognise the need for the Union's action in the proposed area. During the second stage the Commission consults the management and labour on the content of the envisage proposal.[375] Social Partners are provided with two choices. The first, they may provide the Commission with an opinion or a recommendation within six weeks and the proposed measure will be adopted following the legislative route whereby the measure proposed by the Commission is adopted by the Council. The procedures used in Council will depend on the selection of the legal base and will involve either unanimous or qualified majority voting.[376] The second option[377] (used for adopting the Directive on parental leave) enables management and labour to inform the Commission of their intention to begin the process to negotiate framework agreements in accordance with Article 155 TFEU (ex 139 EC).[378] Social Partners are required to conclude the agreement within nine months or if necessary additional time may be agreed with the Commission.[379]

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[373] Article 154(2) TFEU (ex 138 (2)EC). All EU or national organizations which could be affected the policy are contacted.

[374] Commission Report on the `Application of the Agreement on Social Policy`,COM(93) 600, 19 and COM (98) 322, 9 provide for the six-weeks limit and outline the instances where the time limit is to be applied in flexible manner.

[375] Article 154(3) TFEU(ex 138(3) EC).

[376] Article 154(3) TFEU does not require the Commission to consider the opinion or the recommendation provided by management and labour.

[377] Article 154(4) TFEU (ex 138(4) EC).

[378] Social Partners may only act on a proposal from the Commission, which is the main initiating force and have no power to initiate the legislative process on their own. Bercusson calls it `bargaining in the shadow of law`, which significantly limits the bargaining power of SP and lacks the surprise element associated with the traditional means of collective bargaining. B. Bercusson `Institutional Reform and the European Social and Labour Policy` in U. Muckenberger (eds.) (2001) *Manifesto Social Europe*, Brussels: European Trade Union Institute (ETUI), pp.101-128. Szyszczak points out that the EU has no competence to oblige Social Partners to begin collective bargaining, the whole negotiating process depends on the desire of Social Partners and their readiness to enter into a dialogue at the EU level. E. Szyszczak (2000) *EC Labour Law*, London: Pearson Education, p.37.

[379] Article 154(4) TFEU. In order to prevent the occurrence of the prolonged and fruitless discussions the Commission has the power to assess the parties' chances of arriving at an agreement within the assigned time limit. Where an agreement cannot be reached, the Commission after considering the material discussed by Social Partners may propose a legislative instrument in the field.

The importance of Article 155 TFEU derives from the relative novelty of its provisions which enable management and labour to conclude contractual relations, including agreements that may constitute basis of a Commission proposal and Council decision. Article 155 TFEU neither defines what constitutes an agreement nor states what can be a subject matter of the agreement.[380] Furthermore, no clear indication is given as to who should be allowed to negotiate and how Social Partners are to be chosen.[381] Schimidt emphasises[382] that despite the Commission's communication, the criteria for this review process remains undefined. The UNICE, CEEP and ETUC have concluded agreements leading to the adoption of reconciliation Directives, because according to the Commission's opinion these three organisations were the only existing general cross-industry organisations willing to negotiate together. Allowing two Social Partners which represent employers' interests to bargain against one Social Partner representing employees' interests indicates the existence of an imbalance in the decision making process that favours the interests of employers. This indicates a major deficiency of the decision making process under Article 154 TFEU which

[380] According to the Commission the burden of proof in the sex discrimination cases is no appropriate for the negotiations (COM(93) 600 op. cit., para. 67).

[381] Commission Report on the `Application of the Agreement on Social Policy`, COM(93) 600 paras. 31 and 64 and further communication COM (96) 488 final. A number of conditions were outlined, which must be satisfied before an organisation is allowed to participate in the negotiation process. There must be cross-industry organisations, the organisations must be officially recognised as Social Partners within a Member State, the organisation must be able to negotiate agreements, the structure of the organisation must enable it to participate in the consultation process and the organisation must associate representatives of all other Member States. Cf. B. Keller and B. Sorries (1997) `The New Social Dialogue: Procedural Structuring, first results and perspectives`, Industrial Relations Journal 77.

[382] M. Schmidt (1999) `Representativity – A Claim Not Satisfied: The Social Partners' Role in the EC Law Making Procedure for Social Policy`, *IJCLLR*, Autumn 1999, 259-267. Szyszczak contests the representativity of ETUC which is to be seen as an umbrella organisation rather than having a negotiating structure. She recognises that the public sector of employment is underrepresented in the social dialogue. Due to the fragmented nature of trade unionism across Member States, it was impossible to outline the necessary criteria for appointing social partner representatives participating in the consultation process. The UNICE is the main body representing employers, which is composed of national employer's federations and it contains the requirement of unanimity in order to be able to proceed with negotiations (E. Szyszczak (2000) op.cit., pp.38-40). Additionally, the existence of the unanimous vote makes it very inflexible in negotiations and thereby prevents adjustments to changes in the social dialogue during the negotiations. C.Jensen (1997) `The Voice of European Business and Industry – The Case of UNICE. A Study of an Employer Organisation on the European Labour Market`, in P. Flood (1997) *The European Union and the Employment Relationship, Fifth HRA European Industrial Relations Congress*, Dublin: Oak Tree Press.

contributed to the adoption of the lowest common denominator provisions of the Directive on parental leave.

Attempts by smaller but also representative organisations to participate in the negotiations may appear to be an impossible task. Consequently, there maybe a significant number of workers across EU Member States whose interests are not represented when vital decisions affecting them are made. The Commission's selection criteria were unsuccessfully challenged by *European Association of Craft, Small and Medium-sized Enterprises (UEAPME)*[383] representatives of Social Partners who were not invited to negotiate the adoption of the framework agreement on parental leave.[384] Before Social Partners are allowed to begin the legislative process, the Commission will consider the nature and the scope of the particular proposal, and its potential impact on the issues, which the proposed agreement aims to address. While conducting independent negotiations Social Partners are not obliged to follow exclusively the content of the proposal in preparation within the Commission. They are given significant freedom in this respect but the main condition is that the proposal should not go beyond the area outlined in the Commission's proposal. This in real terms substantially limits decision-making powers of Social Partners and forces them to stay exclusively within the outline proposed by the Commission. Not following strictly the guidelines provided by the Commission, in case of wanting to adopt stricter measures than those foreseen by the Commission would undoubtedly lead to the

[383] Case T-135/96, *Union Europeenne de l'Artisanat et des Petites et Moyennes Enterprises (UEAPME) v Council of the European Union* [1998] I.R.L.R. 602 (CFI). The Court of First Instance (now General Court) reaffirmed that representatives with the collective representativity were those who demonstrated their mutual willingness to begin the process and be able to follow it through to its conclusion.[383] It could be argued that allowing organisations to choose other negotiating partners brings about the exclusion of some organisations from the EU legislative process and thereby the interests of their members would not be protected at the EU level.

[384] Franssen and Jackobs argue that EU Treaties should be revised so that problems associated with the selection criteria of Social Partners could be addressed. Solutions proposed include creation of a committee of independent experts able to provide guidance on matters concerning representativity. E. Franssen and A. Jackobs (1998) `The Question of Representativity in the European Social Dialogue, *Common Market Law Review* 1295. Bercusson sees the absence of representatives of interests apart from the traditional Social Partners as a serious deficiency of the collective labour law system. B. Bercusson (2001) op. cit., p.109. Schmidt maintains that rights of the under-represented organisations should be ensured in legislative measures adopted by EU institutions. However, until now no steps have been taken by EU institutions in order to legislate in this area. M. Schmidt (1999) `Representativity – A Claim not satisfied: The Social Partners' Role in the EC Law-Making Procedure for Social Policy`, *The International Journal of Comparative Labour Law and Industrial Relations* p.259.

Framework Agreement either not being proposed to the Council or being *vetoed* by the Council. Importantly, the outcome of the agreement depends entirely on different organisations, which have agreed to negotiate with each other.[385]

The Commission is only required under the Treaties to initiate the dialogue between Social Partners and is not responsible for the negotiations. Consequently, if there is no desire of Social Partners to enter into a dialogue at the EU level concerning an important measure proposed by the Commission, a vital opportunity could irreversibly be lost to the disadvantage of the individuals and groups concerned. The lack of desire to negotiate was expressed in the case of the first proposed measure on *European Works Councils*.[386]

Where there is no existing Commission proposal for EU legislation on the consulted measure, there could be pressure on Social Partners to begin the negotiations even when the outline prepared by the Commission does not allow expansion of the rights in the desired areas. This in turn may lead to conclusion of framework agreements containing merely general provisions reinforcing the old legal regime. Not willing to expand certain rights, Social Partners may also limit the effectiveness of the concluded framework agreements by compromising on measures reflecting the lowest common denominator. Fredman[387] argues that the sanctions applicable to the unions are far weaker than under collective bargaining and Social Partners have limited means of influencing the nature of bargaining.[388]

The major deficiency of the involvement of Social Partners in the decision making process leading to adoption of reconciliation policies derives from that Article 153(5) TFEU (ex 137 EC) excludes pay issues from collective bargaining. It must

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[385] Member States will also be consulted on the proposed social agreement. The decisions taken on the basis of Article 155 TFEU may also be extended to cover the European Free Trade Area countries.

[386] COM(90) 581 final (OJ [1991] C39/10). Negotiations on European Works Councils never begun because after a number of preliminary meetings the agreement could be reached, the UNICE decided that the negotiations would lead to more restrictive agreement than the proposed in the Commission Directive. Response to the questionnaire of 30/05/2006 from the most senior official at UNICE at the time of the adoption of the Directive on parental leave, Appendix, Figure 1, pp. 1-4.

[387] S. Fredman (1998) 'Social Law in the European Union: The Impact of the Lawmaking Process' in P. Craig and C. Harlow (eds.) *Law Making in the European Union*, Hugue: Kulwer.

[388] E.g. unions cannot call a strike or industrial action in response employer's representatives unwillingness to negotiate.

be emphasised that the Commission whilst drafting its social Directives is not barred from covering pay issues. Consequently, one of the key Commission social Directives is the *Pregnant Workers Directive*, which imposes an obligation of Member States to provide adequate level of pay to those on maternity leave. The recent failed attempt to amend the *Pregnant Workers Directive* by extending the duration of maternity leave up to 20 weeks with the right to pay indicates that the Commission social Directives play crucial role in providing parents with effective reconciliation rights.[389]

According to Ryan[390] excluding pay and trade union rights from EU competence is astonishing because one of the main arguments, which was put forward by the Commission when stating the reasons for Union intervention in the field of social policy was to forestall competitive deregulation and social dumping. This exclusion further reveals the *political* or *presentational* function of EU labour law. One of the reasons for including social rights in the EC Treaty was to make European integration acceptable to EU citizens. The inclusion of the social rights is to be considered as a major development but the exclusion of pay and trade union rights certainly reflects the cost of the social rights and the political weakness of European Trade Unions. [391] The lack of legislative action by the Commission in this area was justified on the basis of the application of the principle of subsidiarity, and the principle of diversity of national systems, cultures and practices. Ryan further tested the Commission arguments and argued that in its justification the Commission narrowed down the interpretation of the principle of subsidiarity, which according to him should be seen as an attempt to hide basic beliefs about the legitimacy or necessity of a European labour law.

Article 155 TFEU (ex 139(2) EC) provides that the agreements at the Union level can be implemented in different ways. The agreements can be implemented according to the procedures and practices that are specific to management and

[389] Proposal (failed) for a Directive 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 breast feeding, COM (2008) 637.
[390] B. Ryan (1997) `Pay Trade Union Rights and European Community Law`, *International Journal of Comparative Labour Law and Industrial Relations*, 13:305.
[391] Commission `Action Programme for Implementing the Social Charter` (COM (89) 568) was also silent about legislative action in the field of pay and trade union rights.

labour in Member States.[392] Alternatively, in matters covered by Article 153 TFEU (ex 137 EC), at the joint request of the signatory parties, the agreement concluded by Social Partners can be implemented by a Council decision on a proposal from the Commission.[393] This mode of implementation of agreements shall be further explored as it was used for introducing the Directive on parental leave.

According to Fredman[394] this constitutes a significant departure from the traditional function of the collective bargaining where Social Partners had no power to legislate. The Commission's role is to prepare proposals for decisions to the Council. In its preparations the Commission will have to consider the representative status of Social Partners, their mandate, the legality of the concluded agreement in relation to EU law and if the agreement considered small and medium-sized undertakings.[395] The Commission also produces *explanatory memorandum,* which provides explanations and assessments of the proposed agreement. The Commission, after considering the agreement may decide to propose or not to propose the agreement for implementation to the Council. Where the decision not to propose the agreement has been taken, the Commission will inform the signatory parties about the reasons for its decision.

The wording of the provisions of the concluded framework agreement is a crucial factor because neither the Commission nor the Council is allowed to change the contents of the agreement itself. Their powers are limited to providing the opening and the closing provisions of the instrument. If this occurs, the proposal will be withdrawn by the Commission, which will examine it and consider whether it could be implemented through other legislative instrument. The role of the Commission

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[392] In case of implementation of EU agreements between Social Partners in accordance with national practice, Member States are either obliged to apply the agreement directly or to create rules for their transposition. Consequently, widespread collective bargaining systems of Member States would be given the task of implementing agreements. This would involve implementing agreements on a voluntary basis by collective contracts at the national level. If this were the case, it would be almost impossible to achieve a coherent implementation because of significant legal and institutional differences between national and industrial relations systems. This mode of implementation has not been used for introducing reconciliation policies and therefore it shall not be further addressed. Cf. A. Ferner and R. Hyman (Eds.) (1998) *Changing Industrial Relations in Europe*, Oxford, Blackwell.

[393] Article 155(2) TFEU (139(2) EC).

[394] Cf. S. Fredman (1998) `Social Law in the European Union: The Impact of the Lawmaking Process` in P. Craig and C. Harlow (eds.) *Law Making in the European Union*, Hugue: Kulwer.

[395] 154(2) TFEU (ex 138(2) EC).

is purely consultative one as it has the right merely to comment on the content of the proposed agreement. However, if the Commission had the power to change the content of the agreement, then the balance of power would be shifted either way (the Commission or Social Partners). Some governments may object the increase in power of Social Partners because of their extended powers as an opposition in the national arena.[396]

Although, Article 155(2) TFEU indicates that the concluded agreement is to be implemented by the decision of the Council, decisions as defined in Article 288 TFEU which are individual in nature and are addressed to undertakings, individuals or MS do not create generally applicable EU laws. According to the Commission the term `decision` refers to one of the biding instruments in Article 288 TFEU and it is up to the Commission to choose the most appropriate legislative instrument.[397] On consideration of the content and the nature of the framework agreement on parental leave, the Commission found that the most appropriate legislative tool for implementing the agreement was a Directive. Thus, `decision` in relation to equal opportunity matters in the labour market in the context of Article 155(2) TFEU has a more general meaning and is not limited to legislative tool in the form of EU decisions.[398] The adoption of *Part-time Workers Directive*[399] and *Fixed-term Workers Directive*[400] has reaffirmed that Directives are considered by Commission as the most appropriate legislative instruments for implementing agreements on social issues concluded by Social Partners.

Once the framework agreement between Social Partners has been concluded and submitted to the Commission, the Council decision is limited to adopting binding provisions of the agreement concluded by Social Partners. Therefore, the text of the agreement itself would not constitute a part of the decision, but would be annexed to it. Alternatively, the Council not in favour of the measures proposed

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[396] G.Falkner (2000) op. cit., p.718.
[397] Commission of the European Communities, `Proposal for a Council Directive on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC,` Brussels, 31.01.1996, COM(96) 26 final, 7.
[398] C. Barnard (2006) op. cit., pp.92-93.
[399] Directive 97/81/EC, concerning the framework agreement on part-time work concluded by ETUC, UNICE and CEEP, OJ, L14/9, 1998.
[400] Directive 99/70/EC concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, OJ, L175/43, 1999.

may decide not to implement the agreement concluded between Social Partners. This in practice puts pressure on the negotiating partners to conclude framework agreements containing provisions, which would stand a chance of being implemented by the Council decision. In implementing the agreement, the procedure in the Council will require unanimous vote where the provisions of the agreement in questions cover one or more areas which require unanimity in Article 153(2) TFEU.[401]

The provisions contained in Article 153 TFEU (ex 137 EC) have been amended both by *Treaty of Niece 2000*[402] and *Treaty of Lisbon 2007.*[403] The amendments introduced by these Treaties have failed to sufficiently extend the use of qualified majority voting because the unanimous vote is still required in the area of social protection of workers, which covers parental leave and leave for family reasons, and it does not apply to pay.[404] The requirement of the unanimous vote under this provision significantly limits the legislative process because it enables the unsupportive Member States to *veto* the adoption of a measure in question. Further deficiency of Article 153(2) TFEU as the legal base for introducing reconciliation policies derives from that it merely provides for the adoption of Directives containing *minimum requirements* and emphasises that the adopted Directives should not impose any constraints on Member States.

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[401] EU Social security and social protection of workers; protection of workers where their employment contract is terminated; representation and collective defence of interests of workers and employers, including co-determination, subject to paragraph 5, conditions of employment for third countries nationals residing in the EU, financial contributions for promotion of employment and job creation, without prejudice to provisions of Social Fund. It must be noted the prior to the implementation of Treaty of Lisbon 2007, the wording of Article 139(2) EC (now 155 TFEU) clearly referred to the QMV in the Council with the exception of the agreements containing provisions relating to one or more of the areas specified in Article 137 (2) (b) (ex 118) EC, where the unanimous voting will be used. Although, the substance of this Article remains unchanged the new wording of Article 155(2) TFEU places emphasis on the unanimous vote rather than the QMV which was emphasised in Article 139(2) EC.

[402] Added to Article 153 (ex 137 EC) paragraphs 1(j and k), the combating of social exclusion and the modernisation of social protection systems (without prejudice to point (c) social security and protection of workers.

[403] Procedural changes in Article 153 (2), references to the new ordinary and the special procedure.

[404] Article 153(5) TFEU (ex 137(5) EC) the provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose the lockouts.

In *Commission v. UK*[405] the CoJ held that the Union action under Article 153 TFEU was not limited to the lowest common denominator or the lowest level of protection provided by Member States, and national legislators had the freedom to adopt more stringent laws than outlined in Directives. The emphasis that Directives should not impose any constraints on Member States further indicates that adopted Directives merely provide for the minimum requirements and the key role in introducing stringent measures has been allocated to Member States. This indicates that in the absence of the national initiatives to exceed the minimum requirements outlined in Directives the basic provisions outlined in Directives could be implemented at the national level. This argument is further explored in Chapters 4 and 5 in the context of the national implementations of the Directive on parental leave in the UK and Poland. The evaluation of the provisions of the Directive has revealed that these factors evidently shaped its provisions, and that the Directive merely provides for the minimum requirements which were introduced in the spirit of subsidiarity.

It must be remembered, that the use of unanimous voting in the Council has hampered the development of the EU reconciliation policies as the first drafts for a Directive on parental leave, which were based Article 100 (now 115 TFEU) were vetoed.[406] The selection of the legal basis was questioned by Economic and Social Committee,[407] which argued that the Commission's assertion that differences between Member States in provisions for parental leave and leave for family reasons *risk hindering the establishment and disrupting the functioning of the common market* was lacking credibility. It was doubted whether differences between Member States in arrangements for parental leave and leave for family reasons were of sufficient immediacy or magnitude to have the power to distort the functioning of the common market or to undermine fair competition. The obstacles encountered by Draft 1983 exemplify difficulties, which needed to be overcome under the legislative traditional process in order to secure the approval of appropriate legal basis for the Union's action (**Appendix, Table 2**).

[405] Case C-84/94, UK v. Council (Working Time Directive) [1996] ECR I-5755 at para 56.
[406] COM [83] 686 final, 22 November 1983 and COM (84) 631 final, 15 November 1984.
[407] Opinion of the Economic and Social Committee on the Proposal for a Council Directive on Parental Leave and Leave for Family Reason (84/C206/15) OJ 6.8.84, No 206/51 at pint 2.2.

Although the involvement of Social Partners in the decision-making process resulted in adopting of the Directive on parental leave, the new process did not resolve difficulties associated with the use of unanimous voting in the Council on social policy matters, as the adopting of Directive on parental leave still required unanimous vote in the Council.

Since EU Treaties do not provide for any specific legal base, which could be used for adopting reconciliation policies, the legislative action in the area of reconciliation must be justified by reliance on other legal basis not always fully supporting reconciliation objectives. The lack of a specific legal base for the EU action in the area of reconciliation impacts on the provisions of the adopted reconciliation policies where the focus on reconciliation is diminished in favour of the issues covered by the chosen legal base. Consequently, social Directives such as the *Pregnant Workers Directive* and *Working Time Directive* which are considered as reconciliation policies were based on Article 153 TFEU (ex 137 EC). The Union's action was justified on the basis of the protection of workers' health and safety and the adoption of these Directives was secured because Article 153 TFEU (ex 137 EC) required the qualified majority voting in the Council. The lack of the specific legal base for reconciliation policies, leaves the adopted reconciliation measures open to the challenge on the grounds of the wrong legal base used for their adoption. In *UK v Council*[408] the use of Article 153 TFEU (ex 137 EC) as a legal base for the adoption of the *Working Tome Directive* was challenged under Article 263 TFEU (230 EC).[409]

The requirement of unanimous voting in the Council on issues covering the social protection of workers significantly hampers the possibility of adopting effective reconciliation policies. Thus, allowing Social Partners to participate in the law

[408] Case C-84/94 *UK v. Council* (Working Time Directive) [1996] ECR I-5755

[409] The UK argued that the Directive on working time supported the social policy objectives and therefore it should have been based either on Article 115 TFEU (ex 94 EC) or Article 352 TFEU (308 EC), which required unanimous vote in the Council and would have enabled the UK to block the adoption of the Directive. The UK challenge did not succeed as the CoJ recognised the importance of the broad definition of health and safety. This ruling subsequently reinforced Article 153 TFEU as the legal base for the EU action in the area of social policy which includes reconciliation policies. It also pointed out the difficulties associated with the selection of the appropriate legal base for the EU action in the area of social policy that could facilitate the adoption of the proposed Directive.

making process on issues covering the social protection of workers has had a limited impact on the way in which Directives are adopted in the Council. The retention of the unanimous voting in the Council on the above issues may put pressure on the Commission to draft a very broad proposal on which Social Partners could be invited to negotiate and conclude framework agreements. The Social Partners may also be forced to conclude agreements containing very general provisions leaving a lot of freedom to Member States in how the measures are to be transposed into national laws in order to ensure that the proposed measure is not vetoed in the Council. This may result in concluding framework agreements containing very limited provisions and easily satisfying the unanimous vote requirement in the Council. This became evident in the evaluation of provisions of the Directive on parental leave.

The disadvantage of the unanimous voting in the Council, which applies also to social policy, derives from that it requires absolute majority and gives Member States the right to *veto* decisions, where national interests are at stake.[410] The advantage of qualified majority voting derives from the fact it prevents the opposing Member State from blocking the decision making process and provides the willing Member States with a possibility of adopting the detailed measures. Chalmers sees[411] the reluctance to widen the use of qualified majority voting as deriving from the perception of Member States which sees this method of voting as not adequately protecting the national interests. Additionally, the use of qualified majority voting appears to contradict the stagnant notion that the State constitutes a sovereign entity and the government, the ruler of that entity is equipped with the freedom to make decisions about policies implemented within the boundaries of that State. Under qualified majority voting, a Member State may be forced to implement a policy for which it had not voted or even objected to it. It could be argued that emphasis on the use of qualified majority voting in the *Treaty of Lisbon 2007* is necessitated by new reality of the twenty seven Member States and the difficulties associated with effectiveness of the law making process involving the unanimous voting.

[410] K.D. Borchardt, (2000), The ABC of the Community Law, Luxembourg: Office for Official Publications of the European Communities, pp.42-43.
[411] Damian Chalmers, op. cit., p.108.

Although, under the *Treaty of Lisbon* 2007 qualified majority voting has become the key method of voting in the Council, the option of taking decisions unanimously has not been abolished and therefore it will be used where the important national matters are at stake. Consequently, the *treaty base game* shall continue as the selection of the legal base, which has the potential to lead to a successful adoption of the desired measure remains a valid option. One of the sensitive areas that require unanimous voting in the Council are measures dealing with the approximation of laws based on Article 115 TFEU (ex 94 EC). This indicates that the most significant decisions affecting individual Member States shall be taken by unanimous vote.

As this section has shown, despite some significant changes in the decision-making process introduced by Article 155 TFEU (ex 139 EC), the legislative process leading to adoption of reconciliation policies remains largely unchanged because there is no specific legal base for adopting reconciliation Directive and decisions to adopt reconciliation Directives remain to be largely taken by unanimous vote in the Council.

3.4 The Framework Directive (96/34/EC) Concluded by Social Partners is More Restrictive than the Commission Draft 1983.

This section seeks to contrast provisions of the Commission proposal for a Directive on parental leave and leave for family reasons[412] (the Draft 1983) with provisions of Council Directive 96/34/EC on the Framework Agreement on parental leave concluded by UNICE, CEEP and the ETUC. This comparison will allow consideration of the issue as to whether the above discussed change in the legislative process used for introducing the reconciliation Directives in favour of the involvement of Social Partners has contributed to the introduction of the Directive containing more stringent provisions than those envisaged in the Commission early draft Directives, which followed the traditional legislative process. The

[412] The first Commission proposal for a directive regarding parental leave and leave for family reasons dates back to a draft directive submitted to the Council of Ministers in November 1983 COM [83] 686 final, 22 November 1983; a revised version of the proposal was submitted in November 1984 COM (84) 631 final, 15 November 1984 OJ 27.11.84, No C316/7.

consequences of the legislative change for reconciliation and choice are also considered. Provisions of the Directive on parental leave and the Commission early proposal for a Directive on parental leave and leave for family reasons are contrasted in **Appendix, Table 5**. It can be observed that despite the change in the legislative process which led to adopting of the Directive its provisions largely mirror provisions of the Draft 1983. However, there are some significant differences between provisions of the Directive and the Draft 1983 which need to be considered more in detail as they have consequences for reconciliation and choice.

The reconciliation purpose of the Directive is much wider in its scope than the objective of the Draft 1983, which merely addressed the problem of discrimination on the marital or family grounds.[413] It is essential to emphasise that in the 1980's flexible working arrangements were not widespread, and part-time workers had no equal rights with full-time workers. From that perspective, the proposed Directive constituted a significant development because it addressed the problem of equal treatment both in the employment and family context. This in particular aimed at addressing the problem of women's exclusion from the labour market deriving from the necessity of looking after dependants.[414] Although, the Draft 1983 did not state clearly the reconciliation objective, it could be deducted from Article 2(2) of the Draft 1983 that the elimination of the direct or indirect discrimination on the grounds of marital or family status would in fact help working parents in the reconciliation.

In contrast with provisions of the Directive which do not provide a definition of parental leave, Article 1 of the Draft 1983 defines parental leave as an entitlement to the leave of a given duration for wage earners. Clause 1(2) of the Directive contrasts with Article 3(1) of the Draft 1983 which was intended to apply to all wage earners and not to only to workers with employment contracts or relationship

[413] A balanced participation of men and women in employment and family life and EU commitment to encouraging introduction of measures facilitating equal sharing in family responsibilities between working fathers and mothers now constitute an integral part of the EU social policy.
[414] Male breadwinner type of a family often forced women to stay at home in order to look after their children. Married women because of their commitment to family life were often perceived by employers as unreliable and lacking commitment to given tasks.

(often employees).[415] This indicates that the Commission Draft 1983 contained more inclusive provision in relation to the availability of parental leave than the Directive concluded by Social Partners. A wide spread availability of parental leave which is not restricted by the type of contract on which workers are employed is crucial for reconciliation as it significantly increases the availability of the leave and thereby enhances workers' reconciliation choices. As seen earlier in Chapter, the limited availability of parental leave under the Directive reflects the lowest common denominator approach of Social Partners to introducing the right to parental leave.

Clause 2(1) of the Directive significantly narrows down the provision contained in Article 1 of the Draft 1983 which granted the right to parental leave to persons with the sole or principal charge of a child and not only natural or adoptive parents. The Draft 1983 did not provide a clear explanation as to in what circumstances a parent would be regarded as having *sole or principal charge* of his/her child. Work-family choices made by individuals are not made in an isolation from their individual circumstances and are also influenced by the legal framework[416] Consequently, the Draft 1983 which enabled parental leave to be taken by any person with sole or principle charge of a child significantly enhanced parents' reconciliation choices as the leave could be taken by grandparents or any person who actually cared for the child. Different parents may have different preferences as to their involvement in work and family responsibilities; how caring responsibilities are divided within a family and the ability of delegating care responsibilities to non-parents could effectively assist some parents with making real reconciliation choices. A possibility of taking parental leave by non-parents (for example by a grandmother) could in particular help single parent families for whom due to the lack of help from the second parent it may be particularly difficult to achieve the desired reconciliation.

Both the Directive and the Draft 1983 provide that the duration of parental leave should be at least for three months and enable Member States to provide for

[415] Article 2(1) and Article 3(1) Draft Directive on parental leave COM(83) 686 as amended by COM(84) 631.
[416] R. Crompton (2006) op. cit., p. 13.

longer periods of the leave. Despite the change in the legislative process which resulted in adopting of the Directive, the restrictive provision on the duration of parental leave was reinforced. As discussed earlier Chapter 3, the short duration of the leave can significantly limit parents' reconciliation choices. Although, the Directive aims at helping working parents to reconcile work and parenting responsibilities its provisions are more restrictive than the Draft 1983. The Draft 1983 contained more detailed provisions in relation to the availability of the leave and better responded to the extended needs of various families including single parent families by stating that parental leave could be extended for those families.[417] This progressive provision of the Draft 1983 much better responds to reconciliation needs of various groups of working parents than the Directive which fails to recognise the necessity of tailoring the duration of parental leave to the individual needs of different families. In contrast with provisions of the Directive, the Draft 1983 considered changes in society where traditional families are no longer the norm. It therefore sought to provide single parents with an extended duration of the leave in order to better respond to their extended caring needs, and thereby contribute to elimination of the direct or indirect discrimination on grounds of marital or family status. Thus, the change in the legislative process has resulted in watering down of the original provision of the Draft 1983 on the duration of the leave, and restricting reconciliation choices of various groups of parents with extended caring responsibilities.

Under the Draft 1983 parental leave was available until the child reached the age of two, which implied that the leave was designed to enable parents to care for very young children. This in conjunction with the very short duration of the leave and the fact that parental leave could be taken as a continuation of maternity leave could further reaffirm mothers as primary carers for children. Thus, reinforcing stereotypes about the division of responsibilities within a family and limiting mothers' reconciliation choices. There was no envisaged right to parental leave to enable parents to care for older children.[418] This contrasts the provision on the

[417] Draft Directive on parental leave COM(83) 686 as amended by COM(84) 631 in Article 4(5) stated that length of parental leave could be extended for single parents, one-parent families or both parents in cases where the child is handicapped and lives at home.
[418] Article 4(6) Draft Directive on parental leave COM(83) 686 as amended by COM(84) 631.

age limit in the Directive which provides parents with right to parental leave for children up to 8 years of age.[419] The adoption of the Directive has resulted in the introduction of the right to parental leave, which significantly exceeds the envisaged by the Commission age limit in the Draft 1983. Although, the Directive extended the availability of parental leave to slightly older children, by not providing parents of older children with the right to parental leave it further reaffirmed the deficiency of Draft 1983. The absence of the right to parental leave in relation to older children indicates that despite the change in the legislative process reconciliation needs of parents with older children have not been fully recognised. Neither the Directive nor the Draft 1983 has adequately recognised the reconciliation needs of parents with older children who also need assistance with work-family choices.

Despite seeking to enable both parents to reconcile work and family responsibilities, the Directive does not provide working parents with an absolute right to the non-transferable parental leave.[420] This contrasts the Draft 1983 where the right to parental leave was to be strictly a non-transferable personal right for male and female workers because at the time of the adoption of the Directive personal right did not exist in most Member States.[421] The reason why the non-transferable leave was proposed derived from the fact that predominately female workers were involved in upbringing children. Introducing the non-transferable right would address the imbalance in the division of family responsibilities between working parents, and promote equal opportunities, especially for women in employment. This indicates that the Draft 1983 contained more stringent provisions aiming at ensuring more equality in the distribution of caring responsibilities within a family than the Directive concluded by Social Partners.

Although parents should be given a choice as to how caring and working responsibilities are distributed within a family, the non-transferable leave entitlement is of vital importance in challenging gender stereotypes. It must be

[419] Clause 2(1) Council Directive 96/34/EC on the Framework Agreement on parental leave.
[420] Clause 2(2) Council Directive 96/34/EC on the Framework Agreement on parental leave.
[421] Article 4(7) Draft Directive on parental leave COM(83) 686 as amended by COM(84) 631.

emphasised that the non-transferable right to parental leave in the Draft 1983 was a highly disputed matter, which effectively prevented its adoption.[422] Social Partners have secured the unanimous adoption of the Directive in the Council by removing the highly contested matter concerning the non-transferability of parental leave. Consequently, the change in the legislative process which led to the adoption of the Directive cannot be fully credited for ensuring the EU right to parental leave.

The Directive restricts the availability of the leave to each birth regardless of the number of children born during the same birth. The Draft 1983 contained more generous entitlements for parents than the Directive as it provided workers with the right to parental leave, which could be exercised in respect of each born or adopted child.[423] This provision of the Draft 1983 much better responds to reconciliation needs of working parents because it recognises parents' additional caring needs which derive from multiple births. Unlike the Directive which does not provide for any specific regime in relation to adoptions, the Draft 1983 provided for the legislative regime in relation to adopted children. The Draft 1983 to a lesser extent than the Directive relies on the role of Member States in regulating parental leave entitlements. As it was already seen in this Chapter, the provisions of the Directive have been influenced by the principle of subsidiarity and therefore the Directive contains very few specific provisions and largely

[422] Attempts to draft the new proposal for a directive on the leave periods were renewed during the Belgian Council Presidency in 1993. The change in the attitude towards adoption of the directive on parental leave and leave for family reasons was brought about by changes in the Belgian government, where Liberals were replaced with the Socialists who formed a coalition with Christian Democrats. In order to gain the acceptance of the German government the text of the newly proposed directive no longer provided for non-transferable leave. The UK firstly tried to gain the derogation from the directive and then announced its opposition (During the Social Council's sessions 23 November 1993). While negotiating, the solution appeared to be the lowest common denominator. The UK would agree if parental leave was to be granted only to mothers and that the fathers should be excluded. This in principal contradicted the objective of parental leave as a measure intended to be adopted under the Community programme for combating social exclusion. The Irish delegation and the Commission objected to the proposed change, and the Commission saw it as clear case of discrimination on grounds of sex and even threatened to refer the case to the CoJ. Luxembourg's delegation did not consider the proposed provision as revolutionary because the provisions of Luxembourg's proposed legislation were more advanced than the one proposed by the Commission. The Belgian presidency called upon the UK to try to reach a compromise under the Greek presidency. Despite 11 out 12 Member States agreeing on the proposed Directive, it was not adopted due to the UK *veto* on 22nd September 1994. *Agence Europe*, November 25, 1993:9.

[423] Article 4(4) and (5) Draft Directive on parental leave COM(83) 686 as amended by COM(84) 631.

delegates to Member States the task of introducing specific measures on leave periods. It can be argued that not the change in the legislative process but the lowest common denominator provisions of the Directive and over-reliance on the principle of subsidiarity ensured the adoption of the Directive.

The Draft 1983 in Article 5(4), provided that parental leave could be suspended in the event of the illness of the parent on leave but the Directive merely contains general provisions on parental leave that do not mention this eventuality. The possibility of suspending the leave when a parent due to his/her illness is unable to provide the needed care is crucial for enabling parents to effectively use their short entitlement to parental leave. The Draft 1983 was more progressive and better responded to parents' individual reconciliation needs than the Directive by enabling parents to quickly suspend the leave because of the illness of the leave taker. Considering that parental is unpaid and during sick leave parents maybe entitled to some form of payment, the possibility of suspending the leave due to illness must be seen as providing parents with the needed leave flexibility. This could also contribute to reducing disadvantages associated with the taking of the leave and help parents with making genuine reconciliation choices. In contrast with the Draft 1983, the Directive has been adopted in the spirit of not imposing additional burdens on businesses and therefore as observed earlier in this Chapter it does not enable parents to quickly alter their leave arrangements because of the changing family circumstances.

Both the Directive[424] and the Draft 1983[425] enable Member States to restrict the availability of parental leave to parents who can comply with length of service requirements not exceeding one year. This indicates that the involvement of Social Partners in the legislative process has further reaffirmed the restrictive availability of the leave under the Draft 1983. The lack of the right to parental leave for all employed parents significantly limits reconciliation choices of those working parents who for some reasons do not comply with the qualification requirements. The leave accessibility can be further restricted by Member States

[424] Clause 2(3)(b) Council Directive 96/34/EC on the Framework Agreement on parental leave.
[425] Article 5(3) Draft Directive on parental leave COM(83) 686 as amended by COM(84) 631.

as the Directive allows them to make it subject to various notice requirements.[426] In contrast with the Directive which enables national legislators to introduce any notice requirements, the Draft 1983[427] contained a specific provision, which provided that the length of the required period of notice was not to exceed two months. The cap on the notice period in the Draft 1983 sought to ensure that there were no significantly differences in the leave accessibility across the EU. It also prevented Member States from introducing excessively long notice requirements that could prevent parents from being able to access the leave when it is most needed by families. Unlike the Draft 1983, the Directive further restricted the accessibility of parental leave by allowing Member States to postpone the leave due to some business operational reasons.[428] Despite its reconciliation objective the Directive enables Member States to introduce excessively long, complex notice requirements and allows the leave to be postponed even if the notice requirements were complied with. Since the leave may not be available when it is most needed by working parents this significantly restricts parents' work-family choices. Consequently, the involvement of Social Partners in the EU decision making process resulted in watering down of the provision on notice requirements in the Draft 1983 and allowing employers to postpone the leave regardless of parents' reconciliation needs.

Neither the Directive nor the Draft 1983 provides working parents with the right to flexible parental leave arrangements. In order to not to impose excessive burden on businesses the Directive delegated to Member States the task of introducing flexible leave arrangements. The Draft 1983 was more explicit than the Directive in recognising that the interests of employers come before the reconciliation needs of families as flexible leave arrangements (part-time leave) depended on employer's approval of such arrangements.[429] Unlike the Directive which enables parents to gradually use their leave entitlement, the Draft 1983 was less considerate for parents' reconciliation needs because where the leave was taken in part, the remaining part of the leave was lost.[430] The necessity of exercising the

[426] Clause 2(3)(d) Council Directive 96/34/EC on the Framework Agreement on parental leave.
[427] Article 4(3) Draft Directive on parental leave COM(83) 686 as amended by COM(84) 631.
[428] Clause 2(3)(e) Council Directive 96/34/EC on the Framework Agreement on parental leave.
[429] Article 5(1) Draft Directive on parental leave COM(83) 686 as amended by COM(84) 631.
[430] Article 5(2) Draft Directive on parental leave COM(83) 686 as amended by COM(84) 631.

right to the leave in full indicates that the right to parental leave under the Draft 1983 lacked flexibility, and therefore qualifying parents in disregard of their real reconciliation needs could be forced to prolong their leave in order not to lose their allocated quota of the leave. Mothers and fathers make reconciliation choices in the context of their particular situations and their choices are influenced by various restraints associated with the taking of the leave. Consequently, the leave arrangements agreed by Social Partners are less restrictive than those under the Draft 1983. The Draft 1983 reinforced the traditional division of responsibilities within a family by providing parents with the very short and inflexible leave period which in practice needed to be taken by mothers on expiry of maternity leave. Since the Directive does not provide working parents with adequate flexible leave arrangements enabling them to make real work-family choices, the change in the legislative process has failed to significantly enhance the flexibility of the leave.

Mothers with different earning capacities demonstrate strongly differing beliefs about mothers and mothering. The same can be said about fathers' attitudes towards the provision of care.[431] Depending on different earning capacities of parents the availability of income or other financial support whilst on parental leave may predetermine whether the leave is taken and how caring responsibilities are allocated within a family. Thus, the lack of remuneration whilst on parental leave may prevent less well-off families from making genuine reconciliation choices. Despite ensuring the adoption of the Directive, the change in the legislative has failed to ensure financial support to leave takers as both the Directive and the Draft 1983 do not provide leave takers with the right to paid leave.

[431] Crompton (2006) op. cit., p.672.

In contrast with the Directive[432] which merely provides parents with the right to unpaid parental leave, the Draft 1983[433] stated that workers on parental leave could receive a parental leave allowance that was to be paid from public funds.[434] The presence of a positive statement as to the right to pay whilst on leave indicated the legislator's desire to ensure that parental leave would be paid at least at the low level from public funds.

The involvement of Social Partners in EU decision making process did not provide working parents with the right to paid parental leave. This indicates the failure of the new process to ensure that working parents are provided with reconciliation rights enabling them to make genuine reconciliation choices. Additionally, the new legislative process did not help to overcome the political pressure deriving from Member States concerning the issue of pay which prevented the Draft 1983 from providing for paid parental leave.[435] As the issue of pay is outside the competence of Social Partners, the lack of paid parental leave reaffirms the limits of their legislative powers under the EU decision-making process. Allowing the Directive to be based on a framework agreement effectively meant that it would not provide parents with the right to paid parental leave, which is indispensable for enabling less well-off workers to make genuine reconciliation choices.

The Directive and the Draft 1983 do not seek to provide working parents with the fully comprehensive legislative protection from detriments or dismissal associated

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[432] Clause 2(1) Council Directive 96/34/EC on the Framework Agreement on parental leave.
[433] Article 6 Draft Directive on parental leave COM(83) 686 as amended by COM(84) 631.
[434] The Economic and Social Committee (ESC) contested that the wording of the Article 6 of Draft 1983 should read *during parental leave workers shall be granted a parental leave allowance* but this was not taken into account and the original wording remained unchanged in the amended Draft 1983. The ESC argued that considering that there were approximately 13 million persons registered as unemployed in the EU, the proposal could not be justified either on economic or social grounds. Since there were no legal provisions regulating parental leave in many Member States (1984), the mandatory introduction of parental leave together with the obligatory charge on the social security system and the optional payment of a parental leave allowance would place unacceptable financial burdens on businesses and society as a whole. Consequently, it would be up to Member States to decide whether the leave was to be paid and at what rates. See Opinion of the Economic and Social Committee OJ 6.8.84, No C 206/49 op. cit., para 3.3 and Appendix 3 p.52.
[435] The political pressure deriving from different Member States forced the necessity of a compromise on the pay issue, although parents would certainly prefer the leave to be paid. Not leaving to Member States the freedom to legislate in the area of pay would have certainly jeopardised the adoption of Draft 1984. See Evelyn Ellis (1986) `Parents and Employment: An Opportunity for Progress`, *Industrial Law Journal*, pp.97-109.

with the taking of the leave. Both these measures restrict the availability of the legislative protection from dismissal or detriments only to the period from the application for parental leave until the end of the leave.[436] Thus, enabling employers to subject to detriments or dismiss those parents who could apply for the leave and those who have returned from the leave. The absence of detriments associated with the taking of the leave and adequate legislative protection from dismissal are crucial for enabling parents to make real reconciliation choices, and encouraging fathers' involvement in the provision of care. Consequently, the Directive has reinforced the deficiencies of the Draft 1983 to the detriment of working parents by merely requiring Member States to introduce necessary measures without clearly defining the level of the legislative protection from detriments or dismissal, which needs to be provided to the leave takers.

Mothers and fathers may have preferences as to their involvement in work and family decisions but their work-family choices are also influenced by restraints on employment prospects and job security associated with the taking of the leave. The possibility of returning to the former job at the end of the leave is crucial in enabling parents to make real reconciliation choices. However, neither the Directive[437] nor the Draft 1983 guarantee this and merely enable workers to return to an equivalent job. The decision to take parental leave under the Draft 1983 and the Directive involves a certain level of uncertainty concerning worker's position within the workforce after returning to work. This factor would undoubtedly work as a deterrent from taking parental leave to workers (with good jobs) who were not prepared to gamble with their future career. Consequently, the Directive has reinforced this deficiency of the Draft 1983.

[436] Clause 2(4) Council Directive 96/34/EC on the Framework Agreement on parental leave and Article 10 Draft Directive on parental leave COM(83) 686 as amended by COM(84) 631.
[437] Clause 2(5) Council Directive 96/34/EC on the Framework Agreement on parental leave. and Article 5(7) Draft Directive on parental leave COM(83) 686 as amended by COM(84) 631.

Despite the change in the legislative process the Directive[438] mirrors the provision of the Draft 1983[439] and restricts legislative protection to worker's acquired rights or the rights in the process of being acquired prior to parental leave. This as seen earlier in this Chapter constitutes a major deficiency of both the Directive and the Draft 1983[440] as lower contributions made on behalf of parents (often mothers) during parental leave financially punish the leave takers by reducing their future entitlements under various social security schemes. This could be seen as a form of penalising those willing to use their entitlement to parental leave and thereby further discouraging parents from taking the leave, which in any case is unpaid.

As the **Appendix**, **Table 5** indicates the Draft 1983 also sought to provide workers with the entitlement to time off from work because of *pressing family reasons.*[441] The Directive provides workers with the entitlement to leave on grounds of force majeure for urgent family reasons.[442] Both the Directive and the Draft 1983 do not provide workers with the right to time off for family reasons and merely require Member States to provide for such entitlement. This may indicate that the importance of the provision of care for dependants is lower in the hierarchy of priorities than parental leave both for the Commission and Social Partners. Workers with caring responsibilities for adult dependants also have their preferences as to their involvement in work and care which can be restricted by various factors, including the legal framework. The flexible access to sufficient time off work in order to provide the needed care is of paramount importance in enabling workers to make real reconciliation choices.

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[438] Clause 2(6) Council Directive 96/34/EC on the Framework Agreement on parental leave.
[439] Article 5(5) Draft Directive on parental leave COM(83) 686 as amended by COM(84) 631.
[440] Member States were to adopt measures to ensure the continuity of employment during the period of parental leave was maintained. Periods of parental leave or family leave were to be credited in the same way as periods of maternity leave for the purpose of periods of insurance as regards sickness, unemployment, invalidity benefits and old-age pension (Article 5(6) of Draft 1983). The opinion of the Economic and Social Committee indicated that the provision of Article 5(6) of Draft 1983 could result in additional social insurance costs being imposed on parents for the reason of taking parental leave. See Opinion of the Economic and Social Committee, OJ 6.8.84, No C 206/49 op. cit., para 3.2.
[441] Article 8(1) Draft Directive on parental leave COM(83) 686 as amended by COM(84) 631.
[442] Clause 3(1) Council Directive 96/34/EC on the Framework Agreement on parental leave.

Unlike the Draft 1983[443] that provided the detailed examples of what would constitute `pressing family reasons`, the Directive only states that the leave would be granted in cases of sickness or accidents. Limiting the right to the leave only to cases of illness and accidents significantly narrows down the scope of the right originally envisaged in the Draft 1983 where the pressing family reasons included the death of a close relative; illness of a spouse and the wedding of a child. This provision of the Draft 1983 much better responds to reconciliation needs of workers with caring responsibilities for dependants than the Directive, because it seeks to recognise that workers' caring responsibilities are not limited to cases of sickness or accident, and include joyous events which also need to be reconciled with the demands of work.

Neither the Directive nor the Draft 1983 clearly defines the duration of the leave and therefore it is left to be defined by Member States. The Directive[444] places emphasis on the necessity of the immediate presence of the worker as a condition for granting the leave which may imply a very short duration of the leave. In contrast, the Draft 1983 defined leave for family reasons as leave of limited duration (not short) that was to cover both important and pressing family reasons. The Draft 1983 that provided for the leave of limited duration was more stringent than the provision of the Directive implying that the duration of the leave should only cater for the immediate presence of the worker. This may indicate that this provision of the Draft 1983 better responded to workers' reconciliation needs than the Directive, as it recognised that workers may need the leave of a limited duration but not short in order to provide the needed care to dependants.

Weak provisions of the Directive fail to recognise the extended reconciliation needs of single parent families or families with many children. However, the Draft 1983 provided for the possibility of extending the duration of the leave for family reasons in relation to single parent families and parents with three or more children.[445] This indicates that the Directive has significantly limited the leave arrangements under the Draft 1983 and provides workers with the entitlement to

[443] Article 8(2) Draft Directive on parental leave COM(83) 686 as amended by COM(84) 631.
[444] Clause 3(1) Council Directive 96/34/EC on the Framework Agreement on parental leave.
[445] Article 8(3) Draft Directive on parental leave COM(83) 686 as amended by COM(84) 631.

the leave which does not respond to reconciliation needs of contemporary families. Both the Draft 1983 and the Directive merely seek to ensure that male and female workers are provided with the leave entitlement which can be a family entitlement. By not providing workers with their individual and non-transferable right to the leave, the Directive further reinforces the deficiency of the Draft 1983, and fails to address the issue of imbalance in the division of care responsibilities between men and women. Although, workers should be able to decide how work and care responsibilities are divided within a family, the partially non-transferable leave could help to challenge the predominant ideologies of care.

Unlike the Directive which ignores the importance of ensuring the right to pay whilst on leave, the Draft 1983 stated that the leave for family reasons was to be paid by the employer and for the purpose of remuneration would amount to paid holidays.[446] This provision of the Draft 1983 was essential to helping workers with making genuine reconciliation choices but it was criticised.[447] The lack of right to remuneration whilst on the leave can significantly limit less well-off workers' reconciliation choices. The absence of the entitlement to paid leave for family reasons in the Directive indicates the inability of Social Partners to match the progressive content of the Commission Draft 1983, and their failure to recognise the necessity of ensuring income during the leave in order to enable workers to reconcile paid work with care for dependants.

Taking into account that the Draft 1983 was not passed by the Council because it provided for the right to pay whilst on the leave, the change in the legislative process in favour of the involvement of Social Partners, albeit resulting in the introduction of the right to unpaid leave in the Directive, it cannot be considered as more appropriate method of introducing the EU reconciliation Directives than the

[446] Article 11 Draft Directive on parental leave COM(83) 686 as amended by COM(84) 631.

[447] The proposed directive was seen as potentially imposing an unnecessary burden on businesses. See DTI, March 1985, *Burdens on Business: Report of a Scrutiny of Administrative and Legislative Requirements* and see John, McMullen (1986) `The New Proposal For Parental Leave and Leave for Family Reasons`, *Company Lawyer,*7(1), 30-32. The conclusion of the Select Committee disagreed with the proposed right to leave for family reasons because it saw it as unnecessary, and therefore should be applied on a voluntary basis. The main reason why the Committee rejected the right to leave for family reasons was that it saw the inability of the legislation to effectively deal with the vast variety of reasons for taking family leave. See Third Report of the House of Lords Select Committee on the European Communities on 12th February 1985, p.xxxi-11, paras 93-97.

Commission Draft 1983.[448] This derives from that the adoption of the Directive was secured by removal of the most contested provision on pay. This indicates the lowest common denominator approach which was adapted by Social Partners to introducing the entitlement to leave for urgent family reasons. The comparison between the provisions of Draft 1983 and the provisions of the Directive indicates that the change in the legislative process in favour of the involvement of Social Partners in the legislative process, rather than the Commission being the leading legislator has not resulted in the introduction of more stringent provisions in the Directive than those outlined in the Draft 1983. As the Directive merely aims at ensuring the minimum entitlements to the leave periods the introduction of the stringent national policies will depend on the national initiatives and not the impetuous deriving from the Directive. Subject to the national implementation the Directive can be progressive in Member States where more stringent rights than envisaged in the Directive have been introduced or reinforcing the stereotypes about the distribution of responsibilities between working parents where merely the minimum requirements of the Directive have been implemented.

Consequently, it is now necessary to consider the national implementations of the Directive in the UK[449] (Chapter 4) and Poland[450] (Chapter 5) in order to evaluate the legislative contribution of this Directive to enhancing the national entitlements to the discussed leave periods and enabling both working parents to reconcile work and family responsibilities.

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[448] The Economic and Social Committee (ESC) saw the necessity of legislating in the area of leave for family reasons as inappropriate. The reason for the reluctance to legislate on family leave derived from the fact that the proposal provided for paid family leave, which undoubtedly raised a significant level of controversy among Member States striving to preserve their national sovereignties. The ESC categorically rejected the necessity of legislating in the area of family leave because of legal, economic and social reasons. It argued that Draft 1983 had no legal basis because it concerned mainly family policy issues and the Community did not have the legal authority to lay down provisions relating to family law. The ESC considered the Draft 1983 as encroaching upon the autonomy of the two sides of industry. This took place particularly in the case of the leave for family reasons, which was traditionally regulated by collective agreements in Member States. It was further stated that collective agreements were more suitable for regulating this area because they take account of different traditions and the individual wishes of workers. The Draft 1983 was considered as contravening the principle of solidarity between those in employment and the unemployed. It was emphasised that the Community top priority should have been given to creation of productive jobs, instead of bringing in costly improvements to the living conditions of those who already have the advantage of having the job. Cf. Opinion of the Economic and Social Committee OJ 6.8.84, No C 206/52 Appendix 3.

[449] With references to the selected well-established Member States such as Belgium, Germany, Ireland Luxembourg and Sweden.

[450] With references to the new Member States such as Czech Republic, Hungary and Slovakia.

Chapter 4 An Exploration of the Parental Leave Directive in Terms of How it Shapes Law in the UK with Reference to Selected Well-established Member States.

4.1 Background

As indicated in Chapter 1, the emergence of EU reconciliation policies has subsequently resulted in measures being introduced at national level in order to comply with the requirements of the EU. The Labour government that came to power in 1997 played an important role in introducing the UK reconciliation policies as it implemented the EU social policy requirements. The government sought to achieve an appropriate balance between promoting the fair treatment of workers and enabling employers to retain the efficiency by relying on flexible work practices. This approach of the Labour Party towards regulation of the labour market indicates a departure from *old Labour's* social democratic interpretation of employment relations and the role of the state in addressing the imbalances in power between capital and labour.[451] The **Appendix**, **Table 6** outlines the key stages in the development of the UK reconciliation policies.

Although the *White Paper Fairness at Work* (the FaW)[452], recognised the need of enabling workers to achieve the desired reconciliation its focus was on not overburdening businesses with the additional regulation of the labour market and encouraging companies to introduce reconciliation policies on a voluntarily basis. The Labour government's rationale for introducing family-friendly policies was that by facilitating parents' reconciliation, the productivity of

[451] I. Roper, I. Cunningham and Ph. James (2003), 'Promoting Family-Friendly Policies, Is the Basis of the Government's Ethical Standpoint viable? Personnel Review, 32(2):211-230. In the White Paper Fairness at Work, Labour government disclosed for the first time its own plans for the future of employment law in the UK. This shift could be identified by comparing the opening line of the Labour manifesto In Place of Strife (1969) to that of the White Paper Fairness at Work. In *Place of Strife,* in para. 1 it states: *"There are necessary conflicts of interest in industry. The objective of our industrial relations system should be to direct the forces producing conflict towards constructive ends.* "The White Paper *Fairness at Work* in the foreword by the Prime Minister states: "This White Paper is part of the Government's programme to replace the notion of conflict between employers and employees with the promotion of partnership..." It should be noted that In Place of Strife was rejected by unions as excessively limiting member's rights.

[452] The White Paper Fairness at Work, CM 3968, Presented to Parliament on 21 May 1998.

individual workers could be increased. Hence, reconciliation policies were needed as long as the mutual benefit of employees and businesses could be achieved by promoting family-friendly culture in business.[453] Roper and others[454] argue that the rejection of a more interventionist approach towards regulation of the labour market could indicate that further employment regulation was perceived by the Labour government as risky, futile and inappropriate. This may have been because the nature of globalisation allows trans-national capital to be moved to countries, which have more favourable regulatory regimes. Since over-regulation could deter investment and make the UK's businesses less competitive in the international market, the government decided to place its emphasis on the role of businesses in transforming the UK's labour market.[455]

Taylor and Emir[456] stress the existence of the on-going debate around the social and economic arguments underpinning the introduction of family-friendly laws in the UK. The social argument behind the introduction of the family-friendly measures was that they would enable employees to spend more time with their families and therefore this would improve the social cohesion. The result of that would be fewer breakdowns in marriages and relationships to the benefit of the whole society. Lea[457] criticises the existence of the laws emphasising the rights of employees and limiting the rights of employers because this could lead to an economy which is less able to compete globally with other businesses which are not restricted by family-friendly measures. Lea[458] also considers the attempts to introduce laws enabling employees to achieve work-life balance as a *sentimentalist retreat from life harsh realities* where employees have obligations as well as rights toward their employer.

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[453]Section 5(1) White Paper Fairness at Work.
[454] I. Roper, I. Cunningham and Ph James (2003) `Promoting family-friendly Policies: Is the basis of the Government's ethical standpoint viable?`, *Personnel Review,* 32(2):211-230 at p.212.
[455] Cf. S. Driver and L. Martell (1998) *New Labour Politics after Thatcher,* Cambridge: Polity Press.
[456] Stephen Taylor and Astra Emir (2009) *Employment Law*, Ashford: Oxford University Press, pp.467-471.
[457] R. Lea (2001) *The Work-Life Balance and All That: The Regulation of the Labour Market*, London: Longman.
[458] Ibid. 1.6.

Taylor and Emir[459] recognise that some commentators perceive family-friendly policies to be unfair. This unfairness is rooted in those policies imposing a significant burden both on employers and other workers who have no family responsibilities, and therefore are forced to work harder to compensate for the *extra* privileges of those workers with family responsibilities. Lea[460] argues that family-friendly polices should be implemented exclusively on a voluntary basis and they should not become the law imposing obligations on employers.

If family-friendly policies were to be implemented exclusively on a voluntary basis employers not in favour of the family-friendly practices would do nothing or very little to help working parents to achieve reconciliation. Consequently, the labour market could be further divided into family-friendly employers and those employers who do not support family-friendly policies. Additionally, allowing the UK's businesses to implement family-friendly policies purely on a voluntary basis would be in breach of the obligations deriving from the EU as reconciliation Directives had to be implemented. Thus, it was recognised that in order to ensure that all parents are better able to achieve reconciliation, the voluntarily measures must be underpinned by the legal framework.[461] It must be emphasised that the UK reconciliation policies have been introduced because the UK was obliged to implement the EU reconciliation Directives and not because of the national legislator's own initiatives to provide workers with reconciliation rights (**Appendix**, **Table 6**).

Hence, the UK reconciliation policies have been based on the minimum standards outlined by reconciliation Directives and seek to help workers with reconciliation by limiting working time, increasing flexibility of work arrangements, improving childcare facilities and providing workers with various

[459] Taylor and Emir (2006), op. cit., p.443.
[460] Lea (2001) op. cit., 4.3.2.
[461] Section 5(5) *White Paper Fairness at Work.* Hence, Labour government pledged to improve family income, to tackle excessively long working hours, provide working parents with greater flexibility in working time arrangements, remove discrimination against part-time workers, improve access to part-time work, extending maternity leave and introducing parental leave and leave for urgent family reasons. The *White Paper Fairness at Work* did not contain any detailed provisions for future family-friendly measures, and as a white paper had no legal significance both for business and working parents.

leave entitlements.[462] This includes parental leave and leave for dependants which due to their paramount importance for reconciliation and choice are going to be addressed in detail in this Chapter. The current UK legal framework does not provide workers with the independent right to reconciliation. The recently introduced equality legislation, *Equality Act 2010,* does not address the necessity of ensuring equality in the distribution of caring responsibilities within a family in the reconciliation context. Considering the current UK economic and political climate, it is very unlikely that the Coalition government is going to further enhance the UK reconciliation policies.

It was seen in Chapter 3, Council Directive 96/34/EC on the Framework Agreement on parental leave merely outlines the minimum requirements on leave periods and its effectiveness in enabling different groups of female and male workers in making real reconciliation choices will depend on the extent to which the national implementations have exceeded the minimum requirements of the Directive and introduced more stringent national rights. This Chapter seeks to explore this Directive in terms of how it shapes law at national level in the UK and the extent to which the UK leave arrangements can help workers with making genuine reconciliation choices. It considers the development of national policies on parental leave and leave for urgent family reasons in the UK. The legal analysis of the provisions of the UK law on parental leave and leave for urgent family reasons is informed by socio-legal methodologies and post-modern feminist perspectives (as outlined in Chapter 2). It considers the extent to which the Directive has stimulated changes in national leave entitlements and whether the UK implementation of the Directive has exceeded its minimum requirements.

Although different groups of female and male workers may have their own preferences as to their involvement in work and care, it is recognised by

[462] The introduction of the right to paid paternity leave by Employment Act 2002 is of a particular importance for the development of reconciliation policies, as it sends a powerful message to fathers that caring for children is not mothers' exclusive responsibility. For the discussion on the evolution of the role of the UK fathers in reconciliation see M. Kilkey (2006) `New Labour and Reconciling Work and Family Life: Making it Fathers' Business?` *Social Policy and Society*, 5(2):167-175.

writers[463] in the field that workers' reconciliation choices are influenced by various constraints which can be associated with a particular legal right.[464] Hence, national legal provisions on leave periods are analysed in terms of their contribution to enabling workers with caring responsibilities to make genuine reconciliation choices. As reconciliation choices are always made in the particular context of different families and different groups of workers have different reconciliation needs, the legal analysis also considers the extent to which leave arrangements in the UK accommodate fathers' and single parents' reconciliation needs. Since the Directive sought to ensure more equality in how caring responsibilities are allocated within a family, national legal provisions are analysed in view of considering whether, or not they contribute to perpetuating of dominant theories of motherhood and parenthood.

The positioning of the UK implementation of the Directive in relation to other well-established Member States is considered by making references to Belgium, Germany, Ireland Luxembourg and Sweden. The relevant case law is analysed in order to identify the most contested provisions and determine whether the national Courts' interpretations of those provisions enhanced workers' legislative rights and their reconciliation choices. The evaluation of provisions of the UK legislation provides information which shall be relied upon in the comparative analysis of national implementations of provisions of the Directive in the UK and Poland that is undertaken in Chapter 6.

4.2 The Evolution of the UK Right to Parental Leave and Leave for Family Reasons.

[463] G. Bruning and J. Plantenga (1999), 'Parental leave and equal opportunities: Experiences in eight European countries', *Journal of European Social Policy*, 9(3):195–209. C. Fagan and G. Hebson (2004), *European Commission, Making work pay' debates from a gender perspective: A comparative review of some recent policy reforms in thirty European countries*, Luxembourg: Office for Official Publications of the European Communities. J. Plantenga and C. Remery (2005), *European Commission, Reconciliation of work and private life: A comparative review of thirty European countries*, Luxembourg: Office for Official Publications of the European Communities. P Moss and F. Deven (eds.) (1999), *Parental leave: Progress or pitfall?*, Brussels: NIDI/CBGS Publications.

[464] These constraints include e.g. restrictive availability of the leave, inflexible leave arrangements, financial penalties for leave takers, employment security risks, no absolute right to return to work after the leave.

As indicated in Chapter 1, the UK opted out from the 1989 Social Charter and the Agreement on social policy and therefore it was not covered by the originally adopted *Parental Leave Directive* 96/34/EC. On 15th December 1997, subsequent amendment by the Council Directive 97/75/EC[465] of the Council Directive 96/34/EC extended its provisions to the UK and Northern Ireland with the deadline for its implementation 15th December 1999. Consequently, in line with Clause 1(1) of the Directive the UK was obliged to implement the compulsory minimum standards[466] and had the discretion as to the implementation of the non-binding, soft law provisions[467] of the Directive. The Directive has been implemented in the UK by *Maternity and Parental Leave etc. Regulations* 1999 (the MPLR)[468] and *Employment Rights Act 1996* (the ERA 1996) as amended by *Employment Relations Act 1999* (the ERA 1999). Regulations came into force on the 15th December 1999 and were introduced to fulfil the obligations deriving from the UK membership in the EU. The *Employment Relations Act 1999*, which received Royal Assent on 27th July 1999, amended the *Employment Right Act 1996* by removing the existing Part VIII[469] on maternity rights and replacing it with a new Part VIII providing for the right to parental leave (Chapter II). Additionally, the *Employment Rights Act 1999* introduced new sections 57A and 57B to part VI of the ERA 1996 containing provisions on time off for urgent family reasons.

4.2.1 The Evolution of the Right to Parental Leave in the UK.

[465] *Official Journal* L 010, 16/01/1998 P. 0024-0024.
[466] The right to at least 3 months' parental leave, an individual right to parental leave, the leave available on grounds of birth or adoption, protection against dismissal for those taking parental leave, right to return to the same job or if not possible to equivalent, rights acquired to be maintained during the leave and after and the right to force majeure leave.
[467] The non-transferable entitlement, entitlement to social security benefits whilst on parental leave (in particular healthcare benefits), parental leave to be taken up to child's 8th birthday, the leave granted not only on a full-time basis (part-time, a piecemeal option, as a time-credit system), men to be encouraged to take parental leave, Social Partners' special role in implementation and application of the Directive 96/34/EC.
[468] SI 1999 No. 3312. Amendments: The Maternity and Parental Leave (Amendment) Regulations 2001, SI2001 No.4010, The Maternity and Parental Leave (Amendment) Regulations 2002, SI 2002 No. 2789, The Maternity and Parental Leave etc. and the Paternity and Adoption Leave (Amendment) Regulations 2006, SI 2006 No. 2014
[469] Sections 71-85 ERA 1996.

The Directive has played a crucial role in the evolution of the right to parental leave in the UK because prior to its implementation there had been no legislative right to parental leave in the UK.[470] Before the legislative right was introduced, parental leave had been granted on a voluntarily basis and there was no legal recourse if the leave was not granted at all. Although the UK vetoed the Commission proposal for a Directive on parental leave in 1980s (**Appendix, Table 2**), Parliamentary debates on this Directive reaffirmed that the right to parental leave was seen as bringing important benefits for childcare and equal opportunities at work and therefore it was a proper subject for legislation.[471]

Additionally in 1993, during the debate on paternity rights,[472] the opposition (Labour Party) proposed the new Clause 11 (amending the Industrial Relations Act 1992) which was intended to provide working parents with the right to parental leave.[473] This proposal was influenced by the Commission proposal for a Directive which was discussed in Chapter 3 and was blocked by the Tory government. The 1993 proposal was more stringent than the later adopted Regulations because it sought to provide working parents with the option of taking the leave either on a part-time or full-time basis and aimed to reward with longer leave those parents who took it on the part-time basis. The adoption of less stringent national scheme on parental leave in the MPLR than proposed in 1993 may indicate *Old Labour* was more committed towards introducing stringent employment rights than the *New Labour* which formed the government in 1997.

The novelty of the UK legislative right to parental leave was confirmed by the study[474] which found that in 1988 none of the companies contacted had a

[470] The legislative right to parental leave also did not exist in the Republic of Ireland, Luxembourg and Belgium (partial right).
[471] Select Committee Third Report for the session 1984-1985, February 1985 at para. 83.
[472] HC Deb 14, 16 February 1993, cc 222-225.
[473] It was proposed that each parent should be entitled to either three months full time or six months part-time parental leave which could not be taken simultaneously by both parents. The leave was to be completed before the second birthday of a child and would be available to adoptive parents.
[474] The study of special leave arrangements in 146 companies undertaken by Institute of Personnel. Cf. M. Gilman, IRRU (1998) *Provision for parental leave in the UK* http://www.eurofound.europa.eu/eiro/1998/01/word/uk9712183s.doc accessed on 05/05/2008.

specific policy on parental leave. The survey[475] indicated that voluntary parental leave arrangements were not very common. Other estimates provided that due to the costs involved, only 3 percent of UK employees had the access to some form of paid parental leave.[476]

The consultation on proposed Regulations on parental leave revealed the existence of the conflict between interests of businesses and those of workers, and the lack of the full recognition by employers of benefits for businesses deriving from the right to parental leave. The leave was seen as imposing an additional burden on businesses.[477] In response to the CBI's views[478] the MPLR do not impose excessive burdens on businesses and provide for the parental leave scheme containing merely the minimum requirements as outlined by the Directive. The UK law on parental leave was adopted with the intention of allowing enough flexibility and simplicity in order to enable employers and employees to agree on particular provisions that meet their needs.[479] Lord Sainsbury of Truville[480] argued that the obvious intention of the government was to refrain from introducing specific measure in order to enable employers and employees to agree on the details of the parental leave

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[475] IRS (1998) 'Workplace Employee Relations Survey, *European Industrial Relations Review.* It established that one in five men and a third of women in the private sector had access to some form of parental leave. In the public sector the availability of parental leave was higher as one in three both men and women had an access to some form of parental leave. The remuneration whilst on parental leave was very rare e.g. the agreement between the MSF union and Remploy provided for three months' parental leave out of which ten days were paid.

[476] H Wilkinson (1997), *Time out: the cost and Benefits of paid parental leave*, Demos, London.

[477] Employers consulted were not convinced about the benefits that the introduction of parental leave could bring for their businesses and perceived the leave as imposing additional burden on businesses. They argued that parental leave should remain to be granted on a voluntary basis but this was not the viable solution because the Directive obliged the UK to introduce legally binding measures. Cf. House of Commons, *Family Leave*, Research Paper 99/89, 11 November 1999 pp.1-47.

[478] According to the CBI which initially was against the introduction of a statutory right to parental leave, the MPLR strike a reasonable balance between individual right and business realities. Cf. CBI news release, *Good progress on parental leave, but still more to do*, 4 August 1999. The CBI was in favour of the legislation outlining merely minimum requirements and details of parental leave to be agreed through voluntarily arrangements between employees and employers. It maintained that the voluntarily leave arrangements were more suitable than the legislation, as they offered a better chance of balancing the needs of employers and employees. Cf. CBI's response to the consultation on parental and maternity leave, October 1999.

[479] Standing Committee (pt 8), Debate on Employment Relations Bill by Mr. McCartney, HC Debate 23/02/1999,

[480] The Parliamentary debate of the Employment Relations Bill 1998/99 in Committee in the Lords, HL Deb 16 June 1999, c 317.

entitlement by means of legally enforceable provisions in collective agreements, workforce agreements or individual agreements.[481] Roper, Cunningham and James[482] suggested that business interests were not merely a consideration, but the priority for the government in setting the family-friendly rights.

During the consultation, the TUC rejected the option of voluntary parental leave arrangements based on workforce agreements. In their view, collective agreements with recognised trade unions should be the core method of voluntary agreements on parental leave.[483] Consequently, the Bill was amended to ensure that the minimum requirements outlined in the Directive are complied with and all other details surrounding parental leave could be agreed by businesses and their workforce. The amendment aimed at enabling the collective and workforce agreements to substitute the regulations, on condition that the contract of employment incorporates or operates by reference to a collective or workforce agreement which provides for parental leave.[484]

The UK legislator by making merely the minimum requirements of the Directive legally binding and leaving the task of introducing detailed provisions on parental leave to collective agreements or workforce agreements, intentionally avoided addressing the real conflict between the demands of work and family responsibilities that the right to parental leave was meant to address. This reaffirms the existence of the inherent difficulties in reconciling the needs of businesses and workers, which prevented both Social Partners and the UK legislator from concluding detailed, legally binding provisions on parental leave and leave for urgent family reasons. The failure of Social Partners to agree on

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[481] Department of Trade and Industry (1999), *Parental and Maternity Leave – Public Consultation*, URN 99/1043, August 1999, par 11 http://www.dti.gov.uk/ir/pat-lve.pdf accessed on 16 September 1999.

[482] I. Roper, I. Cunningham and Ph James (2003) 'Promoting family-friendly Policies: Is the basis of the Government's ethical standpoint viable?', *Personnel Review*, 32(2):211-230.

[483] The TUC response to DTI consultation on parental and maternity leave, October 1999.

[484] In order to achieve this, as Lord Sainsbury clarified there was a need to amend the provisions of the Bill on collective agreements and workforce agreements (new Section 81) with a more flexible arrangement (to be inserted at the end of new Section 78) which would facilitate agreements between businesses and their workforce see HL Deb, 8 July 1999, c 1079.

the detailed provisions of the Framework Agreement has been further reinforced by the general nature of the UK equivalent laws and resulted in neglecting the reconciliation objective of the Directive. Unsurprisingly, the minimum requirements on leave arrangements were well received by employers and are considered by CBI[485] as being introduced in a way that allows employers the flexibility of offering the leave without detriment to their firms and without excessive bureaucracy. McColgan[486] and Smith[487] consider the UK approach toward transposition of the Directive as minimalist and in some cases, inadequate.

Although, the employers and employees have been given the power to agree the precise details of parental leave by means of legally enforceable provisions in collective agreements or workforce agreements, the reluctance of employers towards providing for more than statutory minimum is widespread, as identified by the survey.[488] The general provisions of the Directive as implemented in the UK may act to the detriment of employees employed by small and medium sized companies who, due to operational requirements of the businesses may be deterred from, or unable to use parental leave as a means of reconciling

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[485] House of Commons, Trade and Industry Committee, *UK Employment Regulation Seventh Report of Session 2004–05*, HC 90-1, The Stationery Office Limited, London, 8 March 2005 pp.1-33, at p.23 para. 71.

[486] A. McColgan (2001), `The family-friendly Employment Relations Act?`, in Ewing, K.D. (Ed.), *Employment Relations at Work. Reviewing the Employment Relations Act 1999*, London: Institute of Employment Rights, pp. 113-136.

[487] P. Smith and G. Morton (2001), `New Labour's reform of Britain's employment law: the devil is not only in the detail but in the values and policy too`, *British Journal of Industrial Relations*, 39(1):119-138.

[488] Department of Trade and Industry (2003), *The second Work-Life Balance Study: Results from the Employer Survey – Main Report*, Employment Relations Research Series No.22, October 2003 pp.149-186. It is estimated that between 9% and 11% of UK employers offered extended parental leave arrangements and that there had been no tendency to voluntarily increase parental leave entitlements from what was introduced by the Regulations. It was established that the most stringent parental leave arrangements were offered by public sector employers and workplaces belonging to very large organisations. Among all industries Public Administration was identified as having a higher proportion of workplaces offering parental leave arrangements exceeding the legal minimum. The above survey also established that not only the vast majority of employers did not offer extended parental leave entitlements but 55% of establishments employing five or more employees did not have a written policy covering parental leave. The more generous for employees parental leave entitlements primarily related to working arrangements and only 3% of employers provided for some payment.

work and family responsibilities.[489] This indicates a major drawback of the Directive which was defined in the general manner by Social Partners in order to cater for the needs of the small and medium size businesses and not for the reconciliation needs of their employees.

In contrast with the small public sector companies, the large public sector establishments better accommodate the needs of working parents and thereby enable more parents to use their leave entitlement as a means of reconciliation.[490] At the EU level, employees employed by public sector companies more often use their parental leave entitlement than those working for private sector companies.[491] Despite the possibility of enhancing parental leave rights through the means of the above-mentioned agreements due to the absence of the collective or workforce agreements, the vast majority of working parents are forced to rely on the default legislative provisions in their attempts to reconcile work and family responsibilities.

4.2.2 The Evolution of the UK Entitlement to Leave for Family Reasons.

Before the Directive came into force there had been no UK legislative

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[489] Department for Business Enterprise and Regulatory Reform (2007), *The Third Work-Life Balance Study: Results from the Employer Survey – Main Report*, Employment Relations Research Series No.86, October 2007. There is evidence that the UK employees employed by small companies due to operational business reasons or the organisation culture within a company are less likely to take parental leave than those employed by larger firms. Furthermore survey established that within smaller workplaces (5 to 24 employees), parents employed by private sector establishments were more likely to exercise their right to parental leave (12%) than those working for public sector establishments (5%). The higher rate in the private sector could be justified on the basis that there are very few public sector companies employing up to 24 employees. Working parents employed by small establishments were less likely to be able to use parental leave in order to reconcile family-responsibilities and paid employment.

[490] Ibid. It confirmed the right to parental leave was more often exercised by employees working for large (over 100 workers) public sector establishments (46%) than those working for equivalent private companies (34%). This indicates that in contrast with small public sector companies the large public sector establishments better accommodate reconciliation needs of working parents.

[491] European Foundation for the Improvement of Living and Working Conditions (2007), *Parental Leave in European Companies, Establishment Survey on Working Time 2004-2005*, Luxembourg, pp.1-51. There is evidence that on average 45% of the surveyed EU companies (43% of UK companies) employing ten or more employees and 95% of EU companies (91% of UK companies) with 500 or more employees had some experience of employees taking parental leave during the last three years. The data gathered in the above survey suggests that employees employed by EU public sector companies (58%) more often use their parental leave entitlement than those working for private sector companies (50%).

entitlement to the leave for urgent family reasons because the Tory government believed that legislation was unable to effectively deal with the vast variety of reasons for taking the leave and supported already existing voluntary practice.[492] To implement the Directive, Regulation 20 of the MPLR was introduced and the Employment Rights Act 1996 was amended by Employment Relations Act 1999, which inserted into it the new section 57(A)(B) providing for the legislative right to time off for dependants. This area was previously regulated by contractual schemes, collective agreements, or had been subject to employer's discretion.

Although before 1999 there was no UK legislative right to time off work on grounds of certain sudden and unexpected emergencies, there is evidence[493] that most employers permitted their employees to take time off work to cater for certain family emergencies and in some cases the leave was even paid for by the employer.[494] Since prior to 1999 there was no uniform right to leave for family reasons and in cases where no voluntary regulation existed, employees, in order to be provided with the time off had to rely on contractual implied terms.[495] An employee willing to take time off work on grounds of some family emergency would have to rely on the generosity of the employer, or would have to establish the existence of a contractual term whether express or implied providing him/her with the right to the time off work. Taking unauthorised time off work could result in an employee breaching his/her employment contract which could lead to a fair dismissal. In order to succeed in the claim for an unfair dismissal an employee would need to prove the

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[492] Select Committee, Third Report for the session 1984-1985, February 1985 at para. 83.
[493] M. Cully, S. Woodland, A. O'Reilly, and G. Dix (1999) *Britain at Work: As depicted by the 1998 Workplace Employee Relations Survey*, London: Routledge.
[494] It was reported that 24% of workplaces with 10 or more employees provided employees with special paid leave. The study confirms the leave was more widely available at workplaces with fewer than 10 employees (42%). The existence of well-established, (predating the ERA 1999) emergency leave arrangements is supported by 22% of all workplaces providing for fully paid leave. Cf. Department of Trade and Industry (2003), *The second Work-Life Balance Study: Results from the Employer Survey – Main Report*, Employment Relations Research Series No.22, October 2003 pp.153-160. The Department of Trade and Industry survey established that 30% of workplaces had some form of written policy covering the leave and in majority of cases all employees were eligible to paid time off for dependants. Cf. Department of Trade and Industry (2000) *Survey of Employers; Support for Working Parents.*
[495] J. McMullen (1986) op. cit., pp.30-32.

existence of a contractual term providing him/her with the right to time off work in an emergency and that the employer breached that term. Proving the existence of the contractual term entitling the employee to time off work for urgent family reasons and showing that the employer breached that term by not allowing the employee to take the time off work when it was requested posed major difficulties to employees bring claims before Employment Tribunals.

This is exemplified in *Warner v Barber's Stores* [1978][496] where the employee's request to take a day off work to supervise her son's insulin injection and ensuring his wellbeing was rejected by the employer on the grounds of the organisational difficulties that her absence would have caused. Mrs Warner took an unauthorised day off work and resigned from her job, claiming unfair dismissal. The EAT reaffirmed the decision of the ET that the employer's refusal to permit Mrs Warner to take a day off work to look after her son did not amount to a breach of contract by the employer entitling her to claim constructive dismissal.[497] This claim was treated as any other constructive dismissal claim which was assessed following the approach outlined in *Western Excavating (EEC) Ltd v Sharp* [1977][498] requiring the evidence that the employer's conduct was in breach of a fundamental term of the contract.

Kilner Brown J reaffirmed the existence of either an express or implied term in relation to reasonable time off work in an emergency in particular in large companies. He further stated that there was neither precise authority in the matter nor would be in accordance with common sense to extend the existence of such an implied term to the full range of employer/employee relationships including small businesses and therefore Mrs Warner was not constructively unfairly dismissed. The decisive factor which predetermined the outcome of this case was that the Appellant was employed by a small

[496] *Warner v Barber's Stores* [1978] IRLR 169. See also employer's duty to behave *reasonably* in *Wigan Borough Council v Davis* [1979] IRLR 127; *Robinson v Crompton Parkinson Ltd* [1978] IRLR 61; *Garner v Garage Furnishing Ltd* [1977] IRLR 2006.
[497] Under para. 5(2)(c) of Schedule 1 to the Trade Union and Labour Relations Act 1976.
[498] *Western Excavating (EEC) Ltd v Sharp* [1977] IRLR 25.

company and therefore the EAT was not prepared to imply the term. This ruling effectively reaffirmed that employees employed by small companies could legitimately be treated less favourably in relation to their request for time off work on grounds of family emergencies. The existence of an implied term in relation to the entitlement to the reasonable time off was conditioned by facts of each case and would certainly not apply in favour of employees employed by small businesses.

The existence of implied terms in employment contracts was further explored by the Court of Appeal in the case of *Woods v WM Car Services (Peterborough) Ltd* [1982].[499] Lord Denning MR ruled that an implied term exists in favour of the employee under which `it is the duty of the employer to be good and considerate to his servants`. Although, the existence of the implied term was established, the Court of Appeal did not clearly specify in which situations an employee could rely on the implied term as to the employer's duty to be good and considerate to the employee. The difficulty is that this term is to be implied only in certain circumstances and the question of whether the term should be implied or not remains to be decided by employment tribunals on a case by case basis. This meant that neither the employer nor the employee could be certain about their actions as the matter remained open to various interpretations by courts. Thus, in the absence of the express contractual term or collective agreements in relation to the leave for urgent family reasons, an employee seeking to take time off work because of some family emergency could risk being fairly dismissed from work for breach of his/her employment contract. McMullen[500] identified the potential for some inconsistencies in the way the term in relation to time off for urgent family reasons was implied by courts. He expected that the EU right to leave for family reasons would considerably improve the employment protection in this field in the UK.

Having considered the evolution of the leave policies in the UK, this Chapter now examines the provisions of the national law on parental leave and leave

[499] *Woods v WM Car Services (Peterborough) Ltd*, CA [1982] IRLR 413, [1982] ICR 693.
[500] J. McMullen (1986) op. cit., pp.30-32.

for urgent family reasons (in the chosen context) in view of exploring the contribution of the Directive in shaping law in the UK and helping parents with reconciliation choices.

4.3 The UK Implementation of the Directive is Minimalist and Weak.

The inherent characteristic of EU Directives is that their implementation brings about the existence of significant differences in the equivalent national laws. Börzel[501] identified a number of factors which influence the national implementation of EU policies. In accordance with her view, the implementation of the Directive on parental leave was likely to encounter difficulties in the UK and other Member States which did not have the equivalent national policies (Ireland and Luxembourg) and where the complete overhaul of the national laws on parental leave and leave for urgent family reasons was required.[502] The impact of the Directive was expected to be the highest in those Member States as its implementation required the introduction of the equivalent national rights.[503] The implementation of the Directive in the UK brought about the introduction of new legislative entitlements to parental leave and leave for urgent family reasons. However, despite clear references to the role of parental leave in reconciliation in the *FaW* there is no legislative right to the reconciliation in the UK. Consequently, the UK implementation of the Directive on parental leave has failed to reflect the importance of parental

[501] T. A. Börzel (2000) 'Improving Compliance through Domestic Mobilisation? New Instruments and Effectiveness of Implementation in Spain in Ch. Knill and A. Lenschow (eds.), *Implementing EU Environmental Policy. New Directions and Old Problems*, Manchester University Press pp.222-250 at p.225. In her view, the implementation problems may be assumed only to occur if there is a pressure for adaptation. However, there should be no problems with the implementation of EU measures if they fit the problem solving approach, policy instruments and policy standards existing at the national level. In principle, the EU legislation may easily be incorporated into existing legal and administrative systems of MSs. The implementation failure should be expected only in cases where the implementation of an EU policy requires considerable legal and administrative changes imposing economic and political costs on the public administration.

[502] The Belgium law on parental leave also needed to be revised in order to provide all employees with the right to the leave.

[503] O. Treib, G. Falkner (2004) *The First EU Social Partner Agreement in Practice, Parental Leave in the 15 Member States*, Institute for Advanced Studies, Vienna: Political Science Series 96, pp. 1-21.

leave and leave for family for the reconciliation.[504] The express inclusion of the concept of reconciliation in the body of the legislation would clearly reflect the reconciliation objective of the Directive, and reaffirm the UK legislative commitment to introducing stringent reconciliation policies.[505]

4.3.1 Restrictive Availability of Parental Leave Entitlement.

The minimalist approach of the UK legislator to implementing the Directive became evident in that the MPLR[506] originally restricted the availability of the leave only to parents of children born after 15th December 1999 (the implementation date).[507] The cut-off date significantly reduced the legislative impact of this right as there were a significant number of parents of children born prior to the date specified in the Regulations who were not entitled to benefit from the right to parental leave.[508] The reason why parental leave was not to be retrospective derived from the fear that qualifying employees with children approaching the cut-off age would rush to use their entitlement before

[504] Stephen Byers, Secretary of State for Trade and Industry when launching the consultation document on the Maternity and Parental Leave Regulations frequently referred to the importance of the right to parental leave in helping working parents to balance work and family responsibilities. DTI press release, *Over a million to benefit from new family friendly package for working parents*, 4 August 1999.

[505] The public consultation was published by the Government on 4th August 1999. Cf. DTI Employment Relations Directorate, *Parental and Maternity Leave: Public Consultation*, URN 99/1043, August 1999. The consultation received 310 responses, which included 194 responses from employers and their representatives and 56 responses from employees and employees' organisations. Cf. DTI press release, *Byers lays regulations before Parliament giving parents time off to care for young children,* 4 November 1999. The draft regulations implementing the proposals received during the consultation process were published in September 1999, http://www.dti.gov.uk/ir/pat-regs.pdf , accessed on 23/03/2001. The draft Maternity and Parental Leave etc Regulations 1999 were laid before Parliament on 4 November 1999.

[506] Regulation 13(3) MPLR

[507] The cut-off date did not apply if a child was adopted by the employee, or placed with the employee for adoption by him, on or after that date.

[508] At the time when the MPLR were proposed for adoption there were approximately 3.3 million employees (DTI, *Employment Relations Bill: Regulatory Impact Assessment*, February 1999) with the child under the age of five, out of which 2.7 million were continuously employed by the same employer for longer than a year. Under the above provision of the Regulations at least 2.7 million of employees, parents of children born before the 15 December 1999 were excluded from the rights under the Directive on parental leave. DTI, `Employment Market Analysis and Research, 1999 Compendium of Regulatory Impact Assessment,` *Employment Relations Research Series No.53* http://www/dti.gov.uk/publications on 20/12/2006.

it expires and that it would impose excessive burden on businesses.[509] The TUC argued that section 13(3) of the Regulations was over restrictive; it did not comply with Clause 2(1) of the Directive; that the cut-off date for parental leave eligibility should be removed and that all qualifying working parents with children under the specified maximum age should be provided with the right to parental leave.[510] The cut-off date which was initially inserted into the Regulations indicated that the government favoured the needs of employers over reconciliation needs of working parents.[511]

The compatibility of the cut-off date in the Regulations with Clause 2(1) of the Directive was tested by High Court in *R. v Secretary of State for Trade and Industry*[512] where Mr Justice Morison ruled that that the arguments of the TUC would likely prevail if the case was taken before the CoJ. The matter was referred to the CoJ for a preliminary ruling under Article 267 TFEU (ex 234 EC).[513] The question for the CoJ was whether the Directive 96/34/EC confers the right to parental leave to children of the specified age born or adopted before the implementation date of the Directive. There was no CoJ's ruling on that matter because the cut-off date was then removed from the Regulations.[514]

The expansion of the right to parental leave to children born before 15 December 1999 did not derive from the legislator's desire to make the leave more accessible for parents but it was informed by the Commission's reasoned opinion in relation to the similar cut-off date in the Republic of Ireland, where it

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[509] The CBI argued that making parental leave available to all employees with a year's qualifying service would impose excessive burdens on businesses if too many parents of older children would simultaneously try to benefit from their right to parental leave before it expires. House of Commons, *Fairness at Work,* Cm3968, Research Paper 98/99, 17 November 1998, p.59.

[510] TUC response to DTI consultation on parental and maternity leave, October 1999.

[511] The desire of the UK Government to restrict the entitlement to parental leave only to children born or adopted after the above date was clearly indicated by Ian McCartney, the Minister for Employment Relations at the Department of Trade and Industry during Employment Relations Bill's 1998/99 passage through the Parliament. Cf. House of Commons Standing Committee E, Third Sitting, 23 February 1999, cc 81-116.

[512] *R. v Secretary of State for Trade and Industry*, Case No: CO/376/2000, Queen's Bench (Divisional Court), 23 May 2000, 2000 WL 664409 para.15.

[513] Case C-234/00, OJ C233, 12/08/2000 p.23.

[514] Regulation 13(3) was repealed by Regulation 3(c) of the *Maternity and Parental Leave (Amendment) Regulations 2001*, SI 2001 No.4010.

was found in breach of the Directive.[515] The incompatibility of the cut-off with the Directive 96/34/EC was reaffirmed by CoJ in *Commission of the European Communities v Grand Duchy of Luxembourg*[516] where it was held the right to parental leave is acquired by birth or adoption which is not conditioned by the implementation date.

Although the cut-off date has been removed from the Regulations, the attempt of the UK government to impose additional restrictions on the availability of the leave which further limited the minimum requirements of the Directive clearly indicates the lack of the legislative initiative of the UK legislator to pursue the reconciliation attributes of the Directive, and that interests of businesses took priority over reconciliation needs of working parents. Considering that the Republic of Ireland and Luxembourg also had not provided for the right to parental leave prior to the implementation of the Directive, the introduction of excessively restrictive leave access conditions in these countries indicates that those Member States have also failed to fully recognise the importance of the reconciliation objective of the Directive.[517]

Regulation 13(1) MPLR[518] restricts the availability of parental leave to male and female employees who have or are expected to have a responsibility for a child. An employee shall be entitled to parental leave if he/she has parental responsibilities.[519] The meaning of having a parental responsibility is defined by *Children Act 1989*. In section 3(1), it states that:

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[515] The *Irish Parental Leave Act 1998* that came into force on 3 December 1998 also contained the cut-off date of 3 June 1996. The Irish Congress of Trade Unions complained to the European Commission that the Irish legislation which implemented the Directive 96/34/EC was in breach of EU law because it limited the right to parental leave only to parents of children born on or after 3 June 1996. The European Commission declared the cut-ff date in the Irish legislation as being in breach of the Directive, which resulted in its removal. Cf. `Parental Leave Directive`, *IDS Brief 642*, August 1999.

[516] Case C-519/03 *Commission of the European Communities v Grand Duchy of Luxembourg*, OJ C 35 of 07.02.2004, at para. 47. The implementing the Directive 96/34/EC national law of Luxembourg also provided that parental leave was to be available to parents of children born after 31 December 1998. In case of adopted children, the leave was available if the adoption procedure was initiated before the relevant tribunal after the above date.

[517] The German legislation on parental leave still provides that parental leave is only available to parents of children born after 31 December 1991 but this provision does not have any practical impact on the availability of the leave in Germany.

[518] It implemented in the UK Clause 2(1) Council Directive 96/34/EC on the Framework Agreement on parental leave.

[519] Regulation 13(2)(1)(a) MPLR.

"...parental responsibility means all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property"

Additionally, the entitlement to parental leave is granted to employees who have been registered as the child's father/mother under any provision of section 10(1) or 10A (1) of the *Birth and Deaths Registration Act 1953.*[520] Parental responsibilities under the MPLR also include responsibilities for an adopted child or a child who is placed with the employee for adoption.

The definition of parental responsibilities adopted by the UK in line with Clause 2(1) of the Directive (discussed in Chapter 3) provides the right to parental leave only to the natural and adoptive parents of a child. This effectively implies that persons who have the sole or principle charge of a child and are neither natural nor adoptive parents would not qualify for parental leave. By adopting the narrow definition of parental responsibilities in the Regulations, the UK legislator has potentially excluded from the right to parental leave a significant number of employees who have parental responsibilities for the children who are neither their adoptive nor natural children e.g. grand parents. The narrow definition of parental responsibilities also does not provide for the right to care for older dependants. Consequently, the restrictive definition of parental responsibilities which fails to recognise reconciliation needs of workers with adult dependants merely implements in the UK the minimum requirements of the Directive.

Regulation 13(1) MPLR restricts the availability of parental leave only to qualifying employees and does not provide all working parents with the right to parental leave. The lack of clear definition of the qualifying worker under the Directive brought about the necessity of reliance on different national definitions and concepts of who is a worker with an employment contract or employment relationship, and who is actually entitled to parental leave.[521] Despite calls from the TUC to extend parental leave to all working parents, the

[520] In Scotland The Registration of Births, Deaths and Marriages (Scotland) Act 1965.
[521] For the discussion on various definitions of employment contract Cf. G. Cavalier and R. Upex (2006) `The Concept of Employment Contract in European Union Private Law`, *International and Comparative Law Quarterly*, ICLQ 55 3 (587).

UK legislator fully exploited the lowest common denominator provisions of the Directive and restricted the leave to employees only. The definition of a worker under EU law is much wider than the definition of an employee.[522] The TUC argued that in this respect the UK right to parental leave could be in breach of the Directive on parental leave.[523] However, this argument was never tested by courts. Consequently, only working parents whose employment relationship falls within the national definition of an employee could benefit from parental leave. The UK's weak implementation of the Directive ignores reconciliation needs of working parents with caring responsibilities for children whose employment status is not that of an employee (e.g. self-employed).

[522] Cf. G. Davidov (2005), `Who is a Worker?`, *Industrial Law Journal*, 34(1):57-71.

[523] In response to the consultation on parental leave, the TUC requested that the right to parental leave should be extended to other groups of workers not only employees because Clause 1(2) of the Directive on parental leave applies to all workers with an employment contract or relationship. The key feature of an employment relationship under EU law is that, for a certain period of time, in return for the remuneration a person performs services for and under the supervision of another person. Cases 66/85, *Deborah Lawrie-Blum v Land Baden-Württemberg* [1986] ECR 2121, paras. 16 and 17; Case C-176/96 *Jyri Lehtonen and Castors Canada Dry Namur-Braine ASBL v Fédération royale belge des sociétés de basket-ball ASBL* (FRBSB) [2000] ECR I2681, para. 45; Case C-138/02 *Collins v Secretary of State for Work and Pensions* [2004] ECR I2703, para. 26; Case C-456/02 *Michel Trojani v Centre public d'aide sociale de Bruxelles* (CPAS) [2004] ECR I7573, para. 15 and Case C-392/05 *Georgios Alevizos v Ypourgos Oikonomikon* [2007] ECR I-000, para. 67. The nature of employment under national law has no consequence regarding employment status under the EU law. Case 53/81 *D.M. Levin v Staatssecretaris van Justitie* [1982] ECR 1035, para. 16; Case 344/87 *I. Bettray v Staatssecretaris van Justitie* [1989] ECR 1621, paras. 15 and 16; Case C-188/00 *Bülent Kurz, né Yüce v Land Baden-Württemberg* [2002] ECR I-10691, para. 32 and *Trojani* op. cit., para. 16. The Trade Unions Congress pointed out that the Regulations which limit the right to parental leave to employees could be in breach of the Directive 96/34/EC. This argument of the Trade Unions Congress was not accepted by the government, probably due to the mounting pressure from the Confederation of British Industry and British Chamber of Commerce who saw a worker's right to parental leave as imposing excessive burden on businesses. Cf. TUC response to the DTI consultation on parental and maternity leave, October 1999.

The right to parental leave is also limited to employees in Belgium,[524] Germany[525] and Ireland. In contrast with the UK, the Swedish legislation provides all parents with the right to paid parental leave regardless of their employment status.[526] The UK minimalist right to parental leave for employees, which was introduced to minimise the disruption to business, mirrors national implementations in other well-established Member States (see **Appendix, Table 7**).

The Regulations[527] further safeguard interests of employers to the detriment of reconciliation needs of working parents by restricting the availability of parental leave to employees who have continuously been employed for the period of not less than a year. The right to the leave is lost when the employee changes his/her job as the previous employment with another employer is not considered when assessing the qualifying period.

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[524] The availability of leave may also depend on whether an employee works in the private or public sector. In contrast with the UK where the Regulations provide all employees with the right to parental leave the Belgian national law implementing the Directive has imposed some restrictions on parental leave in relation to certain groups of public employees and workers working in the agriculture or the forestry sector. Convention collective de travail n 64 du Conseil National du Travail instituant un droit au congé parental du 29/04/1997 rendue obligatoire par l'A.R. du 29 octobre 1997. Arrêté Royal du 10 août 1998 modifiant l'Arrêté Royal du 29 octobre 1997 relatif à l'introduction d'un droit au congé parental dans le cadre d'une interruption de carrière.

[525] The positive impact of Directive 96/34/EC on enhancing the availability of the right to parental leave can be identified in Germany, where implementation of the Directive expanded the right to parental leave to working fathers and the single-income couples who previously had no right to the leave. The pre-existing laws on parental in those Member States had to be amended as they did not comply with the Directive which provides all workers with the right to parental leave regardless of the employment status of their partners. Cf. G. Falkner, M. Hartlap, S. Leiber and O. Treib (2002) `Transforming Social Policy in Europe? The EC's Parental Leave Directive and Misfit in the 15 Member States`, Max Planck Institute for the Study of Societies, Cologne, Germany http://www.mpi-sg-koeln.mpg.de/peaople/ot/download/chicago2002pdf accessed on 13/05/2003.

[526] Establishing whether a worker is an employee or self-employed is particularly difficult in Sweden where the concept of `self-employment` is not clearly defined in Swedish. The Swedish concept of an employee is very broad and may be applied to situations that in an EU context are understood as applying to `self-employment`. In Sweden the right to parental leave is primarily associated with the parenthood and not with the employment status as is the case in UK. As the key criteria for the right to parental leave to exist is the parenthood and not the employment status, the Swedish leave arrangements are available to all qualifying parents. The availability of the right to leave on grounds of parenthood also elevates the importance of parenthood in the employment context. European Commission, Directorate General for Employment, Social Affairs and Equal Opportunities, *Bulletin Legal Issues in Gender Equality*, No 2/2005 p.75.

[527] Regulation 13(1)(a) MPLR.

This means that working parents willing to retain their right to parental leave are prevented from changing employment. Those parents who have just changed their jobs will need to wait for a year in order to be eligible to take the leave for the first time or use the outstanding part of their entitlement. This constitutes a major deficiency of the right to parental leave as the Regulations do not provide for the special regime in relation to those parents who were forced to change employment (redundancy). Being unable to satisfy the employment qualification requirement may completely prevent the employee from taking the leave if the child reaches the age of five before the qualifying employment criteria is satisfied. Gilbert[528] rightly saw the requirement of the qualifying period as depriving certain groups of workers of their right to parental leave.[529]

Since, the Directive allows Member States to introduce a qualifying period not exceeding one year, the UK legislator was in a position to introduce national measures providing for the right to parental leave which is subject to much shorter, or not subject to any qualifying periods or service requirements.[530] The UK implementation of the longest qualifying period allowed under the Directive indicates its failure to ensure the wide availability of the leave in the UK and the minimalist approach of the UK legislator to implementing this Directive.[531] This failure of the Directive has also been reinforced in Belgium, Ireland and Luxembourg where the longest permitted service requirement has

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[528] R Gilbert (2000) *New Leave Rights for parents at Work* in http://www.ringelclare.org/newleave.htm p.3 of 3. accessed on 20/01/2001.

[529] It should be noted that in 2001 the MPLR were amended (by SI 2001/4010 Reg 3(a)). Regulation 13(1)(A) of MPLR provides all employees who were in employment (between 15th December 1998 and 9th January 2002) for the cumulative period of at least one year with the right to parental leave. As a result of this amendment the previous employment with another employer could be considered when determining the qualifying period. This amendment of the Regulations was of vital importance to working parents as it enabled them to change employment without jeopardising their right to the leave. It is however regrettable that it only applied to the transitional period and now the right to parental leave is subject to the original continuous employment requirement.

[530] Issues surrounding qualifying service requirements were also brought to the attention of the UK Government by Trade Unions Congress who argued that service requirements on parental leave were discriminatory and therefore should be removed but no legal action was taken against the Government. TUC response to DTI consultation on parental and maternity leave, October 1999.

[531] As discussed in Chapter 3, Social Partners reached the compromise on parental leave by making the leave entitlement subject to the qualifying period. The compromise was reached because the ETUC believed that at the national level the right to parental leave could be expanded and shorter service requirements would be introduced or preferably none.

been introduced. This also proves that all well-established Member States which had no national policies on parental leave have adopted the lowest common denominator approach towards implementation of this provision of the Directive. The existence of parental leave entitlements in Germany and Sweden where all parents regardless of the duration of their employment can benefit from the right to parental leave amplify the failure of the UK legislator to fully recognise the importance of parental leave for caring for children (**Appendix, Table 7**).

The implementation of the Directive has resulted in introducing the individual and non-transferable right to parental leave in the UK.[532] Hence, the UK legislator has exceeded the requirements of the Directive which merely required that parental leave should in principle be granted on a *non-transferable basis.*[533] The existence of the non-transferable right to parental leave indicates the UK legislator's attempt to address the issue of equal sharing of parental responsibilities between working parents and that the era when parental rights were exclusively for women has ended. Although the ERA 1996[534] states that legislation could provide for detailed measures on when the entitlement to parental leave could be transferred, the MPLR do not specify any situations when the right to parental leave could be transferred between parents. Thus, forgetting equal opportunities matters (addressed later in this Chapter), the UK leave entitlement is more restrictive than that envisaged in the Directive, which does not provide for an absolute non-transferable right to parental leave and thereby ensures that the leave is not lost if one parent decides not to take it. The leave entitlement varies across well-established Member States, it is available as an individual and non-transferable right in Belgium, Ireland and Luxembourg; fully transferable family

[532] Regulation 14 MPLR implemented in the UK Clause 2(1) Council Directive 96/34/EC on the Framework Agreement on parental leave.
[533] Clause 2(2) Council Directive 96/34/EC on the Framework Agreement on parental leave.
[534] Section 76(3)(b) ERA 1996.

right in Germany[535] and partially transferable right in Sweden[536] (**Appendix Table 7**).

4.3.2 Inflexible Parental Leave Arrangements Disadvantage Parents.

The Regulations[537] merely provide qualifying employees with the right to thirteen weeks of parental leave which can be taken in relation to each child.[538] Depending on employee's working patterns, a week's leave may also have different meaning. A week's leave may mean the time when the employee is contractually required to work the same period each week and that week's leave would amount to that period. However, if the employee is required by his/her contract of employment to work different periods every week or does not work every week then a week's leave is to be calculated by adding up all periods an employee is required to work during the year and dividing it by 52.[539] This effectively may disadvantage certain groups of workers as their actual leave entitlement may be shorter than expected.[540]

The entitlement to the separate period of parental leave arises in relation to

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[535] The fully transferable right to parental leave which is available to the German parents is more flexible than individual and non-transferable entitlement as it can be either fully or partially shared between parents and they are in a position to decide by whom the leave entitlement is used. Additionally, it allows either parent to use family entitlement, and therefore this entitlement is practically never lost. The existence of transferable leave may also put a pressure on women to use parental leave which is allocated to the family. The disadvantage of family right is that it can be predominantly used by mothers thereby reinforcing the traditional role of women within a family instead of ensuring more equality in the division of responsibilities within a family. The transferable entitlement, if it is equally shared between working parents may also act as an effective tool enabling both working parents to reconcile work and family responsibilities.

[536] The partially transferable right to parental leave is available in Sweden, where parents are both provided with the non-transferable and transferable portion of the leave.

[537] Regulation 14(1) MPLR implemented Clause 2(1) Council Directive 96/34/EC on the Framework Agreement on parental leave.

[538] In response to the *FaW,* the Confederation of British Industry proposed that multiple births should be treated as one child and therefore the duration of parental leave would be the same regardless of the number of children in the family. Additionally, the Confederation of British Industry insisted that the entitlement to parental leave should be limited to twelve weeks. These proposals were not implemented. Cf. House of Commons, *Fairness at Work,* Cm3968, Research Paper 98/99, 17 November 1998, p.59.

[539] Reg 14(2-3) MPLR.

[540] These differences in the meaning of week's leave were exemplified by Sargeant and Lewis[540] who showed that if an employee is required to work for five days every alternative week, then a week's leave will be 5x26, divided by 52, which amounts to 2.5 days. M. Sargeant and D. Lewis (2010) *Employment Law,* 5rd Edition, Pearson Education, London p.281.

each child, including multiple births which are to be treated as separate births. According to UK government the rationale for this right derives from the wording of Clause 2(1) of the Directive on parental leave, which uses the singular ('the birth .... of *a* child', 'to enable them to take care of *that* child') that suggests that a worker is entitled to a separate period of parental leave for each child.[541] By providing parents with the separate right to parental leave in relation to multiple births, the UK has exceeded the requirements of the Directive, which does not confer entitlement to a number of periods of the leave equivalent to the number of children born during the same birth.[542]

Despite providing parents of children born during multiple births with the leave entitlement in relation to each child from the outset the government had no intention of providing working parents with longer entitlements to parental leave than outlined in the Directive.[543] The failure of the UK government to introduce parental leave of the duration longer than outlined in the Directive and its emphasis on more stringent arrangements, which could be concluded between employers and employees[544] indicates that the failure of Social Partners to agree on stringent provisions of the Directive has been further reinforced by UK legislation to the detriment of working parents. Once again, different needs of businesses in relation to the duration of parental leave expressed in the consultation on the MPLR took priority over caring needs of working parents.[545]

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[541] Case C-149/10 *Zoi Chatzi v. Ipourgos Ikonomikon*, para. 46.
[542] Ibid. para. 61.
[543] Section 76(3) of *Employment Relations Bill 1998/99* on which the MPLR were based provided that the duration of parental leave should be at least three months. This provision of the Bill which merely implements the minimum requirements of Directive 96/34/EC and does not attempt to outline any longer duration of parental leave indicates that from the outset the UK Government had no intention to introduce longer leave than required by the Directive.
[544] Hansard HL Deb 16 June 1999, c 317.
[545] Stephen Byers stated that the Government does not want to dictate strict arrangements on parental leave because the public consultation demonstrated that different arrangements would suit different businesses. The minimalist approach of the government towards introducing parental leave can be identified in the words of Stephen Byers who called the Maternity and Parental Leave Regulations etc 1999 as being *groundbreaking* in terms of introducing the right to parental leave. DTI press release, *Byers lays regulations in Parliament giving parents time off to care for young children*, 4 November 1999.

The MPLR merely specify the minimum duration of the leave and the detailed arrangements are to be regulated by collective or workforce agreements. This, in practice, means that there could be significant differences in parental leave arrangements across the industry. The lack of uniform arrangements on parental leave may result in some employers offering more stringent parental leave arrangements whilst others offer the minimum provided for in the Regulations. As seen earlier in this Chapter, the lack of widespread collective or workforce agreements on parental leave forces parents to rely on the basic rights set out in the legislation.

Originally, the thirteen weeks' entitlement applied to all children including those receiving the disability allowance, but the entitlement to parental leave of parents of disabled children was further extended to eighteen weeks' in respect of each child receiving the disability allowance.[546] Even though this amendment slightly expanded the entitlement to parental leave in relation to disabled children, but this certainly does not meet the hopes and expectations of the ETUC negotiating the Directive who believed that agreeing on general provisions in relation to the duration of parental leave at EU level could result in the expansion of the rights at national level.[547] The UK Government, by implementing merely the minimum required by the Directive and emphasising that the key provision on the duration of parental leave could be extended through collective or workforce agreements delegated the task of facilitating workers' reconciliation to employers. Effectively, in the absence of the legislative requirement deriving from the Directive the UK Government avoided tackling the problem of introducing a balanced legislation on parental leave addressing the real needs of employees and employers.

The UK is not the only well-established Member States where prior to the implementation of the Directive there had been no national right to parental leave, which limited the duration of the leave to that set out in the Directive

[546] Added by *Maternity and Parental Leave (Amendment) Regulations 2001* SI 2001 No.4010, Regulation 4(b).
[547] Response to questionnaire of 16/05/2006 from the most senior negotiator for the ETUC, Appendix, Figure 3, pp.1-4.

(**Appendix, Table 7**).[548] This indicates a wider failure of the Directive to ensure that at national level working parents are provided with adequately long parental leave entitlements, which can meet their reconciliation needs. Unlike the UK, where the duration of the leave is not conditioned by any factors, the duration of parental leave in other well-established Member States may depend on whether the leave is taken on a part-time or full-time basis (**Appendix, Table 7**), and if the leave is taken immediately after maternity leave or not.[549] Luxembourg has adopted an unduly restrictive approach towards providing workers with the right to parental leave and sought to restrict the duration of the leave, by making it dependent on the availability of other forms of leave.[550] The post-birth maternity leave may reduce the duration of

[548] The minimum requirements of the Directive on parental leave as to the duration of the leave have also been reinforced by Belgian and Irish legislation. Slightly longer parental leave entitlement exists in Luxembourg where the duration of the leave exceeded the requirements of the Directive. In contrast with well-established Member States where no previous right to parental existed, Germany and Sweden, which have had a long tradition of granting parents with the right to parental leave, provide parents with the significantly longer leave entitlements that enable parents to provide personal care to children for long periods of time.

[549] Cf. S. Clauwaert and S. Harger (2000) op. cit., p.62.

[550] This issues was addressed in *Commission of the European Communities v. Grand Duchy of Luxembourg* where the contested provision was Article 7(2) of the national law on parental leave introduced in 1999 which stated that in the event of pregnancy or adoption of a child during parental, the leave would be terminated and replaced either with maternity or adoption leave. The remaining part of parental leave would then be completely lost without possibility of taking leave at the later time. In view of the Commission there was a breach of Clause 2(1) of the Directive 96/34/EC which provided working parents with the right to parental leave of the same duration which is distinct from other entitlements. The CoJ found that replacing parental leave with maternity leave was in breach of the Directive as maternity leave and parental leave had different purposes. This case revealed the failure of this national legislator to recognise the distinctiveness of parental leave from other periods of leave, and the reluctance of the Luxembourg government to provide all working parents with the equal parental leave entitlement. It is worth noting the justification of the incompatibilities of the national law with the Directive presented by the Luxembourg Government before the CoJ. It stated that only in extreme rare cases the infringement would occur because parental leave has to be taken immediately after maternity leave, it is predominately taken by women and that is not biologically possible for parental leave to be interrupted by another pregnancy. This proves that the parental leave scheme of Luxembourg has been designed exclusively for women with the assumption that very few men would exercise their right to parental leave. The scheme contradicts the main objective of Directive (enabling both working parents to reconcile work and family responsibilities through the use of parental leave) by discriminating against those parents who took parental leave in turns because if maternity leave occurred when the mother would still be on parental leave the outstanding parental leave would be completely lost. The implementation of Directive by Luxembourg legislator does not aim at enabling both parents to reconcile work and family responsibilities but merely ensures the existence of parental leave which is primarily designed to be used by women. Case C-519/03 *Commission of the European Communities v Grand Duchy of Luxembourg*, OJ C 35 of 07.02.2004 at paras. 25-32. For the discussion on the purpose of maternity leave Cf. Case C-366/99 Griesmar [2001] ECR I-9383, para. 43.

parental leave.[551]

The general rule under the MPLR is that qualifying employees may only exercise their right to parental leave in respect of each child who is less than five years old.[552] The right to parental leave (whether used or not) expires when the child reaches the age of five.[553] Despite responses to the Government consultation on parental leave which recognised the necessity of extending the age limit, the low age limit remained unaltered.[554]

[551] German legislation on parental leave §15 para. 3 BErzGG provides that post-birth maternity leave reduces parental time, except in cases of exceptional hardship (e.g. death of the mother). This provision of BErzGG was designed for married couples where the mother takes the first half or uses the full entitlement to parental leave. The duration of parental leave would normally be reduced if not the mother but the father or another relative of the child took the post-birth maternity leave except in cases of exceptional hardship. By reducing parental leave by eight weeks if it is taken immediately after the birth of the child by the father or another relative BErzGG discriminate against less traditional couples where the father not the mother looks after the child. Ironically, BErzGG which implemented the Directive 96/34/EC in Germany also aimed at encouraging fathers to become more involved in family life by exercising their right to parental time. Despite its commitment to enabling both working parents to reconcile work and family responsibilities through the use of the leave, BErzGG contradict this objective and penalise fathers who exercise their right to the leave. Since, more fathers than other relatives exercise their right to parental leave the German implementation of the Directive may be in breach of the EU sex discrimination laws and may further discourage German fathers from taking parental leave. Cf. D. Schiek (2002) op. cit., p. 367.

[552] Regulation 15(1-4) MPLR as substituted by SI2001/4010 reg 5.

[553] MPLR in Regulation 15(1)-(3) provide for three exemptions from the main rule. The first exemption applies to adopted children or placed with the employee for adoption. The upper age limit of 5 years of age does not apply in these cases because the entitlement to parental leave expires on the fifth anniversary of the date on which the placement began or regardless of the adoption date the entitlement ceases to apply on child's eighteenth birthday (Regulation 15(1-2) MPLR). The second exemption applies to working parents with responsibilities for a child who is entitled to a disability living allowance where the right to parental leave cannot be exercised beyond child's eighteenth birthday (Regulation 15(3) MPLR). The third exemption applies to a situation where an employee applied for the leave, the leave was postponed by the employer and meanwhile the child reached his/her fifth birthday. If this occurs the right to the leave can still be exercised at the end of the period that the leave had been postponed for regardless of child's fifth birthday being exceeded (Regulation 15 (4) MPLR. This provision attempts to remedy the effects of an employer's right to postpone the leave which is going to be analysed later in this Chapter.

[554] In response to consultation on the *FaW,* the Trade Unions Congress suggested that the entitlement to parental leave should last until child's eighth birthday. Cf. House of Commons, *Fairness at Work,* Cm3968, Research Paper 98/99, 17 November 1998, p.60. The Trade Unions Congress stressed that there was a need to set this age at 16 for parents of disabled children or children with other special needs. Cf. TUC response to DTI consultation on parental and maternity leave, October 1999. The Maternity Alliance argued that the qualifying child's age for parental leave should be extended to child's sixth birthday in order to cover the first years of schooling and the school holiday problems. Cf. Maternity Alliance response to DTI consultation on parental and maternity leave, 27 September 1999.

As a result of the consultation the standard age limit does not apply to working parents with responsibilities for a disabled child.[555] Consequently, the government merely recognised the necessity of helping employees with responsibilities for disabled children to deal with extra demands involved in caring for those children.[556] The MPLR[557] define the disability living allowance as the disability living allowance stated in Part III *Social Contributions and Benefits Act 1992*. Although the Regulations cover children who receive the disability allowance, they do not provide any special regime for children with special needs which are not classified as disabled and yet impose a significant burden on their families.

The UK legislator by introducing the age requirement (fifth birthday) which is far below what was possible to introduce under the Directive has clearly proven its reluctance towards introducing comprehensive parental leave rights. The UK age limit has made the entitlement to parental leave very short, inflexible and thereby limited leave accessibility merely to parents with very small children. This indicates a major deficiency of the UK right to parental leave as caring needs of parents with older children have been completely ignored by the UK legislator.

National laws of selected well-established Member States make the availability of the right to parental leave subject to the significantly different regimes on the child's age depending on whether the worker works in the public or private sector, and if the leave is taken on the full-time or part-time basis (**Appendix, Table 7**). There are also different national regimes which apply to adopted and disabled children.

[555] Regulation 15(3) MPLR provides parents with the right to parental leave until a child's 18th birthday.
[556] DTI press release, *Bayers lays regulations before Parliament giving parents time off to care for young children,* 4 November 1999.
[557] Regulation 2(1) MPLR.

The UK entitlement to parental leave matches the national requirement of Luxembourg[558] and constitutes one of the most restrictive entitlements to the leave among the selected well-established Member States. In contrast with the UK, more flexible leave entitlements exist in Germany, Ireland and Sweden where parents of children up to the age of eight can benefit from the leave.[559] The restrictive character of the UK provision on the age limit is further reinforced by the fact that, unlike the Swedish scheme on parental leave, which provides for an extended entitlement to the leave if the leave is taken on part-time basis, the MPLR do not allow this option. The length of the entitlement to parental leave may also depend on whether the leave is taken as a single block of time and often as a continuation of maternity leave.[560]

The Directive[561] enabled Member States to provide for flexible parental leave arrangements, but the Regulations[562] apart from imposing minimum and maximum limit on the duration of parental leave contain no provisions making the leave available on a part-time basis. Despite calls for the possibility of

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[558] The parental leave scheme of Luxemburg not only provides for a very restrictive leave entitlement, it also seeks to reinforce the traditional division of responsibilities within a family by requiring that one parent (mother) must take the leave as the continuation of maternity leave. Case C-519/03 *Commission of the European Communities v Grand Duchy of Luxembourg*, OJ C 35 of 07.02.2004 at paras. 25-32. The implementation of Directive 96/34/EC by Luxembourg legislator does not aim at enabling both parents to reconcile work and family responsibilities but merely ensures the existence of parental leave which is primarily designed to be used by women.

[559] All these countries (except Ireland) had their own parental leave schemes that were more stringent than the minimum requirements of the Directive on parental leave. Unlike the UK, the Republic of Ireland extended parental leave entitlement until a child's eighth birthday, which undoubtedly constitutes a major step forward towards providing parents with more generous parental leave entitlement.

[560] In Germany the right to parental leave expires at the age of three if leave is taken as a block. Where it is taken as a block of time, the right to leave expires when the child is still very young leaving families without the right to provide personal care to the older children who would still qualify for the leave if leave was not taken as block. The German law which requires parents to use the majority of their leave entitlement when the child is still very young and only permits parents to use a small proportion of the leave when the child is older significantly limits flexibility of the leave arrangements, which may prevent parents from being able to use their right to leave when it is most needed. Since the leave needs to be started as the continuation of maternity leave it is primarily taken by mothers and it therefore reinforces the traditional division of responsibilities within a family by forcing women to exit labour market for the duration of leave (Appendix, Table 9).

[561] Clause 2(13)(a) Council Directive 96/34/EC on the Framework Agreement on parental leave.

[562] Schedule 2 MPLR.

taking the leave on the part-time basis by EOC[563] and arguments presented, the adopted MPLR clearly reflect the pro-business approach of the UK legislator because in accordance with the CBI's[564] recommendation, employees are not provided with the legislative right to part-time parental leave, and possibility of taking the part-time leave would need to be agreed through voluntary agreements between employers and employees. Consequently, only parents employed by employers offering more stringent parental leave arrangements than the default scheme of MPLR would fully benefit from parental leave. Since the workforce or collective agreements on parental leave are not widespread, the vast majority of employees will have to rely on the default provisions in MPLR, and thereby will have no right to the part-time parental leave.

The lack of the option of taking parental leave in the form of part-time working significantly restricts the flexibility of the leave arrangements, which is indispensable in enabling working parents to efficiently use their leave entitlement. The possibility of taking the leave on a part-time basis could also

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[563] The issue of whether parental leave should be available on the full-time or part-time basis was addressed in the public consultation which preceded the adoption of the Regulations on maternity and parental leave. The Equal Opportunities Commission identified the lack of an option to take parental leave on temporary, part-time basis as a major deficiency of the proposed Regulations. According to the Equal Opportunities Commission, the Regulations did not fully respond to the needs of contemporary society by not providing for temporary reduction in working hours as an alternative to taking one or more blocks of parental leave. In view of the Equal Opportunities Commission, the lack of part-time option of parental leave in the proposed Regulations constituted a major obstacle in helping working parents to achieve work life balance. This in particular could affect women who after returning from maternity leave will not be able to rely on the Regulations when arguing their case for flexible working hours. Additionally, the lack of option to take parental leave in the form of reduced working hours my further discourage men from taking on family responsibilities. The Equal Opportunities Commission argued that the Regulations which do not provide for the right to part-time parental leave significantly hamper the aim of encouraging greater sharing of parental responsibilities between working parents. Cf. Equal Opportunities Commission, *"Parental and Maternity Leave"*: EOC response to the DTI consultation, September 1999. The part-time leave was also supported by British Chamber of Commerce that argued the most mutually practical mode of taking parental leave would be switching to working on a part-time basis whilst exercising the right to parental leave rather than taking the full-time leave. British Chamber of Commerce response to the DTI Parental and Maternity Leave Consultation Paper, 1 October 1999.

[564] The response of Confederation of British Industry was that the possibility of taking parental leave on a part-time basis should be encouraged in the guidance and the details should be agreed through voluntarily agreements between employers and employees. The Confederation of British Industry proposed that leave should be taken on a part-time basis over a number of months because this could be beneficial to both employees and employers. Cf. Confederation of British Industry response to the consultation on parental and maternity leave, October 1999, paras. 16 and 17.

extend the short duration of the UK entitlement to the leave. The lack of possibility of taking parental leave in the form of the reduced working hours under the MPLR fully complies with the requirements of the Directive because it does not oblige Member States to provide for the flexible leave arrangements (see Chapter 3). Caraciollo di Torella[565] identifies the UK parental leave arrangements as being the least flexible; the shortest permitted by the Directive and limiting working parents to taking the leave on a full-time basis.[566]

Unlike the UK where the minimalist approach towards leave flexibility has been adopted, countries such as Belgium,[567] Germany and Sweden[568] provide parents with the legislative right to the flexible parental leave arrangements, including the possibility of taking the leave on a part-time basis or combing full-time and part-time, or in the form of reduced working hours. The most flexible leave arrangements are provided in Sweden where parents have at their disposal the wide range of flexible leave arrangements which offer the real

[565] E. Caraciollo di Torella (2007) op. cit., p. 323.

[566] A similar approach towards implementing the provisions of the Directive can be observed in the case of Ireland and Luxembourg where there is no legislative right to take parental leave in the form of the reduced working hours and the inflexible parental leave schemes have been introduced in order to implement the Directive. Well-established Member States with the exception of Luxembourg, also provide working parents with the possibility of the simultaneous use of their entitlement to parental leave (Appendix, Table 7).

[567] Belgian legislation, despite providing working parents with the right to part-time parental leave, also seeks to financially penalise those parents who took the leave on a part-time basis. In *Meerts v Proost NV*, C-116/08 [2009] All ER (D) 259 (Oct) (paras. 48-56) parents whose employment contracts were unfairly terminated by the employer were entitled to the lower compensation under the Belgian law, which was assessed on the basis of the reduced working hours taken in lieu of parental leave and not their full-time working hours. This constituted a major deficiency of the national implementation of the Directive 96/34/EC as it allowed the leave takers to be penalised for taking the leave (their employment contractual rights being reduced). It could also discourage workers from taking the leave and could encourage employers to dismiss workers who were on the leave rather than other workers. Although the CoJ ruled that Clause 2(6) and (7) of the Directive 96/34/EC protected the full-time employment status of workers who worked part-time in lieu of parental leave, and that the national law did not comply with the Directive, the existence under the Belgium law of the requirement, which disadvantaged the leave takers, revealed the lack of support of the national legislator for flexible leave arrangements.

[568] The implementation of Directive 96/34/EC has had no impact on Sweden as it already had the oldest national parental leave schemes enabling working parents to combine or alter the leave with part-time working.

possibility of combining work and caring responsibilities (**Appendix, Table 7**).[569]

As seen in Chapter 3, effectiveness of national leave arrangements in providing working parents with adequate parental leave rights will depend on how national legislators use the freedom given to them by Directive in introducing specific leave arrangements.[570] This freedom has be fully exploited by the UK legislator in the MPLR[571] which contain provisions setting out limits on the minimum and maximum amount of parental leave which could be taken at one time. Initially, the ERA Bill 1998/99 merely defined the minimum duration of parental leave and contained no provisions in relation to the minimum and maximum amount of parental leave that could be taken at one time.[572] Although in the consultation on MPLR the necessity of ensuring flexibility in leave arrangements was recognised, this was not given effect in

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[569] More restrictive leave arrangements exist in Germany where the legislative right to part-time parental leave does not apply to companies with less than fifteen employees and the needs of single mothers are not catered for because the right to part-time parental leave cannot be transferred to any person other than the actual father, except in cases of the undue hardship. The German provisions on parental leave which provided for the possibility of combing parental leave and part-time working used to apply exclusively to short-time work. In 2001, the right to part-time working whilst on parental leave was extended to companies with more than 15 employees. The existence of part-time option under the German scheme indicates the legislator's willingness to encourage men to take parental leave but the restriction on the availability of this right certainly disadvantages employees employed by companies with less than 15 employees. Considering the models of parenting, the German law on parental leave aims at biological parent couples regardless of their marriage status, who take parental time for the same period of time (§15 paras. 5-7 BErzGG 2000). D. Schiek (2002) `From Parental Leave to Parental Time: German Labour Law and EU`, *Industrial Law Journal*, 31(4):361-369 at p. 364.

[570] Clause 2(3)(a) of the Directive on parental leave provided Member States with the power to decide on the specific national arrangements for taking parental leave, which include deciding about the mode of the leave, whether both parents can take it simultaneously, and making the entitlement subject to minimum and maximum periods of the leave.

[571] Schedule 2(7) and (8) MPLR.

[572] The Bill was then amended in order to enable the regulations to introduce a maximum and a minimum limit on the amount of parental leave. This amendment to the Bill was proposed by the Opposition but was subsequently accepted by the Government who introduced their own amendment at Report Stage in the House of Lords. The rationale for introducing those limits was explained by Lord Sainsbury of Turville as deriving from the intention of the legislator aiming at achieving a balanced parental leave scheme while ensuring the flexibility of the leave through imposition of the minimum and maximum limit on the amount of leave that could be taken at one time. The amendment stated that a single period of leave would be a minimum period of one week and not exceeding a month. Additionally, further limit was to be imposed on duration of parental leave in order to offer the flexibility in the balanced scheme. This related to the amount of parental leave which could be taken within the given timescale of six months or a year without reducing the overall entitlement. Lord Sainsbury of Turville, maintained that the proposed scheme would set out a fair and reasonable framework whilst allowing employees to decide whether or not to take leave as a single block or in shorter periods. Cf. HL Deb 8 July 1999, cc 1078-1079.

the MPLR as the government opted to introduce a more restrictive scheme ("balanced"), which gave more freedom to employers as to how the leave is administered.[573]

Consequently, regardless of personal needs of leave takers, at least a week's leave must be taken at a time.[574] This may result in some parts of the leave being unnecessarily lost as some parents would not require a week's leave. This weakness of UK parental leave arrangements has become evident in *Rodway v. South Central Trains Ltd.*[575] This case highlights the lack of reconciliation objectives in the MPLR, which regardless of working parents' personal needs forces them to use a week's leave entitlement when they actually need a short time off work measured in days or maybe even hours to care for their children.[576] Additionally, this case revealed the reluctance of the UK courts to interpret the MPLR in relation to the reconciliation objective of the Directive. At first instance, the ET[577] adopted a purposive approach to the MPLR and stated that the objective of the Directive was to allow for better organisation of working hours and greater flexibility in order to facilitate the reconciliation. It concluded that parents should be allowed flexibility to take

[573] The Trade Unions Congress in their response to the consultation on Regulations on parental leave clearly recognised the necessity of the flexibility in parental leave arrangements. It recommended that parental leave in principal should be available to be taken in various periods of months, weeks or shorter periods. The leave should also be available on a reduced hourly basis, subject to justification by an employer. TUC response to DTI consultation on parental and maternity leave, October 1999.

[574] Regulation 14(4) MPLR. The exception is a case where the leave is taken in respect of a child who is entitled to a disability living allowance (Schedule 2(7) MPLR). This exemption was introduced as a result of the public consultation where it was expressed that there should be a different regime on parental leave for employees with responsibilities for a disabled child.

[575] Cases No. 2304683/03, 27 October 2003 (Employment Tribunal), Appeal No. UKEAT/0099/04/DA, 9 June 2004 (Employment Appeal Tribunal) and A2/2004/1818, on 18 April 2005 (Court of Appeal).

[576] In the discussed case the Claimant needed a Saturday off in order to look after his son but his application was refused on the grounds that the employer was unable to find a suitable cover for his absence. Having no choice he took an unauthorised day off work and was subsequently disciplined by his employer. The employer submitted that Mr Rodway was not entitled to parental leave because the leave was only available in block of weeks and not in single days. Since, the Claimant needed only one day off work to care for his son a week's leave could not be granted because apart from one day all other days of that week would not be used to care for the child. The Claimant argued that he was entitled to a day's leave on the basis of Schedule 2(7) MPLR which meant that he could take parental leave for a period of less than a week but that period would count as a week's parental leave. This implied that by taking a day's leave he would reduce his parental leave entitlement under Regulation 14(1) MPLR by one week.

[577] Employment Tribunal *Rodway v. South Central Trains* Case No. 2304683/03, 27 October 2003, paras. 19-35.

parental leave so as to care for their children and that the employer's decision substantially undermined the above objective of the MPLR. The ET also acknowledged that there could be *countless occasions* when parents would have to use only one day of their parental leave entitlement in order to look after their children. It further stated that the interpretation of MPLR which requires parents to take a week's leave where in fact only one day is required undermines the Regulations. Forcing parents to apply for a week's unpaid leave would also be a disincentive for parents who only require one day's unpaid leave.

In line with a purposive interpretation of the MPLR, the ET suggested that a proper construction of Schedule 2(7) is that the word *take* should be interpreted as meaning *use their entitlement* to parental leave. On the basis of this interpretation the ET concluded that the Claimant suffered detriment and was entitled to take a day's parental leave, which needed to be treated as exhausting one week's entitlement to parental leave. The proposed interpretation of the word *take* parental leave would effectively imply that for some leave takers parental leave entitlement would in practice mean 13 days instead of 13 weeks. The shortened actual duration of the leave if taken in blocks shorter than one week could be in breach of the Directive, which specifically provides that the duration of parental leave has to be at least three months (discussed in Chapter 3). Thus, the ET recognised the necessity of ensuring more flexibility in parental leave arrangements by potentially further restricting the time parents could spend on parental leave.

The issue as to whether the MPLR permitted Mr. Rodway to take parental leave for one or more days or whether he had to take the leave in blocks of one week or more at a time was further explored by the EAT.[578] In determining the minimum duration of the leave, the EAT[579] firstly clarified the meaning of 13 weeks parental leave entitlement in Regulation 14 MPLR. It observed that Regulation 14(2) deals with normal working week, Regulation 14(3) covers the regular working week and that different regime applies to

[578] *South Central Trains Ltd v. Mr C E Rodway*, Appeal No. UKEAT/0099/04/DA, 9 June 2004.
[579] Ibid. para. 11.

parents of a disabled child that could fall within Regulation 14(4). In its interpretation of the provision in Schedule 2(7) MPLR, the EAT clarified that the phrase that an employee may not take parental leave *in a period* (other than a period which constitutes a week's leave or multiple of that period) means *for the period* and not *during a period* of a week. The EAT overruled the decision of ET by concluding the minimum period of the leave was the period of the week's leave under Regulation 14(3) or (2) but not (4) because the Respondent's child was not disabled. Consequently, the EAT ruled that the Respondent was not subjected to the detriment under section 47C ERA 1996 for reasons related to parental leave because he could not lawfully exercise his right to a day's parental leave.[580]

Although the Court of Appeal[581] agreed that the EAT wrongly interpreted Regulation 14(4) MPLR by confining it to disabled children, it also reaffirmed the significance of the heading to Schedule 2(7) MPLR, "Minimum periods of leave" as having a clear meaning. It further added that the words in Schedule 2(7) *an employee may not take parental leave in a period other than* a week should be interpreted in the same way as the phrase *in periods* used in Regulation 14(4) MPLR where the phrase clearly refers to the length of time actually taken as the leave. The Court of Appeal did not accept arguments that Schedule 2(7) was ambiguous when the normal meaning of the words in this paragraph is applied. Reading the word *take* as if it said *aggregate* would lead to an artificial interpretation as Regulation 14 MPLR adequately deals with the aggregation process. It also concluded that the Regulations fully comply with the criteria set out in *Pepper v. Hart*[582] as the Hansard[583] clearly confirmed that the intention of the legislator was to ensure that with the exception of parents of children with special needs all other parents must take parental leave in block of one week and that other leave arrangements could be introduced on the basis of individual workplace agreements.

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[580] Ibid. paras. 13-18.
[581] Court of Appeal *South Central Trains Ltd v. C. Rodway* A2/2004/1818, on 18 April 2005, paras. 24-39.
[582] [1993] AC 593.
[583] HC Deb 2 December 1999 and HL Deb 9 December 1999.

This decision of the Court of Appeal, which reaffirmed that parental leave is to be taken in blocks of one week, cannot be considered as surprising because the principle role of the Court is not making the law but interpreting it. The Court was bound to reach this decision because the wording of MPLR supported by Hansard clearly indicated that the leave was to be taken in periods not shorter than one week. Although, the Court acknowledged that the Directive on parental leave intended to enhance the rights of employees with caring responsibilities, it also stated that the Directive was of no assistance to the disputed matter and that it left to Member States the task of introducing the detailed national measures on parental leave. This indicates that the Court did not consider as vital to interpret provisions of the Regulations in the light of the aim of the Directive which clearly provides that national measures on parental leave were intended to enable working parents to reconcile work and family responsibilities.

In line with provisions of the MPLR, the focus of the Court of Appeal is not on enabling working parents to reconcile work and family life, but on the balance which needs to be struck between the needs of employees and employers. In fact, reconciling work and family responsibilities through parental leave is not even mentioned by the Court but the needs of employers are discussed. It is disappointing that the Court was not prepared to interpret provisions of the MPLR in accordance with reconciliation objectives of the Directive. Instead, it reaffirmed weak and inflexible provisions of the MPLR, which force working parents to take one week of unpaid leave when in fact the shorter period is needed.

Schedule 2(8) MPLR further restricts the flexibility of parental leave by limiting the annual duration[584] of the leave to no more than four week's leave in respect of each qualifying child. The restriction on the maximum duration in

[584] In relation to a new born child the twelve month period would count from the day the child in question was born. A year is defined as a period of twelve months that starts on the date on which the employee acquired the right to parental leave in respect of the child in question. The exemption from the main rule is the situation where employee's period of continuous employment has been interrupted. In this situation the twelve month period starts on the date when the employee qualifies to exercise his/her right to parental leave (Schedule 2 (9)(b) of MPLR).

the year's time scale may be considered as less restrictive in time than the six month's time scale which was also taken into account but was not further pursued by the legislator.[585] The restriction on annual parental leave was opposed in the consultation on the MPLR[586] but arguments which were presented against the introduction of this provision were ignored and the pro business stand was adopted by the legislator. The restriction on the annual duration of the leave was introduced in order to protect smaller undertakings

[585] Lord Sainsbury of Turville during the debate on the Bill pointed out that there could be a limit imposed on the amount of leave which could be taken in a given timescale of six months or a year see HL Deb 8 July 1999, cc 1078-1079.

[586] Cf. The Equal Opportunities Commission expressed its opposition to the proposed four week limit on the amount of parental that could be taken in one year (Equal Opportunities Commission, *"Parental and Maternity Leave"*: EOC response to DTI consultation, September 1999). It emphasised that the fallback scheme on which workers would have to rely in the absence of collective or workforce agreement is inflexible and prevents working parents from taking parental leave in the form of reduced working hours. The Equal Opportunities Commission also argued that the scheme of introducing more generous parental leave arrangements through collective or workforce agreements may not be very effective and the majority of working parents would have to rely on default provisions of the regulations. The ineffectiveness of enhancing worker's rights through contractual agreements was proven in the case of maternity leave were only 13% of employers introduced maternity arrangements which were better than the statutory requirements (*The Flexible Working (Eligibility, Complaints and Remedies) Regulations* (SI2002 No. 3236) which came into force in 2003 provided working parents with the right to request flexible working. Cf. DSS, *Maternity Rights and Benefits in Britain 1996*, Research Report No 67. The Equal Opportunities Commission in their response to the consultation proposed that the upper limit of four weeks parental leave during a given year should be removed and that the working parents be given the opportunity of taking parental leave in the form of temporary part-time hours (Equal Opportunities Commission, *"Parental and Maternity Leave"*: EOC response to DTI consultation, September 1999).

and enable employers to enhance parental leave arrangements through voluntarily agreements.[587]

The limit on the duration of parental leave that could be taken each year constitutes a major deficiency of the UK leave arrangements as it indicates that parental leave is not intended to allow parents significantly long periods off work in order to provide full-time personal care to the qualifying child. The inflexible UK leave arrangements which prevent working parents from providing long term full-time care for children indicate that the leave is merely intended to provide working parents with short periods off work in order to provide short-term care or put into place the required long-term care arrangements. The evidence from the United States of America that was available at the time of the adoption of MPLR indicated that there was no need to impose the restriction on annual duration of the leave.[588] The disadvantage

[587] The rationale for setting an upper limit of one month on the amount of time on parental leave that a qualifying employee may take during a year appears to derive from the operational needs of small companies. This argument was put forward by Confederation of British Industry in their response to the consultation on parental leave regulations (CBI news release, *Good progress on parental leave, but still more to do,* 4 August 1999). The position of the CBI was that limits on duration of leave needed to be agreed through collective and workforce agreements as this could result in generous arrangements for employees and enhanced flexibility for employers. The Confederation of British Industry emphasised that reliance on the default provisions of the Regulations in relation to restrictions on the minimum and maximum duration of parental leave could lead to less generous arrangements for employees and reduced flexibility for companies. Smaller employers would be particularly affected if the key employees took leave on a full-time basis for several weeks (CBI's response to the consultation on parental and maternity leave, October 1999, paras. 16 and 17). The British Chamber of Commerce also insisted that the maximum duration of leave within a given year should be limited to four weeks and that the minimum duration of leave should be one week and a maximum of two weeks allowed at any time (British Chamber of Commerce response to DTI Parental and Maternity Leave Consultation Paper, 1 October 1999). In line with these views of employers the (draft) Regulations were amended in Schedule 2(8) MPLR to impose the four weeks' limit on the amount of parental leave that could be taken in one year. This amendment of the fallback scheme under the Regulations was justified by the government on the basis of reducing legislative burden that the entitlement to parental leave may impose on small businesses. Stephen Byers also said that small businesses would be encouraged to enter into their own agreements with employees rather than relying on the fallback scheme (DTI press release, *Buyers lays regulations before Parliament giving parents time off to care for young children*, 4 November 1999).

[588] The evidence from the United States of America where the entitlement to parental leave is much longer than the minimum requirement of 13 weeks which is provided for under the MPLR appears to indicate there was no necessity by UK legislator to impose restrictions on the minimum and maximum periods of parental leave that could be taken each year. The American *Family and Medical Leave Act* that provides workers with the time off for caring for new-born or adopted children, sick relatives and children, entitles each employee to take up to 12 weeks' unpaid leave each year and has been proven not to impose excessive burdens on employers (Equal Opportunities Commission, *"Parental and Maternity Leave"*: EOC response to DTI consultation, September 1999).

of taking parental leave in blocks which can be subject to the restrictions on the maximum annual leave entitlement derives from the fact that the total duration of the leave is limited by age of the child and therefore if the leave is not taken on a regular basis a significant part of the total leave entitlement could be lost.[589]

Similarly to the UK, parental leave can be taken in more than one block of time in most of the selected well-established Member States, with the exception of the Luxembourg where the least flexible scheme was introduced. The UK entitlement to the leave which is subject to the minimum duration of one week offers more flexibility to the leave takers than the more restrictive parental leave schemes in well-established Member States which also had to introduce schemes on parental leave. The most flexible parental leave arrangements, which enable working parents to adjust the leave to their individual needs are provided in Sweden (**Appendix, Table 7**).

It was seen In Chapter 3 that the Directive contains merely a few minimum compulsory requirements and leaves to Member States and national Social Partners the task of introducing specific national procedures in relation to conditions of access and the leave application process. The MPLR[590] provide for the default procedure that shall only apply if the employee's contract of employment does not contain specific provisions entitling the employee to time off work for the purpose of caring for a child or the alternative procedures are not provided under collective or workforce agreements. There are certain conditions[591] that a qualifying working parent would need to fulfil in order to be able to exercise his/her right to parental leave such as the evidence condition, the notice condition, the condition in relation to the postponement of the leave, minimum periods of leave and maximum annual leave allowance.

The evidence condition[592] provides that an employee may not use his/her right

[589] G. Bruning and J. Plantenga, (1999) op. cit., p.198.
[590] Regulation 16 MPLR provides that Schedule 2 MPLR sets out the default procedure which shall apply before parental leave is granted.
[591] Schedule 2(1) MPLR.
[592] Schedule 2(2) MPLR.

to parental leave unless he/she provided the employer with the requested documents evidencing employee's entitlement to the leave. In order to satisfy the evidence condition an employer may request from an employee such evidence as *may reasonably be required* of employee's responsibility or expected responsibility for the child in relation to whom the right to parental leave is to be exercised.[593] There is no legal requirement that the employee produces evidence of the leave that had already been taken in relation to the child in question. The lack of this requirement in conjunction with no legal requirement for an employer to keep records of employees taking parental leave may make it impossible for an employer to establish whether the new employee already used his/her entitlement to parental leave and how much of the entitlement has already been used. This could also be used to the detriment of working parents where employers persistently refuse to grant them the leave as it may be very difficult to identify workplaces where for various reasons parental leave is never taken.

The Directive also enabled the UK legislator to introduce and specify notice requirements in relation to the beginning and the end of parental leave.[594] The MPLR[595] restrict the availability of parental leave only to employees provide their employers with at least 21 day's notice specifying the dates on which the leave is to start and finish.[596] The originally proposed length of notice in the regulations was to be four weeks, but as a result of public consultation the

[593] This would cover the child's date of birth, if the child was adopted the date of adoption and if the application for parental leave is in relation to a disabled child the evidence of the disability living allowance would need to be provided.
[594] Clause 2(3)(d) Council Directive 96/34/EC on the Framework Agreement on parental leave.
[595] Schedule 2(3) MPLR.
[596] Schedule 2(3) MPLR notice requirement does not apply to cases in para. 4 or 5. Schedule 2(4) MPLR provides for the special regime in relation to an employee who is a father of a child and would like to commence parental leave on the date on which the child is born. If this occurs the employee is required to provide the employer with the notice which specifies the expected week of childbirth and the duration of the leave. The notice needs to be given to the employer at least 21 days before the beginning of the expected week of childbirth. The exemption in Schedule 2(5) MPLR applies to notice requirements in respect of a child which is to be placed for adoption with the employee. The employee is required to provide the employer with the notice specifying the week in which the placement for the adoption is expected to take place and the duration of the leave. The notice is to be given to the employer at least 21 days before the beginning of week in which the placement occurs or if that is not reasonably practicable, as soon as it is going to be reasonable practicable to do so.

draft regulations were amended to provide for 21 days notice.[597]

By introducing the 21 days notice period which needs to be complied with in order to be able to exercise the right to parental leave, the UK government has significantly limited the needed flexibility of the leave. Considering the minimum and maximum duration of the leave that can be taken the notice requirement is very long and effectively exceeds the duration of the annual leave entitlement. The same notice requirement which applies regardless of the duration of the requested leave period may be considered as imposing excessive restrictions on the availability of the leave when the minimum duration of the leave is needed, which may not significantly affect the operation of the business. The notice requirement indicates that the UK parental leave scheme has not been designed to offer a flexible leave which could be taken at any time. The complexity of the notification process may also prevent working parents from being able to take parental leave when it is needed most. The notice requirement may force working parents to use their annual holiday entitlement in order to care for their children. The advantage of the annual paid leave over parental leave in the UK is that it can be taken at short notice, which constitutes a major factor because it is not always possible to plan ahead when parental leave would be needed.[598]

The UK notice period is neither the shortest nor the longest amongst the selected well-established Member States. What needs to be emphasised is that the UK notice requirement is the shortest among well-established Member

[597] The British Chamber of Commerce suggested that employees willing to take long periods of parental leave should be required to give an employer 10 weeks' notice. The Confederation of British Industry in their response to the White Paper Fairness at Work insisted that an employee wanting to exercise his/her right to parental leave should give to the employer six months notice, unless agreed otherwise. Cf. House of Commons, *Fairness at Work,* Cm3968, Research Paper 98/99, 17 November 1998, p.59. The Maternity Alliance in its response to the public consultation on parental leave pointed out that notice requirements were excessively long and too complex. Cf. Maternity Alliance response to the DTI consultation on parental and maternity leave, 27 September 1999.

[598] The flexibility of the leave would have been further eroded if the UK Government had implemented its proposal to extend the notification period from 21 to 28 in order to bring it in line with the notification requirements for maternity, paternity and adoption leave see Government Consultation on Draft Maternity, Paternity and Adoption Regulations in www.dti.gov.uk/workparents_consult.htm accessed on 07/07/2002.

States that previously had no national laws on parental leave.[599] The most restrictive (unreasonably long) amongst well-established Member States notice requirements have been introduced in Luxembourg which significantly limits the availability of the leave and indicates the failure of the Directive to bring about the introduction of the easily accessible right to parental leave.[600] In contrast with inflexible notice requirements under the MPLR, Swedish leave arrangements allow parents to provide employers with the shorter notices as soon as it is possible to know that the leave would be needed (**Appendix, Table 7**).

The UK implementation of the Directive[601] further restricts parents' flexible access to parental leave by allowing the employer to postpone parental leave even if the employee provided the employer with the notice in accordance with Schedule 2(3) MPLR.[602] The employer has the right to postpone the leave on condition that the operation of the business would be *unduly disrupted* if the employee was allowed to take the leave during the period specified in the submitted notice.[603] The Schedule 2(6)(b) of the draft MPLR stated that an employer could postpone the leave if it would *substantially prejudice* the operation of the business. It would be up to the employer to decide if employee's absence would unduly disrupt the business rather than *substantially prejudice* the operation of the business, which implied the higher level of disruption than the *undue disruption* in the adopted Regulations.

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[599] In the Republic of Ireland where there was no pre-existing law on parental leave, the national measure implementing Directive 96/34/EC requires 6 weeks' written notice and an employee must confirm the leave 4 weeks before it is due to start. This additional requirement under the Irish law introduces additional complexity to the parental leave application process and may prevent parents from taking parental leave if the leave has not been confirmed within the given time scale. Ireland is the only well-established Member State where the relatively complex two-stage notice requirement was introduced. Low leave take-up rates in Ireland indicate the existence of significant difficulties in the leave application process which may render the leave very inflexible.

[600] Case C-519/03 *Commission of the European Communities v Grand Duchy of Luxembourg*, OJ C 35 of 07.02.2004. This case indicates that Luxembourg has adopted the minimalists approach towards introducing parental leave rights.

[601] Clause 2(3)(e) and (f) Council Directive 96/34/EC on the Framework Agreement on parental leave have been implemented in the UK by Schedule 2(6) MPLR.

[602] Added by SI 2001/4010 Regulation 6(a) MPLR. The leave can be postponed except in special cases outlined in Schedule 2(4-5)) MPLR (birth or adoption where due notice was provided).

[603] Schedule 2 (6)(b) MPLR.

This contrasts Clause 2(3)(e) of the Directive which permits postponement of parental leave only on grounds of *justifiable* business operation reasons. Despite an indication in the Directive that the postponement of parental leave would need to be for justifiable reasons, the Regulations do not require employers to justify objectively the need for the postponement.[604] This may disadvantage working parents, because as long as employee's absence causes *undue disruption*, and every absence to a certain degree is bound to cause some undue disruption for the business, the leave could be postponed leaving parents without the right to parental leave when it is most needed.

The term "*disruptive*" was defined by Employment Tribunal[605] as to "*burst asunder*" or to "*break up* and the word "*unduly*" was defined "*in undue measure, excessively or improperly*". The definition of *unduly disruptive* devised by Employment Tribunal and used in the DTI Guidelines[606] which place emphasis on the level of disruption caused by employee's absence can be seen as reasonable in relation to non key workers, and may effectively prevent employers from abusing their right to postpone their leave. The right to parental leave of key workers is not adequately protected by Regulations as their absence may always be considered by employers as being *unduly disruptive* to the business. The right to parental leave may in practice never be

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[604] The Trade Unions Congress insisted that the EU case law standards on objective justifications would need to be invoked when determining if the decision to postpone the leave is justifiable or not. It further pointed out the rights to postponement of parental leave should be more tightly drafted and that employers should be required to justify objectively the need for the postponement. Additionally, the postponement should be subject to the consultation with workers and their representatives. Cf. TUC response to DTI consultation on parental and maternity leave, October 1999.

[605] *Holland v. Sandusky Walmsley*, Case No. 2405543/04, Employment Tribunal on 24/01/2005 paras. 25-27. In this case groundless postponement of parental leave prevented the father from taking parental leave when it was most needed. Mr Holland's application for parental leave was rejected on the basis that his absence from work during the busiest period would unduly disrupt the operation of the business. The Employment Tribunal ruled that the respondents unreasonably postponed parental leave because the period when the leave was requested was not the busiest period and the respondent failed to prove that the Claimant's absence from work would unduly disrupt business. In the present case the employee who requested parental leave could easily be substituted with another employee and thereby his absence would not unduly disrupt the business.

[606] Paragraph 4.3 of the DTI Guidelines provides examples of the situations when the postponement of the leave would be justified such as work at a seasonal peak, other employees on parental leave at the same time or if the employee's absence would unduly harm the business.

available to some key workers particularly those employed by small and medium sized enterprises and other companies. The Regulations similarly to the Directive apply to all companies and do not create special rules for small undertakings. The UK right to postponement of parental leave, although fully complying with the Directive, provides for a more restrictive parental leave regime than envisaged by Social Partners who intended that a more restrictive regime could only cover the small and medium sized companies and not all companies as is the case with the MPLR (see Chapter 3).

Employers can postpone parental leave for up to six months on condition that once the postponement period has ended, the employee would be allowed to take parental leave of the duration that he/she originally applied for.[607] The employer must give the employee a written notice of postponement of the leave which explains the reasons for the postponement and specifies alternative dates when the employer would permit the employee to start and end the postponed leave.[608] The notice of the postponement must be given to the employee not later than seven days after the employee's notice was given to the employer.[609] By setting the time limit within which an employer has to provide an employee with the decision to postpone the leave, the government ensured that employees are not going to be kept in uncertainty as to their request for excessively long periods of time.[610] The UK government, by making parental leave subject to a 21 days notice requirement and enabling the employer to postpone granting of parental leave for the excessively long period of six months, has made the leave very inflexible and unreliable as the application for parental leave does not guarantee that the leave is going to be

[607] Schedule 2 (6)(c) MPLR.
[608] Schedule 2 (6)(d) MPLR.
[609] Schedule 2 (6)(e) MPLR. The current provision in relation to when the employer should inform the employee about the decision to postpone parental leave was introduced in response to the public consultation. The original proposal stated that employers could respond to the request for parental leave within a period equal to the length of the leave which was requested.
[610] Section 80(1) ERA 1996 enables an employee to complain to the employment tribunal if parental leave has been unreasonably postponed or the employer prevented or attempted to prevent the employee from exercising his/her right to parental leave. There is a time limit of three months starting with the date of the matter complained of that the claim would need to made (Section 80(2)(a) ERA 1996). The complaint which is made later than three months may still be considered if the tribunal decides that it was not possible for the employee to bring the claim within the period of three months (Section 80(2)(b) ERA 1996).

obtained when it is most needed by the parent.

Although at the time when the application for leave is rejected, the employer may provide the employee with alternative dates when leave could be taken, this may be of little use to working parents as this period of the leave is primarily driven by family caring needs, which cannot always be planned ahead. The MPLR are also silent as to how many times the leave can be postponed by the employer. This may enable the employer to differ granting of the leave on more than one occasion on grounds of the changing business circumstances and the undue disruption to the business that the employee's absence could cause. The difficulties that the right to postpone poses to working parents became evident in *McDonald v. Royal Mail Group plc*[611] where the originally agreed leave was denied by the employer because of staffing problems and the postponement of parental leave was unreasonable. This case shows that providing employers with the right to decide whether the leave is to be granted significantly disadvantages parents who request the leave and it effectively implies that working parents merely have the right to request the leave and do not have the right to get it when it is needed. What raises major concerns in this case is that the amount of compensation awarded to the Claimant (£850) was too small either to compensate for the worker's absence when he was needed most, or it is not going to act as a deterrent to other employers.

Since the loss of the opportunity to exercise the right to parental leave is generally not accompanied by any other loss, there is no claim under section 80(4)(b) ERA 1996 and thereby the amount of compensation that can be awarded is very limited. This indicates the lack of the adequate court remedy which could deter the employer from unreasonably denying or unduly postponing the leave.

The UK restrictive and minimalist implementation of the Directive mirrors its national implementations in all other well-established Member States which

[611] Case No. 2602058/03, Employment Tribunal on 06/10/2003.

introduced new schemes on parental leave (**Appendix, Table 7**).[612] Thus, the deficiency of Clause 2(3)(e) and (f) of the Directive has been further reinforced in those well-established Member States to the detriment of working parents. In contrast with the UK, Germany and Sweden which have a long tradition of providing parents with parental leave have recognised the importance of not imposing additional restrictions on this entitlement. The lack of the right to postpone parental leave in those Member States indicates that working parents can be provided with flexible parental leave schemes, and that alternative solutions can be found to help companies to deal with potential disruptions caused by employees' absences for reasons related to taking parental leave.

4.3.3 The Right to Parental Leave Contains Financial Penalties.

The failure of the Directive to provide working parents with the right to pay whilst on parental leave, has been further reinforced by UK legislation which merely ensures that parents on parental leave can benefit from the terms and conditions of employment, whether contractual or non-contractual with the exception of the remuneration.[613] Section 77(3) ERA 1996 provides that regulations under section 76 ERA 1996 could specify matters, which are and are not to be treated as the remuneration in relation to parental leave but the MPLR do not contain such a definition. Regulation 22(b) MPLR amends Part XIV Chapter II of ERA 1996 in relation to the calculation of week's pay. It states that the period during which the employee was absent from work because of parental leave should be disregarded when calculating the week's pay. Thus, the calculation is made on the basis of 12 weeks' average pay, and weeks when an employee was on parental leave are to be ignored and thereby parents are not to be remunerated for the time spent on parental leave.

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[612] These Member States also provided employers with the right to postpone granting of parental leave by up to six months and made the leave availability subject to operational needs of the business.
[613] Section 77(2)(b) ERA 1996.

Parliamentary debates which preceded the adoption of legislation on parental leave reveal the minimalist approach of the UK legislator towards implementing the Directive, and providing leave takers with the most important right that is the right to the remuneration or the universal right to financial support whilst on parental leave. From the outset, the UK legislator merely aimed at introducing the minimum standards on parental leave and there were no legislative proposals to provide parents with the right to pay whilst on parental leave.[614] The pro business stand of the government was clearly expressed during debates on the *Employment Relations Bill 1998/99* where it was made clear that the law on parental leave would not expect employers to remunerate employees for the time spent on the leave.[615] The new section 77(2)(b) of Bill ERA 1999 was to ensure that regulations could not require employers to pay for the time on parental leave, but employers were free to provide employees with voluntarily payments. The reason why the government did not require employers to pay for parental leave derived from the assumption that employers by themselves would realise the benefits of parental leave in encouraging and motivating a productive workforce.

The government did not only want to impose the financial burden on businesses by requiring them to provide the leave takers with a right to pay, it also did not intend to provide replacement income through the *Working Families Tax* to those who take the unpaid leave. Initially, the government indicated it was going to consider if financial help should be offered to the leave takers and in what form,[616] but despite very low leave take up rates, the government did not consider it appropriate to provide all leave takers with the

[614] Lord Hunt of Kings Heath supported the proposal for unpaid parental leave and recognized that the introduction of the right to unpaid parental leave would set a decent minimum standard guaranteeing employees security at work when they need to take time off work to look after their children (HL, Debate 13 October 1998, c 908).

[615] Ian McCarthy at the time the Minister for Employment Relations at the DTI confirmed that the Government had no intention to require employers to pay for parental leave (Social Committee Deb (E), 23 February 1999, c 115). This position of the government was restated by Lord Sainsbury of Turville on Report in the House of Lords (HL Deb, 8 July 1999, c 1081).

[616] Dawn Primarolo, then a Treasury Minister said that the government did not intend to provide replacement income through the Working Families Tax to those who take unpaid parental leave and the government was going to continue considering if help should be offered to those taking parental leave and how such help could be provided. This clearly indicates that the government did not entirely rule out some form of payment in the future (Reply to a PQ from Harriet Harman, HC Deb 24 May 1999, c60W).

financial assistance to lessen the burden of taking the leave (**Appendix, Table 9**). Although, in the public consultation on parental leave organisations supported[617] the need of ensuring the financial help to those exercising their right to the leave, only the recommendations of employers' organisations, which emphasised the excessive cost of the financial support if provided to the leave takers were implemented as the right to unpaid leave was introduced.[618]

The recommendation of the *Social Security Committee*[619] which argued that a flat rate payment should be provided to those on parental leave ensuring the adequate take up rates and the relatively inexpensive cost to the tax payer was not further pursued by the government as it would be difficult to reconcile with the government's promise in the *FaW* to make the family-friendly measures also as business friendly as possible. The scheme that was proposed in relation to the low income couples was restrictive and sought to provide with the income support in lieu of parental leave only if both parents

[617] The Trade Unions Congress believed that an appropriate financial support for those taking parental leave could be provided either via an individual tax credits system or through national insurance linked benefit such as Statutory Maternity Pay (Trade Unions Congress evidence to the Social Committee Inquiry on the *Social Security Implications of Parental Leave*, HC 543 1998/99, p.23.) Equal Opportunities Commission argued that parental leave should be compensated by benefits similar to Statutory Maternity Pay (Equal Opportunities Commission, *Parental and Maternity Leave: EOC response to DTI consultation*, September 1999).

[618] The organisations which represented employers, such as the Federation of Small Businesses and Confederation of British Industry opposed any payment to those on parental leave if it was to be made from the public founds. Employers' arguments for unpaid leave were that the payment would impose further administrative burdens on businesses; employers would be under pressure to provide full payment of wages and even if the leave were to be paid from public founds this would involve an unacceptable increase in public expenditure (Evidence to the Social Security Committee Inquiry into the *Social Security Implications of Parental Leave,* HC 543 1998/99, pp29-32).

[619] On the basis of the undertaken consultation with organisations representing employers and employees, the Social Security Committee recommended that a flat rate payment should be provided to those on parental leave ensuring the adequate take up rates and the relatively inexpensive cost to the tax payer. The flat rate payment would be introduced for a specific length of time (subject to monitoring) and could form the basis for more generous provisions in the future (Ninth Report of the Social Security Committee, *Social Security Implications of Parental Leave*, 20 October 1999, HC 543, 1998-1999).

were employed and took the leave simultaneously.[620] This further proves the UK legislator's lack of legislative commitment to providing working parents with adequate parental leave arrangements and that the cost of providing this right, in the view of the legislator, outweighed the benefits deriving from it. Consequently, not only the employers' organisations but also the government failed to recognise the benefits deriving from providing parents with the financially supported right to parental leave. Considering the current economic climate and the composition of the current government it is very unlikely that the right to unpaid parental leave is going to be reconsidered in the near future.

The lack of the UK right to paid parental leave reinforced at the national level failure of the Directive to provide for adequate parental leave rights to the detriment of the leave takers.[621] The lowest common dominator approach of the UK legislator to implementing the Directive and its failure to introduce adequate national schemes on parental leave are evident as the UK and Ireland are the only two of the selected well-established Member States, which introduced the right to unpaid parental leave. The over implementation of the Directive in Luxembourg and Belgium, where the new national schemes on parental leave were introduced providing for state benefits to parents on parental leave clearly indicates that it was also possible for the UK to exceed the minimum standards of the Directive and introduce the right to paid parental leave. In Contrast with the UK and Ireland, all other selected well-established

[620] The Government recognised that in particular low income families would not qualify for income support while exercising their right to parental leave. In contrast to low income families existing benefit rules provided working lone parents on parental leave with the right to income support, subject to fulfilling qualifying conditions. Changes to the Income Support Rules which were proposed by Hugh Bayley a Social Security Minister were intended to enable previously excluded low income families to be able to receive income support whilst on unpaid parental leave. The income support would be available to low income couples who took parental leave to care for a child who lives with them when the only earner is exercising his/her right to parental leave and on the day leave is taken a family is receiving either of the following: Working Families Tax Credit, Disabled Persons Tax Credit, Housing Benefit or Council Tax Benefit. Where both members of the couple are employed, the income support would be available if both parents took parental leave simultaneously. The government estimated that this change would provide about 1,000 employees a year with the right to income support whilst on parental leave and that this would cost £ 1.5 million (HC Deb 28 October 1999, cc 956-957W).

[621] It was seen in Chapter 3, the Framework Agreement on parental leave that was concluded by Social Partners assumed that some financial support could be provided to leave takers at the national level.

Member States provide for some form of payment to those on parental leave but none of the national schemes provides parents with the right to the compensation equivalent to the full remuneration. This confirms that parents are always financially penalised for exercising their right to parental leave and that the importance of caring responsibilities has not been fully recognised even in countries such as Sweden and Germany where significant financial support is offered to the leave takers (**Appendix, Table 7**).[622]

4.3.4 Taking Parental Leave Entails Employment Security Risks.

The UK employees whilst on parental leave are entitled to benefit from terms and conditions of employment applicable to their usual employment relationship.[623] During the period of the leave employees are entitled to benefit from terms and conditions of their employment whether contractual or non-contractual, with the exception of the remuneration.[624] In line with Clause 2(6) and (7) of the Directive, the UK legislation preserves the employment relationship and the employment contract continues during the period of parental leave.[625] Rights associated with employment seniority and pensions which were acquired before the leave are also preserved and on return to work a parent will be able to benefit from any improvement in terms and conditions.[626]

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[622] Although, the German parental leave scheme provides parents with the financial support whilst on the leave, it does not provide the leave takers with the right to remuneration or other work related pay such a Christmas bonus. In the absence of national law providing parents with the right to remuneration and other work related pay (bonuses) whilst on parental leave, parents may not be able to successfully rely on provisions of the Directive 96/34/EC as it became evident in *Lewen v. Denda*. The narrow interpretation of the Directive in this case revealed its inadequacy in safeguarding the leave takers' right to pay, which may discourage parents from taking the leave. Cf. Case C-333/97 *Lewen v. Denda* [2000] All ER (EC) 928.

[623] Section 77(1) ERA 1996.

[624] Section 77(2)(b) ERA 1996.

[625] An employee on parental leave has the right to benefit from the employer's obligation of trust and confidence towards him/her and any terms and conditions of employment such as notice of the termination of employment contract by the employer, compensation in the event of redundancy, disciplinary and grievance procedures (Regulation 17(a) MPLR).

[626] Employees on parental leave are also bound by any obligation deriving from their contract of employment (Section 77(1)(b) ERA 1996). Additionally, they are bound by an implied obligation to their employer of good faith and any terms and conditions of employment relating to notice of the termination of the employment by the employee, the disclosure of confidential information, the acceptance of gifts or other benefits or the employee's participation in any other business (Regulation 17(b) MPLR).

The UK provisions regulating employment relationship during the period of parental leave merely implement the minimum requirements of the Directive and do not seek to provide leave takers with the full employment rights including the right to remuneration. Parents exercising their right to parental leave are further disadvantaged by taking parental leave, as the time on leave does not accrue their entitlement to the annual leave. The UK legislation which penalises working parents who take parental leave fully complies with Clause 2(6) of the Directive, which merely protects employees' rights which are acquired or in the process of being acquired on the day parental leave is taken. Consequently, the right to annual leave only exists in relation to the leave earned prior to parent leave.[627]

Where employees are entitled to parental leave both under the statute and the individual employment contract, employees may benefits from whichever right by choosing the right which is more favourable to them.[628] The employee is not entitled to benefit from the statutory right in addition to the contractual rights. The employee is permitted to select the features of both schemes which are the most suitable for the employee. This provision is of symbolic importance as very few employers provide employees with the contractual right to parental leave which is more extensive than the default statutory right. Although the employment contract remains in existence during the period of parental leave, the employee is punished for his absence from work by not being able to benefit from the full range of employment rights including the right to pay. The UK implementation of Clause 2(6-8) of the Directive is in line with national implementations in selected well-established Member States **(Appendix, Table 7)**.[629]

Regulation 19(1) MPLR provides employees exercising their right to parental leave with the right under Section 47C ERA 1996 not to be subjected to any

[627] Case C-486/08 *Zentralbetriebsrat der Landeskrankenhäuser Tirols v. Land Tirol* (22 April 2010) para. 56.
[628] Regulation 21 MPLR.
[629] There are significant differences among well-established Member States in terms such as whether the time spent on parental leave counts for pension benefits, the right to social security allowance, the calculation of parental leave for seniority rights and the right to annual leave entitlement whilst on leave.

detriment by any act, or any other deliberate failure to act, by their employers. Employees who are dismissed from work because of reasons related to the exercised right to parental leave are considered as being unfairly dismissed under Part X ERA 1996.[630] The legislative protection from detriment or dismissal for reasons related to parental leave is limited only to those qualifying employees who have requested or taken the leave, and it does not provide the protection to all other qualifying employees who have not officially requested the leave. Considering the limits on the flexibility of the UK leave arrangements, which were discussed earlier in this Chapter, using the right to paid annual leave or unpaid leave may provide parents with easy access to the time off work when it is most needed in order to care for the child.

Other leave periods may be more accessible to parents than parental leave but as was reaffirmed in *Tavernor v. Associated Co-operative Creameries Ltd*[631] by using other leave entitlements rather than parental leave in order to care for their children those employees qualifying for parental leave are not protected from dismissal or detriment by MPLR. Since the protection from detriment or dismissal merely covers those who have made an official request for the leave or have taken parental leave, employers are not prevented by Regulations from subjecting to the detriment or dismissing employees who are likely to request parental leave but have not requested it yet. This constitutes a major deficiency of the Regulations as the limited protection from detriment or dismissal that is offered to parents who qualify for the leave may encourage employers not to recruit these employees or enable employers to terminate employment contracts with those employees before an official request for the leave is made.

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[630] Regulation 20(3) MPLR.

[631] Case No. 1902341/2000 and 2900778/2000, Employment Tribunal on 21/09/2001, para. 22. Employment Tribunal decided that the Claimant did not suffer detriment under the Regulations because he did not take or request parental leave. The Claimant did not request parental leave because he did not know that the right to parental leave was available to him and the employer failed to inform him about it. This case revealed that in absence of adequate government parental rights awareness campaign working parents are left unaware of their right to parental leave and therefore are unable to enforce it.

Regulation 20(2) MPLR provides that an employee is to be regarded as being unfairly dismissed if the reason or the principle reason for the dismissal was redundancy. In relation to parental leave, the dismissal through redundancy would be unfair if the reason or the principle reason for selection for the dismissal was that an employee had taken parental leave. The right to claim unfair dismissal on grounds of taking the leave could be lost if on return to work from parental leave an employee is offered *an appropriate and suitable* position by the employer or an associated employer, which is unreasonably turned down by the employee. The right not to be dismissed is also lost where it is not reasonably practicable for reasons other than redundancy to provide the employee with suitable and appropriate job.[632] The Regulations do not define what would constitute an appropriate and suitable position in the reasonably practicable working environment. The employer will have to decide which job is suitable and appropriate for the returning employee and if the employee's refusal of the new position was unreasonable.

The level of protection against the dismissal is significantly eroded by MPLR allowing an employer to fairly dismiss the returning employee who rejected the new position. The Regulations are also silent about the duration of the protection against unfair dismissal which is offered to the returning parents. This enables employers to initially allow the leave takers to return to work in compliance with the Regulations in order to dismiss them at the later stage. Although the burden of proof[633] is on the employer to show that the reason for the dismissal was not connected with the taken or requested parental leave, the lack of complete protection against the dismissal of those who use parental leave in order to care for their children is further eroded by lack of adequately high remedies in parental leave claims.[634]

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[632] Regulation 20(7) MPLR.
[633] Regulation 20(8) MPLR.
[634] The Trade Unions Congress argued that despite the fact that Clause 2(4) of the Directive on parental leave required Member States to take necessary measures to protect workers against dismissal when applying for or taking parental leave, remedies for employer's breaches of parental leave provisions under the proposed Regulations were not a sufficient deterrent to non-cooperative employers. TUC response to the DTI consultation on parental and maternity leave, October 1999.

The protection from detriment or dismissal for reasons related to the requesting or the taking of the leave in the MPLR merely implements the minimum requirements of the Directive.[635] This further confirms UK legislator's minimalist approach towards providing working parents with the adequate level of protection against the dismissal or other detriments related to parental leave. In contrast with the UK, a more progressive approach towards providing parents with the legislative protection from dismissal can be observed in Belgium and Germany where the national laws clearly specify the duration of the protection from dismissal which is provided to the returning from leave workers.[636] In Sweden, the legislative protection from detriments is also provided to parents on grounds of the potential future request for the leave (**Appendix, Table 7**).[637]

Similarly to the Directive, the Regulations[638] do not provide all leave takers with an absolute right to return to the same job and make the level of the legislative right subject to the duration of the leave that has been taken by the employee. The highest legislative protection is provided to parents who do not take leave longer than four weeks[639] as they retain the right to return to the previously held posts.[640] The right to return excludes the redundancy situation.[641] However, employees who take parental leave of the duration longer than four weeks are merely entitled to return to the previously held post

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[635] Clause 2(4) Council Directive 96/34/EC on the Framework Agreement on parental leave.
[636] The existence of the specific protection from dismissal on workers return to work is of a paramount importance in well-established Member States where due to the long leave entitlements parents spend lengthy periods of time away from their employment. In particular, mothers could become vulnerable to dismissal if no adequate protection is provided.
[637] In Sweden, the leave takers are provided with the additional protection from layoffs during the leave which prevents from selecting for layoffs those on parental leave.
[638] Clause 2(5) of the Directive on parental leave which merely secures the basic right to return to work and does not guarantee the right to return to the same job (discussed in Chapter 3) was implemented in the UK by Regulation 18 MPLR.
[639] The original draft of the Regulations was more restrictive than the MPLR and provided that employees at the end of parental leave had the right to return to similar job. The right to return to the previous job for workers taking parental leave of the duration shorter than four weeks was introduced in response to the public consultation.
[640] Regulation 18(1) MPLR. Additionally, an employee who exercises the right to parental leave of the duration not exceeding four weeks which is taken immediately after the expiry of the additional maternity leave is entitled to return to the same job in which she was employed before the absence. If it was not reasonably practicable to allow her to return to her former job both at the end of her additional maternity leave and parental leave, she will have the right to return to another job which is suitable and appropriate for her in the circumstances.
[641] Regulation 18 (3) MPLR.

if it is reasonably practicable for the employer to allow them to return to their former job.[642] Unless there is a genuine redundancy situation[643] the employer is required to offer to the employee another job which is suitable and appropriate in the circumstances.[644]

Although the restrictive character of Regulation 18(2) MPLR was contested and its compatibility with Clause 2(5) of the Directive was questioned by TUC the restrictive provision, which permits the employer to decide whether it is reasonably practicable or not to allow the employee to return to the same job or not has been introduced.[645] The inclusion of the *reasonable practicability* requirement in the Regulations may make it more difficult for the Claimant challenging the employer's decision to refuse the return to the former job to succeed in his/her claim because the focus of Employment Tribunal would be on the reasonableness of the employer's decision rather than the possibility of returning to the same job referred to in Clause 2(5), which could be more favourable to employees.

An employee returning to work after the expiry of the period of parental leave is entitled to return on terms and conditions in relation to remuneration that are not less favourable than those which would have applied if the employee had not been absent because of parental leave. Additionally, the seniority, pension

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[642] Regulation 18(2) MPLR.

[643] Regulation 18(4) MPLR. Regulation 18-18A substituted for regulation 18 (subject to application provisions set out in SI 2002/2789 regulation 2) by SI 2002/2789 regulation 12.

[644] Regulation 18(2) MPLR.

[645] The Trade Unions Congress argued that the provision of the proposed Regulations in relation to the right to return to work could be in breach of Clause 2(5) of Directive 96/34/EC which provides a worker with the right to return his/her former job unless it is not *possible* to do so. The equivalent provision of the Regulations states that an employee returning from parental leave may be offered alternative job if it is not *reasonably practicable* for the employer to allow return to the same job. This according to the Trade Unions Congress did not to fully comply with the requirement of the Directive which places emphasis on the impossibility of returning to the same job, whilst its equivalent provision of the Regulations permits an employer to decide whether it is reasonably practicable or not to allow an employee to return to the same job or not. The Trade Unions Congress insisted that the right to return to exactly the same job following parental leave should be secured by the Regulations. The only exemption from the right to return to exactly the same job should be company's reorganisation or genuinely arising redundancy. If this occurs a worker should be provided with preferential rights to be offered alternative employment with the employer. Although the compatibility with the Directive 96/34/EC of the right to return to work after leave under the Regulations was disputed by Trade Unions Congress this has not been tested by courts (TUC response to DTI consultation on parental and maternity leave, October 1999).

rights and similar rights must be preserved as if the employee had been in continuous employment. The employee must be given the terms and conditions not less favourable than those which would have applied if the employee had not been absent. In cases where parental leave is taken immediately after the period of additional maternity leave, employees are entitled to return on terms as if they had not been absent from work during the periods of their leave (maternity leave, additional maternity leave and parental leave).[646]

The lack of the uniform right to return to the previously held post after the expiry of the leave under the Regulations derives from the lack of the legally binding requirement to provide for such a right in the Directive and its emphasis on the role of Member States in introducing the detailed national measures (see Chapter 3). This deficiency of the Directive has been further reinforced, to the detriment of working parents, by MPLR as only parents who do not take parental leave of the duration which amounts to the annual maximum permissible duration of the leave in Schedule 2(8) MPLR would retain their right to return to their previous job. The restrictive character of this provision has been further reinforced by Regulation 18 MPLR. It seeks to penalise all those parents who have negotiated with their employers more flexible leave arrangements and take longer periods of parental leave than those envisaged in the Regulations because by taking the leave of the duration longer than four weeks' they effectively forfeit their full right to return to the previous job.

Additionally, mothers who take parental leave as the continuation of the additional maternity leave lose their full right to return. By providing only the working parents who took no more than four weeks of parental leave with the right to return to the same job, the UK Government sends an unequivocal message to all working parents that it is undesirable for them to take more than four weeks of parental leave. This clearly reaffirms the pro-business stand of the UK legislator that put interests of businesses before the family

[646] Regulation 18(A) MPLR. Regulation 18-18A substituted for regulation 18 (subject to application provisions set out in SI 2002/2789 regulation 2) by SI 2002/2789 regulation 12.

needs of the working parents by merely ensuring the right to four weeks' leave without jeopardising parents' right to return.[647] The taking of parental leave always involves the risk of not being able to return to the former job as the national regulations of other referred well-established Member States also merely implemented the minimum requirements of the Directive and do not provide workers with an absolute right to return to the same job (**Appendix, Table 7**).

Neither the Regulations nor the national laws of the selected well-established Member States provide parents returning from the leave parents with the right to return to part-time employment when the family situation requires it. The lack of the right to return to work on a part-time basis in the Directive has further been reinforced by its national implementations in well-established Member States and may prevent parents (women) from returning back to work if the return to the part-time work is not possible. Either the Directive or the Regulations contain any specific provisions in relation to the contractual rights of employees who decide to return to work before the end of parental leave. The lack of the specific right to an early return to work from parental leave when the family circumstances change may prevent worker's early return to work and result in wasted portion of the leave. The possibility of an early return to work when the leave is no longer required is particularly important for working parents in the UK where the leave is short and unpaid.[648] The absence of the national legal right to an early return to work when the personal circumstances changes may act to the detriment of working parents and in particular mothers who primarily take the leave. This became evident in *Wiebke Bush v. Klinikum Neustadt GmbH & Co. Betriebs-KG*[649] which was discussed in Chapter 3.[650]

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[647] The survey conducted in the UK identified a significant percentage of organisations, which allowed their employees only four weeks of parental leave per year without jeopardising their right to return (`Parental Leave in the UK` *EOR*, 2000, 92:12-18 at p.17).

[648] An early return to work from parental leave may be particularly difficult in well-established Member States where long leave entitlements exist and the change in individual circumstances forces early return.

[649] Case C-320/01 [2003] ECR I-2041, Celex No. 601J0320

[650] The absence of the appropriate national legal right providing parents with the right to alter the leave arrangement when the individual circumstances change was also addressed by CoJ in Case C-116/06 *Sari Kiiski v Tampereen Kaupunki*, Celex No. 606J0116, ECR [2007] 00000.

4.3.5 Minimalist and Weak Provisions for Time off for Dependants

In this section, the legal analysis focuses on the UK implementation of the Directive in terms of how it shaped the national entitlements to time off work for dependants. Clause 3(1) of the Directive was implemented in the UK by Sections 57A and 57B ERA 1996. Clear impact of the Directive on the UK employment rights because its implementation has resulted in the introduction of the new legislative right to time off work for dependants. In line with requirements of the Directive, employees have been provided with the statutory right to request the reasonable time off from work in order to take action which is necessary to care for dependants.[651] By restricting the availability of the time off work for dependants (the time off) to employees the UK legislator has merely implemented the minimum requirements of the Directive, and deprived of this right all other groups of workers with caring responsibilities for dependants who are not classified as employees. Unlike the right to parental leave, which is limited to the qualifying employees the time off covers all employees and is not subject to any qualifying employment requirement.[652] Consequently, the time off plays an important role in enabling workers to reconcile work and caring responsibilities as it is available to workers who may not have the right to parental leave.

The UK entitlement to time off is only available in relation to dependants however widely defined.[653] In contrast with the right to parental leave which is restricted to small children, time off work for dependants is not restricted by the age of the dependant and constitutes the only leave period that can be taken in relation to adult dependants. The restriction on the availability of the time off exclusively to dependants indicates that the UK legislator fully exploited the

[651] Section 57A(1) ERA 1996.
[652] The right is available to all employees regardless of their hours of work and whether they are employed on full-time, part-time, temporary or permanent contracts. Since, no qualifying period is required every employee is entitled to request the leave.
[653] Section 57A(3-5) ERA 1996. Dependants are defined as a spouse or civil partner, a child, a parent, a person who lives in the same household as the employee but is not his/her employee, tenant or boarder. Additionally, the term *dependant* covers any other person who relies on the employee for assistance in cases of illness, injury, assault or arrangements for care in the even of illness or injury.

freedom under Clause 3(2) of the Directive to the detriment of workers with caring responsibilities for those who do not fall within the definition of the dependant.[654] The availability of the entitlement to time off is also limited to the specific emergencies involving the dependants.[655] Section 57A(1)(b) ERA 1996 makes it clear that the objective of the time off is not to provide employees with the right to physically respond to emergencies related to their dependants but to provide employees with the time off enabling them to make necessary arrangements for dependants who are ill or injured.

James[656] observes that the right to time off may be of little use to employees as it does not provide them with the right to provide personal care to the dependants. Although, the UK implementation of the Directive exceeded its minimum requirements, by not restricting the time off to cases of illness and accidents, to cover childcare and schooling matters it does not cover the joyous events involving the dependants.[657] In other well-established Member States the availability of the time off is also largely limited to emergencies involving dependants or family members, but more flexible leave provisions exist in Sweden (**Appendix, Table 11**).

The availability of the time off is primarily restricted to unexpected events.[658] In *Royal Bank of Scotland PLC v. Mrs JK Harrison*[659] it was reaffirmed that the entitlement to the time off is not restricted to sudden events as the legislation

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[654] Clause 3 of the Directive on parental leave merely outlined the necessity of introducing the right to the leave on grounds of *force majeure* for urgent family reasons and did not limit the right only to dependants.

[655] Section 57A(1)(a-e) ERA 1996, emergencies related to dependants such as illness, giving birth, injuries, assaults, death, unexpected disruption of arrangements for the care dependant and dealing with unexpected incidents associated with a child being at school.

[656] G. James (2009) *op.cit.*, p.50.

[657] It is regrettable that the UK legislator (unlike the Draft 1983) did not bring within the scope of the time off for dependants joyous events such as a wedding of a dependant where worker's presence is also indispensable.

[658] Section 57A(1)(d) ERA 1996.

[659] *The Royal Bank of Scotland PLC v. Mrs JK Harrison*, Appeal No. UKEAT/0093/08/LA on 27 June 2008 paras. 26-30. According to the Employment Appeal Tribunal the word "unexpected" is not to be defined as containing the time element. The disruption is only unexpected at the moment when or the moment before the employee learns about the forthcoming disruption and there is no reason for redefining the meaning of the word "unexpected" because it is an ordinary word which should be construed in its natural meaning that did not involve the time element. The Employment Appeal Tribunal saw no justification in adding to the clear statutory provisions the words that were not there and provided for the requirement that Parliament had not inserted.

does not provide for such a requirement. The key principle is that the more time the employee has to make the alternative arrangements, the less likely it is going to be established by employment tribunals that it was necessary for the employee to take the time off. Whilst establishing the necessity of the time off employment tribunals will consider the unique facts of each case and other factors such as the nature of the disruption, the availability of alternatives, financial resources and time. The wide interpretation of the entitlement to time off, which exceeds the minimum requirements of the Directive by not making the right to time off subject to the condition that the immediate presence must be necessary for the right to be applicable, significantly expands the availability of the UK right to time off to the events where employees were aware of the forthcoming disruptions to their employment.

Unlike the Directive, Section 57A ERA 1996 does not use the word *force majeure* but the word "necessary" which according to the Employment Appeal Tribunal[660] is a straightforward word which does not require definition or interpretation and that it is for the Tribunal to decide on the facts of each case if there is an issue about the action, which an employee wishes to take or took and whether it was necessary because of the unexpected disruption or termination of arrangements to care for a dependant. In deciding whether it was necessary for the employee to take that action, the Tribunal can take into account all relevant circumstances and considerations of urgency and time. Unlike the UK implementation of the Directive where the leave is not limited to sudden and unexpected events, other well-established Member States have limited the availability of the *force majeure leave* to urgent events requiring employee's immediate presence indispensable (**Appendix, Table 11**).

The clear recognition[661] that the right to time off for dependants is not limited to the sudden and unexpected events, but also covers the forthcoming disruptions that employees are aware of before they physically impact their employment, is of vital importance in helping employees to reconcile work and responsibilities for dependants. By not limiting the right to time off for

[660] Ibid. paras. 13-20.
[661] Ibid. paras. 26-30.

dependants to sudden and unexpected events the Employment Appeal Tribunal significantly enhanced the application of the right to time off to the events that are known to employees and the protection against dismissal and detriment is granted as long as employees have taken reasonable steps in order to put into place the alternative arrangements. However, the Employment Appeal Tribunal did not set a clear rule on determining what actions would have to be taken in order to meet the requirement of the reasonableness, and the necessity of time off is to be assessed on the merits of each case.

This may enable employers to limit the availability of the right to time off in cases where the forthcoming emergency is known to the employee by requiring him/her to prove to the employer that the employee has done everything that was possible in order to put into place the required alternative arrangements. Consequently, in the first instance it will be up to the employer, using the employer's own criteria to judge if the employee has taken necessary steps to ensure the existence of the alternative arrangements. This indicates that the decision to grant or not to grant the time off will continue to be made by the employer, and therefore employers not willing to grant time off could set very difficult to meet criteria for assessing the employee's attempts to provide for the alternative arrangements. An employer may require an employee to prove that he/she put in place adequate provision e.g. childcare arrangements including a number of contingencies which could be relied upon should the original arrangement failed as in *Chwesivk v. Ocado Ltd.*[662]

The death of a dependant may often involve the necessity of the additional time off work in order to recover from illnesses associated with the bereavement. Section 57A ERA 1996 does not provide any specific guidance as to whether the events following the death of a dependant fall within the scope of the time off for dependants.

[662] *Chwesivk v. Ocado Ltd*, Employment Tribunal, Case Number 1200611/2008 on 9-10 October and 8 December 2008. The Claimant's childcare arrangements were questioned by the employer and the employer required the details about contingencies that the employee had in place enabling him to rely on the alternative arrangements to care for his daughter.

This issue was addressed by Employment Tribunal and the Employment Appeal Tribunal in *Forster v. Cartwright Black.*[663] The EAT[664] confirmed the narrow interpretation of the meaning of time off for dependants in Section 57A(1)(c) ERA 1996 *"in order to take action which is necessary"*[665] limits the time off to taking action directly related to putting into place arrangements to care for dependants or responding to emergencies such as dealing with consequences of the death in physical terms but it does not cover the consequences of the death of the dependant that may prevent the employee from returning to work.[666] Although the death of a dependant may affect the person who has taken time off that effect does not in itself activate the entitlement to time off. One may expect that the death of the dependant will affect the person on time off but Section 57A ERA 1996 was not intended to provide employees with the right to compassionate leave. This narrow interpretation of the extent of time off disadvantages employees who suffer from a recognised illness related to the death of a dependant, and do not qualify for protection from unfair dismissal under Section 98 ERA 1996 as their failure to return to work could result in fair dismissals.

4.3.5.1 Restrictive Leave Access Limits Availability of Time off

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[663] *Forster v. Cartwright Black* (Solicitors), Employment Tribunal, Case Number 1602328/2003 on 26 November 2003 and *Forster v. Cartwright Black*, Employment Appeal Tribunal on 25 June 2004 [2004] I.C.R 1728. The Claimant was dismissed from work for taking excessively long periods of time off (3 weeks) following the death of her mother. The main issue which needed to be determined was whether absences from work due to the illness related to the bereavement fell within the scope of time off for dependants. That the time off taken by the Claimant after the death of her mother (ordered by doctor) did not fall within the scope of the leave for dependants under Section 57A(1)(c) ERA 1996. Subsequently, she had no right to claim that she was automatically unfairly dismissed for reasons set out in Section 99 ERA 1996. It was established that she was fairly dismissed on grounds of her capabilities due to her excessive sickness absences.

[664] *Forster v. Cartwright Black*, Employment Appeal Tribunal on 25 June 2004 [2004] I.C.R 1728 at paras. 17-18.

[665] The Employment Appeal Tribunal considered Hansard, HL Deb 8 July 1999, col. 1084, where Lord Sainsbury stated the statutory right to time off is limited to urgent cases of real need, emergency involving a dependant, it provides for reasonable time off if an employee suffers a bereavement of a dependant to deal with the consequences of that bereavement such as making funeral arrangements and attending the funeral.

[666] *Forster v. Cartwright Black*, Employment Appeal Tribunal on 25 June 2004 [2004] I.C.R 1728 at paras. 17-18. Section 57A(1)(c) ERA 1996, the necessary actions in consequence of the death would not be limited to covering an employee's right to time off to attend the funeral but would also cover making various arrangements required by the death of dependant such as funeral arrangements, registering the death and other administrative matters.

The access to time off is subject to the notice and information requirements which require the employee to inform the employer about the absence as soon as reasonably practicable, and where it is not reasonably practicable to inform the employer about the absence until the employee returns to work. The employee is further required to inform the employer about the duration of the absence.[667] The compliance with the notice and information requirement is crucial for establishing the existence of the entitlement to time off and the legislative protection from dismissal, should the employee be dismissed whilst on the leave. The difficulties associated with the interpretation of the notice and information requirements can be observed in the contradictory interpretations in the landmark case of *Qua v John Ford Morrison Solicitors.*[668] This case shows that the excessive notice and information requirements could be used to dismiss employees who take the time off.

The first interpretation of Section 57A(2) ERA 1996 by Employment Tribunal in *Qua v John Ford Morrison Solicitors* required it to be construed firmly and restrictively in order to give effect to the statutory requirements. In situations where the employee was not in a position to provide the employer with the requested information on duration of absence the leave would not fall within the scope of the time off.[669] The Employment Appeal Tribunal[670] provided a wider interpretation of Section 57A(2) ERA 1996 and the guidance on how Tribunals should deal with dismissals under section 99 ERA 1996 and Regulation 20 MPLR. The guidance[671] requires employers to examine the extent to which each employee's absence complies with notice requirement

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[667] Section 57A(2) ERA 1996.

[668] Case Number 2300398/01 on 14 June 2001 at paras. 10 and 12 and *Qua v Morrison Solicitors* Appeal No. EAT/884/01.

[669] The Employment Tribunal in *Qua* at paras. 10 and 12 stated that Section 57A(2) ERA 1996 was to be construed firmly as required by the statute. This means that an employee is required to contact his/her employer as soon as it is reasonably practicable and provide the employer with the precise information on the length of the anticipated absence and an update on the position. On the basis of the above interpretation the Employment Tribunal concluded that because Miss Qua did not provide her employer with the information on the duration of her absence as soon as reasonably practicable and for how long she expected to be absent she therefore failed to comply with the requirement under Section 57A(2) ERA 1996. Thus, the right to take time off work under Section 57A(1) ERA 1996 did not apply to her. The Employment Tribunal further added that the employee had the duty to report to his/her employer on a daily basis whilst on the leave.

[670] *Qua v Morrison Solicitors*, Appeal No. EAT/884/01.

[671] Ibid. paras. 25-27.

rather than merely considering all absences cumulatively which would disadvantage the leave takers where there have been few isolated instances where the notice or information requirements have not been complied with.

The EAT[672] further clarified that employees are merely required to inform the employer about the reasons for the absence (except where it is not possible before returning to work) and how long the employee expects to be absent. The extent to which the employee's absence is necessary and reasonable in the duration is to be assessed on the basis of the individual circumstances. Although employers would like their employees taking the time off to update them on the situation there is no such requirement in Section 57A (2) ERA 1996. It is undisputable that there will be certain family emergencies where it will be impossible for the employee to provide the employer with the detailed information on duration of the absence and the date on which he/she will return to return to work. The notice requirements remove the necessary flexibility relating to time off, which was intended in the Directive in order to provide workers with an effective means of dealing with various emergencies. The strict approach of employers towards the notice requirements may effectively prevent employees from taking the emergency leave when it is most needed. Those who have taken the leave and were unable to quickly provide employers with the requested information may risk being dismissed from work without the protection of Section 99 ERA 1996 and Regulation 20 MPLR.

The general provision contained in Section 57A(2) ERA 1996 does not state if the new notice needs to be given to the employer if the circumstances for the requested time off have changed. The issue of whether the change in the circumstances required the employee to make a new request for time was addressed in *MacCulloch & Wallis Ltd v. Moore.*[673] According to the Employment Tribunal[674] *`if circumstances change an extension can or must be*

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[672] Ibid. para. 28.
[673] *Moore v. MacCulloch & Wallis Ltd* ET Case Number 6001591/01 on 16 & 29 October 2001 para. 11 and *MacCulloch & Wallis Ltd v. Moore* EAT/51/02/TM on 11 February 2003, 2003 WL21236505, 2003 WL21236505 (EAT) paras 32 and 41.
[674] *Moore v. MacCulloch & Wallis Ltd* ET Case Number 6001591/01 on 16 & 29 October 2001, para. 11

taken without the notice'.[675] This wide interpretation of the notice requirement would offer employees the desired flexibility when dealing with various family emergencies without having to comply with multiple notice requirements when personal circumstances change but further time off work is required.

However, the Employment Appeal Tribunal[676] disagreed with the Tribunal that the wording of the statute *"without the notice"* cannot be taken literally. It is evident that in certain emergencies, time off can be taken without prior permission but in such circumstances the notice must be given as soon as reasonably practicable. Only in cases where the notice requirement cannot be complied with until after the employee has returned to work the notice requirement could be waived. This implies that only in cases where it was physically impossible for the employee to inform the employer about the absence the notice requirement would be waived. Considering the current availability of different methods of communication there will be very few instances where it is not going to be reasonably practicable for an employee to inform the employer about his/her absence until after the employee has returned to work.[677] Consequently, where the circumstances change, an employee is required to notify the employer of the changes so that Section 57A(2) ERA 1996 would be complied with and further time off, if necessary, could be granted.

This interpretation of the notice requirement significantly limits the effectiveness of the time off in enabling employees to respond to the emergencies involving the dependants because the multiple notices, which have to be given to employers when the personal circumstances change but the time off is still required may effectively prevent employees from focusing on

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[675] This meant that Miss O Moore who requested time off on 19 January in order to look after her father who was ill did not have to provide her employer with the further notice when he passed away on 22 January and would still be protected by Section 57(A) ERA 1996.

[676] *MacCulloch & Wallis Ltd v. Miss O Moore* EAT/51/02/TM on 11 February 2003, 2003 WL21236505, 2003 WL21236505 (EAT) paras. 32-41.

[677] In *MacCulloch & Wallis Ltd v. Miss O Moore* EAT/51/02/TM the notice was given for the absence on 19 January and not 22 January when her father passed away. If there had been a request for time off on Monday 22 January Section 57A(2) ERA 1996 would have been complied with. However, there was no attempt to contact the employer on 22 January when the circumstances changed.

the family emergencies. The legislation appears to ignore the fact that very often difficult personal circumstances[678] may impact on the employee in such a way that he/she could be unable keep up with the notice requirements. Those employees who fail to request additional time off when the circumstances change may risk being fairly dismissed from work as they would not be exercising their right under Section 57A ERA 1996. This becomes evident when considering the requirements that need to be satisfied in order to gain rights under Section 57A ERA 1996 which were devised in the discussed case.[679]

The issues surrounding the meaning of the words *"tells his employer for how long he expects to be absent"* in Section 57A(a)(b) ERA 1996 and whether this section requires an employee to provide the employer with the precise date of the return to work were addressed by Employment Tribunal in *Idoniboye-Obu* v. *Royal Mail Group Plc.*[680] The ET concluded that Section 57A(2)(a)(b) ERA 1996 does not require the employee to provide the employer with the precise date of return to work.[681] The wide interpretation of the statutory notice requirement, which does not require employees to provide employers with the precise date on which they intend to return to work, significantly simplifies the time off notice requirements. The narrow interpretation of this provision would render the notice requirement in relation to the precise date of the return to

[678] E.g. dealing with an accident or sudden death.

[679] *MacCulloch & Wallis Ltd v. Miss O Moore* EAT/51/02/TM paras. 33-36. In order to determine whether Section 57A ERA 1996 has been complied with the tribunal is required to ask itself the following questions in relation to each date when the request or the demand for time off has been unreasonably refused and when the request/demand is made and refused. Was the request for time off during the working hours necessary in order to provide assistance on an occasion a dependant falls ill, gives birth, is injured or assaulted or for the purpose of making caring arrangements for the dependant who is ill or injured (Section 57A(a)(b))? The questions must be asked separately in relation to each date in question. If the answer to either of those questions is "Yes" and it was determined by the Tribunal that the time off was necessary and reasonable in circumstances the Tribunal must then consider Section 57A(2) ERA 1996 whether the employer was informed about the reason for the absence as soon as reasonably practicable and for how long the employee expects to be absent. In the discussed case, the Employment Tribunal did not ask itself the above questions in relation to 19 January and therefore it was necessary for the Employment Appeal Tribunal to refer the case for a rehearing in the new Employment Tribunal.

[680] *Idoniboye-Obu* v. *Royal Mail Group Plc*, Employment Tribunal, Case Number 2201274/2008 on 28 & 29 August and 22 September 2008 at paras. 6.6(ii).

[681] In the discussed case the statement "as soon as I have found a carer for my mother" was held by Employment Tribunal to be sufficient to fulfil the statutory requirement of telling the employer for how long the employee expected to be absent.

work very difficult to fulfil as in many circumstances, due to the fluidity of the personal circumstances employees could not be in a position to provide employers with the precise date of their return to work. Thus, employee's failure to provide the employer with the precise date of the return to work or providing inaccurate information will not deprive the employee of the legislative protection associated with the entitlement to the time off. Section 57A(2) ERA 1996 does not specify whether the notice requirements must be fulfilled personally by the employee or may be fulfilled by the authorised person acting on the employee's behalf.

In *Harbisher v. Buy As You View Ltd,*[682] the Employment Tribunal adopted the wide interpretation of the statutory notice requirement. It held that the request for the time off did not have to be made personally by the Claimant and that it was sufficient that the request was made on behalf of the employee. It must be emphasised that the Tribunal recognised the effectiveness of Section 57A(2) ERA 1996 and required this flexibility as there could be many situations where the employee will not be able to personally inform the employer.[683] The wide interpretation of the statutory notice requirements offers more flexibility in the application process and may prevent employees from losing their right to the time off where it would not be possible for the employee to personally inform the employer about the absence or request additional time off.

Section 57A(2) ERA 1996 sets out the notice requirements but it does not specify how much information an employee is required to provide the employer with in order to secure the time off. The case of *Truelove v. Safeway Stores plc*[684] indicates that employees requesting the time off may be subjected to excessive information requirements, which may prevent them from the leave

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[682] *Harbisher v. Buy As You View Ltd*, Case Number 2500334/2003, Employment Tribunal on 22 September 2003, para. 6. It was argued by the Respondent that the Claimant did not comply with the notice requirement under Section 57(A)(2) ERA 1996 because he did not personally request the time off in order to look after his spouse and the request which was made on his behalf by his mother did not comply with the notice requirements in the legislation which implied that the request for time off would have to be made personally by the Claimant.
[683] The phone conversation of 14 October 2002 between the employer and the mother of the Claimant amounted to the reasonable practicable notice.
[684] *Truelove v. Safeway Stores plc*, Case Number 2407514/03, Employment Tribunal on 30 January 2004.

when it is most needed. This raised the question of how much information the employer should be provided with in order to secure the entitlement to the time off. The aim of time off was to enable employees to respond to various emergencies involving the dependants. This includes the right to request the time off to look after a child when it is not possible to arrange for a baby-sitter or previous arrangements had fallen through. In *Truelove v. Safeway Stores plc* the Employment Tribunal adopted the restrictive interpretation of section 57A(2) ERA 1996 as requiring employees to provide employers with the detailed information about the circumstances for which the time off is required.

This would render the entitlement to the time off very inflexible and could prevent employees from being able to take the time off when it is needed.[685] The Employment Appeal Tribunal[686] overruled the restrictive interpretation of Section 57A(2) ERA 1996 and held the entitlement to the time off arose due to the unexpected failure of the baby-sitter.[687] It also pointed out that the Tribunal's construction of the word "reasons" was incorrect and that there is no requirement for the reason in Section 57A(2) to be articulated with any formality. Consequently, the EAT concluded that the time off was designed to be exercised without formality by an employee in difficult circumstances and the employer was provided with sufficient information to be able to determine whether the statutory right existed. Although the decision of EAT offered

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[685] In *Truelove v. Safeway Stores plc*, the employee informed the employer (well in advance) about the need for time off and its duration but his request for leave was denied by the employer (the employee needed to look after his daughter). In line with the employer's view the Employment Tribunal ruled (paras. 17-21) that the Claimant was not entitled to time off as he failed to provide the employer with sufficient information as to the unexpected disruption of the relevant arrangements (the sister was meant to look after the child but she could not). The Claimant failed to inform the employer that alternative arrangements had fallen through at the last stage and that his partner's meeting was an urgent one. According to the Employment Tribunal the word *"reason"* in Section 57A(2) ERA 1996 must indicate to the employer how the right arises and in this case it would involve informing the employer that there had been an unexpected disruption to the arrangements. The Employment Tribunal concluded that although the Claimant informed the Respondent about the date on which the time off was needed and its duration, the refusal to grant the leave was not unreasonable as the employee did not provide the employer with the sufficient information enabling the employer to determine whether the right to time off existed.

[686] *Truelove v. Safeway Stores plc*, Employment Appeal Tribunal, Appeal No. UKEAT/0295/04/ILB on 1 November 2004 at paras. 16-18.

[687] The right to time off would not arise if the Applicant's case did not deal with the unexpected disruption of caring arrangements. In *Rodway v. South Central Trains*, Case Number 2304683/03 on 27 October 2003, at para. 32 the Employment Tribunal held that the right to time off for dependants merely arises in the unforeseen circumstances.

clarification as to the understanding of the word "reasons" and reaffirmed the existence of some flexibility in the application process it has not provided any detailed guidance, as to the information that needs to be provided in order to secure the right under Section 57A. Unwilling to grant the time off, employers could discourage employees from exercising their right to the time off by requiring excessive amounts of information to be provided before the existence of the right is established.

Providing employers with the task of deciding if employees should be given the time off may subject employees to unnecessary and excessive scrutiny by employers involving intrusion into private lives of the employees (e.g. the requirement to produce the evidence of the emergency). The leave will not be granted unless the employer is fully satisfied that the evidence provided by the employee merits the right to time off of the requested or taken duration. In order to secure the right to time off the employee may be forced to allow the employer to view sensitive personal data about the dependants. This became evident in *MacCulloch & Wallis Ltd v. Moore*[688] where the employer undertook an investigation in order to confirm whether the father of the employee was really very ill and whether he was in a critical condition with no chance of recovery.[689] As employers play the key role in deciding whether the leave is to be granted this may render the leave application process very intrusive into personal lives of the applicants, and may discourage employees from applying for the leave. This indicates a major deficiency of the UK legislation on the time off, which may effectively prevent employees with responsibilities for dependants from securing the right to time off when it is most needed.

The present role of the employer in the leave application process unambiguously proves that the UK legislator has put the needs of the business before the needs of employees with caring responsibilities for dependants. In

[688] *MacCulloch & Wallis Ltd v. Moore* EAT/51/02/TM on 11 February 2003, 2003 WL21236505, 2003 WL21236505 (EAT).

[689] In order to gather the information the employer contacted the relevant hospital and requested the detailed information about the condition of the person in question. On the basis of the information obtained from the hospital the employer tried to argue that the condition of the employee's father was not as serious as the employee alleged and therefore there were no basis for time off under Section 57A ERA 1996, a few days later the father passed away.

contrast with the UK, the role of employer in the leave application process is less prominent in other selected well-established Member States where the right to leave for urgent family reasons is clearly defined and is not subject to employer's scrutiny. (**Appendix, Table 11**).

4.3.5.2 The UK Implementation of the Directive 96/34/EC Fails to Specify the Duration of Time off for Dependants.

Section 57A(1) ERA 1996 merely provides that the employee is entitled to be permitted by the employer reasonable time off work to respond to arising emergencies. There is no explanation provided in the Employment Rights Act 1996, as to what length of the leave would possibly amount to reasonable time off because there is no set right to the time off as it is merely intended to help employees to deal with emergencies and not provide employees with additional time off work. The emphasis on actions which are necessary rather than the necessity of the immediate presence of the employee to deal with those emergencies indicate that the leave is designed to provide an employee with the time off from work of the limited duration.[690] This would ideally be in hours and in extreme situations days off work in order to put into place the necessary arrangements providing for the arising emergencies.[691]

The entitlement to the time off caters more for the needs of business than the employees' because the legislation delegates to employers the task of determining whether the requested or taken time off was reasonable or not. This may bring about significant differences in the actual availability and the duration of the time off, as it is going to be conditioned by employer's decision rather than the statutory requirements. Employees working for unreasonable employers may subsequently be prevented from taking the time off; their right being unduly restricted or being dismissed from work on the grounds that the leave which was taken was unreasonable. These deficiencies indicate that

[690] Section 57A ERA 1996.

[691] The words of Lord Sainsbury of Turville (Hansard HL Deb 18 July 199 cc1084 and 1085) which are mirrored in the DTI Guide confirm that time off for dependants is limited to very urgent cases with the duration with the maximum of one or two days in most urgent cases (The Department of Trade and Industry Guide, URN 99/1186, sections 1 and 5 (one or two days but no entitlement to two weeks off to look after a child)).

despite the existence of the statutory entitlement to the time off the actual availability of the leave, and its duration remains subject to the employer's discretion.

The lack of entitlement to the time off for a set duration poses major problems not only to employees who remain uncertain about their rights; also employer's subjective view as to what amounts to the reasonable time off work varies and the courts have failed to clearly outline what is the reasonable duration of the time off work to care for dependants because it is to be assessed on the case by case basis.[692] In *Darlington v. Allders of Croydon*[693] the time off of the duration of five weeks was held to amount to reasonable time under the circumstances.[694] This case shows that in certain circumstances longer periods of the time off could be taken in order to look after dependants (subject to individual circumstances). The issues of whether reasonable time off was taken and if the time off that was taken was necessary were further addressed by Employment Tribunal in *Qua*[695] The Tribunal devised a test for establishing the reasonableness of the time off. It was to be assessed by considering the duration of all absences and there was no need to deal with each individual

[692] In *Munnelly v. Royal Mail Group Ltd*, Employment Tribunal, Case Number 2203166/2009 on 2nd March 2009, the employer argued that the time off work of the duration of one full day was not reasonable as Mr. Munelly should have only have taken part of the day off in order to look after his child. The Employment Tribunal held that the Claimant took reasonable time off and he was subjected to a detriment (dismissal) for taking the leave contrary to section 57A ERA 1996.

[693] *Darlington v. Allders of Croydon,* Employment Tribunal, Case Number 2304217/01, on 5th December 2001.

[694] The reasonableness of the duration of time off for dependants was examined by Employment Tribunal. The Claimant a single parent, mother of three small children was dismissed from work for taking an unreasonable time off work to look after her 11 year old daughter who was involved in an accident and required care (in total 5 weeks off). In establishing whether the requested time off work was reasonable, the Employment Tribunal took regard of sections 1 and 5 of the DTI guidance on the duration of the leave and concluded that the DTI Guidance was not conclusive on what in particular circumstances of each case would amount to the reasonable duration of time off. In determining whether the employee requested an unreasonable time off work in order to care for the dependant all the facts and factors of each individual case must be weighted. Subsequently, the Employment Tribunal held that on consideration of the unique circumstances of the Claimant (no external help available, limited financial resources available for caring arrangements) the requested time was reasonable under Section 57A ERA 1996 and her dismissal was unfair under Regulation 20 MPLR. *Darlington v. Allders of Croydon,* Case Number 2304217/01, Employment Tribunal on 5th December 2001, paras. 32-36.

[695] Case Number 2300398/01 on 14 June 2001 at paras. 20-22. It was outlined that in determining whether the reasonable time off was taken the totality of taken absences; the past and the prospective disruptions to the business would have to be taken into consideration. Additionally, it would have to be established whether employee's absences were necessary.

absence separately. The Tribunal seemed to assume that all absences for reasons related to looking after the Claimant's ill son should be considered together as if all absences were the same (clearly not the case). Since every single absence from work derives from different circumstances the correct approach to establishing the necessity of the absence would be assessing each absence on its own and then all absences together.

It was a subjective test which focused on the needs of the business and neglected the individual needs of employees. In the assessment of whether the employee's absence was necessary, the test made no references to the personal circumstances of the employee. It is clear that the necessity of the action that needs to be taken must be assessed on the basis of the individual circumstances. The absence deemed to be considered as necessary in the case of a single parent family may not be the case where both parents are available to respond to emergencies. Unsurprisingly, the Tribunal concluded the Claimant's absences were not necessary and that she should have made better arrangements for the short-term problems and that she took an unreasonable amount of time to look after her son. In relation to the duration of the leave, it was concluded that the statutory right applies to short term absences during working hours covering an occasion when the dependant falls ill or there is an unexpected disruption.

The Employment Appeal Tribunal[696] established that in determining the necessity of the employee's absence(s) the factors must be taken into consideration such as the nature of the incident, the closeness of the relationship between the employee and the dependant and the extent of the availability of the help. The EAT[697] recognised that in assessment of the reasonableness of time off for dependants the disruption to the business caused by employees absence is not to be taken into account as it would contravene the purpose of this leave, which is intended to enable employees to deal with unexpected events without the fear of reprisals. The test of the EAT is more focused on the employee's particular circumstances than the test

[696] *Qua v Morrison Solicitors* Appeal No. EAT/884/01 at para. 17.
[697] Ibid. para. 22.

of the ET, and it does not make references to the disruption of the business that the employee's absence may cause. This undoubtedly indicates a step forward towards recognising by tribunals the importance of personal circumstances of the employee rather than the needs of the business when determining whether the employee's absence amounted to the necessary action. Following the above test it may now be easier for more employees to justify their absence from work on the basis of the necessities covered by right to the leave for dependants.

However, the assessment of availability of external help appears to indicate that the leave would only be taken as the last resort where no other help is available. This contrasts with the availability of the leave of some other well-established Member States where the leave can be taken regardless of whether there is another person in the household who could provide the needed care or not (**Appendix, Table 11**).

Considering the current economic downturn and the limited financial resources of employees to put into place the necessary arrangements to care for dependants, employees may be risking being dismissed from work for their absences related to such care as it may not be considered as the *necessary actions* which had to be taken; not falling under the right to time off for dependants and therefore not providing those employees with the legislative protection against the dismissal. Although the disruption to the business that employee's absence may cause cannot be directly used to justify the refusal or unreasonable postponement of the leave, the lack of clear legislative provisions on the duration of the leave enables employers to consider the business needs when deciding whether the leave is or is not to be granted and for how long. However, the disruption to business caused by employee's absence remains to be taken into account by tribunals when determining whether the duration of the time off was reasonable in the circumstances.[698]

[698] Cf. *Clifton v. Enticotts Bakery,* Case Number 3104944/2009, Employment Tribunal, on 20th April 2010, where at para. 61 the Employment Tribunal clearly considered the disruption or inconvenience caused by employee's absences to the Respondent's business when determining whether the leave of the duration of four to six weeks was reasonable in circumstances.

On the issue of what constitutes a reasonable amount of time off work, the EAT[699] concluded that the normal duration of the leave would be no more than a few hours and in most serious cases at most one or two days could be taken. The EAT clearly stated that it is not possible to specify the maximum duration of the leave because this will depend on the individual circumstances of the employee and will always be a question of fact for the Tribunal to determine if the duration of the leave was reasonable. Although the EAT attempted to interpret what would amount to a reasonable duration of the leave the clarification of the matter as provided by EAT simply reinforces the unclear provision of the statute without providing any clear guidance on how in particular circumstances the reasonableness of the duration of the leave is to be assessed. It remains a question of fact for employment tribunals to determine the reasonableness of the duration of the leave in the particular circumstances of each case. This leaves both employers and employees confused about how the leave is to be administered. Although, the EAT acknowledged the importance of the individual circumstances in determining the reasonable duration of the leave, it adopted the narrow interpretation of the statute which indicates that the leave of the longer duration as seen in *Darlington v. Allders of Croydon* will now rarely be given. This became evident in *Uzowuru v London Borough of Tower Hamlets*[700] where the EAT reaffirmed the decision of the Tribunal and held that the time off provided for a relatively short period of absence enabling the employee to deal with the emergency.[701] The existence of inherent difficulties that tribunals, employers and employees face in the interpretation and application of the right to time off can be observed in *Otoole v. Cortest Limited*.[702] The question for the Employment Tribunal was to determine whether the reason for the dismissal was the request for time off under Section 57A(1) ERA 1996 and whether the requested time off (one or two months) was reasonable in the

[699] *Miss J Qua v Morrison Solicitors* Appeal No. EAT/884/01 paras. 18-20.
[700] *Uzowuru v London Borough of Tower Hamlets*, UKEAT/0869/04/CK paras. 8-9.
[701] The employee's absence in order to look after his ill mother in Nigeria (from 7 October 2002 – 31 July 2003) did not fall within section 57A ERA 1996.
[702] *Otoole v. Cortest Limited*, Case Number 3100417/07, Employment Tribunal, on 31 May 2007.

circumstances.[703] The reasonableness of requested time off was assessed on the basis of the Claimant's length of the employment, his individual circumstances, that the request was for unpaid leave and the evidence that the employee would not have required any longer than four weeks. On the basis of the guidance of the EAT in *Qua,* the Tribunal accepted that the request for the time off was reasonable. The dismissal was therefore automatically unfair under Section 99(d) ERA 1996 and Regulation 20 MPLR.

On appeal the Employment Appeal Tribunal[704] concluded that the Tribunal erred both in the interpretation and application of Section 57A(1)(d) ERA 1996 as the purpose of the legislation is not to enable parents to care for their children but to enable parents to put into place the required care arrangements.[705] The EAT reaffirmed that legislation does not allow an employee to become a childminder for the duration of one month or longer and allowing such a long leave would expand the right under Section 57A ERA 1996 to cover another type of time off that was not intended by the legislator.[706] The view of the EAT in *Cortest Ltd v. O'Toole* was that in situations where longer periods off work are required in order to care for children employees would have to rely on the right to parental leave. Setting the rule that all longer periods of care leave would have to be covered by parental leave would disadvantage employees who do not have the right to the leave because they either do not fulfil the qualifying period of employment

[703] Ibid. at paras. 14-17. The Employment Tribunal held that the request made by the Claimant fell within Section 57A(1)(d) ERA 1996. The request for the absence was made as soon as reasonably practicable and sufficient notice was given. The requested time off (one month or maybe two months subject to changing circumstances) was held to be reasonable (top end that could be permitted under the circumstances).

[704] *Cortest Ltd v.Mr K O'Toole*, UKEAT/0470/07/LA on 7 November 2007 at paras. 11,22-23. On appeal the employer argued that there had been no automatic unfair dismissal as the request for time off under Section 57A(1)(d) ERA 1996 was unreasonable and that it did not fall within the scope of a request for the time off under Section 57A ERA 1996 because the employee intended to act as a carer when his wife was away.

[705] Although the reasonableness of the duration of time off is to be assessed on the basis of individual facts of each case the requested period of one month or even longer in order to care for a child would rarely or never be covered by Section 57A ERA 1996. Considering the long duration of leave and that there was no evidence that any other arrangements were sought (e.g. help from neighbours or relatives) it was unreasonable for the Employment Appeal Tribunal to conclude on facts that the time off was reasonable. Consequently, there was no absence which fell under Section 57A ERA 1996 and therefore the dismissal was not automatically unfair.

[706] The case was remitted for further hearing by a fresh Tribunal.

requirement or have children who are too old for parental leave.[707]

The right to parental leave is also very different from the right to time off because it cannot be used at short notice and the leave can be postponed for up to six months.[708] It would be wrong to assume that the right to parental leave could always be used when longer periods of the time off are required in order to care for dependants because the right to parental leave can only be taken in order to care for children and it does not cover all other types of dependants who are covered by Section 57A ERA 1996. Following the reasoning of the EAT in *Cortest Ltd v. O'Toole*, an employee requiring a month off work in order to care for his/her ill parent would not have the right to time off because this would not be considered as an emergency and the duration of the leave would not be considered reasonable in the circumstance. The same employee would not have the right to parental leave either because it does not cover the elderly dependants.

The narrow interpretation of the duration and the availability of the leave for dependants adopted by EAT significantly hampers the effectiveness of the right to time off in helping employees to reconcile work and responsibilities for dependants (especially elderly) as it provides employees with no legislative right to provide adult dependants with the long-term care. The lack of UK legislative right to care for elderly dependants, which is available in relation to children under parental leave, may amount to discrimination on grounds of age. In contrast with employees caring for adult dependants who are not disabled the recent ruling of the Court of Justice in *Coleman*[709] and the introduction of the *Equality Act 2010* have significantly improved the situation of employees with caring responsibilities for disabled dependants as the

[707] In *Clifton v. Enticotts Bakery,* Case Number 3104944/2009, Employment Tribunal on 20th April 2010 the necessity of providing care to the child (not qualifying for parental leave) who was involved in a car accident resulted in a fair dismissal as the right to the time off work does not enable an employee to provide long-term personal care to the dependant (four to six weeks) and there is no other legislative right that would enable a parent to do that.

[708] In the discussed case the Claimant had three children the youngest at the age of two and the oldest at the age of eight. The employee was entitled to parental leave for the requested duration in respect of the youngest child but the employer never informed him about his rights. If the employee had known about his right to parental leave he would most likely have requested it.

[709] *Coleman v. Attridge Law* Case C-303/6 [2008] IRLR 722.

refusal of the time off could amount to disability discrimination.

The decision in *Idoniboye-Obu* v. *Royal Mail Group Plc*[710] indicates that the time off work up to one month may still fall within Section 57A ERA 1996. This clearly contradicts the discussed decision of the Employment Appeal Tribunal in *Cortest* where it was established despite the consideration of the individual circumstances the long periods of the time off would not be covered by the statute. In *Idoniboye-Obu* the Employment Tribunal recognised the difference between the time off work to provide personal care and the time off work to put into place the necessary care arrangements. While the Tribunal did not accept that the duration of a month off work to provide personal care was reasonable it accepted that due to the exceptionally difficult circumstances of the Claimant, the time off to care for the dependant whilst putting in place the necessary caring arrangements was reasonable within Section 57A ERA 1996 and in line with the existing case law.[711]

The contradictory decisions in the above discussed cases indicate that despite the attempts of Tribunals to define the rules on how the reasonableness of the time off should be assessed the existing guidance of Employment Appeal Tribunal in *Qua,* which is commonly used by Tribunals has failed to introduce the satisfactory level of clarity ensuring uniformity in the application of the entitlement to time off for dependants. The lack of a specific duration of time off for dependants continues posing major problems for the Tribunals, employers and employees who struggle to determine the existence of entitlement to the leave. Section 57A(1) ERA 1996 is silent about the frequency of the entitlement to time off for dependants; how the reasonableness and the necessity of the leave should be assessed in cases where the employee already took the time off on one or more previous

[710] *Idoniboye-Obu* v. *Royal Mail Group Plc* op.cit at para. 5.6.

[711] Considering the exceptionally difficult circumstances in which the employee found herself with very limited founds and resources which resulted in the necessity of providing assistance to her mother while she was in the hospital and putting in place the necessary caring arrangements, the Employment Tribunal held that the period of absence (4 January – 8 February 2008) was reasonable within Section 57A ERA 1996. The Claimant's dismissal amounted to an automatic unfair dismissal within Section 99 ERA 1996 and Regulation 20 MPLR.

occasions. Although, the legislation does not specify the number of occasions on which the leave could be taken, according to the Employment Appeal Tribunal[712] this does not mean that an employee is entitled to unlimited amounts of time off work even if the notice requirements are complied with.

This issue was also addressed by Employment Tribunal in *Bartley v. Colway Contractors Ltd*[713] where the employer argued that the employee was not entitled to request further leave for dependants because he had already returned to work. This argument was rejected by the Tribunal,[714] it reaffirmed that the right to time off arises when there is a need and therefore employees returning to work may be entitled to ask for more time off if the necessity arises. Section 57A ERA 1996 does not limit the amount of time that can be requested on condition that the requested time is reasonable. The Tribunal[715] defined the meaning of the time off work as referring to *"to time off during working hours from the work which the employer requires him to perform under the contract of employment"*. Section 57A ERA 1996 refers to time off work which is to be taken when actions are necessary to provide the required assistance but it does not state that those actions must fall within the working hours. This indicates that actions outside the working hours would also fall within section 57A ERA 1996. The Tribunal held that the key aspect of the leave is that the employer must be reasonably flexible to assist the employee in dealing with domestic crises.[716] This further reaffirms the ineffectiveness of the UK entitlement to the time off, as in the absence of the legislative obligation on employers to provide employees with the time off work when it is needed the leave continuous to be granted at employer's discretion.

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[712] *Miss J Qua v Morrison Solicitors* Appeal No. EAT/884/01, paras. 21-22.
[713] *Bartley v. Colway Contractors Ltd,* Case Number 2408768/01 on 13 May 2002.
[714] Ibid. para. 11.
[715] Ibid. para. 12.
[716] If the employee had been offered the work near home he would not have had to request the time off for dependants (the absence involved the absence both during the working hours and outside them as the employee would be away from home). The employee was forced to request additional time off work because the locally available work was not offered to him by the employer. The dismissal of the Claimant was automatically unfair and in breach of sections 57A and 99 of ERA 1996 as the request for an additional week off work in order to care for dependants was held to be reasonable (no-one to call in locality, young children to be cared for and emotionally and physically weak partner).

In contrast with the UK, all other selected well-established Member States provide workers with the right to the clearly set duration of leave for dependants. The clearly defined duration of the leave that can be taken on some urgent grounds provides workers with the specific right to the leave which can be invoked when the request for the leave is made. This is more advantageous to workers as they are fully aware of the leave entitlement and the role of the employer is limited to permitting or not permitting the leave, and the employer does not decide about the duration of leave as it is the case of the UK. The defined entitlement to the leave also removes the possibility of the worker's dismissal on grounds that the excessively long period of the leave was taken if the leave actually taken fully complies with the set statutory entitlement. The existence of the significant differences in the duration of the entitlement to the leave indicates that there is no uniformity in the availability of the right in well-established Member States. Consequently, the UK implementation of the Directive provides for the most restrictive scheme on the time off (**Appendix, Table 11**).

4.3.5.3 Time off for Dependants Entails Financial Penalties and Employment Security Risks.

Section 57A(1) ERA 1996 provides qualifying employees with the right to request time off work for dependants but it does not clearly state whether employees are entitled to pay whilst on leave. The issue of whether the time off is to be paid or not was addressed by Employment Tribunal in *Nardone v. David Fox*[717]where it was held that the right to time off provides employees merely with the unpaid leave in relation to dependants. An employee will be entitled to paid time off in order to care for dependants only in circumstances where the implied term of entitlement to paid leave there can be identified the in the employee's employment contact. The necessity of relying on the contractual terms in order to acquire the right to the paid time off rather than on the statutory right indicates the failure of the UK legislator to adequately cater for the needs of employees with responsibility for dependants. It also indicates

[717] *Nardone v. David Fox t/a David Fox Transport,* Case Number 2502457/04 Employment Tribunal on 3 June 2003 para. 16.

the minimalist approach of the UK legislator to implementing the Directive on parental leave and its failure to provide workers with the legislative right to time off which fully recognises the social importance of the provision of care for dependants. Despite the change of the government in 1997, the importance of time off for enabling workers to reconcile work and caring for dependants has not been recognised as workers are financially punished for taking time off work in order to care for dependants. The lack of statutory right to pay whilst on the time off leaves employees at the mercy of employers and enables employers to financially punish employees for exercising their right to the leave. The 2003 study confirmed that the introduction of the new entitlement to the time off has not significantly increased the availability of the paid leave.[718]

The implementation of the Directive on parental leave in other selected well-established Member States did not result in the introduction of the uniform right to the paid leave for urgent family reasons as the right to payment is only available in Germany and Sweden where the national implementations have exceeded the requirements of the Directive. This indicates that the vast majority of EU workers (particularly women) are financially punished for taking the leave in order to care for the dependants. Consequently, the deficiency of the general provision of the Directive, which did not require Member States to introduce the right to the paid leave, has been reinforced to the detriment of workers with responsibilities for dependants in the UK and selected well-established Member States (**Appendix, Table 11**).

Section 99 ERA 1996 and the MPLR in Regulation 20 make the employee's dismissal automatically unfair if the dismissal is for reasons related to exercising the right to the leave. The right to request time off has been clearly

[718] Department of Trade and Industry (2003), *The second Work-Life Balance Study: Results from the Employer Survey – Main Report*, Employment Relations Research Series No.22, October 2003 pp.153-160. The measured impact of the Employment Relations Act 1999 indicates that merely 28% of workplaces offered (in 2003) fully paid leave for urgent family reasons and 44% had formalised arrangements for the leave.

defined by Employment Tribunal in *Murphy v Benson Transport*[719] as the right to time off without penalty and the dismissal. Since, there is no UK right to time off for dependants of the specific duration, whenever the time off is taken there is always a danger that the employee's absence could be considered by the employer as breaching his/her employment contract (resulting in dismissal). The introduction of the legislative protection against dismissal for reasons related to the time off constitutes an important legislative development but it merely covers those employees who have exercised their right to the leave. It does not protect those workers with caring responsibilities for dependants who are likely to apply for the leave but have not done so yet. This enables employers to terminate employment contracts with workers who are likely to apply for the leave by providing them with the contractual notice. The lack of comprehensive protection from dismissal under Section 57A ERA 1996 will in particular affect workers with caring responsibilities for dependants who do not qualify for protection under Section 98 ERA 1996.

Section 48(1) ERA 1996 provides employees who have suffered a detriment with the right to bring a complaint before Tribunals in relation to the detriment under Section 47C(2)(d) ERA 1996, which covers detriments associated with time off for dependants. Workers' frequent absences from work to deal with family emergencies could result in them being penalised by their employers, being passed over for promotion and their commitment to their employment being questioned. The case of *Harbisher v. Buy As You View Ltd*[720] dealt with the issue of whether the employee suffered a detriment (passed for promotion) because he took time off to look after his ill spouse and the new born child. In this case, before taking time off to look after his spouse the Claimant was told that he was to be promoted to a managerial post within the company. On return to work after the absences he was told that he lacked commitment and his heart was not with the company. Although, this appears to indicate that

[719]Case Number 2407370/00 on 27 March 2001 at para. 7. The dismissal of the employee for taking two days off work in order to respond to his wife's sudden illness was considered the ultimate penalty that could be imposed on the employee and was found unfair.
[720] *Harbisher v. Buy As You View Ltd* op. cit., at para. 7.

there is a direct link between his absences for reasons covered by Section 57A ERA 1996 and his commitment to the company being questioned by the employer, no detriment was established by Employment Tribunal due to other factors which indicated that his previous work performance was not as good as it was previously thought. The complaint of the detriment was not well-founded as there was no evidence that the lack of promotion was related to absences associated with the family responsibilities. This indicates that it will be extremely difficult or even impossible for employees who allege the detriment for reasons related to him/her taking time off for dependants to establish that he/she was penalised for exercising his/her right under Section 57A ERA 1996. It may be almost impossible to succeed in the claim if the employer can evidence that the employee's previous performance was not as good as it was expected. This enables an employer to introduce the criteria of performance that may be very difficult or even impossible for an employee to satisfy. Additional protection to those requesting or taking the time off is provided the requirement that in interpreting Section 57A ERA 1996 Tribunals are required by Section 3 of Human Rights Act 1998 to take into consideration Article 8 of the European Convention on Human Rights.[721] The refusal to grant the time off work may result in the breach of Article 8 of the Convention as in *Morancie v. PVC Vendo plc.*[722] However in certain circumstances it will be reasonable for an employer to refuse granting the time off for dependants as in *Simmonds v. Family Housing Association*.[723]

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[721] It entitles a person to respect for his/her private, family life, home and correspondence subject to exemptions.

[722] Case Number 3300938/2001 on 29 August 2001 at para. 9. The Employment Tribunal relied on Article 8 ECHR when determining whether the Claimant, who took a day off work to look after her ill child was entitled to time off work under section 57A ERA 1996. The case dealt with the expressed hostility of the employer towards the person with family responsibilities as one day off work taken to look after the child resulted in the dismissal from work. The Employment Tribunal ruled (para. 13) in favour of the Claimant as her right under section 57A(1)(a) ERA 1996 was infringed (she took reasonable time off, her presence was necessary to provide assistance).

[723] *Simmonds v. Family Housing Association*, Case Number 2204823/2003, Employment Tribunal, on 4-7 May 2004 and 3 June 2004 at para. 69. This will cover the situations when the employee is already off sick during the requested period or flexi-leave arrangements that were granted to the employees are able to accommodate the needs that arose.

4.4 The UK Parental Leave Arrangements Fail to Help Parents in Terms of their Choice.

As seen in Chapter 3, work-family choices are not made in isolation but are made in the unique context of each family. Families make their work-family decisions within an institutional set of arrangements that can limit choices and impose certain costs upon different options.[724] Choices which are made by workers with caring responsibilities for children and adult dependants are influenced by legal frameworks rather than on the basis of individually rational calculation alone.[725] State policies will have an important impact on the extent to which families can make genuine reconciliation choices as weak or negligible statutory or employment support can significantly limit their reconciliation choices.[726] Thus, families' ability to make work-family choices will depend on the extent to which national legal provisions recognise the necessity of enabling families to better balance the demands of work and family responsibilities. Although, the MPLR and ERA 1996 provide workers with entitlements to leave periods they do not state the reconciliation objective of the Directive. These measures therefore fail to recognise that workers experience difficulties with reconciling work and family responsibilities which need to be addressed. The lack of clear recognition of families' reconciliation needs by UK legislator as already seen in this Chapter, has resulted in the introduction of minimum standards on parental leave and leave for family reasons which can significantly restrict workers' reconciliation choices.

As seen in Chapter 2, postmodern feminist perspectives recognise that there are various groups of women and men who have different preferences and attitudes towards their involvement in work and family responsibilities which need to be recognised by legal rights. Hence, the extent to which various groups of male

[724] M. Daly and K. Scheiwe (2010) `Individualisation and personal obligations - social policy, family policy, and law reform in Germany and the UK`, *International Journal of Law, Policy and the Family*, 24(2), 177-197 at p.182.
[725] R. Crompton (2006) op. cit., p. 13.
[726] Ibid. pp. 125-127.

and female workers are able to achieve the desired reconciliation will depend on individual preferences and other factors which include constraints deriving from the social policy.[727] Both structural and normative constraints and individual preferences play an important role in work-family choices which are made by women and men.[728] Workers' work-family choices are constrained as the definition of parental responsibilities restricts the right to parental leave only to natural and adoptive parents of a child and does not cover all those who actually care for the child.[729] For some families being able to make real reconciliation choices may require the help of a carer who is neither the natural nor adoptive parent of the child. Although, grandparents are often involved in the provision of care for their grandchildren, which enables mothers to remain in employment, the Regulations fail to recognise their role in the provision of care. This constitutes a deficiency of the right to parental leave in enabling parents to make real reconciliation choices as the involvement of grandparents in the provision of care not only enhances parents' work-family choices and also contributes to reducing the negative impact of having children on mothers' employment prospects.

The narrow definition of parental responsibilities also limits workers' work-family choices as parental leave is only available in relation to qualifying children and does not provide for the right to care for other dependants. The lack of UK right to parental leave covering all family dependants significantly limits work-family choices of workers with caring responsibilities for adult dependants as the entitlement to time off for dependants is more restrictive than the right to parental leave and does not provide workers with the right to personally care for their dependants. This deficiency of the right to parental leave indicates the failure of the UK legislator to adequately respond to workers' reconciliation needs as due to aging society ever increasing number of workers (in particular women) have

[727] J. Glover (2002) `The "balance model" theorising women's employment behaviour` in R. Crompton (2006) op. cit., p. 52.
[728] R. Crompton and C. Lyonette (2008) `Mothers' employment, work-life conflict, careers and class` in Scott J et al. (eds) *Women and Employment: Changing Lives and New Challenges*. Cheltenham: Edward Elgar, pp. 213–234.
[729] Regulation 13(1) MPLR.

responsibilities for adult dependants and often difficult work-family choices need to be made. The extent to which the entitlement to time off enables workers to make real reconciliation choices is explored more in detail later in this Chapter.

The right to parental leave entitles qualifying employees to absence from work during the contractual working time which is solely to be used for the purpose of caring for a child.[730] Section 76(5)(a) ERA 1996 provides that Regulations may specify things which are, or are not to be understood as done for the purpose of caring for the child. However, the Regulations do not contain any detailed information specifying instances when the leave is or is not taken for the purpose of caring for the child. This is left to an employer and an employee to decide and therefore potentially giving the freedom to employers to restrict impose further restrictions on how and when the leave could be taken. In *Wells v. Provident Financial Management Services*[731] the Employment Tribunal held that the Claimant did not request parental leave because the leave which he requested did not depend on the need to care for the child. What raises concerns in this case is that the decision of the tribunal appears to imply that in the application for parental leave, an employee would be required to justify before the employer the purpose of the leave and why the leave is taken at the requested time. The requirement that parents need to justify their request for the leave indicates the existence of additional barriers in the application process, which may disadvantage working parents by discouraging them from applying for parental leave or preventing them from taking the leave when it is most needed. This reaffirms that despite the existence of the statutory right to parental leave it is granted entirely at the discretion of the employer, which significantly limits its role in enabling parents to make real work-family choices.

Government policies are designed not to interfere with the employer's right to manage and therefore work-life policies are promoted by demonstrating business

[730] Regulation 14(2-3) MPLR and section 76(1) ERA 1996.
[731] Case No. 1803587/04, Employment Tribunal on 07/09/2004, paras 4 and 5.

rationale for their need.[732] The reliance on business rationale rather than reconciliation needs of workers with caring responsibilities when shaping work-life balance policies indicates the lack of full recognition of the importance of providing workers with policies which could adequately address their various reconciliation needs. Although working parents may have different preferences as to the extent of their involvement in paid employment and the provision of care,[733] their work-family choices can be restricted by laws which allocate employment rights in accordance with different modes of employment market participation rather than workers' reconciliation needs. Since, only qualifying employees are entitled to parental leave[734] the UK right to parental leave ignores reconciliation needs of those workers whose employment status does not fall within the definition of an employee (e.g. self-employed). This limits reconciliation choices of workers with caring responsibilities for children whose employment status prevents them from taking parental leave in order to better reconcile work and caring responsibilities. Further deficiency of the UK parental leave scheme is that parental leave cannot be extended beyond the termination of the contractual period for which an employee was employed. The termination of parental leave on the expiry of the contractual period, regardless of worker's caring needs may deprive workers of their right to parental leave when it is most needed. This in principle restricts parents' reconciliation choices as the sudden termination of parental leave may be very disruptive to parents and prevent them from focusing on providing the needed care.

Although the amount of care which needs to be provided to children does not depend either on parent's employment status or the duration of employment with the same employer, the UK right to parental leave is restricted to employees who have continuously worked for the same employer for at least a year.[735] How work-life balance is achieved by working parents will depend on individual

[732] Crompton (2006) op. cit., p. 216.
[733] C. Hakim (2000) op. cit., pp.223-258.
[734] Regulation 13(1) MPLR.
[735] Regulation 13(1)(a) MPLR.

preferences and other factors which include the social policy constraints.[736] Hence, the right to parental leave only for those employees who can comply with the qualifying employment requirement is very restrictive and merely enhances reconciliation choices of parents who comply with this requirement. The legislative right to parental leave seeks to reward employees with a proven commitment record to one employer and penalises those employees who because of various reasons chose or had to change their employment. Considering that current working practices and career building may require employees to frequently change their employers, the qualifying employment requirement in the Regulations safeguards employers' interests and restricts reconciliation choices of parents who would like to be successful both at professional and family levels.

The duration of employment requirement under the Regulations amounts to the longest permitted by Directive on parental leave and requires excessively long periods of employment loyalty from working parents in order to acquire the right to parental leave. This may influence how work-family decision are made within a family as employees with parental responsibilities may be prevented from changing employment (advancing in their career) in order not to lose their right to parental leave. Hence, work-family choices impose certain costs on working parents which can influence how caring responsibilities are allocated within a family. The widespread absence of the UK collective or workforce agreements that could provide for shorter qualifying periods or none forces employees to rely on the legislative default provisions where the leave is restricted to employees with the year of service. There is an indication that in the UK and other well-established Member States where the maximum qualifying periods were introduced, parental leave take-up rates are much lower (**Appendix, Table 9**).

[736] J. Glover (2002) op. cit., p. 52.

The implementation of the Directive has resulted in introducing the individual and non-transferable right to parental leave in the UK.[737] Bruning and Plantenga[738] argue that parental leave in order to be able to promote equal opportunities between men and women, should be based on an individual and non-transferable right, as where the family right exists it is predominately used by women. An individual and non-transferable right to parental leave can contribute to ensuring more equality in how caring responsibilities are allocated within a family but ultimately work-family choices will be made by working parents in the particular context of each family. Choices which are made by women and men in relation to their employment and their family lives will be shaped or constrained by the context within which they are being exercised.[739] Hence, how parental leave is used within a family will depend on unique individual identities of a mother or father and their attitudes towards caring responsibilities.[740] As seen in Chapter 2 different groups of women and men have different attitudes and expectations as to their work-life preferences and the level of their involvement in the labour market. Parents' attitudes towards using their individual and non-transferable right to parental leave will also be shaped by their occupational class, and employment, partnership, family status and national variations.

There is evidence that parents with lower occupational status tend to be more `traditional` in their approach towards division of family and domestic responsibilities, and less educated women are less likely to remain in employment when their children are young.[741] Consequently the impact of the individual and non-transferable right to parental leave on enabling working parents to make real reconciliation choices will depend on parents' attitudes as to how work and family responsibilities are allocated within a family. The individual and non-transferable right to parental leave may assist with work-family choices

[737] Regulation 14 MPLR implemented in the UK Clause 2(1) Council Directive 96/34/EC on the Framework Agreement on parental leave.
[738] G. Bruning, J. Plantenga (1999) op. cit., p.207.
[739] R. Crompton (2006) op. cit., p. 11.
[740] E.B Silva and C. Smart (1999) op. cit., p.13.
[741] R. Crompton (2006) op. cit., p. 30.

parents with higher occupational status and better educated women as those parents are likely to use their individual leave entitlements. Hence, parental leave could contribute to ensuring more equality in how work and family responsibilities are shared by those parents. However, it may also prevent parents with lower occupational status and less educated women who hold more conservative views about how work-family responsibilities should be divided within a family from making genuine reconciliation choices. As women retain the primary responsibility for childcare and housework the non-transferable parental leave can constrain even well-paid and highly-qualified women in their decisions regarding work and care.[742]

The Regulations which provide all parents with individual and non-transferable right to parental leave aim to penalise those families who wish to follow more traditional work-care patterns as the portion of parental leave could be irreversibly lost if both parents do not use their leave entitlements. The Regulations appear to be developed on the premise of an 'adult worker' model which assumes both fathers and mothers could benefit from their involvement in paid work. However, there are some women who define themselves mainly as mothers and are not interested in taking up employment, regardless of economic consequences for them.[743] Thus, non-transferable parental leave may also contribute to restricting parents' reconciliation choices and deepening class inequalities where the leave is taken by one parent.

Parents' work-family choices also depend on understanding constraints that differently affect groups of women and men who take parental leave. All women (men) face constraints when making decisions about their lives and all decisions involve opportunity costs (things that must be forgone) as well as real costs (loss of income).[744] The constraints and costs associated with taking parental leave

[742] C. Lyonette, G. Kaufman and R. Crompton (2011) 'We both need to work' : maternal employment, childcare and health care in Britain and the USA, *Work Employment Society* 2011 25:34-50 at p.35.
[743] *R. Crompton (2006)* `Class and family`, *The Sociological Review*, 54:4, 658-677 at p.670.
[744] S. McRae (2003) op. cit., pp. 319-330.

will therefore influence how work-care responsibilities are shared within a family. There are direct and indirect costs of taking parental leave which will depend on parents' education, experience, earnings, and labour market sector.[745] The level of parents' commitment to the labour market and the earning power of each parent will influence the decision as to who should take parental leave. As women are more likely to work part-time than men and part-time work often attracts lower wage it will be more economically viable for mother to take parental leave. The position of a mother as a rational parental leave taker is further reinforced by absence of incentives for fathers to take parental leave and the UK gender pay gap. Since, part-time work remains undervalued and full-time employment is often needed to move up the employment ladder carers (mostly women) are unable to compete on equal terms with most men.[746]

The underlying class process also influences women's behaviour and their attitude to employment and parental leave. There is evidence that less well-educated women are more likely to limit their involvement in the labour market or give up working when their children are young but middle-class women are in a better position to realise their work-family preferences as they can rely on the income of their partners.[747] Consequently, the cost of taking parental leave that parents are prepared to pay is a relative cost and will be evaluated in the context of each family. As the UK remains half breadwinner rather than dual breadwinner society where women are still expected to provide the needed care, the right to non-transferable parental leave which attracts employment security risks and financial costs is of a symbolic value in enabling parents to make real reconciliation choices.

Although minority of women see themselves primarily as mothers most women's attitudes and behaviour towards employment and care are influenced by

[745] A. Amilon (2010) op. cit., pp. 33-52.
[746] T.P. Larsen (2004) 'The UK – a test case for the liberal welfare state?' In: Taylor-Gooby P (ed.) *New Risks, New Welfare - The Transformation of the European Welfare State*. Oxford: Oxford University Press, pp.55–82.
[747] S. McRae (2003) op. cit.,317-38.

structural factors rather than the exercise of free choice alone.[748] Structural constraints which include the availability of affordable childcare play an important role in shaping parents' decisions as to how caring responsibilities should be allocated within a family and who should take parental leave.[749] Women's extended involvement in the labour market and fathers' long working hour culture in the UK put additional pressure on the articulation of work-family choices within a family.[750] As parents' caring responsibilities do not decrease because of their involvement in the labour market, parents' work-family choices become conditioned by availability of affordable childcare facilities. Consequently, the effectiveness of the right to non-transferable parental leave in ensuring more equality in how caring responsibilities are allocated within a family and helping both working parents to make genuine reconciliation choices is conditioned by wide-spread availability of affordable childcare facilities in the UK.[751] Although the increase in the public expenditure on childcare helped Labour government to largely meet the Barcelona (2002) childcare targets,[752] the sustainability of childcare services is problematic and resulted in closures of some childcare

[748] R. Crompton (2006) op. cit., p. 163.
[749] S. McRae (2003) op. cit., pp.317-38.
[750] R. Crompton (2006) op. cit., pp. 125-127.
[751] Apart from implementing the hard law requirements of the EU reconciliation Directives, the Labour government took steps to implement the soft law targets on the availability of childcare set out by *Barcelona European Council* 2002 (15-16 March 2002, SN 100/1/02) and reinforced by Open Method Coordination. It must be stressed that when the Labour government came to power (1997) the UK was one of Member States where institutionalised childcare was scarce. The national initiatives aiming at improving the availability of affordable childcare were initiated by the *National Childcare Strategy* 1998 (For more details on the UK childcare see Ch. Skinner (2005) `Coordination Points: A Hidden Factor in Reconciling Work and Family Life`, *Journal of Social Policy*, 34(1):99-119 and T. Warren, E. Fox and G. Pascall (2009) `Innovative Social Policies: Implications for Work-life Balance among Low-waged Women in England`, *Gender, Work and Organisation*, 16(1):126-150. This was further supported by the *Childcare Act 2006* which provided local authorities with the statutory responsibility of ensuring the availability of childcare.
[752] Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Implementation of the Barcelona objectives concerning childcare facilities for pre-school-age children Brussels, COM(2008) 638 final. By 2009, nine EU Member States had already met the targets set in Barcelona, of 33 % of children under 3 in formal childcare (Belgium, Denmark, Spain, France, Luxembourg, Netherlands, Portugal, Sweden, and UK); out of these nine, in Denmark, France, Portugal and Sweden most formal childcare services are used for 30 hours or more per week. Council of the European Union, *Report: Review of the Implementation of the Beijing Platform for Action in the area F: Women and the Economy. Reconciliation of Work and Family Life as a Condition of Equal Participation in the Labour Market*, Brussels, 21 November, 201116835/11 ADD 1 SOC 988 p. 52.

facilities.[753] The sustainability of affordable childcare facilities is going to be even more problematic because of the budgetary cuts planned by the current government. The potential decline in availability of affordable childcare is likely to make it even more difficult for parents to make real reconciliation choices. Since, the cost of childcare in the UK is one of the highest in Europe, in particular less well-off parents (mothers) may be forced to exit the labour market in order to care for their children and thereby be prevented from making genuine reconciliation choices.[754] For parents who cannot afford to pay for formal childcare and are unable to put into place other alternative care arrangements the right to parental leave will be of a symbolic value as children need to be cared for all year round and parental leave does not enable parents to provide children with long-term childcare.

The lack of easily accessible and affordable childcare can also positively influence how caring responsibilities are divided within a family as it forces both parents to be actively involved in the provision of care. It can also help families to address effects of the domestic traditionalism within a family.[755] The high cost of the UK childcare merely enables well-off parents to remain in paid employment. However, providing more affordable childcare facilities can undermine the social importance of care which is provided by mothers as it reinforces the view that women should conform to male working patterns, rather than that work and family work should be reconciled.[756] Childcare costs, moral convictions, individual preferences, social sustainability and depriving the family of one of its main functions would have negative implications for social integration and for demography and social reproduction more generally.[757] As

[753] Cf. J. Lewis and M. Campbell (2007), `Work/Family Balance Policies since 1997: A New Departure`, *Journal of Social Policy*, 36(3):365-381.
[754] C. Vincent, A. Braun and S. J. Ball (2008) `Childcare, choice and social class: Caring for young children in the UK`, *Critical Social Policy* 28: 5-26.
[755] R. Crompton (2006) op. cit., pp.125-127 and 160.
[756] S. Fredman, *CEDAW in the UK* in CEDAW Committee Concluding Observations *Fifth and Sixth Periodic Reports United Kingdom of Great Britain and Northern Ireland* Part of A/63/38.
[757] M. Daly and K. Scheiwe (2010) `Individualisation and personal obligations - social policy, family policy, and law reform in Germany and the UK`, *International Journal of Law, Policy and the Family*, 24(2), 177-197.

parents' attitudes towards their involvement in the provision of care are shaped by their individual preferences and various constraints, the existence of affordable formal childcare and parental leave may help parents to choose the preferred mode of employment and how caring responsibilities are divided within a family. The percentage of UK inactive women out of the labour market which is higher than the EU average of 55.3 per cent may indicate that the limited availability of affordable childcare and the lack of legislative right to provide long-term care to children prevent mothers from making real reconciliation choices.[758]

The MPLR provide each qualifying working parent with the right to thirteen weeks of parental leave which can be taken in relation to each child.[759] The right to parental leave enhances parents' reconciliation choices by providing them with the additional time off work in order to care for their children. However, the impact of this right in enabling parents to make real work-family choices is hampered by short duration of the leave which does not provide parents with the right to provide a long-term care to their children. Considering that there is no UK legislative right enabling working parents to provide long-term care to children and less well-off families cannot afford the formal childcare, the short duration of parental leave constitutes a major deficiency of this measure for reconciliation. This significantly limits parents' work-family choices as for some families longer duration of parental leave could help them to implement their work-family preferences. The short duration of parental leave does not provide working parents with the right to leave that would respond to their actual caring needs. The short leave entitlement could easily be fully used when the child is still very young thereby leaving parents without the right to parental leave when caring responsibilities for that child still require their personal care. There is an indication (**Appendix, Table 9**) that in well-established Member States where the duration of parental leave significantly exceeds the minimum requirements of the Directive, parental leave take-up rates are higher than in Member States offering

[758] Cf. Council of the European Union, *Report (2011)* op. cit., pp. 34-35.
[759] Regulation 14(1) MPLR.

shorter entitlements to the leave. This indicates that longer leave entitlements better respond to families' reconciliation needs, enable parents to provide long-term care to their children and can help parents with making real work-family choices.

The Regulations further limit parents' work-family choices by restricting the right to parental leave only to parents with children who are less than five years old.[760] The cut off age may leave a significant number of parents without the right to parental leave when their children are still very young and need to be cared for. This constitutes a major deficiency of the right to parental leave as it merely recognises caring needs of parents with small children and neglects caring needs of families with children older than 5 years of age. Hence, it is more difficult for parents with older children to make genuine work-family choices as they cannot rely on their legislative right to parental leave or any other equivalent leave in order to care for their children. The case of *Allam v. ISS London Ltd*[761] clearly shows that parents' work-family choices are significantly limited by the age limit set out in the Regulations as parents of young children who no longer qualify for parental leave face major difficulties with the reconciliation and may not be able to personally care for their children when it is most needed. Although, parents with older children are entitled to request the time off work for dependants, this leave period is very different from parental leave and does not provide working parents with right to personally care for their child. Considering the lack of affordable childcare facilities in the UK and that there is no legislative right to long-term care for older children it will be particularly difficult for less well-off parents with older children to make genuine reconciliation choices.

Although, the number of children within a family has a strong impact on mothers'

[760] Regulation 15(1-4) MPLR as substituted by SI2001/4010 Regulation 5.
[761] Employment Tribunal, Case No. 2201234/2003 on 13/06/2003. In this case the father of four children, the youngest (twins) being under the age of six was unable to reconcile work and family responsibilities by relying on parental leave when it was most needed because his youngest children exceeded the age of five required by MPLR.

labour market behaviour[762] and flexible parental leave arrangements can help working parents to remain in full-time employment whilst providing the needed care, the MPLR contain no provisions making parental leave available on a part-time basis. This significantly limits parents' work-family choices as the impossibility of taking parental leave on a part-time basis may prevent parents from efficiently using their leave entitlement. The lack of part-time parental leave also reinforces the short duration of parental leave entitlement and indicates that this leave entitlement does not adequately respond to families' reconciliation needs. Mothers like flexibility in their working hours[763] and part-time parental leave could further enhance it by enabling parents to use their parental leave in accordance with their real reconciliation needs. Since, part-time parental leave could help parents to remain in full-time employment whilst providing the needed care to children, the absence of part-time parental leave may force mothers to switch to less attractive part-time employment and thereby prevent them from making real reconciliation choices. In Member States where legislative rights to flexible leave arrangements exist parents are provided with additional flexibility in their working patterns, which can enable them (mainly women) to remain active in the labour market (**Appendix, Table 7**).

Parents' work-family choices are bound by various factors which influence their attitudes towards their involvement in work and family life.[764] The understanding of constraints associated with parental leave which differentially affect diverse groups of women and men influences parents' attitudes towards taking parental leave and their work-family choices.[765] Under the MPLR regardless of personal needs of leave takers, parental leave cannot be taken on a part-time basis and at least a week's leave must be taken at a time.[766] The minimum duration of parental leave significantly constrains parents' work-family choices by forcing

[762] O. Kangas and T. Rostgaard (2007) op. cit., p. 248.
[763] C. Lyonette, G. Kaufman and R. Crompton (2011) op. cit., p.46.
[764] S. Walters (2005) Making the Best of a Bad Job? Female Part-Timers' Orientations and Attitudes to Work Gender, Work and Organization 12(3): 193-216.
[765] McRae (2003) op. cit., p. 242.
[766] Regulation 14(4) MPLR.

parents to use a week's leave where in fact much shorter leave is required. This requirement as seen (earlier in this Chapter) in *Rodway v. South Central Trains Ltd*[767] limits parents' work-family choices by preventing them from efficiently using their parental leave entitlements.

The MPLR further ignore families' reconciliation needs by imposing limits on the annual duration of parental leave to no more than four week's leave in respect of each qualifying child.[768] By setting the minimum and maximum duration of parental leave the legislator has failed to recognise that families need to make work-family choices which are made in the context of each family and setting out restrictions on the availability of parental leave constraints parents' reconciliation choices. The minimum duration of parental leave may prevent some less well-off parents who cannot afford to take a full week of unpaid parental leave from taking the leave. The maximum duration of parental leave may also prevent better well-off parents from using their leave entitlements in a manner which best suits their reconciliation needs. This significantly limits parents' reconciliation choices as the right to parental leave merely enables working parents to provide short-term care to children, or put into place the required long-term care arrangements.

Hence, the MPLR fail to provide working parents with flexible leave arrangements that could enable all groups of parents to make real reconciliation choices. The UK parental leave take-up rates are very low, which indicates that working parents do not consider current leave arrangements as enabling them to make real reconciliation choices. In contrast with the UK, high parental leave take-up rates in Sweden (where parents have at their disposal the wide range of flexible leave arrangements) indicate that flexible leave arrangements which enable parents to decide how the leave is taken better respond to families'

[767] Cases No. 2304683/03, 27 October 2003 (Employment Tribunal), Appeal No. UKEAT/0099/04/DA, 9 June 2004 (Employment Appeal Tribunal) and A2/2004/1818, on 18 April 2005 (Court of Appeal).
[768] Schedule 2(8) MPLR.

reconciliation needs and enable parents to make real work-family choices (**Appendix, Table 9**).

The UK procedural rules in relation to access to parental leave can further restrict parents' work-family choices. As employers are not required to keep records of employees taking parental leave, it may be very difficult to identify workplaces where for various reasons parental leave is never taken. This enables employers not supportive of work-life balance policies to prevent parents from taking parental leave without being easily identified. The lack of official records as to how parental leave is administered makes it very difficult to determine parental leave take-up rates and its taking patterns. Consequently, the real availability of parental leave in the UK largely depends on employer's willingness to allow parents to take parental leave rather than their legislative right as it may impossible to identify workplaces where the leave is never taken. The lack of monitoring as to how parental leave is administered by employers may therefore further restrict parents' access to the leave and their reconciliation choices.

Parents may make work-family choices in relation to their employment and their family lives. Their choices are either shaped or constrained by the context in which they are made.[769] Parents' choices as to whether or not to take parental leave are influenced by parents' preferences and individual family needs. Decisions in relation to when parental leave is taken, and how caring responsibilities are allocated within a family are not taken incidentally but are very carefully negotiated between working parents. Parents' decisions to take parental leave derive from their caring needs, which need to be catered for at the specific time when they occur, and not at any other time. Easy access to parental leave is crucial in enabling parents to make real choices as to how the leave is used in order to balance work and family responsibilities.

By making parental leave access subject to 21 day's notice requirement the

[769] R. Crompton (2006) op. cit., p. 11.

MPLR[770] has rendered the leave very inflexible, which may deprive working parents of the right to leave when it is most needed if this notice requirement cannot be complied with. The notice which needs to be given to the employer exceeds the maximum annual parental leave entitlement and the same excessively long notice applies to the minimum period of parental leave. Considering that the time off for dependants that can be taken at short notice does not provide parents with sufficient time off to care for their children, the excessively long notice which needs to be given in order to take parental leave does not complement this deficiency of the time off. Effectively parents with caring responsibilities may find themselves with no access either to the time off or parental leave where children need to be cared for and the notice requirement cannot be complied with.

As it is not always possible to plan well ahead when parental leave is going to be needed the notice requirement renders parental leave more restrictive than the annual leave entitlement which is as disruptive for business as parental leave and yet it can be taken at short notice. Thus, the complexity of the notification process may prevent working parents from being able to take parental leave when it is needed most. Additionally, it may prevent parents from making genuine reconciliation choices by forcing them to use their annual leave entitlement in order achieve the desired reconciliation. The low leave take-up rates in the UK and other well-established Member States which introduced new parental leave schemes could be influenced by the disproportionately long notices to the duration of the leave entitlement, which render the leave very inflexible and not responding to workers' caring needs. The high leave take-up rates in Sweden where leave arrangements allow parents to provide employers with the shorter notices as soon as it is possible to know that the leave would be needed indicate that the flexibility in the notification can help parents with making real work-family choices (**Appendix, Table 9**).

[770] Schedule 2(3) MPLR.

The right to parental leave under the MPLR does not enable parents to make real work-family choices as even working parents who have complied with the notice requirement do not have to be provided by employer with parental leave during the period requested in the application. Employees may be deprived of the access to parental leave when it is needed most because employers have the right to postpone parental leave for up to six months as long the absence causes *undue disruption* to the business and the notice of postponement is given to the employee.[771] Since employers have been provided with the freedom to decide when the undue disruption to the business occurs, and every absence is bound to cause some disruption to the business, parents' choices as to when the leave is to be taken do not have to be accepted by employers. There is evidence that it is more difficult for parents employed by small companies to take parental leave than it is for those working for big companies.[772] This indicates that it may be particularly difficult for those parents to make genuine reconciliation choices as all requests for parental leave will be disruptive for small businesses.

The MPLR by enabling employers to postpone parental leave for the excessively long period of six months have made parental leave very inflexible, unreliable and thereby limiting parents' work-family choices as the application for the leave does not guarantee that parents will be able to benefit from the leave when it is most needed by the family. The UK leave arrangements ignore parents reconciliation needs as the leave has been designed to be taken at the time when it suits the employer and not when the individual family needs require the leave to be taken by working parents. Employers' right to postpone parental leave may discourage parents from applying for parental leave as the MPLR do not prevent employers from postponing the leave on more than one occasion. Thus, the lack of an absolute right to take parental leave when it is needed most by working parents can prevent parents from making real work-family choices.

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[771] Schedule 2 (6)(c) MPLR.

[772] This is supported by the recent work-life balance study which identified low parental leave take-up rates among employees employed by small companies. Cf. Department for Business Enterprise and Regulatory Reform (2007), *The Third Work-Life Balance Study: Results from the Employer Survey – Main Report*, Employment Relations Research Series No.86, October 2007.

Constraints of the right to postpone on parents' work-family choices have become evident in *McDonald v. Royal Mail Group plc*[773] where a parent despite complying with the notice requirement was not allowed to take parental when the need arose.[774]

The low parental leave take-up rates in the UK (**Appendix, Table 7**) and the high take-up rates in Germany and Sweden where there is no right to postpone parental leave, suggest that the inflexibility of parental leave deriving from the possibility of its postponement for the unreasonably long periods of time may have contributed to the limited popularity of parental leave (**Appendix, Table 9**). The UK low leave take-up rates and the limited number of claims in relation to parental leave that have been brought before Tribunals indicate the ineffectiveness of MPLR in providing working parents with the effective parental leave rights, which is reflected by the existing litigation gap.[775]

As seen in Chapter 3, the Directive does not provide workers with the right to paid parental leave and this economic factor substantially undermines the substance of this right as not all parents can afford the loss of income whilst on parental leave.[776] This failure of the Directive has been further reinforced in the UK as the legislation does not provide leave takers with the right to remuneration. This indicates that the UK current policy on parental leave lacks the economic power to enable parents to make genuine choices in terms of how parental responsibilities are allocated within a family. Parents' work-family choices are made in the context of each family; social factors and financial constraints influence how decisions about employment are made within a family. The loss of wage associated with parental leave and that women often occupy less well-paid

[773] Case No. 2602058/03, Employment Tribunal on 06/10/2003.
[774] This case has been discussed more in detail earlier in this Chapter.
[775] 357 claims in relation to parental leave have so far been filed with the Tribunal Services (England and Wales) on 01/10/2010, source Bury St Edmunds Employment Tribunal archives.
[776] S. Fredman *(2006)*` Transformation or Dilution: Fundamental Rights in the EU Social Space` *European Law Journal,* 12: 1, 41–60 at p.47.

positions than men severely constrain parent's women's work-family choices.[777] The existing gender pay gap in UK, less well-paid part-time work which is often undertaken by women and the lack of quality affordable childcare influence families' decisions as to how work-family responsibilities are allocated between parents.

Since, various groups of women and men have different preferences as to their involvement in work and care the loss of income associated with parental leave will affect families in different ways. Hence, the impact of unpaid parental leave on parents' choices will also vary. To some women poorly paid jobs and the high cost of childcare accompanied by the negative effect of employment on children could be an unattractive alternative to domesticity. To families with very limited financial resources where two incomes are needed to make both ends meet and where alternative childcare arrangements exist unpaid parental leave will not enhance parents' reconciliation choices. The right to unpaid parental leave may also contribute to reinforcing poverty in families where less-well educated parents rely on poorly paid work opportunities, cannot afford organised childcare and do not have alternative care arrangements in place. In those families mothers are often forced to leave the labour market in order to provide the needed care. Financial constraints associated with parental leave will also differently affect work-family choices of well-educated parents with well-paid jobs.[778] The right to unpaid parental leave could enhance work-family choices of families where parents can afford to take unpaid parental leave and pay the high cost of childcare.

Although the duration of parental leave in the UK is very short, it must be emphasised that lower contributions to social funds which are made by employers (or their absence) during parental leave involve future financial penalties for leave takers. This undoubtedly will constitute an important

[777] R. Guerrina (2002) op. cit., pp. 49-68.
[778] R. Crompton (2006) op. cit., pp. 125,184-185.

consideration for some parents in their decision as to whether or not to take parental leave. The financial cost associated with parental leave and caring for children, which mainly affects women, as feminist critiques often emphasise, indicates the lack of attention that is given by legislators to the significance of women's unpaid work and family care.[779] Hence, the right to unpaid parental leave reaffirms the failure of MPLR to recognise the social importance of child care; that child rearing brings benefits to society as a whole and the cost of bringing up children should be born by society and not only by parents, carers and organisations that employ them.[780]

In the absence of widely spread collective or workforce agreements providing for paid parental leave the vast majority of working parents are forced to rely on default provisions of the MPLR which render the leave available to parents who can afford it. The attempts to convince employers that it was in their best interest to make extensive contributions to the caring and family needs of their employees have not been successful because of the costs associated with it.[781] Even in companies where paid leave entitlements were introduced their benefits were offset by increasing levels of work intensity amongst workers who did not take leave, which resulted in the negative perception within the workforce of those who take leave. The availability of paid parental leave schemes and cost of such policies to employers indicates that they are going to be offered mainly to higher-level employees or at managerial discretion.[782] This implies that in the absence of legislative right to paid leave less-well educated parents who often occupy less well-paid jobs are very unlikely to benefit from employer's paid parental leave scheme. Hence, class-associated variation will also impact on how work and caring responsibilities are distributed. There is evidence that state-funded, comprehensive, dual-earner family supports have most substantial

[779] Ibid. p. 125.
[780] S. Fredman (2004) 'Women at Work: The Broken Promise of Flexicurity', *Industrial Law Journal* 33:4, 299-319.
[781] Gornick and Meyers (2003) op. cit., p. 141.
[782] R. Crompton (2006) op. cit., pp. 212-213.

impact on less well-off families.[783]

The right to paid parental leave is of particular importance for enabling mothers to make genuine work-family choices as to their active participation in the labour market. There is evidence that the higher the compensation rate or the longer the leave period, the more likely it is that women with children will be in paid employment. Where there are generous leave programmes, it is more likely that women work full-time than part-time.[784] Part-time working often involves employment disadvantages and contributes to reinforcing gender inequalities in the labour market. Hence, parents' preferences about their involvement in work and care are diluted by various constraints, which include the lack of pay whilst on parental leave, which merely facilitates work-family preferences of those who can afford to take parental leave. However, some women see themselves mainly as carers and regardless of financial disadvantages associated with parental leave would still exit the labour market in order to care for their children. Thus, the right to unpaid leave would have no bearing on work-family choices of women having preferences for family life. The financial support whilst on leave contributes to shaping parents' attitudes to parental leave. The low leave take up rates may indicate that financial penalties associated with parental leave dissuade parents form taking the leave. Despite very low leave take up rates, the government did not consider it appropriate to provide all leave takers with financial assistance to lessen the burden of taking the leave (**Appendix, Table 9**). The lack of increase in parental leave take-up rates can be explained by the absence of the UK government's legislative initiative to enhance provisions on parental leave in order to enable them to better respond to the reconciliation needs of working parents.[785]

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[783] *R. Crompton(2006)* op. cit., p.672.
[784] O. Kangas and T. Rostgaard (2007) op. cit., p. 254.
[785] The recent UK survey (2007) established that there has been no increase in parental leave take up rate since 2003. It is estimated that 14% of the UK parents exercise their right to parental leave every year. Cf. Department for Business Enterprise and Regulatory Reform (2007), *The Third Work-Life Balance Study: Results from the Employer Survey – Main Report*, Employment Relations Research Series No.86, October 2007 pp.52-53.

In the UK and other well-established Member States where the leave remains unpaid or very limited financial support is provided to parents, the leave is predominantly taken by employees in well-paid and secured jobs.[786] In the UK and Ireland, the leave take-up rates are very low because working parents cannot afford to use their entitlement.[787] This indicates the failure of the Directive to introduce adequate parental leave schemes in those countries as the right to pay whilst on leave is crucial for its popularity.[788] The highest leave take-up rates in Sweden and Germany where earnings-related benefit is paid to workers on parental leave indicate that the availability of financial support whilst on leave plays an important role in enabling parents to make genuine work-family choices (**Appendix**, **Table 9**).

Since during parental leave merely employee's acquired rights or those in the process of being acquired on the day parental leave is taken are protected, parents can be further penalised for being away from work on leave. Consequently, the right to annual leave only exists in relation to the leave earned prior to parent leave[789] and leave takers can also lose out on bonuses or other financial rewards, which cover the period of their absence from work.[790] The loss of performance related bonus because of taking parental leave may dissuade parents with well-paid jobs for whom the bonus may constitute a substantial part of their income from taking protected leave. The reduction in paid annual leave because of the time spent on parental leave may further discourage parents from taking unpaid parental leave. This in particular constrains work-family choices of

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[786] Cf. T. Hogarth, C. Hasluck, and Pierre, G. (2001) *Work-Life Balance 2000: Results from the Baseline Study*, research report RR249, Department for Education and Employment, London: HMSO.

[787] P. Moss and F. Deven (eds) (1999) op. cit. The research on attitudes to parental leave also revealed that 42% of Irish parents had major concerns about the lack of financial assistance whilst on leave. Cf. U. Barry, C. Conlon and J. O'Connor (2004) 'Making work pay' debates from a gender perspective – the Irish national report, European Commission's Expert Group on Gender,' *Social Inclusion and Employment report for the Equal Opportunities Unit*, DG Employment.

[788] G. Bruning and J. Plantenga (1999), op.cit., C. Fagan and G. Hebson (2004) op. cit.,; J. Plantenga and C. Remery (2005) op.cit., P Moss and F. Deven (eds.) (1999) op.cit.

[789] Case C-486/08 *Zentralbetriebsrat der Landeskrankenhäuser Tirols v. Land Tirol* (22 April 2010) para 56.

[790] Case C-333/97 *Lewen v. Denda* [2000] *All ER* (EC) 928.

parents with less-well paid jobs who cannot afford to forfeit their right to full annual leave entitlement in favour of unpaid parental leave.

Employment security risks associated with the taking of parental leave play an important role in parents' decision-making as to how caring responsibilities are allocated within a family. As seen earlier in this Chapter, the MPLR[791] do not fully protect from detriment or dismissal parents who are entitled to parental leave. The lack of legislative protection from dismissal or detriment to all qualifying employees regardless of whether, or not they have officially requested parental leave can significantly constrain parents' work-family choices. Employment security risks associated with parental leave can prevent parents with well-paid jobs from requesting parental leave (career development aspirations), and workers with low-paid jobs for whom ensuring financial security of the family is crucial. The MPLR do not prevent employers from subjecting to detriments or dismissing employees who are likely to request parental leave. Hence, parents working for employers who do not support reconciliation policies may be forced to be very discrete about their work-family preferences and be prevented from applying for parental leave.

As the legislative protection from detriment or dismissal for reasons related to parental leave does not extent to the period after the return from parental leave employers are not prevented by MPLR from dismissing parents who have returned to work by providing them with contractual notice. Thus, employers can fairly terminate employment with parents who returned from parental leave before they make a new leave request. This in particular can affect mothers who mainly take parental leave and limit their reconciliation choices as employment security risks associated with taking parental leave may outweigh its benefits.

Working parents' ability to return to jobs which they held before taking parental leave is of paramount importance in enabling parents to make genuine work-

[791] Regulation 19(1) MPLR.

family choices. Parents' (mainly women) decisions to return to work are influenced by their preferences, individual circumstances and constraints associated with the legislative right to parental leave. Women's work-family choices are also influenced by their previous employment history and age. Well-educated women in well-paid full-time jobs are more likely to return back to similar jobs than less-well educated women with low-paid part-time jobs. Individual circumstances may also force women into employment in order to secure a decent family income.[792] Although, the right to return to a previously held job is crucial for enabling working parents to make real work-family choices, the MPLR constrain parents' choices by not providing all leave takers with an absolute right to return to their previous jobs.[793] It is crucial for reconciliation that legislation enables parents to use their leave entitlement in accordance with parents' individual needs. The legislative right to return seeks to impose on parents how parental leave should be taken. Additionally, it reinforces the maximum duration of parental leave by discouraging parents from negotiating with their employers longer leave periods which better respond to their individual caring needs. The right to return for those who take parental leave of the duration longer than four weeks imposes significant employment security risks on leave takers as they do not have to be allowed to return to work if it is not *reasonably practicable* to provide them with jobs. There is evidence that a significant percentage of companies do not allow their employees to take more than four weeks' leave without jeopardising their right to return.[794]

Families' caring needs are constantly changing and may require that previously agreed parental leave arrangements may need to be altered at short notice to enable parents to effectively use their short leave entitlement. The MPLR constrain parents' work-family choices by not providing them with the legislative right to an early return to work from parental leave when their family circumstances change. Considering that parental leave is unpaid, the lack of

[792] O. Kangas and T. Rostgaard (2007) op. cit., pp. 246-248.
[793] Regulation 18 of MPLR.
[794] *Parental Leave in the UK, Equal Opportunities Review*, 2000 No. 92:12-18 at p. 17.

possibility on an early return to work may impose unnecessary financial constraints on parents and result in wasted portion of the leave.

Women's work-family orientations may change over their life and are subject to various factors and constraints which influence their decisions about the extent of their involvement in the labour market.[795] The limited availability of quality affordable childcare in the UK poses a particular challenge for families. This may prevent in particular mothers from returning to full-time employment, and yet the MPLR do not provide leave takers with the right to return to work on a part-time basis. In spite of disadvantages associated with working part-time, the right to return to part-time working could enable some women to remain in employment whilst providing the needed care to children. The high cost of childcare constitutes a major structural constraint on women's real work-family choices which resulted in adaptive work-family choices. This is not simply a preference for more family work and less market work but a response to parents' reconciliation needs.[796] However, the possibility of returning from parental leave to part-time working could enable better well-off families to reduce their labour market involvement in order to achieve the desired reconciliation.

The effectiveness of a national right on return from parental leave in responding to needs of working parents may be conditioned by the duration of the leave, availability of financial support during the period of the leave, the existence of the affordable childcare and the flexibility in working patterns. **Appendix, Table 10** indicates that at the end of parental leave the majority of mothers either reduce their working hours or do not return to their previous jobs at all. This implies that in the vast majority of well-established Member States most parents are unable to return to work without altering their working patterns. In the UK and other selected well-established Member States where the right to leave is short and unpaid a significant proportion of mothers tend to resume their work to the same

[795] S. Walters (2005) op. cit., p.212.
[796] S. McRae (2003) op. cit., p.333.

extent, on condition that affordable childcare is available.[797]

In contrast with the UK, one of the highest numbers of mothers not resuming work after parental leave is in Germany where the long entitlements to the paid leave exist. German women returning from the lengthy parental leave and experiencing difficulties with childcare are forced to switch to part-time working.[798] Reducing working hours in order to care for children is also common in the UK and Sweden. In well-established Member States where parental leave remains unpaid women either resume employment immediately after maternity leave or exit the labour market.[799] The return rates are higher for well educated women and those in well paid occupations.[800] The main reason why women do not return to work after the leave is lack of reconciliation facilities and the high cost of childcare, which particularly affects low income families. Husbands' or partner's attitudes towards work and family responsibilities and men's long hours working culture also impact on women's labour decisions to remain in the labour market.[801]

4.5 The Time off for Dependants Fails to Help Parents in Terms of their Choice.

This section considers the UK implementation of Clause 3(1) of the Directive by Sections 57A and 57B ERA 1996 and the extent to which the right to time off for dependants assists workers with making real work-family choices. Although, all workers with caring responsibilities for dependants require assistance in enabling them to better balance the demands of work and caring responsibilities for

[797] As seen in Chapter 3, the UK has met the Lisbon targets for the childcare.
[798] *Parental Leave in European Companies: Establishment Survey on Working Time 2004-2005* (2007) op. cit., p.12. German parents are also discouraged from returning to work by problems with childcare and subsidies which are provided to men under a family tax credit if their wives are unemployed.
[799] C. Fagan and G. Hebson (2004) op. cit., p.43.
[800] J. Plantenga & C. Remery (2005) op. cit., pp.30-32.
[801] S. McRae (2003) op. cit., p.333.

dependants, the legislative entitlement to time off is limited to employees only. This constrains preferences and work-family choices of workers with caring responsibilities for dependants whose employment status is not that of an employee as they do not have any legislative entitlement to leave for dependants. Considering that more than fifty percent of dependent elderly people in the UK receive informal care or no care the limited availability of time off can effectively prevent workers from providing needed care to their elderly dependants.[802]

The UK entitlement to time off is only available in relation to dependants however widely defined.[803] It significantly enhances parents' reconciliation choices as it provides them with the additional time off that can be taken in relation to older children who no longer qualify for parental leave and can also be used in order to care for adult dependants. The UK legislation does not provide employees with the specific right to time off but it merely sets out the right enabling employees to request a reasonable time off work for emergencies associated with their dependants. Consequently, employees with caring responsibilities for persons who are not members of their families may encounter difficulties with convincing their employers that individuals they provide care to are their dependants. Considering that it is becoming more common than ever before that care is provided to persons who are not family members, the lack of legislative right to time off in relation to cared for persons rather than dependants can significantly constrain work-care choices of employees who fail to satisfy their employers that they are caring for dependants.

Work-care choices which are made by men and women are influenced by their

[802] Report (2011) *Review of the Implementation for Action in the Area F: Women and the Economy. Reconciliation of Work and Family Life as a Condition of Equal Participation in the Labour Market*, Vilnius, European Institute for Gender Equality pp.42-44.

[803] Section 57A(3-5) ERA 1996. Dependants are defined as a spouse or civil partner, a child, a parent, a person who lives in the same household as the employee but is not his/her employee, tenant or boarder. Additionally, the term *dependant* covers any other person who relies on the employee for assistance in cases of illness, injury, assault or arrangements for care in the even of illness or injury.

individual preferences and are constrained by the context in which they are made. The availability of time off also restricts employee's work-care choices as it is limited to the specific emergencies involving the dependants, and does not provide employees with a free standing right to provide care to dependants when it is needed most.[804] The entitlement to time off can effectively prevent women who mainly care for children and adult dependants from making genuine work-care choices as it does not provide them with the right to provide personal care to the dependants.[805] Thus, forcing employees to put into place often costly necessary arrangements for the dependant who is ill or injured, rather than providing them with time off to care, constrains employees' work-care choices by imposing on them the financial costs of care, and may force less well-off employees (women) out of the labour market. This indicates a failure of the UK entitlement to time off to adequately respond to reconciliation needs of workers with caring responsibilities for dependants who often cannot afford to ensure that their elderly dependants receive care in an institution.

Enabling parents to make genuine work-family choices may require them not only to be able to effectively respond to various emergencies, childcare and schooling matters involving the dependants and yet the entitlement to time off fails recognise the importance of parents' presence at joyous events involving the dependants. This clearly indicates the failure of legislator to recognise the social importance of care which is provided by employees to children and elderly dependants and its benefits for employers and society at large. The UK legislation on time off reinforces the notion that there is no positive correlation between employees' private lives and their employment. Additionally, it fails to recognise the long-term benefits for business deriving from care work which is performed by employees, and therefore it perceives the time off as another disruption to business.

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[804] Section 57A(1)(a-e) ERA 1996, emergencies related to dependants such as illness, giving birth, injuries, assaults, death, unexpected disruption of arrangements for the care dependant and dealing with unexpected incidents associated with a child being at school.
[805] Section 57A(1)(b) ERA 1996.

The key role of employers in allowing employees to take time off in order to care for dependants, and the lack of specific right to time off (merely the right to request) reaffirm that employees' caring needs are subordinate to those of business. This significantly constrains work-care choices of employees with caring responsibilities for children and adult dependants as they may not be able to take the time off when it is needed most. Thus, regardless of employees' work-care choices and reconciliation needs, the time off may merely be granted as the last resort measure when the employer is fully satisfied that the employee has done everything that was possible in order to put into place the required alternative arrangements. This became evident in *Chwesivk v. Ocado Ltd*[806] where the failure of the employee to prove that there were alternative childcare arrangements in place contributed to his fair dismissal, and despite providing the needed care to the dependants his absence from work did not amount to time off.

Employees' work-care choices are also limited by the necessity of complying with the notice and information requirements in order to benefit from the time off and associated with it legislative protection.[807] The case of *Qua v. John Ford Morrison Solicitors*[808] indicates that the excessive notice and information requirements limit parents' work-care choices, restrict leave accessibility and could be used to dismiss employees who take the time off. Employees who are exercising their right to time off can be prevented from focusing on responding to emergencies involving their dependants because where their circumstances change, multiple notification notices need to be given to employers in order to secure the continuity of time off.[809] This indicates that the time off arrangements are very restrictive, focus on business needs, fail to recognise various difficulties that employees responding to emergencies encounter, and lack the necessary

[806] *Chwesivk v. Ocado Ltd*, Case Number 1200611/2008, Employment Tribunal on 9-10 October and 8 December 2008.
[807] Section 57A(2) ERA 1996.
[808] Case Number 2300398/01 on 14 June 2001 at paras 10 and 12 and *Qua v Morrison Solicitors* Appeal No. EAT/884/01
[809] *MacCulloch & Wallis Ltd v. Miss O Moore* EAT/51/02/TM on 11 February 2003, 2003 WL21236505, 2003 WL21236505 (EAT) paras 32-41.

flexibility which is needed in order to enable women and men to make genuine work-care choices.

The failure of legislation[810] to specify how much information the employee needs to provide the employer with in order to be entitled to time off further restricts the availability of time off as unsupportive employers may require excessive amounts of information to be provided before granting the leave. This became evident in *MacCulloch & Wallis Ltd v. Moore*[811] where excessive amounts of personal and confidential information from the hospital needed to be provided in order for the employee to be able to benefit from the time off. The case of *RKS Services v. Palen*[812] indicates that work-care choices of employees working for small companies could be particularly constrained and they may find themselves in a vulnerable position in terms of the amount of information that they would need to provide in order to convince their employers that their situation merits the time off for dependants.

As there is no specific right to the time off employers may attempt to limit the disruption to the business deriving from employees' absences by forcing employees who request the time off to use their annual leave entitlement instead as in *Harbisher v. Buy As You View Ltd.*[813] The attachment of the condition that the time off had to be taken as the paid holiday and leaving no choice to the

[810] Section 57A(2) ERA 1996.

[811] *MacCulloch & Wallis Ltd v. Moore* EAT/51/02/TM on 11 February 2003, 2003 WL21236505, 2003 WL21236505 (EAT). This case was discussed more in detail earlier in this Chapter.

[812] *RKS Services v. Palen*, UKEAT/0300/06/RN. In this case the employee who requested a few hours off work (the ambulance took his wife to the hospital) was subjected to questioning lasting 20 minutes and detailed questions about his wife's health were asked. On return to work the employee was told that his employment was terminated because they were a small company and they could not afford the incidents such as happened to the Claimant on the previous day. The dismissal was held to be unfair.

[813] *Harbisher v. Buy As You View Ltd*, Case Number 2500334/2003, Employment Tribunal on 22 September 2003 at para. 6. The Claimant who requested two weeks off in order to look after his spouse and the newly born child was forced by the employer to take the remaining two weeks of his annual leave entitlement which left him with no further annual leave entitlement until the end of the holiday year. According to the Employment Tribunal the permission to take two weeks of the annual paid leave was not the permission to take time off work for dependants as the right is for unpaid leave. The Claimant requested time off work of the duration which as the Employment Tribunal concluded in the light of principles set out by Employment Appeal Tribunal in *Qua* amounted to a reasonable time off work.

employee in this matter amounted to an unreasonable refusal to permit him to take the time off in accordance with Section 57A ERA 1996.[814] The practice of forcing employees who request the time off to use their annual holiday was further addressed by Employment Tribunal in *Gomes v. Top Class Investments Ltd.*[815] The Tribunal[816] reaffirmed the distinctiveness of the right to the time off which includes the bereavement leave from the holiday entitlement, and that there is no obligation on the employee to substitute the time off with the holiday leave regardless of whether one follows or precedes the other.[817] These cases clearly indicate that in the absence of specific right to time off employers may attempt to reduce disruptions to business by restricting workers' work-care choices and forcing them to use their annual leave instead.

By not specifying the duration of entitlement to time off the ERA 1996 appears to have acknowledged that various groups of employees with caring responsibilities for children and adult dependants may require the leave of significantly different lengths in order to effectively respond to various emergencies involving dependants. However, the duration of leave for dependants is limited to the reasonable time off, which as seen earlier in this Chapter has been interpreted by courts as providing employees with the right to short absences from work during working hours.[818] The short duration of time off as measured in hours and most serious case in days does not enable workers to make real work-care choices as

[814] The employee was also entitled to parental leave but he was unaware of his right and the employer did not inform him about it. The decision of the employer to ask the employee to use his annual leave entitlement was made in line with the advice of the Human Resources Department of the company (large company) which argued that he had no right to any other leave but the annual leave. This proves that it was a common practice within that company to force employees to use their annual leave entitlement for dealing with family emergencies and thereby depriving employees to their right to time off for dependants.

[815] *Gomes v. Top Class Investments Ltd*, Employment Tribunal Case Number 2204585/2003 on 20 November 2003. The employee requested the bereavement leave under section 57(A) ERA 1996 in order to attend the funeral of her father and was told by her employer to use her holiday entitlement instead, refusal resulted in the dismissal as the employer argued that by attending the funeral she walked out of her job in breach of her contract of employment.

[816] Ibid paras. 24-28.

[817] The dismissal was unfair because the Respondent attempted to force the Claimant to use her holiday entitlement instead of the bereavement leave, and she was not allowed to take reasonable time off in order to take actions, which were necessary in the consequence of the death of her father.

[818] *Qua v Morrison Solicitors* Appeal No. EAT/884/01 paras. 18-20.

it merely provides them with the right to put into place the needed care arrangements, and it does not enable them to personally care for their dependants. The lack of right to provide long-term care particularly constraints work-care choices of employees with caring responsibilities (mainly women) for elderly dependants of whom the vast majority receives an informal care (over 50 per cent).

It must be emphasised that it may be particularly difficult for workers with caring responsibilities for elderly dependants to make genuine work-care choices as there are no other leave entitlement that could provide them with time off to care for their dependants. The short duration of leave for dependants may also prevent from making genuine work-family choices parents with older children who no longer qualify for parental leave but still need to be cared for. The inability to provide long-term personal care to older children or elderly dependants will in particular affect less-well educated employees with modest earnings who may not be able to afford the costs of care for the dependants, and therefore may be forced to exit the labour market in order to provide the needed care. As women mainly care for children and elderly dependants there is evidence of negative and statistically significant impact of care on women's probability of being employed and their working hours.[819]

Taking unpaid time off for dependants also involves direct financial costs to employees. In order to extend the duration of time off and to mitigate the loss of earnings associated with taking of the unpaid time off employees may be forced to cover the period of absence both by their holiday entitlement and the entitlement to time off as in *Sutton v. East Kent Joineries.*[820] The cost of taking time off will depend on employees' earning capacity. The higher employee's earnings the higher the direct cost of taking time off to the employee. Families'

[819] Report (2011) op. cit., pp.43-44.
[820] *Sutton v. Mr Peter Frank t/a East Kent Joineries*, Employment Tribunal Case Number 11/00728/2004 paras 10-12. In this case the Claimant requested three days of annual paid leave and further two days as the leave for dependence in order to deal with the birth of a still-born child and its funeral.

work-care decisions are made in the context of each family and financial constraints associated with taking of time off impact on how work-care responsibilities are allocated within a family.

Consequently, the lack of paid time off will in particular prevent women who often earn less than men from making real work-care choices as they will be forced to take time off in order to minimise the cost of care to the family. The lack of pay whilst on time off will particularly constrain work-care choices of employees with low earning capacities who can neither afford to lose wage because of taking time off nor can afford to pay for alternative care arrangements. Considering the current economic climate where many employees needed to accept pay cuts in order to remain in employment, the financial costs of taking time off could be particularly burdensome to workers with caring responsibilities for children and adult dependants.

Since, there is no UK right to time off for dependants of the specific duration, taking time off always involves employment security risks as the leave is granted at employer's discretion and its duration may be considered as unreasonable by the employer, and thereby breaching his/her employment contract. The limited legislative protection from detriment or dismissal,[821] which merely covers those who requested or took time off reinforces employment security risks associated with the entitlement to time off and significantly constraints employees' work-care choices. Employees (mothers) who often take time off are likely to be considered risks by their employers, as employers are likely to prefer employees who are regularly at work rather than those who are absent because of caring responsibilities. Mothers who often take time off may be considered by employers as being less committed to their employment and therefore they could be given fewer responsibilities, unlikely to be promoted and thereby more likely to receive lower wages.

[821] Section 99 ERA 1996 and Regulation 20 MPLR.

Consequently the cost of taking time off will depend on mother's education and career aspirations. Women with caring responsibilities who compete for promotion with men are likely to incur substantial costs of taking time off as they may not get the desired promotion.[822] Despite the above work disadvantages which derive from having caring responsibilities the UK legislative protection from detriment or dismissal does not cover those employees who are likely to apply for the leave but have not done so yet and it does not provide with additional protection those employees who often take time off. Hence, due to its employment security costs time off for dependants is unlikely to be taken by those employees who have the most to lose from taking leave.

As long as the necessity of time off and the reasonableness of its duration are going to be assessed by employers, the time off is granted at employer's discretion, employees will continue being deprived of their right to time off when it is most needed, and therefore the right to time off will remain to be of a symbolic value in enabling UK employees to reconcile work and caring responsibilities for dependants. The limited number of claims that have been brought before employment tribunals may indicate the ambiguousness surrounding this entitlement; that very few employees request or take time off for dependants and effectively it does not help workers with making real work-care choices.[823]

4.6 The UK Implementation of the Directive does not Help Fathers to Play a More Active Role.

The care of children and other domestic matters have traditionally been considered as women's issues. However, as more and more women are actively involved in the labour market the family and care responsibilities have become the responsibility of both men and women. While men of all classes have held more traditional views on division of work and family responsibilities than women,

[822] A. Amilon (2010) op. cit., pp.33-52.
[823] Only 506 claims have been logged with the Tribunal Services since Section 57A of ERA came into force. Archives of Employment Tribunal Services, Bury St Edmunds, on 01/10/2010

men's attitudes have been changing over time.[824] In recent years men have begun to take more responsibility for domestic work and childcare but women are still primarily responsible for domestic work and care for children and adult dependants. Although different groups of men have different work-family preferences their real work-family choices are constrained by demands of work which often prevent them from being more involved in family life.[825] Many fathers are unable to make 'real' and 'free' work-family choices as their attitudes, preferences and work-family orientations are influenced by the factors which constrain their lives.[826] The level of father's involvement in family life can be hampered by constraints such as inflexible work schedules, long hours worked by fathers in order to support their families and legal provisions which do not adequately respond to fathers' reconciliation needs. Consequently, the effectiveness of legislative right to parental leave and time off for dependants in helping fathers to play a more active role in the family will depend on the extent to which these leave arrangements respond to individual work-family needs of different groups of working men.

By providing fathers with the individual and non-transferable right to parental leave the MPLR[827] sending an unambiguous message to the UK working fathers that the task of looking after children is no longer an exclusive responsibility of mothers and that the time has come to equally share the family responsibilities. The availability of the individual right to leave is particularly important in encouraging working fathers to play an active role in sharing family responsibilities with working mothers. Since both working parents have equal entitlements to parental leave, fathers are not legally prevented from more equally sharing childcare responsibilities with mothers.

The MPLR merely provide working parents with non-transferable leave

[824] S. Walters (2005) op. cit., pp.35-36.
[825] R. Crompton (2006) op. cit., pp. 74 and 209-210.
[826] S. Walters (2005) op. cit., pp. 193-216.
[827] Regulation 14 MPLR.

entitlement and do not seek to reinforce the idea that both parents have the rights and caring responsibilities for their children, and that parents should also be provided with the choice as to by whom the caring responsibilities are performed and shared by the parents. The MPLR do not seek to promote social change and encourage more fathers to take parental leave as no financial incentives are provided to those fathers who take parental leave and it remains to be primarily taken by mothers. Parents make rational choices as to how work and care responsibilities are divided within a family. The individual non-transferable right to unpaid parental is unlikely to convince fathers (mothers) with higher earning capacity to financially disadvantage their families by taking parental leave and allowing mothers often with lower wage to be more involved in the labour market.

Working fathers have different preferences as to their involvement in work and care and the non-transferable right to parental leave may prevent families who wish to follow more traditional work-care patterns from making genuine work-family choices. Fathers' work-family choices are carefully negotiated with mothers and are not made in isolation from families' needs. Hence, the non-transferable right to parental leave which is lost if not used by fathers may impose on families the work-care patterns which they do not wish to follow, and it therefore can restrict parents' work-care choices. The non-transferable right may prevent the home-centred fathers and those with lower earning capacity than their wives who have made adoptive work-family choices from playing a more active role.

Fathers similarly to mothers make work-family decisions in the particular context of each family and the father's family orientation is influenced by the mother's employment and family caring needs. Hence, fathers with working mothers are more inclined to be involved in family life than fathers with mothers who are not

engaged in paid employment.[828] There is evidence that fathers' orientation towards their involvement in work and family life can change as a reaction to circumstances such as job insecurity, organizational culture, personal and professional relationships, and the expectations of other family members.[829] Working behaviour also affects parents' attitudes towards leave periods and therefore men whose wives or partners have higher occupational prestige are more supportive of mothers' employment. Therefore, the non-transferable parental leave can prevent fathers from making genuine work-family choices.[830] There is evidence that limited availability of childcare facilities can influence fathers' work-family attitudes by forcing them to be more involved in the provision of care.[831] This indicates the lack of affordable childcare facilities can have a positive impact on gender equality in the UK as difficult family circumstances may force more fathers to take parental leave.

Very low leave take up rates indicate that parental leave arrangements are not perceived by UK fathers as adequately responding to their individual reconciliation needs. Since, very few UK fathers take parental leave the non-transferable leave entitlement which is lost if not taken by fathers can further restrict mother's work-family choices (**Appendix, Table 9**). Considering that the UK remains a strong male-breadwinner state,[832] the non-transferable right to parental leave without any incentives for fathers will be ineffective in encouraging fathers to play a more active role in family life and promoting social change.

In contrast with the UK non-transferable leave, a partially transferable right to parental leave is available in Sweden, where parents are both provided with the non-transferable and transferable portion of the leave. The existence of the

[828] McRae, S. (2003) op. cit. pp. 317–38.
[829] J. Nolan (2009) 'Working to Live, Not Living to Work': An Exploratory Study of the Relationship between Men's Work Orientation and Job Insecurity in the UK', *Gender, Work and Organization*. 16(2):179-197.
[830] Kroska and Elman in C. Lyonette, G. Kaufman and R. Crompton (2011) op. cit., pp.36-39.
[831] R. Crompton (2006) op. cit., p. 160.
[832] S. Walters (2005) op. cit., pp. 193-216.

specifically allocated non-transferable portion of the leave which is supported by the pay incentives effectively encourages fathers to use their allocated leave entitlement and enhances father's involvement in childcare responsibilities (**Appendix, Table 9**). Although, the transferable part of parental leave can be transferred between parents there is no automatic right to claim other parent's share of the leave, as the written consent of the parent giving up the right to the leave is required. This procedure is intended to reinforce the concept that both parents have caring rights and responsibilities for their children. Working parents may have different preferences as to their work-family involvement. The partially transferable right to parental leave enables families to make their own work-family choices as to which patterns of work-care allocation they wish to follow without penalising those families who wish to follow more traditional care patterns.

Although the flexibility in leave arrangements is crucial in encouraging fathers to play a more active role in the provision of care the UK legislative right to parental leave lacks the needed flexibility and thereby significantly limits fathers' work-family choices. The MPLR do not effectively respond to fathers' reconciliation needs as they do not provide for the right to part-time parental leave, impose restrictions on minimum and maximum duration of leave, contain excessively long notice requirements and prevent fathers from taking leave when it is most needed by allowing employers to postpone parental leave for unreasonably long periods of time.[833] Additionally, the short leave entitlement which needs to be used when the child is still very young in particular constrains reconciliation choice of home-centred fathers.

The case of *Rodway v. South Central Trains Ltd*[834] clearly exemplifies how inflexible parental leave arrangements can effectively prevent fathers from making genuine work-family choices. The inflexible leave arrangements would

[833] Schedule 2 MPLR.
[834] Case No. 2304683/03, 27 October 2003

particularly affect fathers who often are the main breadwinners in the family and are more likely than mothers to take one day parental leave instead of one week.[835] The right to postpone further constrains fathers' work-care choices and can discourage fathers from applying for parental leave as in *McDonald v. Royal Mail Group plc.*[836] Thus, inflexible leave arrangements and complexities associated with the taking of parental leave (discussed in detail earlier in this Chapter) can discourage fathers from playing a more active role in family life. This could contribute to reinforcing inequalities in the distribution of caring responsibilities within a family as parental leave is mainly taken by mothers.

Although, social and cultural issues contribute to low take-up rates by British fathers, the decisive factor influencing fathers' decisions not to take parental leave is the financial cost of leave because many low income families do not qualify for any financial support in lieu of parental leave and yet cannot afford to take it.[837] There is evidence that the lack of financial compensation during the period of parental leave is the most important factor which prevents fathers from taking leave.[838] The lack of pay whilst on parental leave means that in practice the leave would be taken only by fathers who can afford it. Consequently, the financial cost of taking parental leave by fathers who often are the main breadwinners within a family can prevent them from taking parental leave as families' financial security is more important for fathers than their own ability to reconcile work and family responsibilities.

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[835] Eugenia Caracciolo di Torella (2007) op. cit., pp.324-6.

[836] Case No. 2602058/03, Employment Tribunal on 06/10/2003. The Claimant (a father) applied for a week's parental leave in order to assist his wife in looking after their children and on the basis of the verbal agreement with his employer the leave was granted. Two months after the initial agreement the notification of cancellation was given to the employee stating that the reason for cancellation were staffing arrangements. Although the respondent admitted that the postponement of the leave was unreasonable and the employee was financially compensated by Employment Tribunal, the case proves that Schedule 2(6)(d) MPLR may effectively prevent UK working parents (fathers) from exercising their right to parental leave when it is most needed.

[837] This may be evidenced by the survey carried out by YouGov which established that 48% of the UK fathers did not use their right to paternity leave because of financial considerations in J. Carvel (2006), `Fathers Fail to Make full use of Paternity Leave, Survey Finds` *The Guardian*, 01/08/2006 p.6.

[838] European Commission, *Europeans' Attitude to Parental Leave* (European Commission, 2004), at p.18.

There is evidence that the loss of income whilst on parental leave will in particular affect UK families with fathers in the lower occupational categories where the necessity of two incomes can prevent both parents taking leave.[839] For less well-off husbands with home-centred wives the right to unpaid leave will be of a symbolic value in enabling them to make real reconciliation choices. The high cost of childcare in the UK can further prevent low-income fathers from being able to take unpaid parental leave.

The highest leave take-up rates are in countries paying earnings-related benefit such as Sweden and Germany. In Sweden, in addition to nearly all mothers, a significant number of fathers also take parental leave. This is because the parental leave arrangements are very flexible and the law stipulates that at least one month of earnings related leave is to be taken by either parent. The issue of the low take up rates by the German fathers have recently been addressed by introducing the new right which provides parents with the additional entitlement to paid leave if they take parental leave for at least two months. A similar initiative aimed at ensuring more equality in the distribution of parental responsibilities between working parents was implemented in Sweden where the gender equality bonus is paid to the parent who spent the longest period on parental leave if the other parent takes the leave. It aims at encouraging more fathers to be involved in sharing family responsibilities and the bonus also addresses the needs of single parent families as it is also available to parents who do not live in the same household(**Appendix**, **Tables 7 and 9)** .

Fathers wishing to achieve a better reconciliation by taking parental leave may be dissuaded from taking leave as whilst on leave they would not acquire any new employment rights which include pension rights and bonuses. Fathers' decisions as to whether, or not to take parental leave are made in the context of each family by considering their preferences and various constraints which are

[839] C. Lyonette, G. Kaufman and R. Crompton (2011) op. cit., p.46.

associated with this leave. As seen earlier in this Chapter, taking parental leave involves employment security risks as neither the MPLR nor ERA 1996 provide parents wishing to benefits from their right to leave with adequate levels of protection from detriment or dismissal and provide leave takers with an absolute right to return to work. Since, fathers often are family main breadwinners, the above employment security risks which are associated with the right to parental leave can effective discourage fathers from taking leave. This constitutes a major deficiency of the UK right to parental leave in encouraging fathers to play a more active role in family life as employment security costs of taking leave outweighs its benefits for fathers and their families.

Although men face structural demands at work,[840] such as inflexible and demanding work schedules which often prevent them from meeting family obligations the restrictive and inflexible parental leave arrangements accompanied by financial penalties and employment security risks do not provide fathers with leave that could enable them to meet family obligations.

In addition to parental leave employees with caring responsibilities for dependants have been provided with the legislative entitlement to time off for dependants.[841] However, as it has been argued (earlier in this Chapter) this entitlement fails to enable workers to make genuine work-care choices as it does not provide them with an absolute right to time and merely a right to request leave. It contains numerous constraints on leave accessibility; flexibility; employment security risks and financially penalises those who take time off leave takers. These constraints may discourage fathers from taking time off as flexible leave access to time off when it is needed most by fathers, and absence of employment security risks and financial costs of taking leave are crucial far encouraging men to be more involved in providing care to children and adult dependants.

[840] Pleck in J. Nolan (2009) op. cit., p.185.
[841] Section 57A ERA 1996.

Despite the fact that mainly women provide care to children and dependant elderly, which often prevents them from making real work-care choices, the legislative entitlement to time off fails to effectively address issues surrounding the imbalance in allocation of caring responsibilities because it does not expressly recognise the role of men (fathers) in the provision of care. The ERA 1996 merely provides all employees with caring responsibilities for dependants it neither states that female and male employees have responsibilities for their dependants nor provides them with individual right to leave for dependants. As traditionally care for children and adult dependants was provided by women, and employers did not expect men to have caring responsibilities, the absence of fathers' (men's) individual right to time off may prevent them from making real work-care choices as some employers still do not expect men to have any caring responsibilities. Although, men have different work-care preferences they are especially inclined to take time off when the child or mother is sick.[842]

The difficulties faced by fathers requesting and taking time off for dependants deriving from employers' traditional perceptions about the distribution of caring responsibilities within a family are evident in *Robison v. TD & AM Bugg Limited*[843] where the request for time off by a father in order to care for a seriously ill son invoked the hostility of the employer which led to employee's dismissal. The case of *Sutton v. Frank t/a East Kent Joineries*[844] also indicates that regardless of the duration of requested leave and the desire of the employee (a father) to reduce future absences by covering the period of absence by his holiday entitlement, the absences from work for reasons related to dependants by men may find very little understanding from some employers and result in employees

[842] A. Amilon (2010) op. cit., pp. 33-52.
[843] *Robison v. TD & AM Bugg Limited,* Employment Tribunal Case Number 1502356/2003 on 26 March 2004 (awarded compensation £5,804.60).
[844] *Sutton v. East Kent Joineries*, Employment Tribunal Case Number 11/00728/2004 paras 10-12.

being punished for taking the time off.[845] The Claimant's claim for sex discrimination failed as he was unable to show that he was less favourably treated than a woman would have been treated in similar relevant circumstances. As time off and parental leave are predominantly taken by mothers (women), the lack of adequate protection from detriments or dismissal for reasons related to leave periods can disadvantage working fathers for whom it may be particularly difficult to successfully rely on equality legislation before courts (see Chapter 3).

The lack of set duration of time off and that employers are not obliged to keep records of when time off is taken can disadvantage fathers with caring responsibilities who are often absent from work for reasons related and not related to time off. This came to light in *Chwesivk v. Ocado Ltd*[846] where father's frequent absences for reasons related and not related to his care responsibilities resulted in his fair dismissal. This case revealed that absences in connection with childcare were treated by the employer as other absences and therefore the verbal warning was given to the employee for one of the absences that had been taken in connection with childcare. Effectively, the absences in relation to time off for dependants alongside other absences have contributed to his fair dismissal. This indicates that time off arrangements under the ERA 1996 where the reasonableness of leave is subject to employers' subjective standards, often tainted with prejudices towards employees who frequently take time off can penalise fathers with more extensive caring needs.

The case of *Truelove v. Safeway Stores plc*[847] shows that fathers willing to play a

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[845] The Claimant (a father) requested three days of annual paid leave and further two days as the leave for dependence in order to deal with the birth of a still-born child and its funeral. Despite being granted the requested time off the employee was dismissed from work in breach of 57(A) ERA 1996. The Employment Tribunal found that the employee was automatically unfairly dismissed under Regulation 20 MPLR and Section 99 ERA 1996.

[846] *Chwesivk v. Ocado Ltd*, Employment Tribunal, Case Number 1200611/2008 on 9-10 October and 8 December 2008. The Employment Tribunal held that his dismissal was fair as he was frequently absent from work and the vast majority of his absences were not related to his childcare responsibilities.

[847] *Truelove v. Safeway Stores plc*, Case Number 2407514/03, Employment Tribunal on 30 January 2004. This case has discussed more in detail earlier in this Chapter.

more active role in family life by taking time off can be discouraged from applying for leave as employers can make time off subject to excessive information requirements, which may prevent fathers from taking time off when it is needed most. Fathers could be further discouraged from applying for time off because of difficulties associated with employer's notice requirements. Above all fathers who take time off in order to care for dependants could be penalised by their employers, being passed for promotion and their commitment to their employment being questioned, which can be observed in *Harbisher v. Buy As You View Ltd.*[848] The failure of UK legislator to provide for the legislative right to paid time off further constrains fathers' work-care choices by depriving them of wages at the time when responding to various emergencies increases families' expenditures. Fathers who are often better paid than mothers will therefore be reluctant to take time off in order to avoid financial costs associated with this leave.

Consequently, the identified constraints associated with time off and parental leave can effectively discourage fathers from playing a more active role in the family life.

4.7 The UK Leave Entitlements do not Respond to the Needs of Single Parents.

It was seen in Chapter 3, the lowest common denominator provisions of the Directive on parental leave do not require Member States to provide for any special regime in relation to single parents and one parent families that could enable them to make better work-family choices. This failure of the Directive has been further reinforced in the UK by MPLR and the ERA 1996 which fail to expressly recognise the enhanced caring needs of single mothers and fathers, and therefore do not provide for special regimes on parental leave and time off

[848] *Harbisher v. Buy As You View Ltd*, Case Number 2500334/2003, Employment Tribunal on 22 September 2003. This has been discussed more in detail earlier in this Chapter.

for dependants in relation to those families. Considering recent social and behavioural changes in society which brought about major shifts in family arrangements where often the concept of a family is now understood more in terms of one parent family rather than in terms of a traditional family consisting of two parents with the male breadwinner, the UK implementation of the Directive is out of touch with real reconciliation needs of families (**Appendix, Table 8**).[849]

By not providing for special regimes in relation to single mothers and fathers, the UK and other national legislators missed out on a vital opportunity to introduce national leave schemes able to make a real difference in helping those vulnerable working parents to make real reconciliation choices. The UK Government, by implementing merely the minimum required by Directive and emphasising that the key provision on parental leave and time off for dependants could be extended through collective or workforce agreements delegated the task of facilitating single parents' reconciliation choices to employers. Effectively, in the absence of the legislative requirement deriving from the Directive the UK Government avoided tackling the problem of introducing a balanced legislation on parental leave and time off addressing the real work-family needs of different groups of employees with caring responsibilities for children and adult dependants.

The UK and other selected well-established Member States (except Sweden) also do not provide the single parent families with an extended entitlement to parental leave (**Appendix, Table 7**). By providing for a special regime on parental leave in relation to single mothers and fathers, Swedish legislation has recognised the necessity of enabling those parents to make better work-family choices and effectively responded to reconciliation needs of many contemporary families.

As it was observed in Chapter 3 single mothers and fathers may have diverse

[849] P. Moss & F. Deven (eds.) (1999) op. cit., p.149.

work-family preferences, which can either be facilitated or constrained by legislative rights which fail to recognise their enhanced reconciliation needs.[850] Hence, single parents' ability to make real work-family choices is likely to be constrained if the UK policies on parental leave and time off for dependants do not adequately respond to diverse reconciliation needs of single mothers and fathers. Generally, single parents' work-care choices are more constrained than those of parents in a household with two adults where work-care responsibilities can be shared by both parents. Single parents rarely share the burden of brining up children with the other parent and tend to rely more on the help of grandparents for providing needed care to children. Since, the right to parental leave under the MPLR[851] restricts parents' leave access to natural and adoptive parents of a child it therefore constrains single parents' work-care choices as it prevents grandparents who often care for children from reducing single parents' burden of childcare by being more involved in caring for their grandchildren.[852]

In the UK, Working Families Tax Credit helps subsidise childcare costs for those working single parents on low to middle incomes. However, childcare remains primarily organised and provided by the expensive private sector and the main reason for mothers staying at home is the cost of childcare.[853] The high cost of childcare may in particular constrain reconciliation choices of less-well educated single parents with low wages as the lack of possibility of delegating parental leave to for example grandmothers could force some single parents out of the labour market. The Child Tax Credit which is paid to the main carer regardless of employment status which offers single parent families with children greater financial support can further discourage single mothers from undertaking paid employment.[854]

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[850] R. Crompton (2006) op. cit., p. 13.
[851] Regulation 13(1) MPLR.
[852] C. Lyonette, G. Kaufman and R. Crompton (2011) op. cit., p.37.
[853] Ibid. p. 44.
[854] M. Daly and K. Scheiwe (2010) `Individualisation and personal obligations - social policy, family policy, and law reform in Germany and the UK`, *International Journal of Law, Policy and the Family*, 24(2), 177-197.

The availability of parental leave and leave for dependants that is conditioned by worker's employment status rather than the actual caring responsibilities of mothers and fathers also indicates the failure of UK legislation to fully recognise the social importance of care for children and adult dependants, which will particularly constrain work-care choices of single parents. The requirement of being an employee in order to gain access to parental leave or time off for dependants can in particular disadvantage single parents whose employment status is not that of an employee as despite having extensive caring responsibilities and no help from the other parent they will have no legislative right to leave.

Since state policies can influence the manner in which single parent families manage the articulation between employment and family life, adequately long, flexible leave arrangements which respond to single parents' various reconciliation needs are needed to enable them to make real work-family choices.[855] The Regulations[856] which provide qualifying employees with the same right to thirteen weeks of parental leave fail to recognise that single mothers and fathers have more caring responsibilities than mothers and fathers in families with two parents, and therefore they may need more time off work in order to provide the needed care. More importantly, as the right to parental leave is individual and non-transferable right, single mothers or fathers who actually care for children are disadvantaged as they merely have access to their own leave entitlement and not to that of the other parent who is not providing the needed care.

The restriction on the maximum period of the leave clearly disadvantages single parent families as the MPLR do not provide them with the additional leave entitlement which could accommodate the real caring needs of those families. As families consisting of two parents will be entitled to eight weeks of parental

[855] R. Crompton (2006) op. cit., p. 125-127.
[856] Regulation 14(1) MPLR implemented Clause 2(1) Council Directive 96/34/EC on the Framework Agreement on parental leave.

leave each year, single parent families with the extended caring needs will have at their disposal only four weeks of parental leave each year. Thus, the MPLR do not adequately respond to single parents' reconciliation needs because parental leave is too short to enable them provide long-term personal care to their children.

The flexibility of parental leave entitlement is crucial in enabling single parents to use their short leave entitlement in a manner which best suits their individual needs and work-family preferences. However, as it was discussed earlier in this Chapter, the MPLR provide for very inflexible leave arrangements which significantly restrict availability of parental leave and may render leave not to be available when it is needed most by working parents. The short duration of parental leave which is further restricted by the set maximum duration of leave and that leave needs to be taken when children are still very young can prevent single parents from efficiently using their leave entitlement. Additionally, the lack of legislative right to parental leave for children older than five years of age ignores real work-care needs of single parents and constrains their work-family choices as despite continuing care responsibilities they will be unable spend more time with their children. The restrictions on child's age limit can force single parents to use their parental leave entitlement before it expires rather than taking leave when it is most needed by parents.[857]

The marital status of single parents imposes constraints on their employment patterns as the absence of income earned by the second breadwinner reduces their employment options. Consequently, not having a spouse decreases the likelihood of taking up part-time employment. Hence, despite having their work-family preferences the disadvantages associated with working part-time and low income associated with it may force single parents (often less-well off mothers) to choose either no employment or full-time work.[858] The UK inflexible leave

[857] G. Bruning and J. Plantenga, (1999) op. cit., p.198.
[858] O. Kangas and T. Rostgaard (2007) op. cit., p.248.

arrangements significantly constrain work-family choices of single parents who often work full-time because they are not provided with the right to take parental leave on a part-time basis, and regardless of their actual caring needs the minimum limits on the duration of leave apply. This constitutes a major deficiency of the MPLR in enabling single parents to achieve the desired reconciliation as being able to take short periods of parental leave measured in hours or days rather than weeks would better assist them with making real work-family choices. The absence of the national legal right to an early return to work when the personal circumstances change may act to the detriment of single parents as they may be forced to remain on leave when it is not needed and subsequently have no right to leave when it is needed most.

Working full-time single mothers and fathers with caring responsibilities for children often cannot count on help of the other parent and therefore it is crucial for enabling them to make effective work-care choices that they can access parental leave when it is actually needed by their families. The MPLR do not provide parents with an absolute right to parental leave when it is needed most by parents and regardless of their reconciliation needs enable employers to postpone leave for up to six months.[859] This indicates that parental leave arrangements fail to adequately respond in particular to single mothers' reconciliation needs and therefore they may be forced to rely on more a reliable annual leave in order to care for their children rather than parental leave. Since, employees on parental leave do not acquire new employment rights, and therefore taking parental leave reduces employee's entitlement to paid annual leave, low-income single parents could be more inclined not to take parental leave in order to preserve their full annual leave entitlement which is paid.[860]

Taking into account that work-family choices which are made by single parents are make in the context of each family by considering various constraints

[859] Schedule 2(3) MPLR.
[860] Cf. Case C-486/08 *Zentralbetriebsrat der Landeskrankenhäuser Tirols v. Land Tirol* (22 April 2010) para 56.

associated with taking parental leave, the lack of right to remuneration whilst on parental leave constitutes a major deficiency of the UK right to parental leave. Thus, parental leave will be mainly taken by single parents who can afford it. Considering, the high cost of childcare in the UK and the lack of second income to compensate the loss of income associated with taking parental leave, the leave may merely help with work-care choices well-educated single parents with well-paid jobs. However, the low wage single mothers who cannot afford to take unpaid parental leave may be further encouraged to exist the labour market in order to alleviate the cost of childcare and be able to claim income tested benefits. Thus, the lack of pay whilst on parental leave, and that women often earn less than men significantly hampers single mothers' work-family choices and can contribute to reinforcing gender inequalities in the labour market. In contrast with the UK, in Sweden the necessity of providing single parents with an additional financial support whilst on leave was recognised and equality in sharing of caring responsibilities between parents is encouraged by the gender equality bonus (**Appendix**, **Table 7**).

It was observed earlier in this Chapter that the cost of taking parental leave apart from financial cost in terms of lost wages also involves employment security risks, as the MPLR merely provide parental leave takers with a limited protection from detriments or dismissal, and do not guarantee that all leave takers will be able to return to their previous jobs. As there is no legislative protection from detriment or dismissal in relation to working parents prior to when the application for parental leave is made or after the employee was allowed to return to work this may particularly disadvantage single mothers who are more likely to take parental leave than other parents. The larger caring burden of single mothers compared with other employees may render them being perceived by employers less attractive in the labour market.

The MPLR do not prevent some employers who perceive single parents who take parental leave or are likely to take it as being less committed to their

employment from subjecting them to detriment or dismissal before they request leave or after they returned back to work.[861] In the absence of second income single parents may be forced to reduce the amount of leave that they take in order to alleviate employment security risks associated with taking parental leave and thereby ensure financial stability of their families. The negative impact on employment prospects and career development associated with taking parental leave can also prevent from taking leave work-centred single mothers in well-paid jobs. The restrictive right to return will also constrain work-family choices of work-centred, well-educated single mothers with good jobs and high aspirations for career development who may not be prepared to accept the employment security risks of taking parental leave in order to achieve the reconciliation.

In addition to parental leave employees with caring responsibilities for older children and adult dependants are entitled to time off work for dependants.[862] However, as seen earlier in this Chapter, the lack of clearly specified right to time off which is given at employers' discretion accompanied by unclear notification and information requirements and the absence of adequate financial and employment security of leave takers could in particular constrain work-care choices of single mothers and fathers who more often than other parents will have to respond to various emergencies involving older children. The lack of clearly stated duration of entitlement to time off may in particular affect single parent families and families with many children or ill dependants where workers' frequent absences from work in order to deal with various family emergencies could result in them being penalised by their employers, being passed for promotion and their commitment to employment being questioned. The notice and information requirement[863] may in particular affect single parent families for whom it may be especially difficult to swiftly put in place the necessary arrangements dealing with the occurring emergencies, and therefore they may not be in a position to promptly provide employers with the requested

[861] A. Amilon (2010) op. cit., pp.33-34.
[862] Section 57(A) ERA 1996.
[863] Section 57A(2) ERA 1996.

information. The strict approach of employers towards the notice requirements may effectively prevent single parents from taking time off when it is needed most.[864] As single parents who take unpaid time off carry all costs associated with this leave, both financial and employment security costs, the individual circumstances of each mother or father will determine how they use their entitlement to time off. Consequently, the constraints associated with entitlement to time off can prevent single parents from making genuine work-care choice and force them to make adoptive work-care. Since single mothers are less likely than partnered mothers to be helped by fathers with providing care to sick children and therefore some single mothers may more often request time off than partnered mothers. However, single mothers who cannot afford to take time off and fear the negative impact of taking time off on their employment will therefore take leave less often than partnered mothers who feel more secure because of the second source of income to support their families. The financial cost of taking unpaid time off can prevent single mothers from making real work-care choices. The higher the mother's earning, the higher the cost of taking time off. For well-educated, work-centred mothers with high earnings, the financial cost of taking time off and its negative impact on the employment may be too high to take leave.[865] Thus, the failure of the Directive to provide for the right to paid leave for family reasons has been further reinforced in the UK to the detriment of single mothers with caring responsibilities for children and other dependants who most often take time off for dependants.[866]

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[864] Those who have taken the leave and were unable to quickly provide employers with the requested information may risk being dismissed from work without the protection of Section 99 ERA 1996 and Regulation 20 MPLR.

[865] A. Amilon (2010) op. cit., pp. 34-35.

[866] Department of Trade and Industry (2004) *The Second Work-Life Balance Study: Results from the Employees' Survey*, Employment Relations Research Series No.27, March 2004 pp.80-86. The survey undertaken by the DTI established that 45% of all employees had taken time off work with their current employer, to deal with an emergency in the last year. The findings also indicate that in the vast majority of cases the time off was taken for emergencies associated with the dependants. The study establishes that the availability of time off for emergencies is of greater importance to working parents who are more likely to request time off to deal with emergencies (54%) than non-parents (40%). Additionally, more working mothers (56%) than working fathers (51%) requested the time off work to deal with an emergency. The likelihood of the necessity of taking time off for emergencies is particularly high in the case of lonely mothers (68%) who do not have the support of their partner.

Since single parents are most likely to take time off work for dependants, the lack of special regime both under the Directive and ERA 1996 constitutes a major deficiency of this entitlement in the process of enabling in particular single working parents to reconcile work and family responsibilities. The burden that single parents have to bear when bringing up their children has been clearly recognised in the German implementation of the Directive where the entitlement to leave for urgent family reasons was doubled for single parent families. It is regrettable that despite the necessity of addressing the needs of single parent families, the UK has failed to provide for the adequate legal framework addressing the needs of those parents.

This deficiency of the UK law became evident in *Qua v John Ford Morrison Solicitors*[867] where frequent requests by a single parent for time off in order to look after her ill son resulted in her dismissal. Despite informing the employer, the inability of a single mother in obtaining a babysitter (for one day) resulted in her dismissal on grounds of a gross misconduct in *Carter v. Johnson* although this was held to be unfair.[868] The difficulties that single fathers face whilst requesting time off in order to care for their dependants came to light in *Weaver v. Huntington Plant Hire Ltd.*[869] Although, the Claimant was successful in his claim, the lack of special regime under the UK law in relation to single parent families and families with many children indicate a failure of the national legislator to adequately respond to caring needs of contemporary families. Thus, the implementation of the Directive on parental leave has not resulted in the

[867] Case Number 2300398/01 on 14 June 2001 at paras. 10 and 12 and *Qua v Morrison Solicitors* Appeal No. EAT/884/01.

[868] *Carter v. Johnson* Case Number 2407629/02 ET on 29 April 2003. The Claimant was successful in this case and it was held that her dismissal was unfair as her behaviour did not amount to the gross misconduct.

[869] *Weaver v. Huntington Plant Hire Ltd* Case Number 1501542/03 Employment Tribunal on 27 August 2003. In this case the Claimant requested time off under Section 57A(1)(d) (arrangements to care for dependants), gave reasonable notice to the employer, informed the employer about the duration of his absence, the employer agreed to grant him the time off to put in place his daughter's schooling arrangements and then dismissed him from work for letting the customers down. On the basis of the guidance on establishing the statutory right devised by EAT in the case of *Qua v Morrison Solicitors,* the ET concluded that the Claimant's rights under Section 57A have been breached.

introduction of national schemes on parental leave and leave for dependants that could enable single parents to make genuine reconciliation choices.

4.8 The UK Implementation of the Directive Perpetuates Dominant Theories of Motherhood and Parenthood.

Predominant ideologies of motherhood and fatherhood considered caring for children as women's responsibility, and men were often seen as incapable of being caregivers.[870] The patterns of division between employment and caring responsibilities have gradually developed in societies and integrate material moral dimensions and do not merely operate on the basis of fixed rules but constantly envolve.[871] Although traditionally work and family responsibilities were considered as being incompatible and therefore male breadwinner model prevailed in the UK, social changes that took place in society stimulated the introduction of various legislative measures on working time and employees' leave entitlements contributed to making work and family more compatible. The role of men in the provision of care for children and adult dependants was subsequently recognised too. However, inequalities between men and women in the labour markets still exist as men still occupy most of the higher level jobs, there is gender pay gap and the UK is yet to become a dual bread winner society.

The gender neutral right to parental leave and time off for dependants can play a crucial role in challenging the predominant ideologies of motherhood and fatherhood where caring for children was seen as women's responsibility, and men were often seen as incapable of being caregivers. Despite the gender neutrality of parental leave and time off dependants they target women as primary cares and require them to meet standards of work which are based on

[870] A. Rich (1977) *Of woman born*, London: Vigaro Press and C.L Czarnecki (1989), op. cit., pp.113-114. A. Hawkins and D. Dollahite (1997) *Generative fathering: beyond deficit perspectives*, Thousand Oaks, Sage.

[871] S. Ducan, R. Edwards, T. Reynolds and P. Alfred (2003) 'Motherhood, paid work and parenting', *Work, Employment and Society* 17, 2:309-330 at p. 310.

male standards and family responsibilities that based on traditional gender roles and division of labour.[872] Consequently, the content of legislative provisions on parental leave and time off for dependants can either reinforce the dominant ideologies of care or contribute to challenging them and promoting more equality in how work and care responsibilities are allocated between women and men.

The legislative right to parental leave and entitlement to time off for dependants as contained in the MPLR and ERA 1996 provide female and male employees with leave entitlements and thereby challenge the dominant ideologies of care by recognising that both men and women have equal care responsibilities for children and adult dependants. However, the UK legislator's failure to recognise the necessity of providing single parent families with additional rights to parental leave and time off has reconfirmed its traditional perception of parenthood and family, as opposed to the modern concepts of parenthood and family where often single parents and one parent families are the norm. The MPLR aim at traditional families as the individual and non-transferable right to parental leave disadvantages single parent families by providing them with the shorter leave entitlement than that which is available to traditional families. Hence, the Regulations do not address the needs of modern families and thereby reinforce the traditional concept of parenthood, which is detached from the reality in which working parents work and live. Despite the necessity of addressing needs of non-traditional families, the provisions of MPLR do not provide for any special rights in relation to single parents for whom the reconciliation may constitute a particularly difficult task.

As argued earlier in this Chapter, the UK merely implemented the basic requirements of the Directive on parental leave which reinforce the existing stereotypes about the division of responsibilities within a family. This derives from that the UK leave arrangements as set out in the MPLR and ERA 1996 fail to expressly recognise the reconciliation objective of the Directive, which seeks

[872] R. Guerrina (2002) op. cit., pp.49-68.

to challenge the dominant ideologies of care by ensuring more equality in how work and parental responsibilities are shared within a family. It therefore seeks to enable both working parents to achieve the desired reconciliation. The primary focus of the UK leave arrangements is not on the reconciliation objective of the Directive and ensuring more equality in how work-family responsibilities are allocated within a family but their main objective is to safeguard employers' interest by ensuring that leave arrangements are not too burdensome for businesses.

Although encouraging fathers to be more involved in providing care to children and adult dependants could help to challenge the dominant theories of care and motherhood, the UK leave arrangements fail to expressly recognise the role of fathers in the provision of care and therefore do not provide for specific provisions on parental leave and time off in relation to fathers. As discussed earlier in this Chapter, the current leave arrangements do not enable fathers to make genuine reconciliation choices because of constraints and costs associated with taking parental leave and time off for dependants. Hence, these leave schemes further perpetuate the dominant theories of motherhood and parenthood as parental leave continues to be taken mainly by mothers and women primarily care for sick children and adult dependants (**Appendix**, **Table 9**).

Social and cultural factors play an important role in fathers' attitudes towards parental leave and time off for dependants and fathers have different preferences as to their work-care participation. However, dominant ideologies of motherhood and parenthood also influence employers' attitudes towards men with caring responsibilities for children and adult dependants. As the UK legislation on parental leave and time off does not expressly recognise the role of fathers (men) in the provision of care employers' traditional perceptions about the distribution of caring responsibilities within a family remain unchallenged. Consequently, the UK legislation which provides employers with the key function in how leave

entitlements are administered and fails to challenge employers' traditional perceptions about the distribution of caring responsibilities contributes to further reinforcing the dominant ideologies of care. The earlier discussed cases of *Robison v. TD & AM Bugg Limited*[873] and *Sutton v. Frank t/a East Kent Joineries*[874] indicate that men would like to spend more time with their families but that dominant ideologies concerning their breadwinning role prevent them from doing so.

The UK legislator exceeded requirements of the Directive on parental leave and provided working parents with the non-transferable right to parental leave, which in principle should ensure more equality by ensuring more fathers take parental leave. However, the effectiveness of non-transferable leave in promoting social change in how work-care responsibilities are allocated between working parents is defeated by disadvantages associated with the taking of leave, which were discussed earlier in this Chapter. In particular the absence of pay whilst on parental leave or time off for dependants, indicates that these leave arrangements do not have the economic power to promote the gender equality and merely recognise the importance of mother's work.[875] The lack of paid leave and absence of financial incentives for fathers to take leave perpetuate the existing gendered division of unpaid work and promotes inequality in the workplace and society, as financial costs associated with taking parental leave are often higher to fathers than are to mothers. Consequently, the family rationale which is often driven by financial factors dictates that mothers should take parental leave and fathers should remain in paid employment.

The effectiveness of unpaid leave as a measure designed to enable equal sharing of parental responsibilities between working parents must be considered in the context of gender pay gap in the UK. By not providing for a paid parental

[873] *Robison v. TD & AM Bugg Limited,* Employment Tribunal Case Number 1502356/2003 on 26 March 2004.
[874] *Sutton v. East Kent Joineries*, Employment Tribunal Case Number 11/00728/2004.
[875] K.J. Morgan and K. Zippel (2003) `Paid to Care: the Origins and Effects of Care Leave Policies in Western Europe`, *Social Politics* 49.

leave, the UK government effectively discarded the reconciliation objective of the Directive aiming at bringing about more equality in sharing of parental responsibilities between working parents. The lack of paid parental leave or time off for dependants, and the existing gender pay gap reinforce the traditional distribution of responsibilities within a family, and could contribute to increased discrimination against women of childbearing age, and mothers with young children, as they may be perceived by employers as less reliable in the workforce. Mothers' who take unpaid parental leave lower contributions to various social schemes (or no contributions) also reinforce dominant ideologies of care and assumption that women are dependant on male partners. [876] Effectively, unpaid parental leave is predominately taken by mothers and that very few fathers exercise their right to parental leave (**Appendix, Table 9**).

By depriving leave takers of the right to remuneration the Directive and its UK implementation fail to address the impact of economic hierarchies on parental choices about employment and care.[877] Since mothers often earn less than fathers they are most likely to exit the labour market in order to care for children. Due to the loss of earnings caused by mothers' exit from the labour market, fathers may be forced to further limit their involvement in sharing of family responsibilities by undertaking additional employment and thereby compensating for the loss of mother's wage. Providing personal care to children may prevent women from effectively competing in the labour market; reinforcing gender segregation and the gender pay gap. Fathers' necessity of extending their labour market participation in order to provide for family financial and economic needs will further perpetuate single male breadwinner family model and prevent mothers from making genuine work-care choices. States can also act in a manner that contributes to perpetuating gender traditional division of labour.[878] Gornick and Meyers[879] recognise that progress in ensuring greater gender

[876] S. Fredman (2004) op. cit., p. 305.
[877] R. Guerrina (2002) op. cit., pp.58-62.
[878] Crompton (2006) op. cit., p.211.
[879] J.C. Gornick and M.K. Meyers (2003) *Families that work*, New York: Russel Sage, p.66

equality is conditioned by existence of national supportive leave packages. The structural factors which include the availability of affordable childcare are of paramount importance in challenging the traditional work-care patterns. Consequently, the consideration of effectiveness of right to unpaid parental leave and time off in challenging the dominant ideologies of care must take into account availability of affordable childcare in the UK. It was identified earlier in this Chapter that the limited availability of affordable quality childcare can prevent less well-off UK families from making real work-care choices by forcing mothers to leave the labour market in order to care for their children. Hence the high cost of childcare also contributes to perpetuating mothers as carers and reinforcing male-breadwinner family models in the UK.

Having considered the legislative contribution of the Directive on parental leave to stimulating changes in the national legal provisions on parental leave and time off for dependants, and their implications for reconciliation and choice in the UK with reference to selected well-established Member States, Chapter 5 explores national leave provisions in Poland with references to selected new Member States. It evaluates the extent to which the Directive has enhanced national leave arrangements and considers their implications for reconciliation and choice.

Chapter 5 An Exploration of the Parental Leave Directive in Terms of How it Shapes Law in the Republic of Poland with Reference to Selected New Member States.

5.1 Background

As discussed in Chapter 1, the EU binding reconciliation measures have primarily been introduced through the Directives which needed to be implemented by all Member States. Poland became a member of the EU on 1st May 2004 and is required to comply with and implement all EU legislation, which include the EU reconciliation Directives. At present, the main sources of labour law such as the *Polish Constitution*, *Kodeks Pracy* 1974 *(Labour Code 1974* (LC)) and collective agreements make no direct reference to the concept of reconciliation. Although there is no express legislative right to reconciling, Poland has a long legislative tradition of providing policies, which are now considered as reconciliation policies such as on protection of pregnancy; maternity and childcare leave rights. Reconciliation policies developed in Poland in three distinct stages: stage one, the reconciliation policies during the time of socialism until 1989; stage two, during the transitional period (1990s) and stage three, the influence of the EU membership The key stages in development of reconciliation policies in Poland are outlined in more detail in **Appendix, Table 12.**

Traditionally, the Polish reconciliation policies focused on women and legislative entitlements were only available to women who were seen as the primary carers of children and other dependants. Although during the time of socialism, reconciliation policies did not promote equality in distribution of caring responsibilities within a family, the availability of affordable childcare ensured very high levels of women's participation in the labour market.[880] In the 1990s, reconciliation policies continued focusing primarily on women who were recognised as primary carers.[881] The decline in the availability of affordable childcare and high unemployment rates in particular among women fostered a

[880] In 1988, activity rates for Polish women were much higher than in the Western Economies and peaked to 85.5 per cent. M. Gora, I. Kotowska, T. Panek and J. Podgorski (1993) in A. Gregory, M. Ingham and H. Ingham (1998) `Women's Employment in Transition 1992-4: the Case of Poland`, *Gender Work and Organization*, 5(3):133-147, pp. 134.
[881] U. Nowakowska, A. Swedrowska, `Women in the Labour Market`, *Polish Women in the 90s*, http://free.ngo.pl/temida/labour.htm accessed on 15/05/2003.

departure from the well-established dual breadwinner model in favour of the single male breadwinner model.[882] In the absence of adequate protection from discrimination and equality legislation, the stringent maternity rights dissuaded employers from employing women.[883] The implementation of EU reconciliation Directives (the *Working Time Directive* (WTD)[884], the *Pregnant Workers Directive* (PWD),[885] the *Parental Leave Directive* (PLD)[886] and the *Part-time Workers Directive* (PTD)[887]) did not pose any major difficulties as the national legislation contained in the Labour Code largely complied with the minimum requirements of these Directives. However, their implementation has contributed to ensuring the availability of reconciliation rights for both male and female workers in Poland. It further resulted in enhanced flexibility in working arrangements, which aim at improving female participation in the labour market.

The compatibility of the existing Polish policy on protection of pregnancy and maternity with the *Pregnant Workers Directive* was questioned[888] because of the prohibitive tone of the legislation contained in Articles 176 and 178 LC.[889] Additionally, the prohibition of night work for pregnant women was seen as discriminatory for women.[890] Despite the above concerns, the Polish legal framework on pregnancy and maternity has not been altered and continues ignoring individual situations of pregnant workers. Furthermore, Article 178(1) LC bans pregnant women from working overtime, which may imply a significant loss of earnings during pregnancy and lower maternity leave benefits calculated on the

[882] Cf. G. Pascal and N. Manning (2000), `Gender and Social Policy: Comparing Welfare States in Central and Eastern Europe and Former Soviet Union`, *Journal of European Social Policy*, 10(3):240-266.
[883] Cf. U. Nowakowska, A. Swedrowska, `Women in the Labour Market` op. cit., and U. Nowakowska, `The Position of Women in the Family` *Polish Women in the 90s*, http://free.ngo.pl/temida/family.htm on 15/05/2003.
[884] Council Directive 93/104/EEC OJ, 307/18, 1993 and 2003/88/EC.
[885] Directive 92/85/EEC of 19/10/1992 on the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, OJ L348/1, 28/11/1992.
[886] Council Directive 96/34/EC of 3 June 1996 on the Framework Agreement on parental leave concluded by UNICE, CEEP and the ETUC, *Official Journal* L 145, 19/06/1996 P. 0004-0009 as amended by the *Council Directive 97/75/EC Official Journal* L 010, 16/01/1998 P. 0024-0024.
[887] Directive 97/81/EC, concerning the framework agreement on part-time work concluded by ETUC, UNICE and CEEP, OJ, L14/9, 1998.
[888] The European Union Common Position on the Polish EU Accession, Negotiation Document CONF-PL 11/00 of 15 March 2000 p. 4.
[889] The contested aspects of this policy related to that the protection of pregnant women was based on the system of absolute prohibitions rather than on the individual risks assessment, which would better respond to the individual needs of pregnant women.
[890] The prohibition on night work of pregnant women also exists in Italy and Austria.

basis of the last salary. The current over-protective approach of the Polish legislation does not appear to comply with the EU equality legislation as it disadvantages pregnant women; limits their equal participation in the labour market and implies that pregnancy is not compatible with the labour market.

The normal weekly working time in Article 129 LC, set at 40 hours in 2003 (currently applies)[891] exceeded the requirements of the Directive on working time. The implementation of this Directive in Poland not only did not reduce the weekly working time, but resulted in reducing overtime payments and worsening the rights of employees.[892] The Directive resulted in extending the annual leave entitlement to 20 days (was 18 days)[893] for employees with ten or less years' in employment. This legislative change can be seen as contributing to the reconciliation because it mainly affects young employees who are likely to be parents, for whom the two extra days off work could make a real difference for reconciliation. The Directive on parental leave was implemented in Poland through Articles 186 and 188 LC and is discussed in detail later in this Chapter.

Although Polish labour law provides for flexibility in working time arrangements,[894] and Article 29 LC ensures equality in treatment with those in full time employment, the availability of these arrangements have not aided the reconciliation process due to lower security of employment attached to the flexible working patterns.[895] The introduction of protection from discrimination for part-time workers in Poland is of vital importance to workers with family responsibilities because equalising the rights of part-time workers with full-time workers could encourage more parents to work on a part-time basis in order to enhance their work-family choices.

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[891] Article 129 LC. The recent amendments which came into force on 25th July 2010 did not alter the duration of the normal working week (8 hours per day and 40 hours per week)

[892] G. Meardi (2007) 'More voice after more exit? Unstable industrial relations in Central Eastern Europe, *Industrial Relations Journal*, 38(6):503–523.

[893] Article 154(1) LC.

[894] E.g. fixed-term work, part-time work, teleworking, job-sharing, weekend work or shortened week.

[895] Cf. A. Plomien (2009), 'Welfare State, Gender and Reconciliation of Work and Family in Poland: Policy Developments and Practice in a New Member State, *Social Policy &* Administration, 43(2):136-151, at pp. 143-147.

Since Poland has joined the EU in 2004, the issues concerning reconciliation have received more attention from the Polish policy makers. Although there is no legislative right to reconciliation in Poland, the recent legal developments in the area indicate the willingness of Polish legislator to address the issues concerning the inequalities in the distribution of caring responsibilities between parents.[896] On 1st January 2010, the new right to additional maternity leave was introduced, which can be shared between the parents.[897] This leave is of a vital importance to working parents because it introduced more equality in the distribution of caring responsibilities within a family by providing for the enhanced involvement of the father. Additional maternity leave is also paid[898] and provides parents with flexibility.[899] Although fathers in limited circumstances can take the leave, the wording of Article 182(1) LC clearly refers to the leave as being a female employee's right. It remains to be seen how this right is going to be shared between parents.

The involvement of fathers in bringing up children is further supported by the new right to paternity leave of the duration of one week (two weeks in 2012) available as of 1st January 2010.[900] In contrast with additional maternity leave, the right to paternity leave is a father's individual right, which can be taken simultaneously with maternity leave and is paid at the level of statutory maternity pay. This right contributes to enhancing fathers' participation in family life by enabling them to spend more time at home when children are very young. Although some attempts have been made to improve fathers' participation in sharing childcare responsibilities, the focus of the national policy makers remains on enhancing female employee's rights and their labour market participation rather than on

[896] In August 2007, more flexibility into the organization of the working time was introduced by the new right to teleworking by Article 67(5) of LC.
[897] 14 days in 2010/11, Articles 182(1)(2) and 183 of LC. Introduced by Ministerial Order of 6 December 2008 (Ustawą z dnia 6 grudnia 2008 r. o zmianie ustawy – Kodeks pracy oraz niektórych innych ustaw (Dz. U. Nr 237, poz. 1654)).
[898] Art. 5 and 5a Ministerial Order of 25 June 1999 on social benefits during illness and maternity (Ustawa z dnia 25 czerwca 1999 r. o świadczeniach pieniężnych z ubezpieczenia społecznego w razie choroby i macierzyństwa (Dz. U. z 2005 r. Nr. 31, poz. 267, z późn. zm.)).
[899] It can be taken on a part-time basis and can be used by either working parent to reconcile work and family responsibilities. The duration this leave will progressively increase up to 6 weeks in 2014 and needs to taken weekly blocks. The right to additional maternity leave is a family right and can only be taken by the father if mother returns to work after 14 weeks of maternity leave or uses the full entitlement to maternity leave and does not intend to use the additional maternity leave.
[900] Article 182(3) LC.

ensuring more equality in the distribution of caring responsibilities within a family. This approach is identifiable in the Polish government's family policy for 2007-2014 [901] which refers merely to the need of enabling women to achieve reconciliation and does not focus on the role of men in the family.

The draft policy on childcare for children up to the age of three that is currently debated by the Polish Parliament aims at improving the availability of childcare but it does not ensure its affordability.[902] The most recent government's plans to abolish the birth giving allowance[903] will further discourage young people from having children. Although Poland has implemented the binding requirements of the reconciliation directives, it has failed to meet the soft law Barcelona (2002) targets on the availability of affordable childcare facilities.[904] In Poland current use of childcare services falls short of the target by more than 20 percentage points and childcare is mostly family-based and/or informal.[905] The limited availability of affordable childcare facilities indicates the failure of Open Method Coordination in ensuring the availability of affordable childcare facilities in Poland, which may hamper the effectiveness of other reconciliation policies in providing workers with genuine work-family choices. This argument is further explored later in this Chapter in the context of childcare leave and leave for dependants, which implemented in Poland the Directive on parental leave.

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[901] The Polish Government Family Policy (draft) for 2007-2014 in http://66.102.9.132/search?q=cache:rGCLzgTmh5IJ:217.149.246.88/archiwum/politykarodzinna.doc+%22program+polityki+rodzinnej%22&cd=8&hl=pl&ct=clnk&gl=pl&lr=lang_pl accessed on 25/01/2010.

[902] Cf. D. Szelewa and M.P. Polakowski (2008)`Who cares? Changing patterns of childcare in Central and Eastern Europe`, *Journal of European Social Policy*; 18:115-131, pp.115-131., A. Plomien (2009), op. cit., pp. 138-140. European Commission (2008), *Early Childhood Education and Care in Europe: Tackling Social and Cultural Inequalities,* EURYDICE 2008.

[903] Single payment of 420 Euro.

[904] Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Implementation of the Barcelona objectives concerning childcare facilities for pre-school-age children Brussels, 3.10.2008, COM(2008) 638 final.

[905] The Barcelona target of 33 per cent was also not reached or passed in Austria, Bulgaria, Czech Republic, Hungary, Lithuania, Malta, Poland, Romania, and Slovakia where the proportion of children under 3 using childcare is still less than 10 per cent. Cf. Council of the European Union, *Report (2011): Review of the Implementation of the Beijing Platform for Action in the area F: Women and the Economy. Reconciliation of Work and Family Life as a Condition of Equal Participation in the Labour Market*, Brussels, 21 November, 201116835/11 ADD 1 SOC 988 p. 52.

It was seen in Chapters 3, that the Directive on parental leave merely outlines the minimum requirements on parental leave and leave for urgent family reasons. It therefore does not provide for fully comprehensive leave arrangements that could enable workers with caring responsibilities for children and adult dependants to make real work-care choices. Hence, the effectiveness of this Directive in enabling different groups of Polish workers to make genuine reconciliation choices will depend on the extent to which its national implementation has exceeded its minimum requirements and introduced more stringent national rights. This Chapter seeks to explore the Directive on parental leave in terms of how it shapes law at national level in Poland and the extent to which Polish leave arrangements can help workers with making real work-family choices. It considers the development of Polish national policies on childcare leave and leave for dependants. Similarly to the analysis of provisions of the UK law on parental leave and time off in Chapter 4, the evaluation of Polish legal provisions on leave arrangements is also informed by socio-legal methodologies and post-modern feminist perspectives. The undertaken legal analysis of provisions of Polish law on parental leave and time off for dependants seeks to consider the extent to which the Directive on parental leave has contributed to enhancing legislative rights to leave periods. It further considers whether, or not the Polish implementation of this Directive has exceeded its minimum requirements.

As seen in Chapter 3, the Directive on parental leave was adopted with the aim of enabling working parents to reconcile work and family responsibilities. However as discussed in Chapter 2, there are diverse groupings of working parents deriving from different social classes, who have different attitudes towards reconciliation and express different work-family preferences.[906] Although, workers with caring responsibilities for children and adult dependants have their own work-family preferences they are not always able to make real choices as to their involvement in work and care. This is because parents' work-family choices are often constrained by various factors including the constraints deriving from legislative right to childcare leave and leave for dependants which can prevent parents from making genuine work-family choice. State policies such as policies on childcare

[906] J. Glover (2002) `The "balance model" theorising women's employment behaviour` in R. Crompton (2006) op. cit., p. 52.

leave and leave for dependants will therefore influence the manner in which families manage their work-family articulation.[907] Hence, the Polish legal provisions on childcare leave and leave for dependants are analysed in this Chapter and the extent to which they are capable of assisting workers with caring responsibilities for children and adult dependants with making genuine reconciliation choices is considered.

Since different groups of workers have different work-family needs and preferences[908] the legal analysis of measures on childcare leave and leave for dependants also considers the extent to which these leave arrangements can accommodate fathers' and single parents' reconciliation needs. As seen earlier in this Chapter, traditionally care responsibilities in relation to children and adult dependants were legally and socially recognised as belonging to women, and men were not expected to actively participate in the provision of care. Since the reconciliation objective of the Directive sought to ensure more equality in how work and care responsibilities are allocated within a family, the Polish legal provisions on leave periods are evaluated in view of considering whether, or not they contribute to perpetuating dominant theories of motherhood and parenthood.

The positioning of Polish implementation of the Directive in relation to other new Member States is considered by making references to Hungary, Czech Republic and Slovakia. The relevant case law is analysed in order to identify the most contested provisions and determine whether the national Courts' interpretations of those provisions enhanced workers' legislative rights and their reconciliation choices. The evaluation of provisions of the Polish legislation provides information which shall be relied upon in the comparative analysis of national implementations of provisions of the Directive in the UK and Poland that is undertaken in Chapter 6.

[907] R. Crompton (2006) op. cit., p. 127.
[908] C. Hakim (2000) op. cit., pp.274-276.

5.2 The Evolution of Right to Parental Leave and Leave for Family Reasons in Poland.

In Poland, unlike in the UK, the Republic of Ireland and Luxembourg where there had been no national entitlements to parental leave, the entitlement to childcare leave (*urlop* wychowawczy) was introduced in 1968 in response to the suggestions of the Council of Working Women of the Trade Unions and women's organisations.[909] It provided a mother with the right to leave up to one year in order to raise her young child without the danger of losing her job, seniority or pension rights. The duration of childcare leave was increased to three years in 1972 and remained unchanged by the 1975 leave reform. Since 1974, in Poland the main source of employment law regulation has been Labour Code (LC). In 1975, the arrangements for granting childcare leave were relaxed, which made it easier for women to benefit from various subsidies and benefits associated with childcare leave provided by the individual work establishments.[910] At the time many work establishments provided employees with subsidised childcare facilities, which effectively assisted mothers with making work-family choices as the vast majority of mothers with young children remained in employment. The leave was only available to female employees and therefore for example all the self-employed and freelancers were not entitled to the leave.[911]

In addition to childcare leave, since the 1960s parents have been provided with the right to time off work in order to respond to various family emergencies involving their dependants (*urlop opiekuńczy*). The leave could be taken by employees (mainly women) in order to care for children, sick family members or respond to other emergencies involving dependants. Originally, emergency leave was available to either parent, and parents could decide who took leave in order to

[909] Order of the Council of Ministers number 158 of 15 May 1968 (Uchwala nr 158 Rady Ministrow z dnia 24 maja 1968 r. w sprawie bezplatnych urlopw dla matek pracujach, opiekujacych sie malymi dziecmi (M.P. Nr.24, poz 154); amended by Ministerial Decree of number 13 of 14 January 1972 (Uchwala nr 13 Rady Ministrow z dnia 14 stycznia 1972 r. w sprawie bezplatnych urlopow dla matek pracujacych opiekujacych sie malymi dziecmi (M.P. Nr 5, poz. 26).

[910] Order of the Council of Minsters of November 29, 1975 regarding leaves without pay for working mothers taking care of small children (Uchwala Rady Ministrow z dnia 29 listopada 1975 w sprawie bezplatnych urlopw dla matek pracujach, opiekujacych sie malymi dziecmi (M.P. Nr.43, poz.219)).

[911] Order of the Council of Minters of 17 July 1981 regarding childcare leaves (Uchwala Rady Ministrow z dnia 17 lipca 1981 w sprawie bezplatnych urlopow wychowaczych (M.P. Nr. 19, poz.97).

respond to the emergency. In 1973, the law was changed and only a mother was provided with the right to emergency leave. The father was only able to take leave if the mother passed away or was unable to provide the required care. The rationale for the change in the law provided by the Ministry of Health and Social Affairs was based on mothers' special predispositions to take personal care for children. The restriction was based on some cultural belief that only mothers could adequately care for sick children. This legislative change reaffirmed that a husband's employment was seen as more important than a mother's and therefore she had to take time off work in order to care for sick children.[912] It also sent a clear message to working parents that reconciling work and family responsibilities was mother's and not father's "problem".

In Poland, traditionally, women were primarily responsible for bringing up children and therefore the state policies on child bearing and rearing reinforced the gender inequalities by assigning the role of women within the family, the labour market and the society. Poland has a long legislative tradition of encouraging women to balance work and family responsibilities.[913] The focus of those social policies was on the importance of women's role in the labour market, but their level of participation was expected to be lower than men and there was no legislative intention to address the imbalance in the division of responsibilities within a family. The national social policies intended to help women to balance work and family responsibilities in the specific manner. The emphasis was placed on helping working mothers to exit the labour market for a specific period of time, and subsequently enable them to return to full-time employment.

Childcare leave periods facilitated women's absences from the labour market but men's involvement in the family life was restricted as they had no legislative right to leave. The state policies promoted and legitimised certain patterns of behaviour influencing the division of roles within the family and child rearing practices. Although national social policies facilitated women's participation in the labour market, the policies contained restrictions on the level and the quality of women's

[912] C.L Czarnecki (1989), op. cit., pp.113-114.
[913] Cf. E. Fodor, Ch. Galss, J. Kawachi and L. Popescu (2002), "Family policies and gender in Hungary, Poland and Romania, *Communist and Post-Communist Studies*, 35:475-490.

involvement. The thrust of those national social policies clearly indicated that the labour market was incompatible with family responsibilities and bringing up children required women to exit the labour market.

Prior to 1996, only a mother was entitled to childcare leave and leave for urgent family reasons (the father only in exceptional situations). Thus, until 1996, the Polish labour regulations were unambiguously reinforcing the traditional roles within a family, undermining women's role in the labour market and restricting father's right to act in a parental role. The social and political changes that took place in Poland facilitated the amendment of Articles 186 and 189 LC which provided both parents with the right to childcare leave.[914] Article 189 LC was also amended and the entitlement to time off work for urgent family reasons became available to both parents. These amendments were of paramount importance to both working parents striving for reconciliation because childcare leave became available to both parents and the legislation no longer violated the principle of equality of opportunities in employment. Childcare leave being available to both parents was no longer exclusively associated with women and therefore it contributed to improving women's opportunities in the labour market. Despite attempts to improve equality in the distribution of family responsibilities between parents, the right to care for the child under the age of two remained reserved to the mother. The renaming childcare leave to a more inclusive parental leave, which indicated the involvement of both parents in childcare responsibilities, was seen as a means of creating partnership within a family.[915] Although in 1996 the national laws were amended to provide both working parents with the right to childcare leave, the wording of Article 186 of LC continued referring to the entitlement of a female employee and made no express references to the father's entitlement.[916]

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[914] The leave arrangements were regulated by the Ministerial Order of 28 May 1996 on childcare leave (Rozporzadzenie Rady Ministrow of 28 May 1996 w sprawie urlopow i zasilkow wychowawczych) Dz.U Nr 60, poz 277.

[915] U. Nowakowska, A. Swedrowska, `Women in the Labour Market`, op. cit., pp. 3-4 of 20.

[916] Ibid. pp.3-4 and A. Gregory, M. Ingham and H. Ingham (1998), "Women's Employment in Transition 1992-4: the case of Poland", *Gender Work and Organization*, 5(3):133-147.

As Poland strived to become a member of the European Union it aimed at implementing the Directive on parental leave by 1 January 2003.[917] The Directive was implemented in Poland through the provisions contained in Articles 186(1)-186(8) and 188 LC as supplemented by the Order of the Council of Ministers of 16 December 2003 outlining the detailed arrangements for granting childcare leave.[918] The new legal framework on childcare leave came into force on 1 January 2004, amended the existing provisions on childcare leave contained in the Labour Code[919] and repealed the Order of the Council of Ministers of 28 May 1996,[920] which previously regulated how childcare leave is administered. The legal framework contained in the above stated legislation on childcare leave applies to all employers and all sectors of employment.[921] The delay in the implementation of the Directive was not caused by any particular political difficulties but derived from the administrative overload. The final implementation deadline was met.[922]

The implementation of the Directive on parental leave in Poland did not pose any major difficulties as the existing childcare and emergency leave entitlements already contained equivalent provisions. The legal framework implementing the Directive in Poland, which came into force on 1 January 2004 merely amended the existing provisions on childcare leave. The national provisions on leave for urgent family reasons (*urlop opiekuńczy*) were retained. It must be emphasised that in Poland, the institution of childcare leave (*urlop wychowawczy*) regulates the area of parental leave set out in the Directive. The Polish sources of employment law and the judiciaries do not refer to the institution of parental leave (*urlop rodzicielski*) but to childcare leave (*urlop wychowawczy).* The right to parental leave (*urlop rodzicielski*) is exclusively referred to by the Polish legislator and judiciaries in the context of the Directive on parental leave and the decisions of the Court of Justice on matters related to the Directive. This indicates the failure of

[917] The Negotiation Document CONF-PL 35/99 of 23 September 1999.
[918] Rozporzadzenie Ministra Gospodarki, Pracy i Polityki Spolecznej of 16 December 2003, Dz.U. Nr 230, poz 2292.
[919] Articles 186 & 189.
[920] Rozporzadzenie Rady Ministrow of 28 May 1996 w sprawie urlopow i zasilkow wychowawczych, Dz.U Nr 60, poz 277.
[921] Article 3 LC and the decision of the Polish Supreme Court of 06/08/1980, V. PZP, 12/78, PiP 1982, Nr 11
[922] Cf. S. Leiber (2007), "Transposition of EU social policy in Poland: are there different `worlds of compliance` in East and West?", *Journal of European Social Policy,* 17(4): 349-360.

Polish legislator to fully recognise the importance of gender neutral right to parental leave in the Directive.

Having considered the evolution of leave policies in Poland, this Chapter examines the provisions of the national law on childcare leave and leave for urgent family reasons (in the chosen context) in view of exploring the contribution of the Directive to shaping law in Poland and assisting parents with reconciliation choices.

5.3 The Polish Implementation of the Directive is Minimalist, Weak and the Right to Parental Leave Fails to Help Parents in Terms of their Choice.

It was seen in Chapter 3, that in preamble and Clause 1 (1) of the Directive, clear references are made to the role of parental leave in enabling both working parents to reconcile work and family responsibilities. Articles 186 and 189 of LC, which implemented the Directive in Poland, provide both male and female employees with the entitlement to childcare leave but make no reference to the reconciliation objective of the Directive. This constitutes a major deficiency of this implementation of the Directive in enabling both working parents to make genuine work-care choices as the lack of express recognition that both working parents have childcare responsibilities which need to be reconciled does not effectively aid the process of moving away from the past where childcare leave was primarily associated with mothers. The absence of express reference to reconciliation objective of the Directive also reaffirms the failure of national legislators to recognise the importance of reconciliation policies for enabling working parents to make real work-care choices and its minimalist approach to introducing reconciliation policies in Poland.

A clear impact of Clause 1(2) of the Directive on the national entitlement to parental leave can be observed in Article 186(1) LC. Before the Directive came into force in 2003, the wording of this article referred to childcare leave as being available to a mother and made no direct reference to the right of the father. The leave provisions were also located in the Labour Code in the section providing

rights for mothers. Since 1996 both parents have been entitled to childcare leave and yet the Code did not make any direct reference to the father's right to the leave. Thus, mothers and not fathers were expected to take childcare leave and therefore the legislation expressly targeted mothers and effectively disadvantaged family–centred fathers who wished to spend more time with their families. As childcare leave was expressly associated with mothers it also contributed to reinforcing employers' negative attitudes to women with caring responsibilities and fostered discrimination against women in the labour market. Hence, mothers' work-care choices were significantly constrained by the wording of childcare leave in the Code and further restricted by the lack of institutional childcare facilities which often forced women to exit labour market in order to become full-time carers to their children.

The implementation of provisions of the Directive has resulted in creating a new Chapter 8 in the Code, titled "Workers' Rights Associated with Parenthood" where childcare leave rights can now be found. This Chapter is crucial for enabling both working parents to make-work care choices because it specifically refers to childcare leave as being the right of both parents. It sends a powerful message to fathers that responsibilities for children rest with both parents and not only with mothers as it was the case in the past. However, the impact of this change in the wording of Labour Code on promoting equality in the division of work within a family is hampered by the failure of the legislator to rename the existing childcare leave right to parental leave right (*urlop rodzicielski*) literally outlined in the Directive. By retaining the old concept of childcare leave an opportunity was missed to introduce the more inclusive, gender neutral right for parental leave, which would be more effective in promoting social change and encouraging fathers' involvement in family responsibilities than childcare leave traditionally associated with women's responsibilities for children.

5.3.1 Restrictive Availability of Parental Leave Constrains Parents' Work-family Choices.

The implementation of the Directive has resulted in amending Article 186(1) LC.[923] The current wording of Article 186 (1) LC is more inclusive as it no longer refers to the female employee's entitlement to childcare leave and instead provides all qualifying employees, who have been employed for at least six months, with the right to parental leave not exceeding 3 years. This amendment is of paramount importance in assisting parents with making reconciliation choices and ensuring more equality in the division of work-care responsibilities within a family because it provides both male and female employees with the right to childcare leave, and no longer assigns childcare responsibilities to mothers alone. Hence, in principle, the more inclusive wording of right to childcare leave could encourage more fathers to take leave and thereby help mothers to better articulate their work-family preferences.

The failure of the Directive[924] to provide all workers with the right to parental leave has been further reinforced in Poland by Article 186(1) which limits the availability of childcare leave to employees only. The Polish implementation of Clause 1(2) of the Directive has not resulted in the enhancement of the national leave entitlement, because qualifying employees already had the right to childcare leave and as discussed in Chapter 3, the Directive did not require Member States to cover other groups of workers. Workers whose jobs are not regulated by Labour Code do not have the right to childcare leave e.g. self-employed and freelancers. As already seen in Chapters 3 and 4, the restriction on availability of childcare leave to employees only, rather than providing all workers with caring responsibilities for children with the right to leave, constrains reconciliation choices of those workers with preferences for being more involved in family life (or their individual family circumstances require them to provide care to children) and yet their employment status excludes them from the right to childcare leave. By failing to recognise that work-family needs of non-employees (e.g. self-employed) also need to be reconciled, the national legislator disregarded the social importance of care and the long-term contribution that parents (mothers) make to the labour market. As there is no equivalent right to childcare leave that non-employees could rely upon in order to reconcile work and family responsibilities, the restrictive

[923] DZ.U.03.213.2081 of 14/11/2003, in force from 01/01/2004
[924] Clause 1(2) Council Directive 96/34/EC on the Framework Agreement on parental leave.

right to childcare leave for employees only effectively prevents non-employees with caring responsibilities for small children from making real work-family choices.

The excluded categories of workers from the provisions of Labour Code also include those employed by the *National Security Agency* on contracts for service e.g. police, soldiers, border control and prison officers whose employment is regulated by the specific legislation.[925] They, in line with Articles 32 and 33 of the Polish Constitution 1997 should also be ensured equality in access to the right to childcare leave for both women and men in the service.[926]

The lack of equality in the entitlement to childcare leave of those employed by the national security agency was addressed in the decision of the Polish Constitutional Tribunal.[927] The case concerned the refusal of childcare leave to a serviceman on grounds that Article 93 of the applicable legislation[928] provided this right to mothers and not fathers. It was acknowledged by the court of first instance in the discussed case that Article 93 contradicts the right to childcare leave in Article 186 LC and Articles 32 and 33 of the Constitution 1997.[929] On the point that Article 93 did not provide men with the right to childcare leave, on determination of the legal status of Article 93, the Constitutional Tribunal concluded that the legislative status of this Article does not enable it to confer any legislative right at all, including the right to childcare leave as it is merely a referring provision. Consequently, this Article does not breach the provisions set out in Articles 32 and 33 of the Constitution 1997 because Article 93 on its own does not regulate childcare leave and therefore it cannot be used to deny access to childcare leave. The Labour Code does not directly confer rights on the discussed groups of workers, in view of the Constitutional Tribunal Article 5 LC can indirectly confer social policy rights including the right to childcare leave in Article 186 LC on condition that the right to childcare leave does not interfere with the special requirements of the job. This case emphasises the complexities surrounding the availability of childcare leave to

[925] Article 5 LC.
[926] Ministerial Order of 24 of May 2002 (Ustawa z dnia 24 maja 2002 r. o Agencji Bezpieczeństwa Wewnętrznego oraz Agencji Wywiadu (Dz. U. Nr 74, poz. 676 ze zm).
[927] Decyzja Trybunalu Konstytucyjny z dnia 29 Czerwca 2006r. P 30/05.
[928] Ministerial Order Dz. U. Nr 74, poz. 676 ze zm.
[929] Articles 32 and 33 ensure the equality in treatment between men and women in employment, also in relation to parental leave.

those working for the national security agencies, which may render childcare leave not to be available to some working parents. Hence, the complexities of childcare leave can prevent those working parents from making real work-family choices.

The lack of entitlement to childcare leave covering all groups of workers clearly disadvantages those working parents who are not considered as employees and shows lack of commitment at the national level to providing all working parents with effective reconciliation rights. As the Directive did not require Member States to provide all workers regardless of their employment status with the right to parental leave, this failure has further been reinforced by the national legislation of the Czech Republic, Hungary and Slovakia.[930]

The Labour Code[931] safeguard interests of employers to the detriment of reconciliation needs of working parents by restricting the availability of childcare leave to employees who have continuously been employed for the period of not less than six months. Although Clause 2(3)(b) of the Directive enabled national legislation not to make parental leave subject to any qualifying employment requirements, the access to childcare leave is limited only to parents who have been employed for at least 6 months.[932] This provision of Labour Code significantly exceeds what was required by the Directive which enabled Member States to make parental leave subject to the qualifying employment not exceeding twelve months.[933]

Despite being much shorter than allowed by the Directive the qualifying employment requirement that needs to be complied with before the right to childcare leave is accrued constrains parents work-family choices as only parents who can comply with the employment requirement will be able to benefit from

[930] Note that the only new Member State providing with the right to parental leave also non-employees are Estonia and Latvia. The national entitlements in those Member States preceded the implementation of the Directive and provide for more entitlements than envisaged by the Directive. Although in those Member States the right to the leave is also available to the non-employees the dual payment systems which define the level of financial support to those on the leave tend to financially disadvantage non-employees. Cf. Report on *Parental Leave in Council of Europe Member States*, CDEG (2004) 14 Final, Strasbourg, 2005.
[931] Article 186(1) LC.
[932] Article 186(1) LC.
[933] It should be noted that until 1985, the Polish law on childcare leave required twelve months of employment, which significantly limited the availability of the leave.

childcare leave. By limiting leave access to qualifying employees the legislator failed to recognise that all working parents including those newly employed with no previous employment can have work-care responsibilities that need to be reconciled. Being unable to satisfy the employment qualification requirement may also completely prevent the employee from taking childcare leave if the child reaches the age of four before the qualifying employment criteria is satisfied.

The feature which improves the availability of childcare leave is the lack of requirement under Article 186(1) LC that an employee must have been working for the same employer for at least six months and that the continuity of employment must be preserved. This provision well responds to reconciliation needs of working parents and the demands of contemporary labour market where in order to advance in their careers parents may be required to continuously change their employers. The absence of requirement in the Code that the continuity of employment must be preserved in order to qualify for childcare leave significantly improves the leave's accessibility which is crucial for enabling parents to make real work-family choices.

The Polish Court of Appeal[934] ruled that the period of unemployment during which an unemployment benefit is received also counts as qualifying employment for the purpose of the leave. Considering the high unemployment in Poland, the possibility of taking into account the period during which the unemployment benefit was received when assessing the length of the qualifying employment significantly improves the availability of childcare leave to those parents who previously were unemployed. Young parents with caring responsibilities who have not been in employment or have not been receiving an unemployed benefit during the last six months despite their reconciliation needs would not qualify for childcare leave.

Taking into account difficulties with finding a job in Poland; that unemployment benefit is only paid for six months, the employment qualifying period requirement may therefore exclude from childcare leave in particular young, unskilled parents (mothers) for whom it may be very difficult to find employment. However, the

[934] Article 79 Ustawy o Promocji Zatrudnienia, Decision of the Court of Appeal in Bialystok on 18/06/1998, III Aua 296/98 (OSA 1999,z. 5, poz 28).

qualifying period requirement may easily be satisfied by most skilled working parents (who are likely to be in paid employment than unskilled parents) because the cumulative duration of any employment can be taken into account regardless of the duration of the gaps between successive employments.

The Polish right to childcare leave, which preceded the Directive already offered less restrictive childcare leave rights than envisaged in the Directive. Hence, the implementation of Clause 2(3)(b) of the Directive in Poland has not resulted in the enhancement of the national entitlement to childcare. Although Polish legislation clearly exceeds the basic requirements of the Directive in terms of the duration of the qualifying period, the Directive has failed to enhance the existing national law to cover all workers without the necessity of fulfilling the qualification requirement.

A qualifying period requirement of six months also exists in Hungary. In contrast with Poland and Hungary, much wider availability of parental leave exists in Czech Republic and Slovakia[935] where the access to parental leave is not restricted by any qualifying period requirements. The unrestricted access to parental leave in terms of the qualifying period of employment in those Member States, significantly improves the availability of parental leave and simplifies the leave application process as there is no need to provide evidence that the qualifying period of employment has been satisfied. The unrestricted by employment duration access to parental leave in these Member States indicates that it was also possible for the Polish legislator to introduce the right to childcare leave which is associated with parental responsibilities and not parents' employment.

5.3.2 Weak and Inflexible Parental Leave Arrangements do not Help Parents with Reconciliation Choices.

The feature of childcare leave which is crucial for the reconciliation and choice is that parents can take childcare leave in different forms such as full-time, part-time, fragmented or as time credit system. Mothers and fathers who provide care to children make choices in relation to their employment and their family lives and

[935] Cf. CDEG (2004) *Parental Leave in Council of Europe Member States*, 14 Final, Strasbourg 2005.

their choices either facilitated or constrained by the actual context within which choices are being made.[936] Consequently, parents' ability to make genuine reconciliation choices in relation to childcare leave will depend on how legal provisions; other contextual factors and various constraints associated with childcare leave interact with each other in the unique context of each family.

As seen in Chapter 3, the Directive sought to introduce more equality in how work-care responsibilities are shared between working parents by providing that parental leave should be in principle the non-transferable right. The implementation of the Directive in Poland has not resulted in introducing the individual and non-transferable right to childcare leave as the family right to leave was retained.[937] The national implementations of the Directive in Czech Republic, Hungary and Slovakia (**Appendix, Table 13**) also provide working parents with the family entitlement to parental leave.

The Polish legislator merely implemented the minimum requirements of the Directive and thereby failed to adequately address the issues concerning lack of equality in how caring responsibilities are distributed within families. Since, Poland has a long history of inequality in the distribution of work within a family, the lack of individual and non-transferable right to childcare leave for men clearly reflects a weakness of the Directive in ensuring equality in the distribution of caring responsibilities within a family. Hence, the family entitlement to childcare leave fails to promote social change in Polish families and contributes to reinforcing inequalities in how work-care responsibilities are allocated within a family. As childcare leave remains to be mainly taken by mothers in Poland, the lack of non-transferable right to childcare leave may be seen as preventing some mothers from making genuine work-family choices (**Appendix, Table 14**).

As seen in Chapter 4, the non-transferable right to leave may also constrain parents' work-care choices by imposing on them work-care patterns which they do not wish to follow. How work-care responsibilities are allocated within a family

[936] R. Crompton (2006) op. cit., p. 11.
[937] Article 186(1) LC implemented in Poland Clause 2(1) of the Council Directive 96/34/EC on the Framework Agreement on parental leave.

does not merely depend on the legal right to childcare leave but it is influenced by unique individual identities of a mother, father or carer which are developed by workers with caring responsibilities.[938] The family right to childcare leave enables families to make their own choices in relation to how their right to leave is used. It does not penalise parents who wish to follow more traditional work-family patterns by depriving them of fathers' portion of childcare leave. The family right to childcare leave which provides families with flexibility as to who should take leave is ideal for home-centred mothers (fathers) who regardless of the negative impact of childcare leave on their career prospects choose voluntarily to exit the labour market. However, parents' work-care decisions which are made in the context of each family are constrained by husbands' or partners' attitudes to their involvement in the provision of care that can effectively prevent mothers from making genuine reconciliation choices.[939] Hence, husbands' or partners' traditional work-care attitudes accompanied by the family right to childcare leave could contribute to putting pressure on mothers with preferences for employment rather than the family to leave the labour market in order to provide the needed care.

Parents' ability to overcome constraints associated with the family right to childcare leave will depend on their social class, education, qualifications gained and their earning capacity.[940] The family right to childcare leave will particularly constrain work-family choices of less-well educated mothers with low earnings who may be forced to exit the labour market in order to secure fathers' higher income. As parents' work-family decisions are made in the context of each family, the family right to childcare leave could enable well-educated mothers with well-paid jobs to remain in paid employment whilst lower income fathers take childcare leave. As discussed earlier in this Chapter, Poland has a long tradition of being a dual breadwinner state. Polish mothers were therefore actively involved in the labour market and the provision of care because their burden of work did not lessen mothers' family responsibilities. Since women retain the primary responsibility for childcare and housework the family right to childcare leave can

[938] R. Crompton (2006) op. cit., p.13.
[939] S. McRae (2003) op. cit., p.331.
[940] Ibid. pp. 333-335.

prevent from making real work-care choices even well-paid and highly-qualified women.

Despite social and cultural factors playing an important role in how work-care responsibilities are distributed between parents, the orientations held by fathers and mothers towards their work-care involvement change over their life course in response to various constraints which need to be overcome by families.[941] Poles' attitudes towards gender roles are also changing as younger age groups tend to hold more gender balanced work-care attitudes which take into account various constraints and parents' individual work-family preferences.[942] This may indicate that the gender factor is not as prominent as it used to be and therefore some contemporary families could be better equipped to make real reconciliation choices.

As seen in Chapter 4, structural constraints which include the availability of affordable childcare play an important role in shaping parents' decisions as to how caring responsibilities should be allocated within a family and who should take childcare leave.[943] The availability of affordable childcare is of paramount importance in enabling parents to make unconstrained choices as to how the family entitlement to childcare leave should be allocated between working parents. Hence, the effectiveness of leave in enabling working parents (in particular mothers) to make genuine work-family choices is significantly hampered by the lack of formal childcare facilities for children under the age of three in Poland. As indicated earlier in this Chapter, Poland has failed to meet the Barcelona 2002 targets on childcare. Hence, the formal childcare for children under the age of three is very scarce and the vast majority of children are provided with other types of care (by mothers or grandparents). In recent years the situation of Polish mothers has worsen as the percentage of inactive women out of the labour force for family reasons has increased from approximately 62 to 72 percent (period from

[941] S. Walters (2005) op. cit., p. 212.
[942] European Parliament (2011) *The Policy on Gender Equality in Poland*, PE 453.177 p. 13.
[943] S. McRae (2003) op. cit., pp. 317-38.

2006 to 2010).[944] This indicates that limited availability of childcare prevents mothers from making genuine reconciliation choices and forces them either to take childcare leave or exit the labour market altogether. Consequently, despite having preferences as to their involvement in work and care the absence of formal childcare facilities prevents Polish mothers from choosing their preferred work-family arrangements.

The lowest common denominator provision in Clause 2(1) of the Directive on the duration of parental leave has failed to enhance the duration of childcare leave in Poland as Article 186(1) LC already provided for childcare leave of the duration not exceeding three years for each qualifying child. The long duration of childcare leave significantly enhances parents' reconciliation choices as it enables them to provide long-term care to children. Considering the limited availability of childcare in Poland, the right to provide long-term childcare is the only reconciliation option that parents who cannot rely on informal childcare arrangements may have. Although the long childcare leave recognises the importance of long-term care for small children it also facilitates mothers' exist from the labour market for long periods of time, which can discourage their re-entry to the labour market.[945] Exercising the right to childcare leave also involves financial costs and employment security risks that constitute major constraints of the right to childcare leave (discussed more in details later in this Chapter). Long periods of absence from the labour market because of childcare leave also contributes to mothers being perceived by employer as less committed to their employment and therefore given fewer responsibilities, paid lower wages than men and not likely to be promoted.

There is no limit on the maximum duration of leave that could be taken in relation to all children. Parents of twins or triplets are not entitled to the extended duration of childcare leave because the Polish government considers that the purpose of childcare leave is not affected by the number of children that need to be cared for and the key difference constitutes the intensity of the care which needs to be

[944] The percentage of inactive women out of the labour force for family reasons has also increased in Sweden, Slovenia, Bulgaria, Hungary, Estonia, Slovakia and the Czech Republic. Cf. Council of the European Union, *Report (2011)* op. cit., pp. 34 and 52.
[945] M. Daly and K. Scheiwe (2010) op. cit. pp. 177-197.

provided to twins and not in the duration of the care as all children go through the same stages of the development. [946] Although, the Polish legislator has recognised that there in an increased intensity of care in relation to care which needs to be provided to twins, it has failed to recognise that the right to childcare leave does not enable parents to adequately address this increase in the intensity of care that needs to be provided. This derives from the fact that the family entitlement to childcare leave is designed to enable one parent to provide the long-term care to children. The lack of additional childcare leave for parents of twins or triplets will constrain their work-family choices as it does not provide both parents with the equal right to provide long term care to their children.

Childcare leave can only be used in order to personally look after a child and the entitlement does not occur in any other circumstances. The leave entitlement only arises as long as the employment relationship continues and the duration of the leave may not exceed the duration of the employment contract. This particularity disadvantages qualifying for childcare leave working parents on employment probation contracts, employed for the specific periods of time and those employed to perform specific tasks. In relation to those groups of employees their leave entitlement is restricted by the duration of the employment contract, and therefore they will be unable to take childcare leave of the duration exceeding their employment relationship. The remainder of childcare leave is not lost and can be taken later when the employment relationship can be re-established and the employee still qualifies for the leave.

The loss of entitlement to childcare leave because of the loss of the employment relationship will particularly affect poorer families because the loss of entitlement to leave implies the loss of means tested financial support which is provided to qualifying leave takers. According to the ruling of the Polish Supreme Court[947] where an employer allowed an employee to take childcare leave of the duration exceeding the period of the employment relationship with the employer, it is to be assumed that the parties reached an agreement and their employment relationship is now of an unlimited duration. This effectively means that by

[946] Case C-149/10 *Zoi Chatzi v.Ipourgos Ikonomikon*, paras 55 and 58.
[947] The Decision of the Polish Supreme Court of 21/11/1978, I PZP 28/78, OSN 1979, Nr 5, poz 9.

authorising childcare leave exceeding the duration of the employment relationship, the employer automatically provides the employee with a permanent employment contract. Thus, the employee may benefit both from the longer duration of childcare leave and the permanent employment contract with the employer. This ruling of the Supreme Court can be of benefit to working parents employed on fixed-term contracts but it also requires employers to keep their records up to date to avoid providing employees with childcare leave that exceeds the duration of their employment relationship.

The implementation of Clause 2(1) of the Directive in Poland has not resulted in the enhancement of the duration of the national entitlement to childcare leave because the minimum duration of childcare leave set out in the Directive (3 months) is more restrictive than the pre-existing national entitlement. A similar pattern can be observed in the context of Czech Republic, Hungary and Slovakia where the national leave entitlements significantly exceed the duration of parental leave outlined in the Directive (**Appendix, Table 13**). It could be argued that the Directive was merely designed to address the lack of parental leave entitlements in some of the well-established Member States (discussed in Chapter 3) and did not take into account the enlargement and the existing entitlements in new Member States. Consequently, the Directive which requires Member States to ensure the existence of national entitlement to parental leave of the minimum duration of three months is minimalist, weak and out of touch with the national entitlements in Poland and other selected new Member States.

It was seen in Chapter 3 that the Directive aims at facilitating reconciliation for both working parents and it is in this context the duration of the national entitlements to childcare leave must be seen. This indicates that the leave is not merely intended to facilitate parents' exit from the market in order to look after a child and ensure the return to work once the leave entitlement has been exhausted. It is also designed to help both working parents to balance the demands of paid employment and family responsibilities. The long periods of childcare leave which are also available in Czech Republic, Slovakia and Hungary provide working parents with the right to stay at home and look after a child up to the age of three. In all these countries parental leave is primarily taken by mothers as an extension

of maternity leave. Most of Czech and Slovak mothers use on average two or three years of their leave entitlement in order to remain at home caring for their children (**Appendix, Table 14**).

Fegan and Hebson[948] rightly point out that entitlements to parental leave can create both opportunities for women's reintegration into the labour market and obstacles to the re-entry. This is clearly visible in the case of the Hungarian parental leave entitlement where, because of high levels of financial support parents receive whilst on parental leave and the limited availability of formal childcare, parents are discouraged from returning to work. Consequently, parents often use their full entitlements to parental leave.[949]

Similarly to Hungary, the availability of affordable childcare is also very limited in Poland,[950] Czech Republic and Slovakia, which makes it difficult for women to make genuine reconciliation choices.[951] Kotowska[952] rightly observes that the decline in the popularity of childcare leave and the duration of childcare leave actually taken by Polish women are to be attributed to high unemployment, financial difficulties and worries about future career prospects. Consequently, the limited state support for the family in terms of income and provision of childcare together with discriminatory practices (directed at women with family responsibilities) in the workplaces often force mothers back to work when it is most difficult to reconcile work and family responsibilities. Despite the above disadvantages associated with taking childcare leave, 52 per cent of entitled Polish parents still used their leave entitlement in 2007 (**Appendix, Table 14**).

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[948] C. Fegan and G. Hebson (2005), op.cit., pp.91-2.

[949] B. Nagy, (2004) 'Making work pay' debates from a gender perspective – the Hungarian national report, European Commission's Expert Group on Gender, Social Inclusion and Employment report for the Equal Opportunities Unit, DG Employment. The leave arrangements in Hungary, clearly support and reinforce the traditional division of work within a family as the leave does not aim at enabling both working parents to achieve the reconciliation but it merely encourages women (by allowances) to exit the labour market and ensures their absence from the labour market by not proving affordable childcare facilities.

[950] The limited availability of childcare especially for children less than three years old.

[951] For more information on childcare policy in Poland, Hungary and Czech Republic Cf. D. Szalewa and M.P. Polakowski (2008) op. cit., pp.115-131.

[952] I.E. Kotowska, (2004) 'Making work pay' debates from a gender perspective – the Polish national report, European Commission's Expert Group on Gender, Social Inclusion and Employment report for the Equal Opportunities Unit, DG Employment.

The constraints associated with childcare leave and negative impact of taking childcare leave on employment can prevent parents from making genuine work-family choices. Thus, childcare leave often taken in full (by 40 per cent) and primarily by women with low professional qualifications (61 per cent) for whom various costs associated with the taking of leave are lower than for fathers. The main reasons for taking childcare leave in Poland are the lack of family help with childcare and the unavailability of affordable childcare.[953] This indicates that the long duration of childcare leave does not enable parents to make genuine work-family choices as the structural constraints deriving from the limited availability of formal childcare force parents to make adoptive reconciliation choices and use childcare leave in order to compensate for the lack of affordable childcare.

Although, flexible parental leave arrangements are crucial for enabling parents to make real work-family choices, the Directive does not require Member States to provide working parents with flexible leave arrangements (see Chapter 3). Polish entitlement to childcare leave exceeds the minimum requirements of the Directive and provides working parents with the right to additional flexibility in childcare leave arrangements. Parents' work-family choices are significantly enhanced as working parents are provided with the right to three months' leave that can be taken simultaneously by both parents.[954] Outside this period only one parent can exercise his/her right to the leave. The right to the simultaneous leave was introduced in 2001. Under the old regime in Article 189(1)(1) LC parents were not allowed to simultaneously exercise their right to childcare leave.

By providing working parents with the right to childcare leave that can be taken simultaneously, the Polish legislator recognised the importance of the involvement of both parents in childcare responsibilities. As men often are not at ease with providing care to very small children the simultaneous childcare leave could encourage more fathers to share family responsibilities with mothers. However, the duration of simultaneous childcare leave which is restricted to three months'

[953] I. E. Kotowska, E. Słotwińska-Rosłanowska, M. Styrcz, A. Zadrożna (2007) 'Sytuacja kobiet powracających na rynek pracy po przerwie spowodowanej macierzyństwem i opieką nad dzieckiem, Raport z badań', *Wieloaspektowa diagnoza sytuacji kobiet na rynku pracy SPO RZL 1.6 (b)*, Warsaw, April 2007, pp.32-37.
[954] Article 186(3) LC.

leave can be seen as limiting work-family choices of those parents who would like to spend together more time looking after their child (children). Thus, parents who would like to spend more time on providing simultaneous care to their children would need to use their annual leave entitlement.

Apart from providing parents with the right to simultaneous leave not exceeding three months, the legislation does not provide any details as to how this period of the leave is to be administered. It would be beneficial for working parents if the simultaneous leave was more flexible and could be taken in the form of half day work not exceeding the duration outlined in the legislation. As work-family choices are made in the context of each family the simultaneous childcare leave could in particular expand work-family choices of hesitant fathers or where parents have the preference and can afford to spend more time together on unpaid childcare leave.

The duration of the simultaneous leave appears to be inspired by the Directive and refers to a very restrictive period of parental leave that can be taken by both parents. Czech parents can also simultaneously use their entitlement to parental leave but only one parent will be entitled to the allowance. In Contrast with Poland and Czech Republic the right to simultaneous leave does not exist in Hungary or Slovakia. In Hungary, the national legislation not only does not provide for the simultaneous use of parental leave by both parents but also makes parental leave exclusively available to mothers (insured employees) until a child's first birthday (**Appendix, Table 13**).

The legislative entitlement to simultaneous leave disadvantages families of twins, or triplets (multiple births). The Supreme Court[955] restricted the duration of childcare leave to three years in cases of multiple births and did not extend the duration of the simultaneous leave. The right to childcare leave is not each parent's individual right and therefore both parents are not entitled to simultaneously use their full leave entitlement in order to adequately respond to the needed intensity of care for twins or triplets. The deficiency of the entitlement

[955] Polish Supreme Court (Sad Najwyzszy), 28 November 2002 (OSNP 2004,z.6, poz 106).

to simultaneous leave in fostering equality in sharing family responsibilities between working parents is also rooted in that only one parent can be entitled to the childcare allowance at a given time.[956] Hence, childcare leave arrangements fail to adequately cater for the enhanced intensity of care which needs to be provided by parents of twin or triplets.

The Polish implementation of Clause 2(1) of the Directive is minimalist and weak and further reinforced the deficiency of the Directive which did not clearly specify the minimum qualifying child's age limit for the right to childcare leave to occur. The implementation of this provision of the Directive in Poland has not resulted in the enhancement of the national law on the age limit as the original provision has been retained. Article 186(1) LC further restricts the flexibility of childcare leave by forcing parents to use their leave entitlement before child's fourth birthday (disabled children up to eighteenth birthday).[957] The cut off age is much lower than it was envisaged by the directive may leave a significant number of parents without the right to parental leave when their children are still very young and need to be cared for. This constitutes a major deficiency of the right to childcare leave as it merely recognises work-care needs of parents with small children and neglects caring needs of families with children older than 4 years of age. Since parents with older children cannot rely on the legislative right to childcare leave or any other equivalent leave in order to provide care for their children, this indicates a major deficiency of the Polish legislation in enabling parents to make genuine reconciliation choices.

By limiting the availability of childcare leave to children under the age of four the Polish legislator has significantly restricted the availability of childcare leave. The relatively low age threshold accompanied by childcare leave up to three years indicate that childcare leave is designed to be taken as a continuation of maternity leave and when children are still very young. In cases where the leave is not taken as a continuation of maternity leave certain proportion of the leave is irreversibly lost. The low age threshold appears to support the presumption that at

[956] Article 30a (2) legislation of 1 December 1994 o Zasilkach Rodzinnych, Pielegnacyjncyh i Wychowawczych, Dz. U. z 1998 r. Nr 102, poz. 651.
[957] Article 186(2) LC.

the age of four a child will attend a kindergarten and therefore the leave would no longer be needed. However, childcare facilities are very underdeveloped in Poland, and therefore the vast majority of parents need to look after their children well beyond the envisaged age of four.[958] Consequently, the right to childcare leave that can merely be taken in relation to small children fails to recognise parents' real work-care needs and does not assist all parents in making real work-care choices.

The national implementations of the age limit requirement have not resulted in extending the availability of parental leave in Czech Republic, Hungary and Slovakia (**Appendix, Table 13**). In the absence of obligation deriving from the EU, the existing national limits on the child's qualifying age have been reaffirmed. In contrast with Poland, where childcare leave is available to parents with children up to the age of four, the national laws of Czech Republic, Hungary and Slovakia provide for more restrictive leave arrangements as the right to parental leave is limited to parents with children under the age of three. Thus, the Directive has failed to enhance the availability of parental leave in Poland and selected new Member States.

In the past, the Polish childcare leave scheme was often criticised for its inflexibility.[959] In 2002, the issues surrounding the inflexibility of childcare leave arrangements were addressed and the right to request leave in the form of reduced working time was introduced by Article 186(7) LC. In 2003, more flexibility in childcare leave was ensured by providing parents with the option of taking childcare leave in blocks of time and parents were provided with the right to work or study whilst on leave.[960] Before the detailed analysis of the flexible leave arrangements is undertaken, it should be acknowledged that those arrangements

[958] Department for Business Innovation & Skills (2009), *International Review of Leave Policies and Related Research 2009*, Employment Relations Research Series No. 102, September 2009 p.272. The 2005 survey established that only 2 per cent of children under the age of three attended crèches and 41 per cent of children age three to five years attended kindergartens. These figures indicate that the vast majority of parents do not use the institutional childcare services. The high cost of childcare services further prevents parents from using them where available. This in particular affects low income families for whom the estimated cost of childcare ranges from 23 per cent to 80 per cent of their earnings; families with many children and single parent families.
[959] A. Matysiak, (2005) `The sharing of professional and household duties between Polish couples: preferences and actual choices`, Studia Demograficzne 1, pp.122–154.
[960] Articles 186(1)(5) and 186(2) LC.

exceed the requirements of the Directive, and were introduced prior to Poland's accession in 2004. Although the Directive did not require Poland to provide for flexibility in the leave arrangements, it can be argued that the introduction of the flexible leave arrangements in the Labour Code was influenced by the soft law provisions of the Directive.

Article 186(7)(1) LC exceeds the lowest common denominator requirements of the Directive by providing qualifying parents with the right to request leave in the form of reduced working hours. The option of taking childcare leave in the form of the reduced working hours is to be seen as a positive development in ensuring the existence of the flexible leave arrangements capable of helping parents with making real work-family choices. How reconciliation is achieved by working parents will depend on individual preferences and other factors which include legal constrains associated with right to childcare leave.[961] The application for childcare leave in the form of the reduced working time may be considered as not imposing excessive constraints that could discourage parents from applying for leave, as the period of notice is limited to two weeks prior to the date of the proposed change in the working hours.[962]

The deficiency of this option of taking childcare leave that can constrain parents' work-family choices derives from the fact that only one parent at a time can benefit from the reduced working time in order to care for the child. The flexibility of this option of taking childcare leave is significantly hampered by the limit on the extent to which the working time can be reduced for the purpose of taking the leave which can prevent parents from using their leave entitlements in the manner which best suits their reconciliation needs. Article 186(7)(1) LC provides for the possibility of reducing the contractual working time not more than by half and it does not foresee any circumstances where this limit could be exceeded. Consequently, working parents who would like to reduce their working time by more than foreseen in the legislation would have no choice but to take the full-time leave. Considering the lack of affordable childcare facilities in Poland, the possibility of taking the leave in the from of unrestricted reduction in contractual

[961] R. Crompton (2006) op. cit., p. 52.
[962] Article 186(7)(2) LC.

working time would help working parents to find the most suitable working arrangements enabling them (particularly women) to remain in the labour market whilst providing the needed care.

Further deficiency of this provision derives from the fact that an employer is merely required to consider an employee's application to take childcare leave in the form of reduced working time, but is not obliged to grant the requested reduction.[963] Since there is no legislative right to the reduced working time whilst on childcare leave, the employee's request for such reduction could easily be denied by the employer forcing the employee to take the full-time leave, or not taking the leave at all. The lack of unqualified right to part-time childcare leave significantly constrains parents' reconciliation choices as employers can refuse to provide employees with childcare leave when it is needed most by working parents.

Parents' work-family choices are constrained by various factors which influence their attitudes towards their involvement in work and family life.[964] Consequently, various costs associated with the legislative right to childcare leave will influence and shape parents' attitudes towards this leave period. Although the Labour Code provides working parents with the possibility of reducing their working time in order to care for qualifying children, it does not protect their wages whilst on childcare leave and does not provide parents with the right to childcare allowance in order to compensate for the reduced income. The financial costs associated with working reduced working time in lieu of childcare leave may prevent less well-off families from being able to benefit from this leave option. Hence, this leave option does not enable all working parents to make real work-family choices and is limited to those families who can afford it.

Until 2004, working parents who took the leave in the form of reduced working time were entitled to the childcare allowance.[965] The national implementation of the Directive has coincided with the lowering standards for parents who take childcare leave in the form of the reduced working time. In contrast with the Polish

[963] Article 186(7) LC.
[964] S. Walters (2005) op. cit., pp. 193-216.
[965] Previously qualifying parents could obtained allowance up to 60% of the monthly average remuneration (set by the Government).

right to childcare leave, the Czech parental leave arrangements encourage parents to work reduced hours whilst on leave by providing them with the right to childcare allowance which can be used to pay for the childcare (**Appendix, Table 13**). This indicates that the Czech parental leave arrangements better respond to parents' real reconciliation needs than the Polish right to childcare which financially disadvantages parents who whish to benefit from flexible childcare leave.

Parents' work-family choices are further constrained because parents who take part-time childcare leave have no legislative right to return to their previous working arrangements.[966] This indicates that taking leave in the form of reduced working hours may involve not being able to return to the previous working arrangements or even losing the job if the time spent on the leave exceeds twelve months. The employment security risks associated with childcare will therefore play a crucial role in parents' decisions as to how this leave is taken and shared by working parents. Considering the limited availability of part-time work in Poland the option of reducing working hours in lieu of childcare leave and the associated disadvantages may render it not to be perceived by working mothers as an effective reconciliation tool.

Although Article 186(7) LC does not impose any restrictions on the length of childcare leave that can be taken in the form of the reduced working hours, Article 186(8) LC limits the legislative protection of the employment relationship only to those parents who took the leave for less than twelve months (cumulative). The absence of legislative protection of the employment relationship of those who take the leave in the form of the reduced working hours for the cumulative period in excess of a year effectively constrains parents work-family choices and effectively limits the duration of this form of childcare leave to the period of up to twelve months when the legislative protection is available. This indicates that the objective of childcare leave is not enabling parents to reconcile work and family responsibilities but to enable parents to provide long term-care to children by

[966] Until January 2009, there was no special legislative protection against dismissal for parents who took childcare leave in the form of the reduced working time. The leave takers were treated like other part-time employees who could be dismissed from work following the standard dismissal process.

facilitating their exit from the labour market. Hence, regardless of their reconciliation needs the legislative right to childcare leave forces parents to take full-time leave.

The lack of legislative right to work unrestricted reduced hours during the period of childcare leave; the loss of pay whilst on childcare leave; the lack of right to switch back to the previous work arrangements and the restricted legislative protection against the dismissal renders this option less attractive to working parents and significantly hampers the effectiveness of this provision in facilitating reconciliation. This is supported by the recent review[967] which established that despite the option of part-time working being available since 2003, the vast majority of mothers took full-time leave (80 per cent). The legislative protection against dismissal which was introduced in 2009 is unlikely to encourage more parents to take part-time childcare leave because of the financial implications associated with taking leave and the lack of right to return to full-time working arrangements. It must be emphasised that part-time employment is not widely available in Poland; employers are unwilling to offer part-time employment or reduce working time, and it is primarily seen as an option to those who cannot find permanent employment.[968] The identified deficiencies of the flexible leave arrangements clearly favour the interests of employers over the interests of employees with family responsibilities in the labour market.

Article 186(2) LC attempts to introduce additional flexibility into the leave entitlement by providing parents exercising their right to the full-time childcare leave with the right to work or study whilst on childcare leave on condition that this does not prevent them from personally caring for the children. This provision of the Code contradicts itself because it permits the leave takers to work or study without stating any time restrictions on their involvement in the labour market or studies, and at the same time it deprives them of their right to childcare leave if they do not provide personal care to children. Working or studying will often

[967] Department for Business Innovation & Skills (2009), op.cit., p.272.
[968] Only 11 per cent of women and 5 percent of men worked part-time in 2010, Cf. Report (2011) op. cit., p. 24. Only 13% women and 8 % men worked part-time in 2004 Cf. I. Kotowska, J. Jóźwiak, A. Matysiak, A. Baranowska (2008), `Poland: Fertility decline as a response to profound societal and labour market changes?`, *Demographic Research*, Vol. 19, July 2008, Article 22, http://www.demographic-research.org/Volumes/Vol19/22/ accessed on 10/05/09, pp.834-837.

involve not providing personal care to children. There is no definition of personal care included in Article 186(2) LC which could help parents to determine the extent of the permissible involvement in work or studies.

Article 186(2)(2) LC implies that the decision as to when an employee has stopped providing personal care is made by an employer on the basis of some intelligence. This clearly indicates that the legislator has provided employers with the task of scrutinizing how childcare leave is used by employees. Under the circumstances it would be very risky for parents to undertake employment with another employer, and working for the same employer could trigger premature return to work. Additionally, this option of working would only be considered by those parents who do not qualify for the childcare allowance as undertaking any employment would deprive leave takers of the right to the childcare allowance. On the basis of the flexible leave arrangements it can be concluded that the right to childcare leave has been designed to be primarily taken on a full-time basis, as any attempt to work whilst on childcare leave results in financial penalties or may pose risks to employment security. Consequently, the option of working whilst on childcare leave may assist with making work-family choices some better well-off professionals who do not qualify for the childcare allowance and do not want to be completely detached from the labour market during the lengthy leave period.

As seen in Chapter 4, the ability to take parental leave when it is most required by working parents in a staggered form plays an important role in enabling parents to make genuine reconciliation choices. Although part-time employment whilst on parental leave is available in Czech Republic, Hungary and Slovakia none of these Member States provides parents with the right to parental leave in a staggered form (**Appendix, Table 13**). In those countries working parents must take parental leave as a single block of time, or if parental leave is taken on a part-time basis its continuity must be preserved to safeguard the remaining part of the entitlement. Despite providing for the possibility of taking parental leave on a part-time basis very few new Member States enable parents to spread out their entitlement to the leave so that it could be taken when it is most needed.[969] As

[969] Out of 12 new Member States only in Latvia, Lithuania, Malta and Poland provide for this option.

seen in Chapter 3, the Directive does not require Member States to provide parents with the right to spread out the entitlement to parental leave and therefore new Member States that provide for this option have exceeded its requirements. The lack of this requirement in the Directive has significantly limited the flexibility of parental leave arrangements as few new Member States provide parents with the possibility of taking parental leave in blocks of time.

Poland is one of the few new Member States where working parents can spread out their entitlement to childcare leave. Article 186 LC provides the qualifying parents with the option of taking childcare leave in no more than four blocks of time. By providing working parents with the possibility of spreading out their entitlement to childcare leave, the Polish legislator both exceeded the requirements of the Directive and provided working parents with an additional flexibility in the leave arrangements, which is crucial for enabling parents to use their leave entitlement in a manner that best suits their individual work-family needs. As the entire childcare leave entitlement does not need to be used as one block this contributes to reducing the negative impact on employment that the taking of a lengthy childcare leave would otherwise have. Additionally, the shorter periods spent away on childcare leave have a positive impact on parents' ability to return to work and adapt to the demands of work at the end of leave. This leave option therefore plays an important role in enabling parents to better reconcile the demands of work and family.

Article 186 LC merely specifies that childcare leave can be taken in no more than four blocks of time and it does not provide any clarification as to the duration of those blocks of time. The lack of clear guidance as to the duration of the blocks of time indicates that the legislator did not want to impose any additional restrictions on childcare leave arrangements, and that the particularities of childcare leave would need to be individually agreed between employees and employers. The lack of legislative clarity as to usage of childcare leave in the blocks of time may be for the benefit of the leave taker if the employer is willing to provide the employee with the flexible leave arrangements. It may also be used to the detriment of working parents if the employer is unwilling to provide the employee with the desired flexibility in the leave arrangements.

Since Article 186 LC merely states that childcare leave can be taken in up to four blocks of time, and it does not provide working parents with the legislative right to childcare leave, which could be taken in up to four blocks of time, the employer is not obliged by the Labour Code to allow the employee to take childcare leave in more than one block of time. As long as working parents are allowed to take childcare leave not shorter than three months' the requirements of the Directive are complied with, and the rest of childcare leave could be irreversibly lost. In this scenario, the employee who is unable to use his/her full national entitlement to childcare leave will have no recourse in the Directive. It must be emphasised that the Labour Code does not provide working parents with the right to the flexible leave arrangements, it merely provides for the possibility of requesting them. This provision of the Code emphasises that the Polish legislator put the interests of employers before the interests of working parents striving to achieve the reconciliation. Consequently, the lack of legislative clarity in relation to the usage of childcare leave in the blocks of time and the prominent role of the employer in determining their duration significantly constraints parents' reconciliation choices as there is no absolute right to childcare leave in four blocks of time.

The cap on the number of blocks in which childcare leave is to be taken also removes the desired flexibility from the leave arrangements, which is required for childcare leave to be effective in responding to families' individual work-family needs. The option of taking childcare leave in blocks of time is rarely used by Polish parents (only 7 per cent of women) and childcare leave is predominately taken as a single block of time (93 per cent of women). There is evidence[970] that the low take up rates of part-time childcare leave and the lack of popularity of the block of time option derive from the characteristic of the Polish labour market. The inflexible work arrangements and the limited availability of part-time work were seen by 45 per cent of mothers of children below three years of age as the main reasons preventing them from reconciling work and family responsibilities. Unless the legislation provides working parents with the right to the flexible leave arrangements; employers recognise the benefits deriving from the flexible working

[970] Department for Business Innovation & Skills (2009), op. cit., p.272.

patterns; the availability of part-time work improves; working parents with childcare responsibilities (in particular mothers) will continue being forced out of the labour market and the legislative right to request the above flexible leave arrangements will remain of a symbolic value.

As discussed in Chapters 3 and 4, the effectiveness of parental leave in enabling parents to make real reconciliation choices is conditioned by the extent to which national regulations ensure the flexible access to parental leave. The excessively long notice requirements under the national regulations and the right of an employer to postpone granting of childcare leave for a long period of time can significantly reduce parents' access to childcare leave. Polish legislation regulating access to childcare leave requires parents willing to use their entitlement to childcare leave to provide an employer with the written application for childcare leave which needs to be submitted not later than two weeks' prior to the commencement of leave.[971] As seen in Chapter 4, notice requirements undoubtedly remove some degree of flexibility from the application of childcare leave and may result in childcare leave not being available when it is most needed by working parents. Thus, procedural rules in relation to the access to childcare leave can further restrict parents' work-family choices. However, reasonable notices may be unavoidable in order to help the employer to put into place the necessary arrangements providing for the employee's long term absence from work because of childcare leave. Considering the duration of childcare leave entitlement in Poland (3 years) the two weeks' notice requirement can be seen as reasonably ensuring the desired flexibility in the application process.

What raises concerns is the amount of additional information which needs to be provided by the applicant when the request for childcare leave is made. The complexity of the application process and the amount of information, which must be provided with the leave application derive from the fact that the right to leave is the family right, and therefore the applicant needs to show evidence that the family entitlement is still available to be used by the applicant. Thus, the application for

[971] Paragraph 1 of the Ministerial Order of 16 December 2003 on the detailed conditions for granting childcare leave of Rozporzadzenia Ministry Gospodarki, Pracy i Polityki Spolecznej of 16 December 2003 specifying the detailed conditions of granting parental leave, Dz.U nr 230, poz.2291.

childcare leave always needs to be accompanied by the written declaration of the other parent, evidenced by the records of the employer concerned that he/she is not intending to take the leave during the requested period of time or the requested period of the simultaneous leave complies with the requirements of Labour Code. Any periods of simultaneous parental leave must be clearly stated in the declaration.[972] The delays in granting of childcare leave may occur when the incomplete information is provided in the application or the declaration of the other parent is not evidenced by the records of the employer. Since parents' decisions to take childcare leave derive from their individual caring needs, which need to be provided for at the time when they occur, and not at any other time, the above identified complexities of the leave application process can effectively prevent parents from being able to access childcare leave when it is most needed by the family.

Further flexibility in the leave application process is ensured by not imposing any legislative restrictions on when at the earliest the application for childcare leave can be submitted. This ensures a significant level of flexibility in the leave application process as it enables women to apply for childcare leave whilst still on maternity leave so that the continuity of the childcare is preserved.[973] It must be noted that in Poland childcare leave is primarily taken by women as the continuation of maternity leave and the existing leave arrangements have been designed to support it. In cases where the application for childcare leave was not made two weeks before the intended date of the leave an employer can delay granting of the leave by up to two weeks. The duration of the delay in granting of childcare leave is not very extensive and enables working parents to put into place the alternative care arrangements or use their annual leave until childcare leave commences.

As long as the employee provides the required documentation and complies with the notice requirement, the employer is obliged to provide the employee with

[972] Paras 1 and 2 of Rozporzadzenia Ministry Gospodarki, Pracy i Polityki Spolecznej of 16 December 2003 specifying the detailed conditions of granting parental leave, Dz.U nr 230, poz.2291.
[973] The decision of the Polish Supreme Court of 24/02/1998, I PKN 542/97, OSNAPiUS 1999, Nr 3, poz 89.

childcare leave of the duration specified in the application. The crucial feature of childcare leave entitlement which can effectively assist working parents in making real work-care choices derives from that there are no excessively long delays in granting of childcare leave and there in no provision in the Labour Code enabling an employer to postpone granting of childcare leave. Any attempt by the employer (in the absence of procedural failings) to deny or delay granting of childcare leave will be treated as a breach of the employee's right in Article 281(5) LC, the employer may be subjected to a fine. This ensures that the requests for childcare leave are dealt with promptly and there are no unjustified delays in the application process. The lack of possibility of postponing childcare leave is of paramount importance for enabling parents to make genuine reconciliation choices as it ensures that childcare leave can be taken when it is most needed by the applicant and not when it suits the employer.

Work-family choices which are made by working parents are made in the individual context of each family and are conditioned by various factors which influence parents' attitudes towards their work-family involvement.[974] Thus, the change in the family circumstances will influence parents' attitudes towards taking childcare leave. The childcare leave arrangements effectively respond to families' ever changing work-care needs because an additional flexibility in the application process is ensured by the option enabling the applicant to delay or cancel the requested leave on condition that a written notice is given to the employer seven days prior the start of leave. This feature enables working parents to quickly respond to the change in their circumstances and use childcare leave entitlement when it is actually needed.

5.3.3 Unpaid Childcare Leave does not Help Parents in Terms of their Choice.

As discussed in Chapter 3, the main deficiency of the Directive is that Clause 2(1) does not impose any obligation on Member States to introduce national laws providing for the right to remuneration whilst on parental leave. In Chapter 4, the

[974] S. Walters (2005) op. cit., pp.193-216.

importance of the availability of adequate financial support to those exercising their right to parental leave was identified to constitute the decisive factor influencing parents' decisions to use their entitlement to parental leave. The existence of financial support to those exercising their right to parental leave was also recognised as being of paramount importance in enabling parents to make genuine reconciliation choices. This section considers the extent to which the implementation of the Directive influenced the national laws providing for the financial support to those on childcare leave in Poland.

The failure of the Directive to provide for the right to paid parental leave has been further reinforced in Poland as the Labour Code does not provide leave takers with the right to remuneration. Hence, the implementation of the Directive in Poland has not resulted in the enhancement of the national entitlement to childcare leave as the existing regime, which did not provide for the right to the remuneration whilst on childcare leave was retained. This indicates that the Polish leave arrangements lack the economic power to enable parents to make real work-family choices as not all parents will be able to afford to take unpaid childcare leave. Parents' work-family choices are not made in isolation from the individual family context but reflect the individual context of each family and financial constraints associated with legislative rights influence how work-family decisions are made within a family. Since various groups of women and men have different preferences and attitudes to their work-care involvement the loss of income associated with childcare leave will affect families in different ways. As already indicated in this Chapter, in Poland childcare leave is mainly taken by mothers and therefore the financial constraints associated with childcare leave may particularly prevent women from making real work-care choices.

The rationale for not providing parents on leave with the entitlement to remuneration was provided by the Polish Supreme Court.[975] It ruled that during the period of childcare leave an employment contract is suspended and the employee does not provide any work for the employer therefore the entitlement to remuneration does not arise. Although, employees on childcare leave retain their

[975] The Decision of the Polish Supreme Court of 15/07/1987, I PR 30/87, OSPiKA 1988, Nr.7-8, poz.189.

right to receive[976] certain benefits associated with employment they do not have the right to remuneration and need to rely on the means tested childcare allowance. This ruling recognises that mothers are entitled to be financially rewarded only for their direct contribution to labour when they provide work for their employers. However, it fails to recognise the indirect contribution that mothers make to the labour market by giving birth and caring for children who in the future will be actively involved in the labour market and will therefore provide their employers with economic benefits. Consequently, the failure of the national legislator to provide parents with the right to paid childcare leave indicates its failure to fully recognise both the direct and indirect contribution that in particular mothers make to the labour market. The right to unpaid childcare leave reaffirms the failure of Labour Code to recognise the social importance of childcare and that work absences because of childcare responsibilities bring long-term benefits to employers and society at large and therefore the financial cost of bringing up children should be born by society and not merely by families and employers.[977]

Since mainly women take childcare leave in Poland, the right to unpaid childcare leave in particular affects mothers who are forced to bear all financial costs associated with childcare leave. This as feminist critiques often emphasise[978] indicates the failure of national legislators to recognise the importance of women's contribution to society and labour market though their unpaid work and childcare. Article 186 LC merely provides working parents with the lengthy right to unpaid childcare leave (3 years duration) and does not guarantee any financial support to those who exercise their right to childcare leave, it therefore contributes to reinforcing gender inequalities in the labour market by undervaluing the social importance of childcare leave and mothers' long-term contribution to society and labour market. The lack of entitlement to remuneration or other unqualified financial assistance replacing the lost wages whilst on childcare leave constitutes

[976] Employees on childcare leave are entitled to purchase the shares of the company at the reduced price as other employees see the Decision of the Polish Supreme Court of 06/02/1997, III ZP 14/96, OSNAPiUS 1997, Nr 18, poz.334. Retained the right to the incapacity pension, any accidents whilst on the leave would be treated as in the course of employment see the Decision of the Polish Supreme Court of 15/01/1987, II URN 290/86, PiZS 1987, Nr. 7, s. 17).
[977] S. Fredman (2004) op. cit., pp. 299-319.
[978] R. Crompton (2006) op. cit., p. 125.

a major deficiency of the Polish leave arrangements in assisting mothers in reconciliation.

Although there is no right to remuneration during the period of childcare leave the continuity of employment is preserved. Therefore an employee on childcare leave retains his/her right to bonuses not requiring the factual work for the company.[979] Financial constraints associated with childcare leave will also differently affect work-family choices of different groups of working parents.[980] To well-educated parents with well-paid jobs the entitlement to work-related bonuses whilst on childcare leave may be of paramount importance for their work-family choices if the bonus constitutes a significant portion of their wages. It is crucial for parents exercising their right to unpaid childcare leave (whose finances are already constrained) that they receive their bonuses at the time when they are paid to other employees and not on their return back to work at the end of childcare leave. The decision of the Supreme Court[981] slightly improved the financial situation of leave takers who are entitled to the bonus rewarding the length of service with the company because it needs to be paid to the parents on childcare leave when the entitlement to the bonus occurs and it is not conditioned by the return from childcare leave. By providing parents whilst on childcare leave with the right to the bonus which needs to be paid as soon as the entitlement occurs the parents are not losing out financially when their return to work is not possible or the company no longer exists. This decision of the Supreme Court is of vital importance to parents on childcare leave as it reaffirms their right to certain type of bonuses which have to be paid to parents who are still on childcare leave. It therefore prevents employers from further financially disadvantaging parents on childcare leave by depriving them of their bonuses when they are needed most by parents.

Work-family choices are made in the unique context of each family and therefore financial constraints associated with childcare leave will differently affect work-

[979] E.g. the bonus paid for 20 years of employment with the same company.
[980] R. Crompton (2006) op. cit., pp. 125,184-185.
[981] The Polish Supreme Court (Uchwala Sadu Najwyzszego – Izaba Pracy I Ubezpieczen Spolecznych) 1992/08/19, I PZP 49/92, OSNC 1993, Nr 3, poz.34, str.56. See also the decision of the Polish Supreme Court of 03/06/1992, I PZP 33/92 OSN 1993, Nr 1-2, poz 10.

family choices of various groupings of parents.[982] To some well-educated, in well-paid jobs parents with preference for family life, the right to unpaid childcare leave which can be taken in up to four blocks of time could offer the required flexibility whilst not imposing excessive financial constraints on families. Women in professional and highly qualified occupations are more able to deal with structural constraints as the limited availability of formal childcare or its high cost. They may not be affected by the legislative right to unpaid childcare leave because they are more likely to be able to benefit from their employers' voluntarily maternity or parental leave paid packages than unskilled workers. Well-educated professional women are also more likely to have richer partners and to be able to afford childcare and domestic help.[983] The right to unpaid childcare leave could therefore enhance work-family choices of those families.

Although parents in professional and highly qualified occupations can better deal with the financial constraints associated with unpaid childcare leave than unskilled parents in lower paid jobs, the family decision as to how care responsibilities are allocated within a family will also be influenced by parents' work-family preferences and attitudes. Consequently, for work-centred, well-paid professional mothers both direct financial costs of taking leave and the negative impact of leave on their employment may prevent them from making real work care-choices. Despite being less traditional in their approach towards division of work and family responsibilities, the highest financial costs (the higher the earnings the higher the cost of childcare leave) which need to paid by mothers (parents) in professional and highly qualified occupations who take childcare leave prevent them from making genuine reconciliation choices.[984] Thus, the research which assessed parents' attitudes towards childcare leave identified the loss of remuneration whilst on childcare leave as the main reason why mothers do not take the leave.[985]

Parents' work-family choices are further constrained by the fact that there is no universal financial support available to all parents exercising their right to childcare

[982] R. Crompton (2006) op. cit., pp. 125,184-185.
[983] S. Walters (2005) op. cit., p. 198.
[984] R. Crompton (2006) op. cit., p. 30.
[985] I. Kotowska and A. Baranowska (2006) in *Praca a Obowiazki Rodzinne w 2005*, Glowny Urzad Statystyczny (GUS), Warsaw 2006. The research established that 29.3% of women did not take the leave because of financial reasons.

leave. Poland has a long tradition of providing mothers with an entitlement to unpaid childcare leave which backdates to 1968.[986] In contrast with Poland, the right to paid childcare leave already existed in Hungary and Czechoslovakia in 1960s.[987] In Poland, until 1992 all parents were provided with the universal family allowance which was fully funded by the state. The decline in the financial support for families can be backdated to 1992 when the universal family allowance was replaced with the means-tested allowance.[988] These restrictions on the availability of the family allowance have begun the era of decline in the state's responsibility for the well-being of Polish families which continues until today. The childcare allowances for women (1990s) were also means-tested and less generous than the universally available allowances available to Hungarian, Czech or Slovak mothers.[989] Until recently, family allowances were regulated by the legislation of 1 December 1994 on benefits for families, carers and those bringing up children.[990]

The legislation of 28 November 2003[991] which came into force on 1 May 2004 abolished the traditional carers' allowances available for those bringing up children and introduced the entitlement to one single family allowance. Only parents who qualify for the base family allowance can now be entitled to the additional childcare leave allowance. The old allowance was also means-tested and paid in the form of family benefits consisting of a sum of money (subject to the number of children) which was paid by the state each month to families. Under the old regime set out in Article 2[992] entitlement to the family allowance arose when the

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[986] Childcare leave allowances were not provided because women were expected to return to work as soon as possible, affordable childcare was provided instead.

[987] 40 per cent of the average wage in Czechoslovakia (1970) and 32 per cent of the overage wage in Hungary (1989) For more details on pay issues in Hungary, Czech Republic and Slovakia Cf. Kocourkova (2002) op. cit., pp.306-311.

[988] E. Czerwiec (2007) in Krakowska Szkola Wyzsza im Andrzeja Frycza Modrzewskiego, `Prawne Aspekty Zatrudnienia Osob Wychowujacych Dzieci: Raport`, Krakow: Oficyna Wydawnicza AFM, pp.75-78.

[989] Cf. E. Fodor, Ch. Galss, J. Kawachi and L. Popescu, "Family policies and gender in Hungary, Poland and Romania, *Communist and Post-Communist Studies*, 35 (2002), pp. 475-490, Kocourkova (2002) op. cit., pp.306-311. and E. Fodor (2002) `Gender and the experience of poverty in Eastern Europe and Russia after 1989` *Communist and Post-Communist Studies,*35 (2002):369-382.

[990] Ustawa z dnia 1 grudnia 1994 r. O Zasilakach Rodzinnych, Pielegnacyjnych i Wychowawczych (Dz. U. z 1995 r. nr.4, poz.17; Dz. U. z 1998 r. Nr.102, poz 651 ze zm).

[991] Ustawa z dnia 28 listopada 2003 r. O Swiadczeniach Rodzinnych (Dz. U. Nr. 228, poz.2255 ze zm, Dz.U z 2006 r. nr.139, poz 992 tekst jednolity).

[992] Ustawa z dnia 1 grudnia 1994 r. O Zasilakach Rodzinnych, Pielegnacyjnych i Wychowawczych (Dz. U. z 1995 r. nr.4, poz.17; Dz. U. z 1998 r. Nr.102, poz 651 ze zm) in force until 30th April 2004.

average monthly income per person within the family in the previous year was not higher than 50 per cent of the official overage wage set out by government agency responsible for pensions. The qualifying threshold was rather high which meant that most families were able to qualify for the allowance and therefore it was easier for families to get by without mother's remuneration. The low qualifying threshold for the additional childcare leave allowance restricted the availability of the childcare support to the poorest families where average income per person did not exceed 25 per cent of the national average wage.[993]

Under the new regime in Articles 5 of the 2003 legislation[994] entitlement to family allowance arises when a monthly income per member of a family does not exceed 504 PLN (126 Euro).[995] The deficiency of the Polish means-tested entitlement to the family allowance is that where an income threshold is exceeded (even by 1 PLN) all rights to the financial support are lost. The introduction of the new allowance cannot be seen as a positive development for families because it is more restrictive than the previous allowance. Buczek[996] and Kotowska[997] point out that the introduction of the new criteria for assessing the entitlement to the family allowance has significantly limited the number of qualifying families, and deprived some families of the allowance who had the entitlement under the previous regime. The drop in the number of the recipients of family allowances in 2004 and 2005 confirms more restricted access to the allowance.[998]

The decline in the financial support was justified by the Polish government[999] on the basis that the state could no longer afford to provide such "extensive" support.

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[993] Article 15b Ustawa z dnia 1 grudnia 1994 r. O Zasilakach Rodzinnych, Pielegnacyjnych i Wychowawczych (Dz. U. z 1995 r. nr.4, poz.17; Dz. U. z 1998 r. Nr.102, poz 651 ze zm) in force until 30th April 2004 and Paragraph 6 of Ministerial Order of 28 May 1996, Rozporzadzenie Rady Ministrow z dnia. 28 Maja 1996r. w sprawie urlopow i zasilkow wychowawczych, Dz.U Nr 60, poz 277.

[994] Ustawa o Swiadczeniach Rodzinnych Ustawa z dnia 28 listopada 2003 r. (Dz. U. Nr. 228, poz.2255 ze zm).

[995] Note that the threshold for families with disabled children is 585 PLN (146 Euro).

[996] A. Buczek (2007) in Krakowska Szkola Wyzsza im Andrzeja Frycza Modrzewskiego `Prawne Aspekty Zatrudnienia Osob Wychowujacych Dzieci: Raport`, , Oficyna Wydawnicza AFM, Krakow, pp. 97-107.

[997] I. Kotowska, J. Jóźwiak, A. Matysiak, A. Baranowska (2008), op. cit., pp. 832-833.

[998] The Data provided by the Ministry of Labour and Social Policy proves the drop in the number of recipients of the allowance in 2004 by 7.4% as compared with 2003 (it amounted to 5.510 million in 2004). A further decline took place in 2005 (to 5.192 million).

[999] Left Wing Democrats (Stronictwo Lewicy Demokratycznej (SLD)).

The justification given by the government appears to be groundless as the family allowance in Poland was one of the lowest in the EU.[1000] This indicates that enabling lower-income working parents to effectively reconcile the demands of work and family responsibilities was and still remains low priory for the Polish government. The lack of adequate financial support even for the low-income families which require two sources of income to make both ends meets constitutes a major deficiency of the right to childcare leave and therefore limits the availability of childcare leave merely to parents who can afford it.

Since 2003, there have been a number of amendments to the new legislation regulating family allowances. Previously, the amount of the basic family allowance in the 2003 legislation was assessed on the basis of the number of children in the family.[1001] The current legal framework (amended in 2006) assesses the amount of the allowance on the basis of the age of the child with the highest allowance being available to the oldest children.[1002] Although the base allowance is no longer allocated to the number of children in the household, the new increased allowance which is supported by the additional allowance for families with three or more children[1003] can be seen as improving the financial situation of the poorest families.

In addition to the above basic entitlements to family allowance the qualifying parents on childcare leave are entitled to the childcare leave allowance of 400 PLN (100 Euro) which is paid for of up to 24 months.[1004] The allowance is very low as it amounts to approximately 17 per cent of the average wage. The new allowance is higher than its predecessor but because of the restricted availability

[1000] Poland (12,2 Euro), Germany (154 Euro) and Czech Republic (67 euro)
[1001] Article 47 Dz. U. Nr. 228, poz.2255 ze zm, Dz.U z 2006 r. nr.139, poz 992 tekst jednolity
43 PLN (11 Euro) for the first and second child, 53 PLN (13 Euro) for the third child and 66 PLN (16 Euro) for the fourth and each subsequent child.
[1002] In 2009/2010, child up to the age of 5 - 68 PLN (17 Euro), age 6-18 - 91 PLN (23 Euro), for a child aged 19–24 - 98 PLN (25 Euro).
[1003] 50 PLN (12 Euro) additional allowance for the third and other subsequent children Article 12a Dz. U. Nr. 228, poz.2255 ze zm, Dz.U z 2006 r. nr.139, poz 992 tekst jednolity
[1004] Article 10 Dz. U. Nr. 228, poz.2255 ze zm, Dz.U z 2006 r. nr.139, poz 992 tekst jednolity. Note: the allowance is available up to 36 months in cases of multiple births and up to 72 months for disabled children.

of the family allowance it will only help the poorest parents on childcare leave.[1005] The reform of the family allowances has effectively resulted in restricting the availability of childcare leave allowance to the poorest families, and excluded some families who could qualify for financial support if the old regime was still in force. The allowance constrains parents' reconciliation choices because it is merely available to the poorest families and single-parent families. There is no support available to other families to compensate for their loss of income whilst on childcare leave. After the 2003 reform even more families are left with no financial support from the state and women bringing up children have to rely on their husbands/partners for their upkeep.

Mothers who take childcare leave are further financially disadvantaged by the reduced contributions to the social fund which are made on their behalf by the state whilst they are on leave.[1006] Consequently, taking childcare leave results in reduced contributions to the pension fund and reduced entitlement to the future pension.[1007] The long duration of childcare leave in Poland (up to 3 years) also implies that in families with many children mothers could spend many years out of the labour market providing the needed care. The lower social fund contributions made on their behalf by the state, which financially penalise mothers for their involvement in the provision of care, clearly reflect the lack of legislative recognition of the social importance of childcare and women's unpaid work. This undoubtedly will constitute an important consideration for mothers (fathers) when deciding as to how work-care responsibilities should be allocated within a family and whether or, not the cost of taking childcare leave outweighs its benefits for parents and families. The excessively high financial cost of exercising the right to childcare leave (both direct and indirect) may particularly dissuade from taking leave the high-income work-centred mothers.

[1005] Prior to May 2004, childcare leave allowance was as follows 308 PLN (77 Euro) for a child, 491 PLN (123 Euro) for each child if three or more and single parent families see Article 15c of Ministerial Order, Ustawa z dnia 1 grudnia 1994 r. O Zasilakach Rodzinnych, Pielegnacyjnych i Wychowawczych (Dz. U. z 1995 r. nr.4, poz.17; Dz. U. z 1998 r. Nr.102, poz 651 ze zm) in force until 30th April 2004

[1006] 16 per cent of average pay

[1007] There were plans to increase the contributions of the leave takers on their return to work. This would impose further financial burden primarily on mothers.

Parents' work-family preferences are constrained by various factors which include the lack of pay whilst on childcare leave and future financial disadvantages associated with the taking of childcare leave. Hence, families who cannot afford to make genuine work-family choices will be forced to make adaptive reconciliation choices. Since women often occupy less well-paid positions than men this severely constrains mothers' work-family choices as it is often more economically rational for the family if the lower-waged mother takes leave and the higher-income fathers continues working.[1008] The existing gender pay gap in Poland, social and cultural perceptions about parents' roles in the family and the lack of formal childcare for small children also influence families' decisions as to how work-family responsibilities are allocated between parents, and often prevent mothers from making genuine work-family choices. However, it must also be acknowledged for some home-centred women who see themselves mainly as carers the financial disadvantages associated with the taking of childcare leave would have no impact on their work-family choices.

The current leave arrangements are not perceived by mothers as enabling them to adequately respond to their reconciliation needs because of the lack of entitlement to remuneration whilst on childcare leave[1009] Additionally parents cannot afford to take childcare leave because of the low benefits associated with it and one salary is often not enough to support a family in Poland. This indicates that the currant financial arrangements are failing to provide parents with adequate level of financial assistance whilst on childcare leave that could enable them to make genuine work-family choices. This is supported by the statistical data which indicates that the number of parents taking childcare leave in Poland declined from 336.000 in 1993 to 139.000 in 2000. Although, the fall in the take up rates was influenced by the rapid decline in fertility (547.700 births in 1990 and 378.300 in 2000) the national policies restricting the eligibility (70 per cent of women qualified for parental allowance) and benefits for parents on childcare leave also

[1008] R. Guerrina (2002) op. cit., pp. 49-68.
[1009] I. Kotowska and A. Baranowska (2006) in *Praca a Obowiazki Rodzinne w 2005*, Glowny Urzad Statystyczny (GUS), Warsaw 2006. The research established that 29.3 per cent of women did not take leave because of financial reasons.

contributed to the decline in the take up rates.[1010] The current leave take up rates clearly indicate that parents do not consider the leave to be an effective means of the reconciliation (**Appendix, Table 14**).

An additional deficiency of the current legal framework on childcare allowance derives from the fact that it lacks the necessary flexibility. As seen earlier in this Chapter, the Labour Code provides for some flexibility in the leave arrangements but the 2003 legislation on family allowances does not allow parents to work and receive childcare allowance whist on childcare leave. Any attempt by parents to work whilst on childcare leave results in losing the allowance.[1011] This indicates a regress in the rights of working parents exercising their right to childcare leave because under the previous regime (1996) on childcare leave and allowances,[1012] parents who returned to work would have retained their right to childcare leave allowance if their income had not exceeded 60 per cent of their average monthly income from the previous year. The current legal framework on family allowances undermines the effectiveness of flexible childcare leave arrangements outlined in the Labour Code, because any attempt to work whilst on childcare leave results in losing the entitlement to allowance. This shows that the current legal framework on childcare leave allowances is not compatible with the reconciliation objective of the Directive as it requires parents to stay out of the labour market in order to retain their entitlement to the allowance.

At present there are no legislative proposals to extend the availability of childcare leave allowance to all qualifying parents, or to ensure that flexible leave arrangements are supported by the allowance. It is expected that in the absence of legally binding requirement from the EU to provide all qualifying parents with the right to paid flexible parental leave, the Polish legislator shall further restrict the eligibility criteria and the amount of financial support to those on childcare leave. Considering the current economic downturn and the budgetary cuts, which are at

[1010] 30 per cent of mothers and 14 per cent of fathers did not take leave because of financial reasons. See Department for Business Innovation & Skills (2009), op. cit., pp.271-272.
[1011] Article 10 Dz. U. Nr. 228, poz.2255 ze zm, Dz.U z 2006 r. nr.139, poz 992 tekst jednolity
[1012] Paragraph 7 of Ministerial Order of 28 May 1996, Rozporzadzenie Rady Ministrow z dnia. 28 Maja 1996r. w sprawie urlopow i zasilkow wychowawczych, Dz.U Nr 60, poz 277 in force until 1st May 2004.

present considered and implemented by the Polish government, it is very unlikely that the financial situation of the leave takers is going to improve in the near future.

In contrast with Poland, where limited financial support is available to parents on childcare leave and flexible leave arrangements are not supported by allowances, the Hungarian and Czech leave arrangements provide for much higher leave allowances and enable parents to work and receive parental leave allowances (**Appendix, Table 13**). A high level of financial support which is provided to leave takers enables parents to provide long-term care to their children but long absences from the labour market due to parental leave may also have a negative impact on parents' involvement in the labour market (particularly in Hungary). The paramount importance of the availability of well-paid parental leave for reconciliation was recognised in the 2008 reform of parental leave allowances in Czech Republic. It enhanced parents' work-family choices by enabling them chose the mode of parental leave that best responds to the individual need of each family. Hence, parents were provided with the choice between a shorter parental leave supported by higher allowance and the longer leave with lower financial support (**Appendix, Table 13**).

The change in the approach towards regulating parental leave in the Czech legislation indicates a departure from the focus on the long duration of parental leave in favour of the better paid shorter leave, which could reduce the negative impact associated with long absences from the labour market and make parental leave more attractive to fathers. The leave take up rates in Hungary and Czech Republic are higher than in Poland, which may indicate that the high levels of financial support provided to parents on parental leave encourages more parents to exercise their right to parental leave (**Appendix, Table 14**).

In contrast with the Polish leave arrangements which do not allow parents to work and receive childcare leave allowance, the leave arrangements in Czech Republic and Hungary are more flexible and allow parents to work whilst retaining their right to parental leave allowances (**Appendix, Table 13**). The possibility of working without losing the entitlement to parental leave allowance is of vital importance in enabling parents to make real reconciliation choices, because it enables parents

to return to work and use their leave allowance to pay for the childcare. Furthermore, the possibility of using the allowance as a payment for the day childcare can encourage mothers' early return into the labour market and alleviate the negative impact of taking parental leave on her employment prospects. Thus, providing Polish parents with the right to work and receive childcare allowance could financially help families with funding childcare and would facilitate mothers' early return to work. The effectiveness of this option is conditioned by the availability and affordability of childcare. The lack of affordable childcare services was identified by Polish parents as one of the factors preventing them from reconciling work and family responsibilities.[1013]

5.3.4 Minimalist Childcare Leave Arrangements Pose Employment Security Risks & Constrain Parents' Reconciliation Choices.

As discussed in Chapter 3, Clause 2(4) of the Directive required Member States to provide workers with the legislative protection against dismissal for reasons associated with requesting or taking parental leave. The implementation of this provision in Poland has not enhanced the legislative protection granted to employees requesting or taking childcare leave because the existing policy already protected employees against the dismissal associated with applying for, or the taking of childcare leave.[1014] In line with the basic requirements of Clause 2(4) of the Directive, Article 186(1) LC prevents employers from terminating employment contracts or dismissing employees on grounds of an application for, or the taking of childcare leave. However, the legislative protection merely covers the period from the moment the application for childcare leave was submitted up to end of childcare leave. The Polish implementation of this provision of the Directive is therefore minimalist and weak and further reinforces the deficiencies of Clause 2(4) which were discussed in Chapter 3.

[1013] 53 per cent to 61 per cent of the surveyed women said that the availability of the affordable childcare was important and very important for reconciling work and family responsibilities. Cf. I. Kotowska and A. Baranowska (2006) in National Survey *Praca a Obowiazki Rodzinne w 2005*, Glowny Urzad Statystyczny (GUS), Warsaw 2006.

[1014] Article 4 of Ministerial Order of 28 May 1996, Rozporzadzenie Rady Ministrow w sprawie urlopow i zasilkow wychowawczych (Dz. U. z dnia 30 maja 1996 r.) which replaced para 4(4) of theMinisterial Order of 17/07/1981 Urlop wychowawczy Dz.U. 1990, Nr 76, poz 454.

As seen in Chapter 4, employment security risks associated with the taking of parental leave play an important role in parents' decision-making as to how caring responsibilities are allocated within a family. The absence of employment security risks is of paramount importance in enabling parents to make genuine choices as to how work-family responsibilities are to be allocated within a family. However, the protection offered by Article 186(1) LC constrains parents' work-family choices because the legislative protection is limited to preventing an employer from terminating the employment relationship or dismissing an employee on the grounds of the request for, or the taking of childcare leave. The legislative protection does not cover any termination of employment contract or dismissal which took place before the application for childcare leave was submitted to the employer. This deficiency of the national provision enables employers to discriminate against (e.g. no promotion) or even terminate employment contracts with employees intending to apply for childcare leave. Hence, employment security risks associated with childcare leave will undoubtedly play a crucial role in parents' decision-making and may in particular discourage work-centred parents from taking leave. The limited protection from detriments or dismissal for reasons related to childcare leave will further prevent parents from more equally sharing their leave entitlement as ensuring financial security of the family is crucial when one parent is already on childcare leave. Considering the scarcity of employment in Poland and negative effects of the taking of childcare leave on employment security, the right to childcare leave does not enable parents to make genuine reconciliation choices and it will only taken when all other options have failed.

The job security of working parents entitled to request childcare leave is further weakened by the provision contained in Article 186(1)(2) LC. It deprives working parents of their full right associated with taking childcare leave by enabling an employer to provide an employee with the notice of the termination of employment before the application for childcare leave is made. This clearly disadvantages working parents who are intending to apply for childcare leave because in cases where the notice of the termination of employment precedes the application for childcare leave, the full entitlement to childcare leave, and the legislative protection associated with it is lost. The legislative protection becomes limited to the duration not longer than that specified in the notice of the termination of

employment. The legislative protection from dismissal in Article 186(1) LC merely covers the period from when the application for childcare leave is made, up to the day on which an employee is allowed to return to work. Since the legislative protection from dismissal does not extend beyond the duration of childcare leave, employment contracts with parents who returned to work after childcare leave could easily be terminated by giving a contractual notice. This deficiency of the right to childcare leave is unlikely influence work-family decisions of mothers with preferences for family life. However, it can prevent from taking childcare leave parents who genuinely would like to be more involved in the provision of care but cannot afford to rationally accept the risks associated with it.

The absence of legislative protection in Article 186(1) LC covering all detriments associated with childcare leave derives from the lack of legally binding requirement in Clause 2(4) of the Directive to provide for such protection and the minimalist approach of the Polish legislator in introducing family-friendly employment rights. Consequently, the Polish implementation of Clause 2(4) of the Directive largely reinforced the existing national regime, which was seen by working parents as inadequately protecting them against the dismissal or detriments associated with parental leave.[1015]

The employment security during the period of childcare leave is safeguarded by Article 186(1)(1) LC. It provides that during the period of leave the employment contract cannot be terminated unless the employer was made insolvent or there are underlining reasons for dissolving the contract deriving from the employee's conduct. The retention in Article 186(1)(1) LC of the feature of the old regime enabling the employer to terminate the employment contract because of the employee's conduct[1016] can be justified on the grounds of the necessity of providing the employer with the legislative tools to deal with instances of misconduct associated with the leave. From the outset, the wording of this provision indicates that legislative protection of employment contract during the period of childcare leave is significantly eroded by the exemptions outlined in the

[1015] Cf. U. Nowakowska, A. Swedrowska (1999) *Women in the Labour Market* in http://free.ngo.pl/temida/labour.htm accessed on 15/05/2003.
[1016] Article 52 LC.

body of Article 186(1)(1) LC. This indicates that the legislator did not intend to provide employees on childcare leave with absolute legislative protection in terms of their job security. The provision in Article 186(1) LC enables employers to enforce the requirement in Article 186(2)(2) LC, which requests the employee, who in the employer's view is no longer providing personal care to the child to return to back to work. The failure of the employee to return to work may amount misconduct allowing the employer to terminate the employment relationship. The lack of absolute legislative protection from dismissal or detriments and the prominent role of the employer in administering and scrutinising how childcare leave is used by working parents indicate that the focus of Article 186 LC is not on enabling parents to make genuine reconciliation choices but ensuring that leave is merely taken as the last resort.

Under the previous legislative regime contained in Article 4 of the Ministerial Order of 28 May 1996[1017] an employer was also able to terminate an employment contract because of business operational needs or redundancy situation. The list of acceptable reasons for terminating employment contract of those exercising their right to childcare leave included the economic, organisational reasons, difficulties with production and insolvency.[1018] There is evidence that in order to reduce running costs (employers' contributions to the social fund) employers were able to legitimately select for redundancy women who were exercising their right to the leave.[1019] Despite the implementation of the Directive, the feature of the previous legislative regime on childcare leave enabling the employer to terminate the employment contract with the employee on childcare leave on grounds of insolvency by giving a month's notice (instead of three months') without the right to be compensated has been retained.

[1017] Article 14 of Ministerial Order of 28 May 1996, Rozporzadzenie w Rady Ministrow w Sprawie Urlopow i Zasilkow Wychowaczych (Dz. U. z dnia 30 maja 1996 r).

[1018] Article 1(1) of the legislation outlining the details of the situations when an employment contract could be terminated for the reasons associated with requirements of the business, Ustawa o szczegolowych zasadach rozwiazywania z pracownikami stosunkow pracy z przyczyn dotyczacych zakladu pracy oraz o zmianie innych ustaw, Dz. U. 1990 Nr 4 poz 19 z poznijszymi zmianami.

[1019] Complaint of the Equality Commissioner (Rzecznik Praw Obywatelskich) RPO/122523/93/III which resulted in narrowing the definition of "all employed" for the purpose of the employer's contributions to the social fund.

As the contract of employment is suspended for the duration of childcare leave without the remuneration, the right to pay in lieu of the notice is also lost.[1020] The possibility of terminating an employment relationship with leave takers on grounds of insolvency of the employer at short notice, with no right to be compensated in lieu of the notice, clearly disadvantage working parents exercising their right to childcare leave as other employees in the active employment would be entitled to be compensated. The level of legislative protection in terms of security of employment whilst on childcare leave is further undermined by the existence of legislation applicable to particular sectors of employment (e.g. public sector employees), which specifically provide for the possibility of dissolving an employment relationship during the period of childcare leave.[1021] The employment security risks associated with the taking of childcare leave clearly disadvantage parents (mothers) who take leave and further limit leave's importance for reconciliation and choice.

The practice of terminating employment contracts with employees (mainly women) on childcare leave on the grounds of the organisational changes was widespread and disadvantaged mothers who used leave in order to reconcile work and caring responsibilities. The compatibility of this practice with the Article 4 of the Ministerial Order of 28 May 1996, and its detrimental effects on parents who take childcare leave can be seen in the decision of the Polish Supreme Court.[1022] It ruled that the termination of employment contract with the leave taker on grounds of the needed organisational changes was held to be compatible with the requirements of Article 4. The legal base for termination of the Claimant's employment was identified by the Supreme Court in Articles 1(1) and 10(1-3) of the Ministerial Order of 28/12/1989 outlining the detailed rules on terminating

[1020] The Decision of the Polish Supreme Court of 18/01/1989, IPRN 62/88, OSPiKA 1990, Nr 4, poz 2004 and the decision of 11/02/1992, I PZP 7/92, OSN 1992, Nr 9, poz. 151 and the rulling of the Administrative Court in Katowice of 02/02/1991, III Apr 5/91, OSA 1991, Nr 1, poz. 25. See also W. Muszalski, C.H Beck (2000) Commentary on Labour Code, *Kodeks Paracy-Komentarz*, Warszawa, p.784.

[1021] E.g. Article 13(1)(2) of the Legislation of 18 September 1982 on workers employed in public offices (Ustawa o pracownikach urzedow panstwowych) Dz. U. Nr 31 poz. 214, Dz.U. 2001, Nr 86, poz 953 ze zmm and art. 10(1)(2) of the Ministerial Decree of 22/03/1990 on local government employees, Dz.U, 2001, Nr. 142 poz 159(3), the decision of the Polish Supreme of 18/04/1991, I PZP 8/91, OSNCP 1992, Nr 2, poz. 22 oraz z 14/05/1996 r, III ARN 93/95, OSNAPiUS 1996, Nr 23, poz.352.

[1022] Wyrok Sadu Najwyzszego – Izaba Pracy, Ubezpieczen Spolecznych i Spraw Publicznych, 2005/06/29, II PK 332/04, OSNAPiUS, rok 2006, poz. 83, str.221.

employment relationship due to employer's reasons, which was in force until 31/12/2003.[1023] It was held by the Supreme Court that Article 10(2) of the 1989 legislation, which deals with termination of the individual contract of employment enables an employer to terminate an employment relationship with an employee on childcare leave on condition that this is not being objected to by the trade union within 14 days from the day on which the notification of the termination of employment was received by the employee.

Article 5(3) of the Ministerial Order of 28/12/1989 (1989 Order) also provided for the possibility of terminating an employment contract by the employer in situations where justified absence from work was longer than three months. This meant that employers could terminate employment contracts with parents who took childcare leave exceeding three months.[1024] The current legal framework which replaced the 1989 Order is set out in Article 5(3) of the Ministerial Order of 13 March 2003,[1025] on the detailed rules on terminating employment relationships with employees for reasons not related to employee's conduct. It also provides for the possibility of terminating an employment contract where an employee is on childcare leave of the duration longer than three months, and the notice of termination of employment is given to the employees during the first three months of childcare leave.

Article 5(3) clearly constrains parents' reconciliation choices as it reinforces the old regime, which was used to the detriment of employees who took childcare leave, because Article 5(5) specifying the groups of workers with protected employment relationship does not refer to those on childcare leave covered by Article 186(1)(1) LC. Consequently, the full legislative protection ensuring the job security of working parents exercising their right to childcare leave is limited to the three months' period, and therefore those who take longer periods of childcare leave may be risking losing their jobs. The limited level of the legislative protection of the job security under the Polish legislation can be seen as complying with the

[1023] Dz.U. z 2002., Nr 112, poz. 980 ze zm).
[1024] The Decision of the Polish Supreme Court of 11/12/1996, IPKN 39/96 OSNAPiUS 1997, Nr 14, poz 252.
[1025] Ustawa z dnia 13 marca 2003 r. o szczegolnych zasadach rozwiazywania z pracownikami stosunkow pracy z przyczyn niedotyczacych pracownikow (Dz.U.Nr 90.poz.844).

requirements of Clause 2(1) of the Directive, which merely requires Member States to provide parental leave and, associated with it, employment security covering the period of three months. Working parents (mothers) who use their long entitlement to childcare leave under Article 186 LC (up to 3 years) often do not fully understand the real implications of taking leave for their employment security, as they assume that the legislative protection from detriments or dismissal covers the entire duration of leave, which is often not the case. Thus, the long duration of childcare leave and limited employment security protection associated with it impose more constraints on parents' work-family choices than most parents are aware of.

The recent decision of the Polish Supreme Court[1026] further reaffirmed the existence of the limited protection against dismissal and the termination of the employment contract during the period of childcare leave, which is likely to influence parents' attitudes to childcare leave. This decision of the Supreme Court revealed that apart from the limited number of instances outlined in Article 186(1)(1) LC where the termination of the employment contract with the leave takers are permitted, the employer can also terminate the contract of employment with those on childcare leave for the reasons not stated in Article 186(1)(1) LC. This is possible because taking childcare leave does not remove the leave takers from the jurisdiction of the Ministerial Order of 13 March 2003 setting out the detailed rules on terminating employment relationships with employees for reasons not related to employee's conduct.

The Supreme Court concluded that Article 10(1)(2) of this Order enables an employer to terminate an employment contract (subject to notice requirements) with employees who are provided with the special legislative protection from termination of employment or dismissal under the different legislation. This indicates that even though Article 186(1)(1) LC does not mention the possibility of terminating an employment contract with those on childcare leave on grounds of redundancy, Article 10(1)(2) of the 2003 Order enables an employer to terminate

[1026] The Polish Supreme Court (Uchwala Sadu Najwyzszego – Izaba Pracy, Ubezpieczen Spolecznych i Spraw Publicznych) 2006/02/15, II PZP 13/05, OSNAPiUS, rok 2006, Nr 21-22, poz.315, str. 889.

an employment contract with an individual employee not belonging to the group protected by Article 5(5) on condition that the company's trade union does not object to it within 14 days from the day on which the notification of the termination of employment was received. In the discussed case, this enabled the employer to select for redundancy the claimant who was exercising her right to childcare leave. This indicates that parents striving to reconcile work and family life through the use of childcare leave become exposed to various employment security risks, which are likely to influence their decisions as to whether, or not to take leave.

The level of the legislative protection from termination of employment under Article 186(1) LC is not eroded by the application of Article 5(5) of the 2003 Order where an employer employs less than twenty workers. This indicates that parents working for companies with more than twenty workers are particularity disadvantaged in terms of the protection from termination of employment whilst on childcare leave. This controversial ruling of the Supreme Court[1027] appears to clash with the principle of equality in treatment introduced in 2004 by part IIa of the Labour Code. It indicates that in the absence of particular legislative provision it is not permissible to differentiate the level of the legislative protection of those on childcare leave on the basis of the size of the labour force. Even if there was a specific national legislation providing for different legislative regimes on childcare leave for small and large companies, it could be in breach of the EU equality legislation.

The Supreme Court supported its decision by invoking the intention of the Polish legislator to permit terminating the contract of employment with those on childcare leave for reasons not related to their conduct and not stated in Article 186(1)(1) LC as being specifically outlined in Articles 16, 17 and 20 of the 2003 Order. These Articles allow terminating contracts during the period of childcare leave for reasons not related to the conduct with those employed by the police, border control or prison service. These deficiencies of the national legislation further limit the

[1027] The Polish Supreme Court (Uchwala Sadu Najwyzszego – Izaba Pracy, Ubezpieczen Spolecznych i Spraw Publicznych) 2006/02/15, II PZP 13/05, OSNAPiUS, rok 2006, Nr 21-22, poz.315, str. 889.

security of employment of those exercising their right to childcare leave in order to reconcile work and family responsibilities.

Under Article 186(1)(1) LC the legislative protection is limited to dismissal taking place during the course of employment, and it does not extend to any events beyond this period. The protection against dismissal associated with requesting or the taking of childcare leave no longer applies if the application for childcare leave was submitted after the notice of the termination of employment had been given to the employee.[1028] Employers can dissolve employment contracts with working parents by giving them the contractual notice before the application for childcare leave is made or when the requested leave cannot be granted within the specified period, and the new application for childcare leave needs to be submitted. This lack of adequate legislative protection of the employment contract for parents with caring responsibilities became evident in the decision of the Polish Supreme Court.[1029] It was held that an employment contract of an unrestricted duration with a teacher could be terminated by the employer by giving the contractual notice when the application for the leave had been submitted specifying the start of childcare leave during the period of school holiday.[1030]

In this case, the Claimant made an application for childcare leave during the period when childcare leave could not be granted, which allowed the employer to reject the application for leave and terminate the employment contract by giving the contractual notice before the new application for childcare leave was submitted. This constitutes a major deficiency of the national entitlement to childcare leave, because when the original application for leave is rejected by an employer, and before the new application is made by an employee, the employer can terminate the employment contract with the employee as long as the contractual notice requirements are complied with. The lack of adequate protection from detriments associated with childcare leave will particularly constrain mothers' reconciliation choices as they mainly take childcare leave. As work-family decisions are made in

[1028] Article 186(1)(2) of LC
[1029] The Polish Supreme Court (Uchwala Sadu Najwyzszego – Izaba Pracy i Ubezpieczen Spolecznych) 1983/01/12, III PZP 68/82, OSNC 1983, Nr 6, poz. 76, str. 48.
[1030] A period when contractual annual paid leave needed to be taken by the employee and not childcare leave.

the context of each family the employment security risks associated with the taking of childcare leave may outweigh its benefits and therefore mothers may be dissuaded from taking leave.

As already indicated in this Chapter, the entitlement to childcare leave and the protection associated with it are also lost where the employer establishes that the employee no longer provides personal care for the child in relation to whom childcare leave was taken, and the employee fails to return to work.[1031] The failure to return to work of the employee who no longer personally cares for a child may result in the termination of the employment contract because of the employee's conduct in accordance with Article 186(1) LC and the dismissal without a notice under Article 52 LC. Providing the employer with the responsibility of verifying whether the employee is actually personally caring for the child, and thereby the right to childcare leave arises indicates the weaker position of the employee in terms of how childcare leave is administered. The necessity of justifying before the employer that the employee is still providing the personal care may be very difficult in cases where during the period of leave as permitted by Article 186(2)(1) LC the employee undertakes paid employment for another employer. In the given scenario, the failure of the employee to return to work once it has been established by the employer that personal care is no longer provided to the child would result in a fair dismissal on grounds of the employee's conduct.

Considering that claims for unfair dismissal would need to be brought not later than seven days from the day of the dismissal, and the limited financial resources of the leave takers to pursue such claims, very few parents would be able to seek judicial remedies. The implementation of the Directive in Poland has not resulted in the significant enhancement of the legislative protection of job security whilst on childcare leave because, as seen in Chapter 3, Clause 2(4) of the Directive does not set the level of protection against dismissal or termination of employment contract which needs to be provided to the leave takers but leaves this task to the national legislators and collective agreements. Consequently, this deficiency of the Directive has been further reinforced in Poland by the Labour Code to the

[1031] Article 186(2)(2) of LC requires the leave taker who stopped providing personal care to return to work within 30 days from the day on which the notification was received.

detriment of working parents who use their entitlement to childcare leave in order to achieve the desired reconciliation.

The national policies of Czech Republic and Slovakia also provide working parents with protection against dismissal for reasons related to applying for or the taking of the leave (**Appendix, Table 13**). The implementation of Clause 2(4) of the Directive in Hungary has not been fully achieved yet. Despite providing parents exercising their right to parental leave with the legislative protection from dismissal, the Hungarian policy does not provide working parents with protection from dismissal on grounds of an application for parental leave.[1032]

As seen in Chapter 3, Clause 2(5) of the Directive seeks to ensure that at the end of parental leave workers are provided with the right to return to the same job or, if this is not possible, to an equivalent or similar job consistent with their employment contract or relationship. The requirements of this provision of the Directive have been implemented in Poland by Article 186(4) LC. It requires an employer to allow an employee to return to the same job or, if it is not possible to an equivalent or, similar job or, other job corresponding with the employee's qualifications. The implementation of this provision in Poland has resulted in the amendment of existing national leave arrangements, which previously did not mention the possibility of returning to the same job.[1033] Under the previous legislative regime an employer was required to allow an employee to return to the equivalent post or if this was not possible to another post corresponding with the employee's qualifications. The employer was not legally obliged to enable the employee to return to the previous post as long as an offer of the equivalent job (or other complying with the employee's qualifications) was made.[1034]

The deficiency of the previous right to return was rooted in that the post corresponding with the employee's qualifications, which the employer was legally

[1032] The European Commission reasoned opinion sent to Hungary for incorrectly implementing the Parental Leave Directive (96/34/EC), Brussels, 29 October 2009, IP/09/1619.
[1033] Article 14 of legislation of 28 May 1996, Rozporzadzenie w Rady Ministrow w Sprawie Urlopow i Zasilkow Wychowaczych (Dz. U. z dnia 30 maja 1996 r).
[1034] W. Santera (1998) *Expertyza dot. Dyrektywy nr 96/34 w sprawie urlopow rodzicielskich, Harmonizacja prawa polskiego z prawe wspolnot europejskich, t.9. Parwo pracy. Czesc I. Opracowania analytyczne.* Red. Maria Matej-Tyrowicz. Urzad Kimitetu Integracji Europejskiej, Warszawa 1998, p.287.

obliged to provide to the returning employee could be very different from that held by that employee before the commencement of the leave. Consequently, the taking of childcare leave often involved sacrificing employment in favour of the family. The focus of the entitlement to childcare leave was on facilitating an easy exit from the labour market when it was required by an employee. The limited legislative right to return that the leave takers (mainly women) were provided with reflected the stagnant view that employment cannot be reconciled with family responsibilities. It was the choice of leave takers to sacrifice their careers in favour of the family.

The interpretation of the new right to return in Article 186(4) LC by the Polish Supreme Court[1035] suggests that as a rule the employer is now obliged to employ the returning employee on the previously held post, and only when it is not possible to do so, the employee should be offered an equivalent job, or a different position reflecting his/her professional qualifications. The emphasis of the Supreme Court on the obligation of the employer to allow the employee to return to the post held before the commencement of childcare leave; references to the role of the Directive on parental leave in facilitating the reconciliation for working parents indicate the willingness of the national judiciary to give effect to the reconciliation objective of the Directive.

Despite the ambitious interpretation of Article 186(4) LC by the Supreme Court, the possibility of returning to the same job constitutes a very minor amendment of the existing national right, as the return to the same job does not have to be facilitated if it is not possible. The inclusion of the option of returning to the previously held post is of a symbolic value, and does not provide parents exercising the right to childcare leave with an unconditional right to return to the previously occupied posts. The Labour Code does not provide any examples as to the circumstances where the return to the previous job is to be classified as not being possible. In the absence of legislative guidance the decision as to which job the employee should be allowed to return to is to be made by the employer.

[1035] The Decision of Polish Supreme Court on 29 January 2008, Sygn. Akt II PK 143/07, 1-10.

Constraints associated with the legislative right to childcare leave play crucial role in shaping parents' attitudes towards their usage of childcare leave. The employment security and possibility of returning to the same job at the end of childcare leave are of paramount importance in enabling parents to make genuine choices as to whether, or not use their leave entitlement. Since working parents have different work-family preferences for some home-centred mothers the lack of absolute right to return to their former jobs may not influence their decisions as to how they use childcare leave. However, for the work-centred, well-educated with well-paid jobs mothers who would like to continue working at the end of childcare leave the extent of legislative right to return will play an important role in how they use childcare leave.

The wording of Article 186(4) LC does not provide parents with an absolute right to return to any job at all because if the return to the previous job is not possible, and the employer is not in a position to provide either equivalent, similar or other job corresponding with the employee's qualifications, the return does not have to be facilitated. The definition of the employee's professional qualification devised by the Polish Supreme Court [1036] covers the professional qualifications that the employee had prior to childcare leave and the qualifications acquired on return from leave. The returning employee who accepts the additional training provided by the employer may be offered a job which is very different to that previously held, and yet corresponding with his/her current professional qualifications. If no suitable job can be offered to the returning employee the employment contract can be terminated by the employer following the general legal requirements.[1037]

Considering the very high unemployment rates in Poland, and the lack of absolute legislative right to return to work, a significant number of leave takers could be unable to return to work.[1038] The long duration of childcare leave (up to child's

[1036] The Decisions of the Polish Supreme Court of 10 December 1979, I PZP 40/79, OSNCP 1980, nr 6, poz 111.
[1037] The decision of Polish Supreme Court (Uchwala Sadu Najwyzszego) of 30 December 1985 r. III PZP 50/85; OSNCP Nr 7-8/1986 poz. 118.
[1038] This is supported by the 2005 survey which established that 45 per cent of mothers with children up to the age of three were out of work and one-third of mothers could not find a job (this is the group of mothers who technically should be able to return to work but are unemployed). Cf. I. Kotowska and A. Baranowska (2006) op. cit., and Department for Business Innovation & Skills (2009) op. cit.

fourth birthday), scarcity of formal childcare and the lack of unconditional right to return to the previous post may be seen as contributing to the high rates of the non-return to previously held posts by parents in Poland (**Appendix, Table 10**). As already indicated in this Chapter, an increase in the number of the inactive women of child-bearing age out of the labour market because of care responsibilities in Poland, indicates that current reconciliation policies (including childcare leave) do not adequately respond to women's reconciliation needs. Husbands' or partner's attitudes towards work and family responsibilities and men's long hours working culture can also prevent mothers from returning back to work at the end of childcare leave.[1039]

The lack of unconditional legislative right to return to the previously held post removes the element of the job security from the entitlement to childcare leave and therefore it constitutes a major deficiency of this right impacting on parents' attitudes towards taking childcare leave. This has become evident in Poland, where the possible negative career impacts associated with taking childcare leave were identified as the main reason for not taking the leave by 37 per cent of mothers and 30 per cent of fathers.[1040] Consequently, the lowest common denominator provisions of the Directive which fail to ensure the unconditional right to return to the previous job (see Chapter 3) have been further reinforced by the Polish legislation to the detriment of working parents striving to achieve the reconciliation through the use of childcare leave.

The Slovakian implementation of Clause 2(5) of the Directive also does not provide parents with the right to return to the same job but it merely entitles them to return to a similar job. The possibility of returning to work after the expiry of parental leave is even more restrictive in Hungary where the present legal framework on parental leave has failed to give effect to the requirements of the Directive, and does not provide leave takers with the right to return to the same or equivalent job.[1041] In contrast with the restrictive legislative right to return in Poland and Slovakia, the Czech legislation provides parents who took parental

[1039] S. McRae (2003) op. cit., p.333.
[1040] I. Kotowska and A. Baranowska (2006) op. cit.
[1041] The European Commission reasoned opinion sent to Hungary for incorrectly implementing the Parental Leave Directive (96/34/EC), Brussels, 29 October 2009, IP/09/1619.

leave with the right to return to the same job (**Appendix, Table 13**). By providing parents with the right to return to the same job the Czech legislator exceeded the requirements of the Directive and also significantly improved the job security of women who mainly take parental leave in Czech Republic.

Poland has a long legislative tradition (since 1968)[1042] of ensuring the continuity of employment during the period of the leave and on return to work employees are entitled to all benefits deriving from the preserved continuity of employment. The legislative protection of leave takers was further extended in 1975 and 1981[1043] to guarantee the protection of the employment relationship during the period of the leave, and the right to return to the equivalent post with the remuneration not lower than received before childcare leave was taken. The right to return to the job with the upper pay limit not lower than associated with the previously held post was reaffirmed by the decisions of the Polish Supreme Court[1044]. It held that any attempt by the employer to facilitate the return to the job with a lower upper pay limit would not be permitted. This decision merely ensured that the level of pay which was received on return to work was not lower than received before childcare leave was taken. Thus, mothers who took childcare leave could be legitimately financially penalised for their absence from the labour market as they were merely entitled to be paid at the level they received before childcare leave was taken (3 years ago). This decision of the Supreme Court reaffirmed the legality of the financial disadvantages associated with taking childcare leave and was in force until 1996.

[1042] Ministerial Order number 158 of 15 May 1968 (Uchwala nr 158 Rady Ministrow z dnia 24 maja 1968 r. w sprawie bezplatnych urlopw dla matek pracujach, opiekujacych sie malymi dziecmi (M.P. Nr.24, poz 154); amended by Ministerial Order of number 13 of 14 January 1972 (Uchwala nr 13 Rady Ministrow z dnia 14 stycznia 1972 r. w sprawie bezplatnych urlopow dla matek pracujacych opiekujacych sie malymi dziecmi (M.P. Nr 5, poz. 26).

[1043] Ministrial Order of 29 November 1975 (Rozporzedzenie Rady Ministrow z dnia 29 listopada 1975 r. w sprawie bezplatnych urlopow dla matek pracujacych, opiekujacychb sie malymi dziecmi (Dz.U. Nr 43, poz. 219) amended by Ministerial Order of 17 July 1981 (Rozporzadzenie Rady Ministrow z dnia 17 lipca 1981 r. w spraiwe urlopow wychowaczych (jednolity tekst: DZ. U. z 1990 r., poz. 454 ze zm.))

[1044] The decision of Polish Supreme Court (Uchwala Sadu Najwyzszego) SN of 27 September 1979, I PZP 37/79, OSNCP Nr 2/1980, poz. 22 and SN of 30 December 1985 r. III PZP 50/85; OSNCP 1986 Nr 7-8 poz. 118; OSPIKA 1986 Nr 6, poz.120.

The entitlement to remuneration of those returning from childcare leave was further extended by paragraph 14 of the Ministerial Order of 28 May 1996.[1045] This provision implements the requirements of Clause 2(6) of the Directive (discussed in Chapter 3). Unlike the previous entitlement, which merely ensured the level of pay at the same level as before the commencement of childcare leave, the new right[1046] provides the returning from childcare leave parents with the entitlement to the remuneration, which is not lower than the remuneration associated with the previously held post on the day of the return to work. Article 186(4) LC clearly reflects the intention of the legislator to remove the financial disadvantage which was associated with the returning back to work after the expiry of childcare leave. This was further reaffirmed in the ruling of the Polish Supreme Court[1047] where it was held that exercising the right to childcare leave must not result in the worsening of the professional life of the leave takers, as it would be hampering the reconciliation objective of the Directive.

Although the Supreme Court reaffirmed that the returning to work parent was entitled to receive the wage associated with her post on the day of the return to work, the contradictory rulings of the courts of the lower instance in this case, indicate that the legislation on the right to return remains unclear, and the reconciliation objective attached to childcare leave is not always recognised by national courts and employers. The implementation of the Directive has therefore contributed to improving the financial situation of the returning from childcare leave parents. The right to return to work without a financial detriment is of paramount importance to parents because of the characteristics of the Polish developing economy (labour market) and the long duration of childcare leave. It is also crucial for enabling parents (mothers) to make genuine work-family choices as the right to unpaid childcare leave accompanied by the lack of entitlement to pay at the level associated with the relevant job on the day of the return to work could further discourage mothers from taking leave. Additionally, the double financial penalty associated with the taking of childcare leave would further reaffirm the failure of

[1045] Paragraph 14 of the Ministerial Order of 28 May 1996 (Rozporzadzenie Rady Ministrow z dnia 28 maja 1996 r. w sprawie urlopow i zasilkow wychowawczych (Dz. U. Nr 60, poz. 277 ze zm)) in force until 31 December 2003.
[1046] Now incorporated into Article 186(4) LC.
[1047] The Decision of Polish Supreme Court on 29 January 2008, Sygn. Akt II PK 143/07, 1-10.

the national legislator to recognise the social importance of unpaid work and childcare which is provided by mothers.

Considering the long duration of childcare leave (up to 3 years) in Poland; ever changing family circumstances; women's changing work-family orientations and other factors and constraints, which influence parents' work-family decisions, the previously agreed childcare leave arrangements may need to be altered in order to better respond to families' caring needs.[1048] The Article 186(3)(1-2) LC constrains parents' work-family choices because the notice requirements applicable to the earlier return to work are not as flexible as other notice requirements. Employees on childcare leave can at any time decide to terminate childcare leave without the need of justifying it before the employer, but there is no automatic right to return to work before the end of the requested period of childcare leave. An immediate return to work is subject to the discretion of the employer and there is no legal recourse from the decision of the employer should the request for the immediate return to work be denied by the employer. An employee willing to prematurely return to work has the right to return to work on condition that she/he provided an employer with at least thirty days' notice.[1049]

This long notice requirement has been introduced in order to safeguard the operational needs of business.[1050] The existence of the long notice requirement imposes significant restrictions on childcare leave, and renders it very inflexible for the leave takers when the change in the personal circumstances forces an early return to the labour market. The lack of possibility of a quick return to work when the personal circumstances change constitutes a major deficiency of the Polish right to childcare leave, because there is no right to the remuneration whilst on leave and the additional time away on childcare leave financially disadvantages employees exercising their right to childcare leave. The means tested allowance that leave takers from the poorest families are provided with is also much lower than their wage, and therefore the lack of entitlement to an immediate return to work can further financially disadvantage those families.

[1048] S. Walters (2005) Making the Best of a Bad Job? Female Part-Timers' Orientations and Attitudes to Work Gender, *Work and Organization* 12(3): 193-216 at p.212.
[1049] Article 186(3) LC.
[1050] Article 186(6) LC.

The interests of the leave takers willing to prematurely return to work are to a certain extent safeguarded by the legislation, as it does not allow employers to delay the return to work for longer than the notice period. Should the employer delay the return to work beyond the notice period, the employee ready to undertake the work would be entitled to receive the full wage for the period of that delay. The national implementation of the Directive in Poland has not resulted in the enhancement of employee's rights under the national legislation covering the premature return to work from leave because the Directive does not regulate this area of childcare leave (see Chapter 3). By providing the leave takers with the right to an early return to work the Labour Code has exceeded the minimum requirements of the Directive and provided working parents with the option of an early return back to work and therefore enhanced their reconciliation choices.

Further constraint of the right to childcare leave that could prevent parents from achieving the desired reconciliation derives from that the Labour Code does not provide the leave takers with the right to return to work on a part-time basis. This constitutes a major deficiency of the right to childcare leave as during the long duration of childcare leave parents' work-family orientation may change and the limited availability of formal childcare facilities for small children may force parents to reduce their involvement in the labour market. Due to low wages in Poland two full-time incomes are often needed to enable families to make both ends meet and therefore mothers re-enter the labour market as soon as the financial support associated with childcare leave expires. [1051] Although, the availability of part-time work in Poland[1052] is very limited the possibility of returning to work on a part-time basis could in particular enable in particular better well-off families to reduce their labour market involvement in order to achieve the desired reconciliation. Despite the disadvantages associated with working on a part-time basis it could in particular help mothers to make the adaptive reconciliation choices and thereby prevent them from exiting the labour market.

[1051] M. Valentova and N. Zhelyazkov (2011) 'Women's Perceptions of Consequences of Career Interruptions due to Childcare in Central and Eastern Europe', Journal of Social Policy, 40(1): 89–112 at pp.93-94.

[1052] Only 11 per cent of women and 5 percent of men worked part-time in 2010, Cf. Report (2011) op. cit., p. 24. Only 13 per cent women and 8 per cent men worked part-time in 2004, Cf. I. Kotowska, J. Jóźwiak, A. Matysiak, A. Baranowska (2008), op. cit., pp.834-837.

5.4 The Polish Implementation of Leave for Urgent Family Reasons does not Help Workers in Terms of their Choice

This section considers the Polish implementation of Clause 3(1) of the Directive and the extent to which the right to time off for dependants assists workers with making real work-family choices. Poland has a long legislative tradition of providing employees with the entitlement to paid time off work in order to care for children and adult dependants. This area was originally regulated by the Ministerial Order of 17 December 1974 on social insurance allowances associated with illness and maternity[1053] and Article 188 LC. Clause 3 of the Directive was implemented in Poland by Article 188 LC and Ministerial Order of 25 June 1999 (the 1999 Order) as amended by the Order of 22 April 2010 on social fund allowances associated with illness and maternity.[1054] The implementation of Clause 3 the Directive has not resulted in the enhancement of the national entitlement to leave for family reasons because the national law already provided for the entitlement to leave, which fully complied with the basic requirements of the Directive. Consequently, the provisions contained in Article 188 LC and the 1999 Order were retained. There can be distinguished two separate entitlements to time off work for dependants such as the right of employees in Article 188 LC and the entitlement of the insured workers in the 1999 Order.

5.4.1 The Right to Time off for Older Children in Article 188 LC Fails to Adequately Respond to Parents' Reconciliation Needs

Article 188 LC provides employees caring for at least one child up to the age of fourteen with the right to time off work in order to provide personal care to the child/children. The duration of the entitlement is limited to two days per calendar year for all children in the household with the preserved right to the full

[1053] Ministerial Order of 17 December 1974 (Ustawa z dnia 17 Grudnia 1974 o świadczeniach pieniężnych z ubezpieczenia społecznego w razie choroby i macierzyństwa (Dz. U. z 1983 r. Nr 30, poz. 143, ze zm.; dalej: ustawa z 1974 r.)).

[1054] Ustawa z dnia 25 czerwca 1999 r. o świadczeniach pieniężnych z ubezpieczenia społecznego w razie choroby i macierzyństwa Dz.U. nr 60, poz 636 i ustawa z dnia 22 Kwietnia 2010 w sprawie ogłoszenia jednolitego tekstu ustawy o o świadczeniach pieniężnych z ubezpieczenia społecznego w razie choroby i macierzyństwa, Dz. U.z 2010 r. Nr 77, poz.512.

remuneration. The right to time off for the qualifying children is an absolute right and not merely a right to request leave to provide the needed care. The right to time off is designed to help employees to respond to the arising matters involving the qualifying children. Although the legislation does not provide employers with the possibility of postponing the time off, the delays in granting it may occur, because the actual date on which the time off is to be taken needs to be agreed with the employer. This indicates that the right to time off in Article 188 LC is not designed to enable employees to deal with emergencies involving the qualifying children, but it provides for the right to time off work in order to deal with the foreseeable matters involving families with the qualifying children.

Since, there is no legislative right to leave when it is actually needed by the family, the delays in granting of the leave may occur leaving parents with no right to leave when it is most needed by parents. In contrast with the above discussed childcare leave, which cannot be taken at a short notice, the right to time off in Article 188 LC to a certain degree complements the inflexibility of the right to childcare leave, as it enables qualifying employees to take (at a short notice) one or two days off work in order to care for their children. The prominent role of employers in the leave application process indicates that it may be particularly difficult for employees working for family-unfriendly or small companies to have their leave approved when it is actually needed by the family. The lack of absolute right to leave when it is most needed significantly constrains parents' work-care choices as this is the only leave entitlement in relation to older children that covers the foreseeable matters.

Contrary to the restrictive entitlement to childcare leave, which limits the availability of leave to employees responsible for children up to the age of four, the right to time off in the Labour Code enhances parents' reconciliation choices because it provides them with the time off for foreseeable matters, which becomes available as soon as the child is born, and it lasts up to the youngest child in the family reaches the age of fourteen.[1055] Unlike the right to childcare leave, which merely provides the qualifying employees with the possibility of caring for small

[1055] Article 188 LC.

children, the right to time off is more far-reaching, because it provides the qualifying employees with the right to time off that can be used alongside childcare leave, and after the entitlement to childcare leave has expired. Parents may also exercise their right to time off under Article 188 LC alongside their entitlement to time off under the 1999 Order. The right to time off fails to recognise the reconciliation needs of parents with children older than fourteen years of age for whom it may be very difficult to make real work-care choices as there is no legislative right to leave in relation to these children with regard to the foreseeable matters). Hence, in order to be able to respond to the foreseeable matters involving these children their parents will be forced to use their annual leave entitlement. The extended availability of the right to time off in Article 188 LC significantly exceeds the requirements of the Directive (see Chapter 3).

Considering that less than 10 per cent of Polish dependant elderly people are receiving formal care and that most family elderly dependants are relying on the informal care, the lack of entitlement to time off for elderly dependants under Article 188 LC ignores the enhanced work-care needs of workers who care for elderly dependants.[1056] This can effectively prevent women who mainly care for adult dependants from making genuine work-care choices as they cannot rely on any specific legislative right to leave that could enable them to effectively respond to foreseeable matters involving adult dependants. Additionally, the right to paid time off in relation to older children but not adult dependants reaffirms the failure of the Polish legislator to recognise the importance of the provision of care for adult dependants and that work-care responsibilities of those who care for adult dependants also need to be reconciled. Consequently, parents with older children have more reconciliation choices than workers providing care to adult dependants for whom for example the right to paid time off in order to accompany their adult dependants for the regular medical check ups could significantly enhance their work-care choices. Since the right to time off under Article 188 LC also covers joyous events involving qualifying children, the lack of such legislative right to leave in relation to adult dependants constitutes the major deficiency of the Polish legislative framework on the time off.

[1056] Report (2011) op. cit., pp.41-42.

The lack of requirement in the Directive that each worker should be provided with the individual, non-transferable entitlement to time off has been further reinforced by Article 188 LC which provides parents with the family right to time off. Although the family entitlement to time off enables families to make their own decisions as to how their leave entitlement is used so that it is never lost, it may also further reinforce inequalities in the distribution of caring responsibilities between mothers and fathers if it is not equally shared. However, as already indicated earlier in this Chapter in the context of childcare leave, despite the possible negative impact of the family right to time off on how work-family responsibilities are allocated between working parents it does not penalise the families who wish to follow the more traditional work-care patters.

Similarly to childcare leave, the right to time off work for dependants in Article 188 LC does not recognise the importance of care for older children as such because the availability of leave is conditioned by workers' employment status and not their responsibilities for older children. The right to time off is limited to employees only, and therefore all those who do not work under the contract of service are not entitled to benefit from this right. By restricting this entitlement to employees only, the legislator has significantly limited the impact of this legislation, and failed to recognise the reconciliation needs of other workers with caring responsibilities for children. In contrast with the right to childcare leave the right to time off is available to all employees as there is no work qualifying period requirement attached to this entitlement. By not restricting the leave entitlement to employees who comply with the qualifying employment requirement, the legislator has significantly improved the availability of the time off, as it can be taken by all employees with the qualifying children. However, the right to time off constrains work-family choices of workers with caring responsibilities for children whose employment status is not that of an employee as they are effectively deprived of the right to leave for the foreseeable matters involving the qualifying children. Hence, the self-employed parents have been deprived of the right to paid time off for dependants, which may effectively prevent the less well-off parents from being

able to fully participate in various events involving their children e.g. school Christmas party.

The right to time off as contained in Article 188 LC exceeds the minimum requirements of Clause 3(1) of the Directive, as it provides employees with responsibilities for the qualifying children with the right to the leave regardless of whether their immediate presence with the child is indispensable or not. The entitlement to leave can be used in order to justify the family related absences from work not associated with any emergencies. This right can be seen as effectively assisting working parents in the reconciliation, as the time off can be taken whenever the need for it arises, and it is not limited to situations of sickness or accident when the immediate presence of the parent is required. In principle both working parents cannot simultaneously exercise their right to leave, but the time off can be taken by one employed parent when the other parent is not already working and looking after the child (e.g. maternity leave). This enables both parents to simultaneously respond to the arising matter without the need of justifying why the presence of both parents is necessary. Taking into account that in Poland mostly women look after children and ill members of families, the possibility of taking the time off by a parent when the other parent is already off work providing care can contribute to ensuring more equality in the distribution of caring responsibilities within a family.

As seen in Chapters 3 and 4, work-family choices are made in the particular context of each family and the availability of leave without any financial penalties is crucial for enabling parents to make genuine reconciliation choices. By providing employees with responsibilities for the qualifying children with the right to time off with no loss in pay, the Polish legislator has exceeded the requirements of the Directive, which does not require Member States to provide workers with the right remuneration whilst on leave. The existence of the right to paid leave must be seen an effective means of helping employees with caring responsibilities to respond to arising matters without any financial detriment. This is particularly important in the context of the Polish labour market, where the vast majority of employees are paid very low wages, and any loss of wage associated with looking

after a child would constitute a substantial financial detriment to employees with family responsibilities.

The right to time off enhances parents' reconciliation choices by providing them with the additional leave enabling them to spend more time with their children. However, the impact of this right in enabling parents to make real work-care choices is hampered by short duration of the time off which is limited to two working days per year.[1057]It must be emphasised that the right to two days off work for dependant children is a family right, and each parent does not have an individual entitlement to two days off work. This constitutes a deficiency of this leave entitlement, because its duration is merely limited to two occasions within a calendar year when parents are able to respond to the foreseeable matters involving qualifying children without having to provide any justification for the requested absence. The short duration of time off does not provide working parents with the right to leave that would respond to their diverse reconciliation needs.

Although different families have different work-care needs and the number of children within a family has a strong impact on mothers' labour market behaviour,[1058] the right to time off under Article 188 LC provides all families, regardless on the number of children in the family with the same family entitlement to the time off. This provision of the Labour Code clearly disadvantages working parents with responsibilities for many children, who despite their need for more time off in order to be able to effectively respond to the needs of their children are treated in the same way as parents bringing up one child. The duration of this leave as set out in the Labour Code favours parents with one child, and ignores the extended work-care needs of families with many children for whom it may be particularly difficult to reconcile work and various foreseeable responsibilities involving their children. To families with many children the short duration of time off in Article 188 LC may not even be enough to cover the most important foreseeable events requiring parents' presence, and therefore the entitlement to time off will have to be supplemented by the holiday entitlement. It must be

[1057] Article 188 LC.
[1058] O. Kangas and T. Rostgaard (2007) op. cit., p. 248.

emphasised that the right to time off in Article 188 LC merely provides parents with leave in relation to various foreseeable responsibilities involving qualifying children. Hence, parents responding to various unforeseen emergencies, or those required to provide the long-term care to their children will need to rely on their right to leave in the 1999 Order, which is discussed in following section.

The duration of time off for dependants under Article 188 LC is further limited by the lack of option of taking leave in the form of the reduced working time or on the hourly basis that could enable parents to better use their short leave entitlement. Since parents make their work-care choices in the individual context of each family the flexibility of leave arrangements is crucial for enabling parents to make work-care choices that best suit parents' individual reconciliation needs. The flexible leave arrangements could ensure that no parts of leave entitlement are unnecessarily lost leaving families without the right to leave when it is needed most by the family. This is of paramount importance to families with many children where despite their enhanced reconciliation needs they are not entitled to any additional time off in order to deal with various foreseeable responsibilities involving their children. Since parents have different work-family preferences, the lack of option of taking leave in shorter periods than one full day can significantly constrain work-care choices of the work-centred mothers and force them to unnecessarily lose a significant portion of their leave entitlement. Considering that the time off for the foreseeable matters involving children is the only fully paid leave that can be taken in relation to children, the constraints of this right associated with its inflexibility in responding to parents' real reconciliation needs can effectively deprive some parents of their right to time off when it is needed most by families .

5.4.2 The Right to Time off for Dependants in the 1999 Order Constrains Workers' Work-care Choices

In addition to the right in Article 188 LC, employees and other insured workers with caring responsibilities for children and adult family members are entitled to the additional leave in order to deal with the unforeseen circumstances, or care of the

ill family member. In line with the requirement of Article 189 LC, the 1999 Order[1059] provides for the detailed legal framework on the eligibility of the time off for family members, its duration and associated with it allowances. The implementation of Clause 3 of the Directive has not resulted in the enhancement of the national provisions on the time off because the current legal framework contained in the 1999 Order largely retained original provisions of the Ministerial Order of 17 December 1974 on social insurance allowances associated with illness and maternity.[1060] The 1974 Order introduced the entitlement to time off and allowance for employees caring for children up to the age of eight and other ill family members.

Unlike the current provision in Article 32(1) of the 1999 Order, which does not limit the availability of leave to employees only, and provides all insured workers with the entitlement to the time off, Article 35 of the 1974 Order restricted the leave entitlement to employees only. It must be noted, that the original wording of Article 32(1) of the 1999 Order also limited the availability of leave to employees only. The rationale for restricting the availability of the leave to the insured employees only was explained, as deriving from that the time off was associated with absences related to the contract of employment where absences would need to be justified for the employment contract to exist.[1061] Consequently, this provision (similarly to the right to time off under Article 188 LC) constrained workers' work-care choices by restricting the availability of leave for dependants merely to employees. It therefore failed to recognise that the non-employees also have responsibilities towards their dependants that need to be reconciled.

Workers' work-care choices have been gradually enhanced as the necessity of providing ensured workers (and not only employees) with the right to time off for dependants was recognised. In 2001 Article 32(1) of the 1999 Order was

[1059] Minsterial Order of 25 June 1999, Ustawa z dnia 25 czerwca 1999 r. o świadczeniach pieniężnych z ubezpieczenia społecznego w razie choroby i macierzyństwa Dz.U. nr 60, poz 636 i ustawa z dnia 22 Kwietnia 2010 w sprawie ogloszenia jednolitego tekstu ustawy o o świadczeniach pieniężnych z ubezpieczenia społecznego w razie choroby i macierzyństwa, Dz. U.z 2010 r. Nr 77, poz.512.
[1060] Ministerial Order of 17 December 1974 (Ustawa z dnia 17 Grudnia 1974 o świadczeniach pieniężnych z ubezpieczenia społecznego w razie choroby i macierzyństwa (Dz. U. z 1983 r. Nr 30, poz. 143, ze zm.; dalej: ustawa z 1974 r.)).
[1061] Polish Hansard (Druk sejmowy nr 840/III)

amended to provide with the time off and associated with it allowance all workers who were subject to the compulsory national health insurance contributions.[1062] Entitlement to the time off was no longer restricted to employees only but the access to leave remained limited, as it was only available to those groups of workers who were subject to the compulsory national health insurance contributions. This meant that the legislator merely ensured the leave entitlement to employees, workers working for farming associations and those working in lieu of the military service (compulsory insurance).[1063] Despite attempts of the legislator to introduce more equality into the availability of the leave,[1064] Article 32(1) of the 1999 Order, which was in force on 1st of May 2004 when Poland joined the EU, differentiated between the situations of the insured workers on the basis of whether they made compulsory or voluntarily contributions to the national health insurance scheme. Voluntarily contributions to the national health insurance scheme could be made by groups of workers such as self-employed, agency workers and independent contractors.

The main difficulty with Article 32(1)(2-3) of the 1999 Order was that only those who made compulsory contributions to the national health insurance scheme were entitled to the time off and associated with it allowance. Despite making contributions to the voluntarily national insurance scheme, which were equivalent to the compulsory contributions made by employees, and other required workers, those who made the voluntarily contributions were not entitled to benefit from their contributions to the same degree, as those who made the compulsory contributions, because they were not entitled to the time off and accompanying allowance. This clearly disadvantaged the groups of workers who made the voluntarily contributions to the national insurance scheme, and significantly restricted the availability of the leave to the few groups of workers who were subject to the compulsory national health insurance contributions.

[1062] Ministerial Order of 11 May 2000 (Ustawa z dnia 11 maja 2000 r. o zmianie ustawy o świadczeniach pieniężnych z ubezpieczenia społecznego w razie choroby i macierzyństwa (Dz. U. Nr 53, poz. 633)).
[1063] Ministerial Order of 13 September 1998, Article. 11 ust. 1 w związku z art. 6 ust. 1 pkt 1, 3 i 12 ustawy z dnia 13 października 1998 r. o systemie ubezpieczeń społecznych (Dz. U. Nr 137, poz. 887; dalej: ustawa o systemie ubezpieczeń społecznych).
[1064] Polish Hansard (druk sejmowy nr 1481/III)

Consequently, the workers making the *voluntarily* contributions to the national insurance scheme were treated less favourably than the employees who made the same compulsory contributions. The justification for the disparity in the treatment and the lack of legislative desire to recognise work-care needs of all workers became evident in the decision of the Polish Supreme Court.[1065] According to the Supreme Court, there is no need to provide the self-employed with the entitlement to time off and the allowance because they have the freedom to arrange their work in such a way, so that it could enable them to provide the personal care to the ill dependant. It ruled that on the basis of the employment status, and the lack of obligation on the self-employed to make the national insurance contributions, it was possible to differentiate the entitlements to the allowances. This decision merely focused on the differences in the employment status, and responsibilities for making the national insurance contributions but it did not consider the scenario when the voluntarily national insurance contributions were actually made.

Recently, the discussed issue was further addressed by the Polish Constitutional Tribunal,[1066] which examined the compatibility of Article 32(1)(2-3) of the 1999 Order with the equality principle in Articles 2 and 32(1) of the Polish Constitution. It ruled that the difference in treatment of those who made the same contributions to the national insurance scheme on grounds that the contributions were voluntarily, and not compulsory was incompatible with the equality principle Articles 2 and 32(1) of the Polish Constitution. Since both groups of workers made the same national insurance contributions (common factor) differentiating the entitlements on the basis that the contribution was voluntarily amounted to an unjustified discrimination in breach of the principle of social justice in Article 2 of the Polish Constitution.[1067] The Constitutional Tribunal justified its decision on the basis that the equality principle and social justice in the analysed context required

[1065] The Decision of the Polish Supreme Court of 7th November 2001 (sygn. akt II UKN 567/00, OSNP 2003/14/341)
[1066] The Ruling of the Polish Constitutional Tribunal, of 6th March 2007 (22/3/A/2007, z dnia 6 marca 2007 r. Sygn. akt P 45/06, ogloszony dnia 16 marca 2007 r. w Dz. U. Nr 47, poz. 318).
[1067] See also the ruling of the Polish Constitutional Tribunal of 14 June 2004 where the principle of social justice was defined (wyrok Trybunalu Konstytucyjnego z 14 czerwca 2004 r., sygn. P 17/03, OTK ZU nr 6/A/2004, poz. 57).

to treat equally those who have fulfilled the same criteria for acquiring the entitlement.[1068]

Consequently, this ruling has significantly enhanced work-care choices of workers with caring responsibilities for children and adult dependants as all those who make equal contributions to the national health insurance scheme, regardless of whether their contributions are voluntarily or compulsory are entitled to the same benefits which include the right to time off. Hence, the recently amended Article 32 of the 1999 Order[1069] provides all insured workers with the entitlement to the time off. This amendment is of the vital importance to workers with responsibilities for dependants because it significantly enhanced their work-care choices by extending the availability of the leave allowance to the groups of workers who previously were not entitled to benefit from it. The extended availability of the entitlement to the time off and allowance contributes to removing financial disadvantages suffered by those workers who because of caring responsibilities are unable to work and therefore do not receive their remuneration. As discussed earlier in this Chapter, the absence of financial constraints in the legislative right is of paramount importance in enabling workers to make real work-family choices.

However, the failure of the legislator to provide all workers with caring responsibilities for children and adult dependants with the right to time off regardless of whether, or not they make insurance contributions, indicates the failure of the Polish government to recognise the social importance of care for children and elderly dependants. Consequently, it will be particularly difficult for the uninsured workers with caring responsibilities for children and adult dependants to make real work-care choices because they do not benefit from either the right to time off under Article 188 LC or the 1999 Ministerial Order.

[1068] Se also the ruling of the Polish Constitutional Tribunal of 15 November 2005 (Wyrok Trubunal Konstytucyjny z 15 listopada 2005 r., sygn. P 3/05, OTK ZU nr 10/A/2005, poz. 115).

[1069] Minsterial Order of 25 June 1999, Ustawa z dnia 25 czerwca 1999 r. o świadczeniach pieniężnych z ubezpieczenia społecznego w razie choroby i macierzyństwa Dz.U. nr 60, poz 636 i ustawa z dnia 22 Kwietnia 2010 w sprawie ogloszenia jednolitego tekstu ustawy o o świadczeniach pieniężnych z ubezpieczenia społecznego w razie choroby i macierzyństwa, Dz. U.z 2010 r. Nr 77, poz.512.

Unlike the provision in Article 188 LC, which merely provides employees with responsibilities for the qualifying children with the right to time off work, the 1999 Order further enhances workers' reconciliation rights by enabling all insured workers with caring responsibilities for the qualifying children, and adult family members to take the time off work in order to provide them with the required personal care. The time off can effectively respond to various caring needs that workers may have as the possibility of taking leave is not limited to cases of illness involving children or adult family members, employees with caring responsibilities for the qualifying children can also take time off work to care for healthy children. The most comprehensive entitlement to the time off has been allocated to the insured workers with children up to eight years of age. Those workers in addition to the time off to care for an ill child, are also entitled to take leave to provide personal care to the child in other unforeseen circumstances.[1070]

By providing workers with caring responsibilities for children under the age of eight with the right to leave in order to deal with the unforeseen circumstances other than the illness or accident of the dependant, the national legislation exceeded the requirements of Clause 3 of the Directive, which merely required Member States to provide for the time off work in cases of illness or accident (see Chapter 3). Taking into account that childcare leave can only be taken in relation to children up to age of four, the availability of the additional leave entitlement to deal with the unforeseen circumstances covering the childcare arrangements for children up to the age of eight can be seen as effectively enhancing parents' work-care needs. The possibility of taking leave to respond to various unforeseen circumstances unrelated to the health of the child significantly improves the availability of leave and assists parents with making better work-care choices.

The national policies of Czech Republic, Hungary and Slovakia also provide workers with responsibilities for children and adult dependants with the possibility of taking time off work in order to care for the dependants. Similar to Poland, the availability of leave in other new Member States is not limited to the cases of

[1070] Article 32(1) Ministerial Order of 25 June 1999 provides parents of children up 8 years of age with the time off work in order to provide personal care for that child in cases of the unforeseen closure of a nursery, kindergarten or school, childbirth or illness of the spouse who permanently provides personal care to the child.

illness but it can be taken to respond to the unforeseen circumstances involving children (**Appendix, Table 15**).

Unlike insured workers with children up to eight years of age, the insured workers with responsibilities for older children up to the age of fourteen are merely entitled to the time off in cases of illness of the child.[1071] This significantly disadvantages employees with responsibilities for children between ages eight and fourteen, who despite having similar caring needs to parents of the younger children, they are not provided with the equivalent legislative entitlement to time off. Consequently, working parents with older children will have to rely on the limited right to leave in Article 188 LC, or their annual leave entitlements in order to respond to the unforeseen circumstances involving their children. Although, parents with children older than eight years of age and under the age of fourteen are provided with (albeit restrictive) the right to time off for non-health related reasons involving the qualifying children, reconciliation choices of parents with children older than fourteen years of age are even more constrained as they do not have any legislative entitlement to leave. This significantly disadvantages parents of teenagers and indicates the failure of the Directive and its national implementation in Poland to recognise the importance of provision of care for older children and that parents with older children also experience difficulties with reconciliation and need to make difficult work-care choices.

Workers' work-care choices are further expanded as in addition to the right to time off to care for the children under the age of fourteen, insured workers are provided with the possibility of spending time away from work in order to look after ill children above the age of fourteen or adult family members. The right to time off to care for adult family members may particularly assist with making work-care choices women who mainly care for dependant elderly in Poland.[1072] The scarcity of affordable formal care for dependant elderly in Poland also means that the vast majority of elderly dependants receive informal care at home and that workers (women) providing such care to their dependants often face difficulties in making real work-care choices.

[1071] Article 32(1) Ministerial Order of 25 June 1999.
[1072] Report (2011) op. cit., pp. 39-42.

The socio-demographic changes which have taken place in society also impacted on the patterns of care for dependant elderly and therefore informal care is no longer limited to family members. However, the legislative right to time off does not adequately respond to workers' work-care needs because it limits the availability of time off only to the closed family members living in the same household with the leave taker when the care is provided.[1073] The narrow definition of the family members clearly disadvantages insured workers who care for persons that do not fall within the definition of the family members, and yet are being cared for by the employee. Hence the right to time off is out of touch with workers' work-care needs as informal care is often provided to non-family members (e.g. neighbours or friends) and the legislation does not help them with making better work-care choices.

The effectiveness of time off to care for the ill family members in enabling workers to make better reconciliation choices is further hampered by the requirement that the family member must live together with the employee under the same roof when the care is being provided. Poland has a very long tradition of enabling employees to care for their ill family members, and in the past the extended family members often lived under the same roof, but due to social changes in society this pattern is no longer the norm. The legislative requirement that the family member must live together with the leave taker is out of touch with the caring needs of contemporary families, and deprives workers of the entitlement to leave so as to provide care to the closest family members who live independently.

In contrast with the family right to time off work in Article 188 of LC where the duration of leave is limited to two days per year, the entitlement to leave in order to respond to the unforeseen circumstances involving children up to the age of fourteen, and adult family members is set at sixty days per calendar year.[1074] The long leave entitlement which is not subject to any additional restrictions as to how it is to be taken can be seen as enabling workers to benefit from the right to leave

[1073] Article 32(2) Ministerial Order of 25 June 1999, the definition of family members covers employee's spouse, parents in law, grandparents, grandchildren, brothers and sisters of the applicant and children above the age of fourteen on condition that they live with the employee.
[1074] Article 33(1)(1) Ministerial Order of 25 June 1999.

when it is most needed. The long entitlement to the leave which can be taken each year in relation to the qualifying family members indicates that the leave is intended to provide workers with the possibility of providing long-term personal care to their family members. Further flexibility in the availability of leave is ensured by not imposing any restrictions on how the annual entitlement to leave is to be taken.

The focus of this legislation is on providing the insured workers with caring responsibilities for children up to the age of fourteen with the family entitlement to leave in order to respond to the unforeseen circumstances or illness requiring the qualifying worker to personally care for the children, because the full entitlement to leave can only be used in relation to the qualifying children. By providing insured workers with caring responsibilities for the qualifying children with the long entitlement to leave, the legislator has significantly contributed to helping workers to better reconcile work and care for the family members. The long leave entitlement improves workers' work-care choices as for some families longer duration of time off could help them to implement their work-family preferences.

The legislation fails to fully recognise work-care needs of workers with caring responsibilities for older children or adult family members as only fourteen days of this entitlement can be used to provide personal care to children over the age of fourteen or adult family members.[1075] Since the right to time in relation to older children and adult family members is limited to fourteen days per year per family this can effectively prevent families with more extensive caring needs from being able to provide the needed care to their family members. It must be emphasised that the right to time off does not allocate any leave entitlement neither to the qualifying child nor the adult family member, and merely provides workers with the family entitlement to time off. This will particularly constrain work-care choices of families (women) with responsibilities for older children and adult family members as the family entitlement to time off will need to be very carefully shared in order to cover the needs of older children and adult dependants.

[1075] Article 33(1)(2) Ministerial Order of 25 June 1999.

The short duration of time off for older children and adult family members fails to recognise the enhanced reconciliation needs of families with many older children who simultaneously provide care to elderly family members for whom it may be particularly difficult to make real work-care choices. Considering that the vast majority of the dependant family members are receiving informal care in Poland (less than ten per cent of the dependant elderly receive care in institutions) and that care for family member is primarily provided by women, the short leave entitlement in particular prevents women from making genuine work-care choices.[1076] The inadequate leave arrangements can therefore force women out of the labour market in families where the long-term care is required as there is no legislative right to provide long-term care to dependants in Poland. Consequently, the right to time off in the 1999 Order fails to provide workers with the right to long-term care for older children and adult family members as it merely enables them to respond to various emergencies involving their family members (or short-term care).

Although, flexibility in leave arrangements is crucial in enabling workers to effectively use their leave entitlements, the 1999 Order does not provide workers with the right to take leave in periods shorter than a days leave. This constitutes a major deficiency of the right to time off in particular for families who simultaneously care for older children and the dependant elderly as the lack of possibility of taking leave in periods shorter than a day prevents those families from using their short leave entitlement in the manner that best responds to their family needs. The lack of flexibility in the leave arrangements may results in some part of the leave entitlement being unnecessarily lost as workers are forced to take a day off whilst in fact a few hours off work could be needed. The inflexibility in the leave arrangements accompanied by the short duration of time off means that workers with extensive responsibilities for older children and adult dependants will quickly use their allocated leave entitlement and will be forced to rely on their annual leave entitlement in order to provide the needed care to their family dependants.

[1076] Report (2011) op. cit., pp.41-42.

In contrast with Poland where the longest leave entitlement is provided in relation to the children up to the age of fourteen, the national policies of Czech Republic, Hungary and Slovakia allocate the longest leave periods to the younger children. As discussed earlier in this Chapter in the context of childcare leave, the long entitlements to leave which result in the long absences from the labour market may act to the detriment of the leave takers. The Directive aims at facilitating the reconciliation for parents also through the use of the entitlement to the time off and it does not seek to facilitate parents exit from the labour market in order to provide the needed care. The entitlements to the long periods off work in the selected new Member States indicate that the objective of the time off is both to enable workers to respond to various emergencies involving the dependants and allowing them to be actively involved in providing the long-term personal care to the dependants (**Appendix, Table 15**).

As seen earlier in this Chapter (also Chapters 2 and 4) workers' work-care preferences can particularly be constrained by the lack of financial support to the leave takers which can render the legislative right being unaffordable to workers with caring responsibilities for children and adult dependants. The 1999 Order assists workers with making effective work-care choices by providing them with financial assistance during the period when because of providing personal care to the family dependants they are unable to obtain the income from their usual economic activities.[1077] In contrast with Article 188 LC, which provides qualifying employees with the right to the full remuneration whilst on leave, Article 35 of the 1999 Order neither provides the leave takers with the right to the full remuneration nor limits the availability of leave to employees only.

Although the leave takers are provided with financial assistance the taking of time off involves financial costs to families as the allowance is paid at the level of 80 per cent of earnings. The financial assistance is available to all insured workers with responsibilities for the qualifying children and adult family members. The allowance which is provided to the leave takers does not impose any financial burden on employers, as it is paid from the contributions to the national insurance

[1077] The Ruling of the Polish Constitutional Tribunal, of 6th March 2007 (22/3/A/2007, z dnia 6 marca 2007 r. Sygn. akt P 45/06, ogloszony dnia 16 marca 2007 r. w Dz. U. Nr 47, poz. 318).

scheme. The right to receive allowance whilst on leave must be seen as effectively contributing to helping workers with caring responsibilities for dependants to reconcile work and family responsibilities. However, the financial cost of the taking of leave can also prevent some families from making real work-care choices.

The national policies on the time off in Czech Republic, Hungary and Slovakia also do not provide the leave takers with the entitlements to the long periods of leave with the right to the full remuneration. In all of the selected new Member States the leave is accompanied by the entitlement to the allowance ranging from 70 per cent of earning in Hungary to 60 per cent of earning in Czech Republic and Slovakia. It must be recalled that in contrast with these Member States Poland provides working parents with the right to two days off work for dependants with the entitlement to the full wage, and the leave allowance of the ensured workers is set at 80 per cent of earnings (**Appendix, Table 15**).

Various constraints including those associated with the lack of adequate legislative protection from detriments or dismissal and individual preferences play an important role in shaping choices which are made by workers with caring responsibilities for family dependants.[1078] The long duration of the annual entitlement to leave accompanied by the allowance may also act to the detriment of workers with responsibilities for children up to the age of fourteen in relation to whom the longest entitlement to leave can be taken. In Poland, mainly women provide care to the children and adult family members, and therefore the entitlement to time off is often used by women.[1079] The absences from work of those who use their entitlement to the leave in order to provide personal care to the qualifying dependants are considered as justified absences,[1080] and therefore

[1078] R. Crompton and C. Lyonette (2008) op. cit., pp. 213–234.
[1079] National Statistical Office (2006) *Work and Family Responsibilities in 2005* (*Praca a Obowiazki Rodzinne w 2005*), Glowny Urzad Statystyczny (GUS), Warsaw 2006.
[1080] Ministerial Order 20 December 1974 on justified absences from work and the rules on time off work, para. 10(2)(3) (Rozporządzenie Rady Ministrów z 20 grudnia 1974r w sprawie regulaminów pracy oraza zasad usprawiedliwiania nieobecności w pracy i udzielania zwolnień od pracy).

employment relationship with leave takers cannot be terminated without giving a contractual notice.[1081]

The level of the legislative protection from the termination of employment which is provided to employees using their entitlement to leave merely prevents employers from terminating employment contracts with the leave takers without a notice. The legislative protection from termination of employment relationship without a notice in Article 53(2) LC is limited to employees who took the leave in order to provide care to the qualifying children. The wording of Article 53(2) LC does not make any reference to the protection of the employment relationship of those who take the leave in order to look after adult family members. However, in accordance with Article 53(1)(2) LC, employment contracts with workers who take the time off in order to care for adult family members cannot be terminated without giving a notice, because their absence from employment would need to exceed one month, and the entitlement to care for adult family members is restricted to fourteen days per year.

The legislative protection of the employment security does not enable workers with caring responsibilities to make unconstrained work-care choices as it is limited to preventing employers from terminating employment relationships without notice. This enables employers to terminate the employment relationship with leave takers by providing them with the contractual notice. This significantly disadvantages employees with the caring responsibilities for the qualifying dependants, because whenever the longer periods of time off are taken the employment security may be jeopardised. Additionally, those entitled to the leave employees are not provided with legislative protection from detriments or termination of the employment relationship prior to the leave being requested or after the returning from the leave. The lack of legislative protection from detriments associated with the eligibility for the leave enables employers to avoid employing women with caring responsibilities for the qualifying children or terminate employment contracts by giving the contractual notice to those

[1081] During the period of justified absence employment contracts cannot be terminated without giving a notice, exemptions insolvency or liquidation of the company (Article 41 LC). An employment contract cannot be terminated without a notice if the employee uses the entitlement to time off work in order to care for the child (Article 53(2) LC).

employees (mainly women) who often use or are likely to use their entitlement to the leave.

The reconciliation choices of workers with caring responsibilities for dependants who spent long periods of time away from employment are further constrained as they may be risking not being able to return to their previous jobs, because the legislation does not provide them with the right to return to the previously held post. The absence of comprehensive protection from detriment or dismissal associated with the taking or applying for the leave and the lack of right to return to the former post constitute a major deficiency of the entitlement to the time off in the 1999 Order.

Consequently, the failure of the Directive to ensure that workers with caring responsibilities for children and adult dependants are provided with the adequate protection from detriments or dismissal for reasons associated with the taking of time off has been further reinforced to the detriment of workers with caring responsibilities in Poland. The national policies on the time off in Czech Republic, Hungary and Slovakia also treat the absences from work whilst caring for the qualifying dependants as the justified absences, and provide the leave takers with some legislative protection from dismissal during the period of leave (**Appendix, Table 15**).

Unlike the right to time off work in Article 188 LC, where an employee needs to agree with an employer on which day(s) the right to leave can be used, the entitlement in Article 32 of the 1999 Order enhances workers' work-care choices by enabling them to take time off without providing the employer with any notice. This enables workers to effectively respond to various unexpected matters involving the family members and provide them with the immediate or even long-term care that may be needed. The decision as to whether the entitlement to time off arises is not made by the employer but by the doctor who certifies in writing that the child or an adult requires personal care of the employee. If the leave is taken because of the unforeseen circumstances (not illness) involving children up

to the age of eight, the necessity of providing care must be evidenced in writing by the relevant authority.[1082]

The entitlement to leave provides workers with the possibility of taking the leave when it is necessitated by the family's situation, as the employer has no right to postpone or delay the granting of the leave. Since, there is no restriction on the duration of leave that can be taken at the same time and the leave can be taken with no prior notice, employees' sudden absences may cause significant disruption to the operation of the business. Workers can be away from the employment for up to sixty days each year. In order to avoid the potential disruptions to the operation of the business caused by the right to the time off, employers may be inclined not to employ women with responsibilities for children in relation to whom the full entitlement to the leave could be taken. The lack of equality in the distribution of caring responsibilities within a family where women primarily care for children and adult dependants significantly reduces women's involvement in the economic activities and overshadows their contribution to the labour market.

Workers' work-care choices are further limited by the requirement that leave can only be taken if there are no other members of the family, who could care for the ill family member or provide care to the child. This restriction does not apply to the leave to care for an ill child up to the age of two.[1083] The possibility of providing personal care to the ill child up to the age of two by both parents is of symbolic value because of the low financial support provided to families during maternity and childcare leave. The restriction on the possibility of taking leave when the other parent is already at home looking after the child may effectively prevent both parents from providing the dependant with the needed simultaneous care, and support when it is most needed.

[1082] Articles 53-60 Ministerial Order of 25 June 1999.
[1083] Article 34 Ministerial Order of 25 June 1999

5.5 The Polish Implementation of the Directive does not Help Fathers to Play a More Active Role.

Although the past state socialist regime in Poland supported the reconciliation of paid and unpaid work by providing mothers with the right to various family leave periods it did not encourage fathers to be more involved in unpaid domestic work or care, as it emphasised mothers' unique roles in the provision of care for children and adult dependants.[1084] The social and political changes which have taken place in Poland encouraged women's labour market participation and stimulated the introduction of gender neutral leave entitlements to childcare leave and time off for family dependants, which sought to improve fathers' participation in sharing childcare responsibilities and responsibilities for adult dependants. However, as more and more women are actively involved in the labour market, fathers increasingly are required to make difficult reconciliation decisions.[1085] The younger generation of men also holds more balanced attitudes towards their involvement in work and the provision of care for children and adult dependants. As observed in Chapter 4, different groups of men have different work-family preferences and their work-family choices are made in the unique context of each family. However, fathers are not always in a position to implement their work-family preferences as their choices can be constrained by various factors which include the work demands or legislative provisions which do not fully responds to their individual reconciliation needs.[1086] Hence this section considers the extent to which the right to childcare leave and time off for family dependants enable fathers to play a more active role in the family.

The implementation of the Directive in Poland has not resulted in the introduction of the new rights to childcare leave or time off for dependants that could specifically recognise the role of fathers (men) in the provision of care for children and adult dependants. It merely reaffirmed the existing leave arrangements on childcare leave and leave for family members and it failed to bring about the

[1084] M. Valentova (2011) op. cit., p.89.
[1085] C. Lyonette, G. Kaufman and R. Crompton (2011) 'We both need to work' : maternal employment, childcare and health care in Britain and the USA, *Work Employment Society* 2011 25:34-50 at p.36.
[1086] R. Crompton (2006) op. cit., pp. 74 and 209-210.

introduction of childcare leave and leave for dependants that could contain provisions effectively responding to fathers' diverse reconciliation needs. The right to childcare leave in Article 186 LC which no longer refers to mother's right to leave can be seen as encouraging more fathers to consider taking leave. A vital opportunity to promote a change in the attitudes of fathers towards their caring responsibilities was missed because the wording of Article 186(1) LC merely refers to the generic term *employee* as being entitled to the leave and not to the more specific term as *employed parents*, which would be more orientated towards both a mother and a father. By providing fathers with the right to childcare leave in the context of the gender neutral right to leave the legislator merely recognised that fathers have caring responsibilities for their offspring and they need to be more involved in the provision of care.

As seen earlier in this Chapter, the decision of Polish Constitutional Tribunal[1087] revealed that the complexities surrounding the availability of childcare leave to those working for the national security agencies, may render childcare leave not to be available in particular to working fathers employed by those agencies. This can effectively exclude fathers from being able to take leave when it most needed, discourage fathers from taking leave and thereby prevent fathers from making real work-care choices.

Clause 1(2) of the Directive required Member States to provide all qualifying employees with the right to parental leave and did not allow Member States to exclude or restrict the application of this right in relation to any industry. This requirement of the Directive has been correctly implemented in Poland as the right to childcare leave is available to all employed mothers and fathers and is not limited to any particular industry. In contrast with the Polish implementation, the Hungarian parental leave law has restricted the availability of childcare leave in

[1087] Decyzja Trybunalu Konstytucyjny z dnia 29 Czerwca 2006r. P 30/05.

the armed forces only to the period after the end of maternity leave.[1088] Unlike the Hungarian restrictive right to parental leave, the Labour Code does not prevent fathers from taking childcare leave whilst the mother is on maternity leave. The leave arrangements in the Czech Republic and Slovakia also do not impose restrictions on the availability of parental leave in any particular sectors of employment and enable fathers to use the leave entitlement whilst the mother is on maternity leave. Although this option exists, due to the limited financial support provided to the leave takers very few fathers would opt to take parental leave whilst the mother is on maternity leave (**Appendix, Table 13**).

Despite providing both working parents with the right to childcare leave, the Code[1089] does not seek to encourage fathers' involvement in bringing up children because fathers are not provided with the individual and non-transferable right to childcare leave, which would unambiguously indicate the necessity of their involvement in family life. The absence of individual and non-transferable right to childcare leave for fathers in the Labour Code also fails to send a clear message to employers that fathers have caring responsibilities for children therefore employers should expect fathers to be actively involved in the provision of care. Considering that Poland has a long tradition of recognising childcare as mothers' responsibility, the non-transferable right to leave could help to challenge employers' preconceived ideas about work-care responsibilities and thereby could improve the situation of family-centred fathers in the labour market. The current legal framework regulating the administration of childcare leave in Poland also does not provide for any special incentives aiming at encouraging fathers'

[1088] The European Commission reasoned opinion sent to Hungary for incorrectly implementing the Parental Leave Directive (96/34/EC), Brussels, 29 October 2009, IP/09/1619. Since, maternity leave is predominately taken by mothers in Hungary, by restricting the availability of parental leave to the period after the expiry of maternity leave the national legislator deprived fathers of their right to parental leave during the months following the birth of the child. This clearly indicates that the intention of the Hungarian legislator was to ensure that parental leave is mainly taken by mothers after the expiry of maternity leave and not by fathers when the mother is on maternity leave. Providing fathers with the possibility of being able to simultaneously care for children is of vital importance as it can encourage fathers' involvement in sharing of the family responsibilities. The restriction on the availability of parental leave in relation to the Hungarian armed forces imposed by the national legislator reinforces the tradition perception of the family and is intended to discourage father's involvement in the family life. Considering that there is a family entitlement to parental leave in Hungary which is predominately used by mothers, by not providing fathers with the right to the leave during the period of maternity leave, the national legislator ensured that the leave will continue to be used mainly by mothers.

[1089] Article 186(1) LC.

participation in childcare responsibilities. The result is that only 2 per cent of Polish fathers exercise their right to childcare leave (**Appendix, Table 14**).

The national implementations of the Directive in Czech Republic, Hungary and Slovakia (**Appendix, Table 13**) also provide working parents with family entitlement to parental leave and do not reserve any part of leave exclusively for fathers. The lack of non-transferable right to parental leave and the lack of incentives for fathers to take parental leave (all selected new Member States) are of particular concern in Hungary where childcare is highly gendered and fathers are not encouraged by society to take parental leave.[1090] The lack of father's interest in taking parental leave and very high take up rates for mothers (in particular in Hungary) indicate that the national leave arrangements are failing to ensure more equality in the distribution of work within a family (**Appendix, Table 14**).

Although the Labour Code provides parents with the right to three months' simultaneous leave it does not reserve any portion of childcare leave for each parent. The option of taking childcare leave simultaneously is of symbolic value as the right to childcare leave is a family right; fathers do not have any portion of childcare leave specifically allocated to them and therefore rarely take leave. The Code does not provide for any incentives for fathers to become more involved in family life. In fact, fathers are discouraged from exercising their right to childcare leave because, as discussed earlier in this Chapter, there are various disadvantages associated with the taking of childcare leave which can prevent fathers from making real work-family choices.

The simultaneous leave could encourage fathers to be more involved in bringing up their offspring, but due to the lack of legislative clarity as to how the simultaneous leave is to be administered, the potential flexibility of this entitlement is lost and childcare leave remains primarily taken by mothers (**Appendix, Table 14**). This indicates the lack of legislative initiative of the Polish legislator to ensure the flexibility in the leave arrangements which could encourage more fathers to

[1090] C. Fagan and G. Hebson (2004) op. cit., p. ix

actively participate in bringing up children and ensure more equality in the distribution of parental responsibilities within a family. The lack of financial incentive for both parents during the period of the simultaneous leave may discourage fathers from using their right to childcare leave and will hamper the objective of ensuring equality in sharing of the family responsibilities.[1091] Although, there is no data available on the use of the simultaneous leave, it can be argued on the basis of the identified deficiencies very few fathers would be inclined to use the simultaneous leave.

As seen in Chapters 3 and 4, the flexibility in leave arrangements impacts on fathers' attitudes towards their use of childcare leave and is crucial in encouraging fathers to play a more active role in the provision of care. The impossibility of taking childcare leave in the form of unrestricted reduction in contractual working time significantly reduces the flexibility of leave arrangements, which can discourage fathers from being more involved in the provision of care. The lack of an unqualified right to part-time childcare leave can also discourage fathers from requesting the reduction in the working time in lieu of childcare leave as it does not have to be granted when it is needed most by fathers. The financial costs associated with working reduced working time in lieu of childcare leave may prevent less well-off fathers from being able to benefit from this leave option. Hence, this leave option does not enable all working fathers to make genuine work-family choices and is limited to those fathers who can afford it.

Although part-time childcare leave could appear attractive to some working fathers who wish to be more involved in family life, and are happy to bear the cost of taking leave, the lack of legislative right to return to their previous working arrangements imposes a major constraint on this leave option, which may effectively discourage fathers from taking leave. Fathers' work-family choices are further constrained because parents who take part-time childcare leave of the duration longer than twelve months (cumulative) lose the legislative protection of their employment relationship. Hence both financial and employment security

[1091] Article 30a (2) legislation of 1 December 1994 o Zasilkach Rodzinnych, Pielegnacyjncyh i Wychowawczych, Dz. U. z 1998 r. Nr 102, poz. 651.

costs associated with this leave option can outweigh its benefits for the fathers striving to reconcile work and family responsibilities.

The right to leave in Article 186 LC does not effectively respond to fathers' reconciliation needs as it does not ensure that all parents can benefit from flexible childcare leave arrangements which are needed in order to enable parents to make real work-care choices. It merely specifies that childcare leave can be taken in no more than four blocks of time and it does not provide parents with an absolute right to childcare leave in four blocks. Having to take childcare leave as one very lengthy block of time would be acceptable to the family centred-fathers but it would not be a viable option for the work-centred fathers for whom significantly shorter leave periods would better respond to their work-family needs. The impossibility of taking childcare leave in four blocks of time could further discourage fathers from taking childcare leave and render it to be taken mainly by mothers.

Fathers' work-family choices which are made in the context of their families are influenced by various factors which include social and cultural factors which influence their attitudes towards the extent of their work-family involvement. However, the financial cost of taking childcare leave is of paramount importance in shaping fathers' attitudes toward childcare leave. There is evidence[1092] that unpaid childcare leave and the childcare allowances paid at very low levels dissuaded fathers from taking childcare leave. The lack of paid childcare leave in Poland significantly constrains fathers' reconciliation choices as only fathers who can afford to take leave will be able to benefit from it. Considering that most Polish families are unable to make both ends meet without the second income, very few fathers who often earn more than mothers will be able to take childcare leave. The current leave arrangements do not attract the earners with higher income who are often fathers. The lower social fund contributions made on parents' behalf by the state during childcare leave, which financially penalise leave takers will further discourage father from taking leave. The low take up rates in

[1092] I. Kotowska and A. Baranowska (2006) op. cit. The research established that 14.6% of men did not take the leave because of financial reasons (29.3% of women did not take the leave because of financial reasons).

Poland indicate that current inflexible leave arrangements which do not provide for any incentives encouraging fathers to take leave and financially penalise the leave takers fail to enable fathers to make real work-family choices (**Appendix, Table 14**).

Poland is a dual breadwinner society often not by choice but by necessity because one salary is not enough to cover family needs. The lack of paid childcare leave prevents fathers from more equally sharing family responsibilities with mothers who often take childcare leave, and forces fathers to increase their workload to compensate for mothers' loss of income because of the taking of childcare leave. Although, some fathers would like to be more involved in the provision of care, the low wages, inflexible and demanding work schedules often prevent them from more equally sharing family responsibilities with mothers. The possibility of working whilst on leave could be attractive to more family-centred fathers who take childcare but the lack of needed flexibility in the family allowance arrangements (it is lost as soon as the parent on leave starts working) effectively offset any benefits deriving from the possibility of working whilst on leave.

The objective of the Directive is to enable both working parents to achieve the reconciliation through the use of parental leave. The take up rates for Czech Republic, Hungary and Slovakia clearly show that parental leave is mainly taken by mothers and that very few fathers take the leave. A similar leave take up pattern can be observed in the case of Poland. This suggests that the high level of pay during parental leave encourages leave take up rates but it does not ensure equality in sharing of family responsibilities between working parents (**Appendix, Table 14**).

The low leave take up rates by men in the selected countries are influenced by the traditional perceptions about the division of responsibilities within a family. This is also reinforced by the lack of equality in pay between men and women in the labour market. Both these factors influence the family's decision as to who should take parental leave. The importance of financial incentives for fathers in promoting the change in men's attitudes towards their involvement in family

responsibilities is well recognised in the literature.[1093] However, in the selected new Member States the national leave arrangements neither provide fathers the individual non-transferable right to parental leave nor ensure the existence of financial incentives encouraging fathers' involvement in the family life. By not providing for the financial incentives, the national legislators have failed to promote the change in the distribution of the responsibilities within a family. In the context of Poland where the leave is primarily taken by mothers and the means-tested allowances are only available to the poorest families, the lack of financial incentives for fathers will continue reinforcing the traditional division of work within families.

As seen in Chapters 3 and 4, the lack of adequate protection from detriment or dismissal for reasons associated with exercising the right to childcare leave accompanied by the absence of absolute right to return to the previous job impact on fathers' work-family attitudes and reconciliation choices. Most men recognise family stability and security as the most important value which needs to be protected during times of insecurity.[1094] However, the employment security risks associated with the taking of childcare leave and the lack of absolute right to return to the former job, which were discussed in detail earlier in this Chapter hamper employment security of the leave takers and therefore effectively dissuade fathers from taking leave. The possible negative career impacts associated with taking childcare leave were identified as the main reason for not taking childcare leave by 30 per cent of fathers (37 per cent of mothers).[1095] The gradual increase in the leave take up rates by Czech fathers can be attributed amongst other things to the job security ensured by the right to return to the same job (**Appendix, Table 14**). Hence, the adequate legislative protection of employment security and the right to return to the same job can assist fathers with making real work-family choices.

As seen earlier in this Chapter, in addition to childcare leave employees and ensured workers have been provided with two distinct, gender neutral, family

[1093] C. Fagan and G. Hebson (2005) op. cit., and J. Plantenga & Ch. Remery (2005) op.cit.
[1094] J. Nolan (2009) op. cit., p. 194.
[1095] I. Kotowska and A. Baranowska (2006) op. cit.

entitlements to time off under the Labour Code and the 1999 Order. However, these entitlements do not specifically recognise fathers' reconciliation needs as they do not provide for any specific provisions in relation to fathers that could encourage more fathers to be more involved in the provision of care for children and adult dependants. Fathers may have different preferences in relation to their involvement in the provision of care. Fathers with strong family preferences will often take leave in order to care for the sick child other fathers will take leave when the child is often sick.[1096] As the care to children and the dependant elderly is mainly provided by women, the lack of specific entitlements in relation to time off for fathers and the lack of incentives for fathers to be more involved in the provision of care constitutes major deficiency of these leave arrangements. Consequently, the failure of the Directive to specifically recognise the role of fathers in the provision of care for children and adult dependants has been further reinforced by the Labour Code and the 1999 Order.

Neither the right to time off under the Labour Code nor that in the 1999 Order provide fathers with the individual right to time off. As the right to time off under Article 188 LC is fully paid fathers' individual entitlement to leave could send a powerful message to fathers that they are expected to play a more active role in the provision of care for children. However, as already indicated in this Chapter, this right to leave is very short and its inflexibility could discourage less family orientated fathers from applying for leave as the employer may prevent fathers from using their leave entitlement when it is most needed by the family. The lack of possibility of taking leave on the hourly rather than daily basis could further constrain fathers' work-care choices as fathers who want to attend child's school Christmas party which last for a few hours would need to use a day's leave entitlement and be away from work for longer than it is actually needed. As the leave entitlement is very short and does not reflect parents' actual caring needs it is of paramount importance for the leave takers that no parts of leave are unnecessarily wasted leaving fathers with no right to time off when it is most needed by the family. Hence, Article 188 LC prevents work-centred fathers from taking short leave periods that best suit their reconciliation needs. The right to

[1096] A. Amilon (2010) op. cit., pp. 33-52.

leave under 1999 Order is also very restrictive, inflexible and fails to adequately cater for families real reconciliation needs as it does not allocate the right to leave to children or adult dependants and provides workers with the set leave entitlement.

As men are more inclined to look after their elderly dependants the lack of right to paid leave under Article 188 LC in order to respond to known events involving adult dependants could further discourage men from being more involved in the provision of care for adult dependants. The right to time off under the 1999 Order is less attractive for men as the taking of time off involves financial penalties deriving from that the leave takers are merely entitled to the allowance which is lower than their wages. The financial constraints associated with the right to time off under the 1999 Order constitute a deficiency of this right which will impact on fathers' attitudes to this leave period. The financial cost of taking leave and the absence of incentives for father to be more involved in the provision of care can further dissuade fathers from being more involved in the provision of care for children and adult family members.

At present the Polish, Hungarian and Slovakian policies on the time off do not contain any incentives encouraging men's involvement in caring for dependants. The Czech legislation appears to be addressing the issues surrounding the negative impact of the long period of leave on employment, and the imbalance in the distribution of caring responsibilities within a family by requiring that the leave is to be taken in blocks, and enabling parents to take leave in turns without losing their right to the allowance. Since the legislation does not impose any restrictions on the frequency of the use of the leave, parents can decide how often the leave is taken and by whom (**Appendix, Table 15**).

As discussed earlier in Chapter, the entitlements to time off contain numerous constraints on leave accessibility; flexibility; employment security risks, and financially penalises fathers who would like to be more involved in family life. These constraints may discourage fathers from taking time off as access to time off when it is needed most by fathers, and absence of employment security risks and financial costs of taking time off are crucial far encouraging fathers (men) to

be more involved in providing care to children and adult family members. Considering the existence of the gender pay gap in Poland; that taking the time off involves the wage loss and that the legislation does not provide for any incentives aiming at encouraging men's involvement in caring for dependants, it is very unlikely that more men will be involved in the provision of care in the near future.

5.6 The Polish Leave Entitlements do not Respond to the Needs of Single Parents.

It was seen in Chapter 4 that due to recent social and behavioural changes in society one parent families are on the increase and therefore it is crucial that legislation on leave periods fully provides for reconciliation needs of those families.[1097] However, the failure of the Directive to require Member States to provide for special legislative regimes on parental leave and leave for dependants for single parents has been further reinforced by the Labour Code and the 1999 Order, which do not expressly recognise the enhanced reconciliation needs of single mothers and fathers. The Polish leave arrangements therefore do not provide for special regimes on childcare leave and time off for family dependants in relation to single parent families. Hence, the Polish legislator failed to introduce national leave schemes that could effectively address single mothers' and fathers' various reconciliation needs and assist those vulnerable working parents with making real reconciliation choices.

As seen in Chapters 3 and 4, reconciliation choices made by single mothers and fathers are influenced by their work-family preferences and attitudes which are constrained by their individual family contexts. Additionally, work-family decisions which are made by single parents can either be enhanced, or constrained by legal provisions. The constraints deriving from the legislative rights to childcare leave and time off for family members will therefore differently affect single parents who are potentially worse off, as they have no partners with whom they could share their family responsibilities.[1098] It may be particularly difficult for single mothers and fathers to rely on their legislative rights to leave entitlements in order to

[1097] P. Moss & F. Deven (eds.) (1999) op. cit., p.149.
[1098] A. Amilon (2010) op. cit., pp.32-33.

reconcile work and family responsibilities, as these provisions do not specifically provide for their reconciliation needs.

The right to childcare leave in Article 186 LC and time off for Dependants in Article 188 LC are linked to employment status (restricted to qualifying employees) and there is no universal right to childcare leave or leave for dependants for all parents (carers). This in particular can disadvantage single parents who due to the lack of childcare facilities in Poland were forced to become self-employed in order to ensure more flexibility in their work arrangements enabling them to care for their children. The absence of entitlement to childcare leave for single parents, who are not employees constitutes a major deficiency of the national legislation, as it fails to recognise that the flexibility of working patters that self-employment can offer may effectively enable some professional single mothers and fathers to make better work-family choices.

The requirement that the right to childcare leave is subject to 6 months' employment[1099] can particularly constrain work-family choices of single parents who have not been in employment for six months as the absence of entitlement to childcare leave together with the lack of help from the other parent, and the limited availability of formal childcare could force single parents out of the labour market. The absence of universal right to childcare leave and time off for dependants for all parents regardless of their employment status indices the failure of the national legislator to recognise the social importance of childcare and that single parents are in particularly vulnerable position in terms of their reconciliation choices.

State policies can play an important role in enabling single parents to make better reconciliation choices by providing them with long, flexible leave arrangements that adequately respond to their diverse work-care needs.[1100] The Labour Code and 1999 Order provide single parent families with the same leave entitlements as partnered families and therefore fail to recognise the enhanced reconciliation needs of single parents. The effectiveness of childcare leave in responding to the enhanced reconciliation needs of single parents is further hampered by the fact

[1099] Article 186(1) LC.
[1100] R. Crompton (2006) op. cit., p. 125-127.

that parents are forced to use their long leave entitlement when the child is still very young (before the child becomes four years old). Thus, single parents' reconciliation needs in relation to older children are not adequately catered for as there is no legislative right to childcare leave that could enable them to provide long-term care to children older than four years of age. Single parents' work-care choices are particularly constrained because childcare facilities are very underdeveloped in Poland, and the high cost of childcare may in particular prevent single parents from using them. Thus single parents may be forced to look after their children well beyond the duration of childcare leave.[1101]

The long duration of childcare leave does not adequately respond to reconciliation needs of single parents because it aims at partnered families and merely facilitates mothers' exit from the labour market in order to enable them to provide the long-term care to their children. The current legal framework on childcare leave does not provide for a special regime in terms of the flexible leave arrangements for single parent families and families with many children for whom it may be particularly difficult to reconcile work and family responsibilities. This constitutes a major deficiency of the national leave policy which focuses on the needs of traditional families and neglects the needs of single parents. The impossibility of taking childcare leave in the form of unrestricted reduction in contractual working time accompanied by restrictive availability of childcare significantly constrain work-care choices of single parents, and may prevent them from finding the most suitable working arrangements enabling them to remain in the labour market whilst providing the needed care.

Many single mothers and fathers either cannot afford to leave the labour market in order to care for their children, or are work-centred and therefore prefer to

[1101] Department for Business Innovation & Skills (2009), op. cit., p.272. The 2005 survey established that only 2 per cent of children under the age of three attended crèches and 41 per cent of children age three to five years attended kindergartens. These figures indicate that the vast majority of parents do not use the institutional childcare services. The high cost of childcare services further prevents parents from using them where available. This in particular affects low income families for whom the estimated cost of childcare ranges from 23 per cent to 80 per cent of their earnings; families with many children and single parent families. In 2010, less than 10 per cent of children under the age of three had access to formal childcare. The situation is slightly better with the availability of childcare for older children but the high cost of childcare prevents poorer families from using formal childcare. Cf. Report (2011) op. cit., pp. 25-36.

continue working. Not having a spouse and associated with it financial constraints render part-time employment less attractive for single parents.[1102] Considering the limited availability of part-time work in Poland the option of working reduced hours in lieu of parental leave may in practice be available to very few single parents. Despite disadvantages associated with working part-time which were considered in Chapter 4, this leave option could enable some better well-off single parents to achieve the desired reconciliation. The lack of unqualified right to part-time childcare leave can disadvantage single parent families as the refusal to grant the requested reduction in the working time in lieu of childcare leave could prevent single parents from providing needed care to their children. The loss of right to return to their previous working arrangements for parents who take childcare leave of the duration longer than twelve months (cumulative) significantly constraints work-family choices of those single parents who would like to permanently reduce their working time in lieu of childcare leave.[1103]

As seen earlier in this Chapter, working parents are not provided with the legislative right to take childcare leave in four blocks of time.[1104] Thus single parents working for "family-unfriendly" employers could only be offered childcare leave in one block of time. This could significantly limit those single parents' work-family choices and prevent them from remaining in employment whilst providing the needed care.

The application process for childcare leave has been designed for families with two parents and does not provide any information as to how single parents can comply with the childcare leave application process in the absence of declaration from the second parent. Single parent families may encounter particular difficulties when applying for childcare leave if they are unable to provide the declaration of the second parent or the decision of the court in cases where the other parent has limited or does not have parenting responsibilities. This may cause unnecessary delays in the application process as the lack of second parent's declaration would need to be supported by the necessary documentation.

[1102] O. Kangas and T. Rostgaard (2007) op. cit., p.248.
[1103] Article 186(8) LC.
[1104] Article 186 LC.

The lack of right to remuneration whilst on childcare leave constitutes a major deficiency of the Polish leave arrangements. This in particular constrains choices of less well-educated and less qualified single parents who in the absence of financial support of their partner can be prevented from taking leave.[1105] Work-care choices of single mothers are further restricted by limited availability of affordable childcare for children under the age of three, which in the absence of alternative care arrangements may effectively force mothers out of the labour market. As the right to unpaid childcare leave will different affect different groups of single mothers, well-educated mothers in well-paid jobs generally are better equipped to deal with structural constraints deriving from the limited availability of affordable childcare care.

Childcare leave is mainly taken by not well-educated mothers with poorly paid jobs, who cannot afford formal childcare and for whom means-tested childcare allowance which is paid at very low rates offers an alternative to working. Single mothers either work full-time or exit the labour market in order to qualify for means tested childcare allowances. Regardless of their individual work-family preferences the cost of taking childcare leave can either prematurely force parents back to work or facilitate their labour market exit. Hence unpaid childcare leave accompanied by the gender pay gap, women often have less well-paid jobs than men, make it particularly difficult for single mothers to achieve the desired reconciliation. The lack of right to remuneration whilst on childcare leave clearly indicates the failure of national legislators to recognise the important social function of childcare and the contribution to society and the labour market which is made by single parents. The low childcare leave take up rates in Poland by mothers and fathers indicate that current leave arrangements do not enable parents to make real work-family choices as they cannot afford to take childcare leave (**Appendix, Table 14**).

The recent reforms also reduced the amount of financial support available to the single parent families. This is evident in Article 11a which replaced the provision

[1105] R. Crompton (2006) op. cit., p. 163.

on the additional allowances for single parents in Article 12.[1106] The new provision clearly disadvantages single parent families with more than two children. The reduction in family allowances for single parent families for whom it may be particularly difficult to achieve the desired reconciliation indicates the decline in the commitment of the Polish government to adequately addressing the financial needs of single parent families. Additionally, the financial costs associated with working reduced working time in lieu of childcare leave do not enable all working parents to make real work-family choices and therefore this leave option is merely limited to those families who can afford it. As parents who work are excluded from the means tested childcare allowance less well-off parents are encouraged to leave the labour market for the duration of childcare leave. The possibility of taking childcare leave in the form of reduced working hours with right to the allowance could enhance work-care choices of single parent families or families with many small children where the allowance could be used to pay for the childcare facilities and parents could work.

It was seen earlier in this Chapter that the right to childcare leave involves employment security risks, does not fully protect leave takers from detriments, dismissal and fails to provide them with an absolute right to return back to work. These disadvantages associated with the taking of childcare leave can effectively prevent single mothers and fathers from taking childcare leave because employment stability and guaranteed source of income are of paramount importance for single parent families with (often) very limited financial resources. The lack of additional legislative protection from detriments or dismissal for reasons related to childcare leave for single parent families constitutes the deficiency of the Polish right to childcare leave because as discussed in Chapter 4 employers' negative perceptions about workers with family responsibilities may particularly disadvantage single mothers and fathers.

In contrast with the Polish and Czech legislation where single parents are not provided with a specific legislative protection from dismissal, the Slovakian

[1106] Dz. U. Nr. 228, poz.2255 ze zm, Dz.U z 2006 r. nr.139, poz 992 tekst jednolity. Unlike the provision in Article 12 which provided single parents with the additional allowance of 170 PLN (42 Euro) for each child, Article 11a also provides for the same amount in respect of each child but it introduces a cap of 340 PLN (85 Euro) on allowance for all children.

parental leave policy provides these parents with the additional protection from dismissal until a child's third birthday (**Appendix, Table 13**). By providing single parents with the additional legislative protection from detriment or dismissal associated with applying or the taking of parental leave, the Slovakian legislator recognised the vulnerable situation of these parents in the labour market and minimised the negative impact that parental leave may have on their employment.

The impossibility of returning to work on a part-time basis can in particular disadvantage single parent families where the reduction in the working time may be needed in order for the mother to be able to continue working and provide for the family. The limited availability of formal childcare even for older children may require single mothers to provide the needed care whilst simultaneously providing for the family's financial needs. The impossibility of returning from childcare leave to part-time working when family's circumstance require it (reduced financial support) may significantly constrain single parents' work-care choices and force them out of the labour market for longer than it is needed. This can therefore contribute to reinforcing poverty amongst women with caring responsibilities.

The right to paid time off in Article 188 LC not only does not address the needs of families with many children, it also ignores the existence of the additional burden involved in bringing up children by single parents because it does not provide these families with significantly longer leave entitlements that could respond to their real work-family needs. The inflexible leave arrangements under Article 188 LC may prevent single parents from being able to take leave when it is needed most by families and force parents to use a day's leave where in fact only a few hours off work are needed. Considering that this is the only fully paid leave that can be taken in relation to children and that financial constraints are more likely to affect single parent families than partnered families, the unnecessarily lost parts of leave can effectively prevent single parents from taking time off when it is needed by the family. The right to time off also fails to recognise that single parent families do not share childcare responsibilities with their partners yet the availability of leave in relation to older children than envisaged by Article 188 LC could enable single mothers and fathers to better respond to the foreseeable family matters (especially for larger families). Since, single parents may also have

responsibilities for adult dependants the unavailability of paid leave in relation to adult dependants particularly constrains single parents' work-care choices and forces them to use their annual leave entitlement in order to respond to the foreseeable family matters. Since single parent families may only rely on the annual leave entitlement of one parent, the limited availability of time off under Article 188 LC will be more burdensome for single parent families than partnered families who have two annual leave entitlements at their disposal.

Single parents' work-care choices are further constraints as in spite of the lack of help from their partners the 1999 Order does not provide them with the additional time off time off work to respond to unforeseen matters involving children and adult family members. It may particularly difficult for single mothers and fathers to effectively deal with various unforeseen or urgent matters involving family members. The short duration of leave (14 days per year) in relation to older children and adult family members which is restricted to health related matters does not recognise the difficulties that single mothers and fathers face when responding to emergencies involving children and providing care to adult family members. [1107]

In contrast with the Polish regime on the time off, the Hungarian legislation recognised the extended caring needs of single parent families by providing them with additional entitlement to the time off in order to care for children. Unlike in Poland where no additional allowance is provided to single parents, who provide personal care to the qualifying children, the Czech entitlement to the leave provides single parents with the additional allowance. Although, the Czech legislation recognises the additional financial needs of single parent families, the amount of the allowance (69 per cent of earnings) which is provided to the single parents whilst on leave remains very low is lower than allowance provided to the leave takers in Poland (**Appendix, Table 15**).

Employment security risks associated with the right to time off under the 1999 Order, and lack of absolute right to return to back to work can further disadvantage

[1107] Article 32(1) of Ministerial Order of 25 June 1999

single mothers and fathers in the labour market and effectively prevent them from requesting leave in order not to jeopardise their employment prospects with the employer who can at any time terminate the employment relationship with the "non-committed employees" by providing them with the contractual termination notice.

5.7 The Polish Implementation of the Directive Perpetuates Dominant Theories of Motherhood and Parenthood.

Predominant ideologies of motherhood and fatherhood recognised caring for children as women's responsibility, and men were often considered as not having the necessary predisposition to become caregivers.[1108] Hence, as seen earlier in this Chapter, traditionally Polish men were not expected to be actively involved in the provision of care and therefore they were not provided with entitlements to childcare leave and time off for family members. Although, the role of men in the provision of care for children and adult dependants has only recently been fully recognised by law makers, Polish women have traditionally been expected both to earn wage and provide care to children and adult dependants.[1109] Traditionally in Poland there has been the dual breadwinner society but the burden of bringing up children was not shared equally between working parents. Despite social and behavioural changes that have taken place in Poland women are still perceived by society as being responsible for providing care to children and adult dependants.[1110] However, as observed earlier in this Chapter the introduction of gender neutral rights to childcare leave and leave for family members which implement in Poland the requirements of the Directive on parental leave seek to ensure more equality in how work-care responsibilities are allocated within a family.

Choices which are made by parents as to how breadwinning and caring responsibilities are allocated within a family will depend on parents' individual preferences, work-care attitudes, social class and various constraints which impact

[1108] C.L Czarnecki (1989) op. cit., pp.113-114.
[1109] M. Valentova (2011) op. cit., p.89.
[1110] S. Saxonberg & D. Szelewa (2007) op. cit., pp. 351-379.

on how parents share their work-care responsibilities.[1111] Despite parents' preferences for more equality in how work and care responsibilities are allocated between mothers and fathers their choices could be constrained by state policies such as policies on childcare leave and time off for family dependants, which can either challenge or reinforce the manner in which families manage the articulation between employment and family life. How breadwinning and caring responsibilities are distributed between parents is likely to be challenging for families where weak or negligible statutory or employment support is provided to working parents. Thus, this section considers the extent to which Polish implementation of the Directive on parental leave can effectively challenge dominant theories of motherhood and parenthood.

In principle the existence of a gender neutral right to childcare leave and time off for family dependants in the Labour Code and the 1999 Order can help to challenge dominant theories of motherhood and parenthood as fathers' caring responsibilities have been recognised by providing them with leave entitlements. However, the old concept of childcare leave was retained in the Labour Code, which was traditionally associated with being a mothers' right to care for children. The failure to introduce the new right to parental leave, which is not associated with mothers, constitutes a deficiency of the right to childcare in encouraging fathers to be more involved in the provision of care, as some fathers may still have preconceived attitudes to childcare leave and therefore may be dissuaded from taking it. This could effectively contribute to reinforcing dominant ideologies of motherhood and parenthood and thereby further constrain mothers' reconciliation choices.

As seen earlier in this Chapter, the decision of Polish Constitutional Tribunal[1112] revealed that the complexities surrounding the availability of childcare leave to those working for the national security agencies, may render childcare leave not to be available in particular to working fathers employed by those agencies. The employment sector specific legislation as this case law revealed still refers to the role of mother in the provision of care and does not provide fathers with an

[1111] R. Crompton (2006) op. cit., pp.125-127 and 160.
[1112] Decyzja Trybunalu Konstytucyjny z dnia 29 Czerwca 2006r. P 30/05.

express right to childcare leave. The necessity of relying on a wide interpretation of this legislation in order to ascertain fathers' right to childcare leave not only may deprive fathers' of childcare leave when it is needed most but also contributes to reinforcing dominant ideologies of motherhood and parenthood. As mainly men work for the national social security agencies the complexities surrounding the availability of childcare leave can contribute to reinforcing mothers as primary cares and further discourage fathers from taking childcare leave.

Although, the Directive on parental leave aims at enabling both working parents to reconcile work and family responsibilities, the lack of explicit references to this reconciliation objective in the Polish legislation on leave arrangements indicates the lack of commitment of the national legislator to challenging dominant ideologies of motherhood and parenthood. This is evident as the family right to childcare leave and time off for family dependants contained in the Labour Code and the 1999 Order fail to recognise that both men and women have equal care responsibilities for children and adult family members. These leave entitlements do not challenge the dominant ideologies of care and therefore contribute to legitimising inequalities in how care responsibilities are allocated within Polish families. The lack of individual and non-transferable entitlements to childcare leave and time off for family dependants further reinforces the traditional perception of family and division of responsibilities within a Polish family as fathers' attitudes towards their involvement in the provision of care remain unchallenged. Even if the right to leave periods were to be granted on a non-transferable basis, it would take a long time to change fathers' attitudes to family responsibilities in Poland as the concept of a traditional family is still deeply rooted in the Polish culture. The recent study[1113] on fatherhood and professional and family responsibilities confirmed that the majority of Polish fathers strongly believe that giving up work when children are small is a bad solution. Unless there is a significant change in the attitudes towards the division of work within a family, childcare leave will continue to be taken predominantly by women and the legal entitlement to childcare leave shall remain of symbolic value. The lack of

[1113] Cf. A. Kwiatkowska, A. Nowakowska (2006), *Mezczyzna Polski, Psychospoleczne Czynniki Warunkujace Pelnienie Rol Zawodowych i Rodzinnych*, Bialystok: Wydawnictwo Wyzszej Szkoly Economicznej w Bialym Stoku.

individual and non-transferable right to time off in Czech Republic, Hungary and Slovakia also continues to reinforce the traditional care patterns where the care for children and adult family members is primarily provided by women (**Appendix, Table 15**).

The change in men's attitudes is not stimulated by government's family policy 2007-2014.[1114] It merely aims at facilitating reconciliation for, and does not emphasise the importance of, the involvement of fathers in sharing of family responsibilities. The absence of a strategic plan for encouraging the involvement of men in family life derives from the traditional perception of the division of the responsibilities within a family, which is upheld by the Polish legislators. It could be argued that reconciliation issues and equality in the distribution of work within a family are not a priority for the Polish government because of the high unemployment rates, and the effects of recession on the labour market. As seen earlier in this Chapter, the introduction of the additional maternity leave in 2010, which primarily aims at women is in fact designed to keep mothers away from the labour market in order to reduce the level of unemployment. This tactic was often used in the past to regulate labour market in Poland.[1115]

The failure to provide for special regimes on childcare leave and time off for family dependants in relation to single parent families indicates that the Labour Code and the 1999 Order seek to reinforce the traditional perceptions about parenthood and family. This legislation does not recognise the modern concepts of parenthood and family and contemporary families do not always consist of mothers and fathers who provide for family's needs and share work-family responsibilities. The definition of family members[1116] in relation to time off for dependants relies on the traditional concept of a family; it fails to recognise same sex families and is out of touch with the needs of contemporary society, where many people do not have

[1114] The Polish Government proposal for Family Policy for 2007-2014 in http://66.102.9.132/search?q=cache:rGCLzgTmh5IJ:217.149.246.88/archiwum/politykarodzinna.doc+%22program+polityki+rodzinnej%22&cd=8&hl=pl&ct=clnk&gl=pl&lr=lang_pl accessed on 25/01/2010.

[1115] C.L Czarnecki (1989), op. cit., pp.92-101.

[1116] Article 32(2) Ministerial Order of 25 June 1999, the definition of family members covers employee's spouse, parents in law, grandparents, grandchildren, brothers and sisters of the applicant and children above the age of fourteen on condition that they live with the employee.

their own families, and are being cared for by distant relatives or strangers. Hence, these leave arrangements are out of touch with the needs of non-traditional families because the enhanced reconciliation needs of single mothers and fathers in relation to various family leave entitlements have not been addressed by the legislation yet. Consequently, as long as the Labour Code and the 1999 Order continue reinforcing the traditional perceptions about parenthood and family they will be unable to effectively address the real work-family needs of contemporary families.

As seen earlier in this Chapter the Polish leave arrangements do not expressly recognise the role of fathers in the provision of care for children and adult dependants, do not provide for incentives encouraging fathers' involvement in the provision of care and above all various constraints associated with childcare leave and time off for depends discourage fathers using their leave entitlements. Undoubtedly, enhanced fathers' involvement in the provision of care thorough childcare leave and time off for dependants could help to challenge the dominant ideologies of motherhood and parenthood. The failure of national legislators to provide for entitlements to leave periods which adequately cater for fathers' work-care needs prevents fathers from being more involved in the provision of care. Additionally, it indicates the lack of commitment of the Polish government to introducing laws that could effectively challenge dominant theories of motherhood and parenthood. The low leave take up rates by fathers and that childcare leave remains to be mainly taken by mothers indicate that Polish leave arrangements are incapable of effectively challenging the dominant ideologies of care (**Appendix, Table 14**).

The dominant theories of motherhood and parenthood are further reinforced by childcare leave arrangements which have been designed to target mothers as potential leave takers. Hence childcare leave has been designed to be taken by mothers in one long block as the continuation of maternity leave and therefore Article 186 LC does not guarantee that the employee will be able to childcare leave in more than one block of time. The lack of legislative right to take childcare

leave in four blocks of time[1117] could further discourage fathers from taking childcare leave and render it to be taken mainly by mothers. This could effectively contribute to reinforcing mothers as the primarily carers and fathers as breadwinners. Additionally, the short period of the simultaneous leave reaffirms the traditional distribution of caring responsibilities within a family in the Labour Code where only one family (mother) member is expected to be primarily involved in bringing up children. This is further reinforced by the childcare allowance which does not enable parents to simultaneously use their childcare leave entitlement. The business rationale for preventing parents from simultaneously and equally sharing their childcare leave entitlement appears to be weak as very often parents work for different employers.

Childcare leave arrangements have been designed to facilitate mothers' exit from the labour market for the full duration of leave and mothers are discouraged from taking leave in any other form or working whilst on leave. This is effectively reinforced by providing parents with the right to request reduced working time in lieu of childcare leave (no right to part-time leave) and discouraging parents from using this leave option by depriving of the legislative protection of employment relationship those who use this leave option for longer than twelve months.[1118] Effectively, parents who would like to be able to use their full leave entitlement should not take part-time childcare leave because the Directive only guarantees that three months' leave needs to be provided. However, Article 186 LC merely guarantees the availability of childcare leave in one block of time. Childcare leave is designed to be taken by mothers as the continuation of maternity leave because it can only be taken when the child is still very young (up to 4th birthday). The Labour Code does not clearly state when the right to childcare leave begins and it assumes a natural transition from maternity leave to childcare leave because it merely states that the right to childcare leave expires when the child reaches the age of four. The limited availability of formal childcare for children under the age of three forces mothers to take childcare leave in addition to maternity leave and therefore reaffirms dominant ideologies of motherhood and parenthood whereby work and family responsibilities are not compatible. The information requirements

[1117] Article 186 LC.
[1118] Article 186(8) LC.

associated with the taking of childcare leave are very simple as long as leave is taken by mothers alone, otherwise they become very complex. Thus despite providing fathers with the right to childcare leave the Labour Code continues reinforcing the dominant ideologies of motherhood and parenthood.

The long duration of childcare leave which is primarily taken by mothers contributes to endorsing mothers as primary care providers and hence reinforces dominant ideologies of care which associate care giving with women. The long entitlement to childcare leave as accompanied by the lack of formal childcare for small children reaffirms the family (mothers) as the most appropriate provider of childcare. The Polish leave policy where mothers are expected to use their long entitlements to childcare leave in the absence of adequate financial support and affordable childcare, and fathers are expected to provide for families indicate the existence of what Saxonberg and Szelewa refer to as a new "refamiliazation".[1119] The existence of this trend in the policy indicates a departure from the long tradition of the dual-breadwinner model in Poland, in favour of the single male-breadwinner model, which clearly disadvantages women in the labour market; reinforces the traditional division of responsibilities within a family and hampers the reconciliation objective of the Directive on parental leave. Consequently, the failure of the Barcelona (2002) soft law targets to ensure the availability of affordable formal childcare has contributed to reinforcing dominant ideologies of care in Poland.

As seen earlier in this Chapter parents' make rational decisions as to how work-care responsibilities are allocated within a family. However, because of numerous constraints associated with legislative entitlements to childcare leave and time off for family dependants parents' work-family decisions not always reflect their work-family preferences. As various costs associated with taking unpaid childcare leave are taken into account by families in their decision as to how work-care

[1119] S. Saxonberg & D. Szelewa (2007) op. cit., pp. 351-379. After the fall of communism, many of the governments opted for a male-breadwinner model, closing many childcare centers and withdrawing the financial support, developing a new "refamilization" trend, emphasizing that maternity and rearing children are a woman's role, encouraging women to leave the labor market to raise children. ("Defamiliazing" policies on the other hand, shift the responsibility for care away from the family, by providing accessible and affordable child care services, enabling women to join the labor force.)

responsibilities should be allocated within the family, mothers who often earn less than fathers and occupy less prominent jobs are often the rational childcare leave takers. Hence the Labour Code and the 1999 Order that provide for entitlements to childcare leave and time off for dependants contribute to reinforcing dominant ideologies of motherhood and parenthood by imposing on families financial and employment security costs which are often lower for mothers than fathers and therefore reaffirm them as the natural leave takers.

The financial loss associated with the taking of childcare leave accompanied by limited availability of formal childcare render childcare leave to be primarily taken by mothers and impose additional burdens on fathers who need to work longer hours in order to compensate for mother's loss of remuneration. Consequently, mothers' long absences from the labour market prevent fathers from being more involved in the provision of care by imposing on them additional breadwinning functions and contribute to reinforcing dominant ideologies of parenthood and fathers as breadwinners. Hence, weak and inadequate provisions on childcare leave which do not enable parents to make genuine work-care choices contribute to reinforcing dominant ideologies of care by preventing mothers from being fully involved in the labour market (building a career) and the demands of work often prevent fathers from being more involved family life.[1120]

There is evidence that limited availability of formal childcare can also influence fathers' work-family attitudes by forcing them to be more involved in the provision of care.[1121] The low childcare leave take up rates by both mothers and fathers in Poland may indicate that the lack of formal childcare may also have a positive impact on gender equality in Poland as difficult family circumstances can force more fathers to be involved in the provision of care in order to enable mothers to remain in employment and therefore secure the needed second source of income for the family. As seen earlier in this Chapter, although during the time of socialism in Poland affordable formal childcare was available which ensured high employment rates for women with caring responsibilities, it did not ensure more equality in how work and care responsibilities were allocated within families, and in

[1120] R. Crompton (2006) op. cit., p. 74.
[1121] R. Crompton (2006) op. cit., p. 160.

fact it put less pressure on fathers to be involved in the provision of care. However, in recent years (2005-2010) employment rate gender gap has increased in Poland (above EU overage 13 percentage points also in Czech Republic and Slovakia) and the percentage of inactive women out of the labour force for family reasons has also increased (2006-2010, also in Hungary, Czech Republic and Slovakia), which may indicate that current economic situation and leave provisions fail to ensure more equality in how work and care responsibilities are allocated.[1122]

The identified constraints associated with the right to time off for family dependants under the Labour Code and the 1999 Order also render these leave entitlements less attractive to fathers. Fathers' limited involvement in the provision of care for children and adult family members; limited availability of formal care for adult dependants; that care to dependants is mainly provided at home by women, high rates of women employment inactivity due to care responsibilities and lack of legislative right to provide long-term care to dependants elderly indicate that the current legal framework on time off for dependants does not respond to workers' real work-care needs and continues reinforcing women as providers of care children and adult dependants.

The 1999 Order restrict availability of time off for family dependants to situations when there are no other members of the family, who could care for the ill family member or provide care to the child. The legislator appears to refer to the concept of traditional family, and the assumption that the extended family would assist the worker in providing the needed care to children and adult dependants. Only when this help is not available would the leave be taken the qualifying worker. The absence of right to simultaneous time off; the necessity of proving that there is no other family member available to provide required care, and the expectancy in Polish society that care for children and adults is to be provided by women, results in the time off mainly taken by women. Men are not expected by Polish society, employers and doctors who certify the necessity of providing care to ill family members, to be actively involved in providing the required personal care.

[1122] Report (2011) op. cit., pp.16-23.

Having explored the Directive on parental leave in terms of how it shapes law at national level in the UK (Chapter 4) and Poland (Chapter 5) the following Chapter contrasts UK and Polish legal provisions on parental leave and leave for family reasons, identifies the good practice areas and considers the potential transplants in terms of a potential way forward.

PART III: COMPARATIVE EVALUATION & THE WAY FORWARD

Chapter 6 Conclusion – Comparative Analysis of the UK and Polish Leave Arrangements and the Way Forward

This thesis has explored the Directive on parental leave in terms of how it shapes law at national level in Poland and the UK (with references to selected Member States). It seeks to address the legislative contribution of the EU to addressing the complex and diverse matters surrounding the interaction between work and caring responsibilities for children and adult dependants and enabling workers to make real work-family choices. The legal analysis of provisions of Directive on parental leave and its national implementations in the UK and Poland has been "informed by" socio-legal methodologies, post-modern feminist perspectives and the concept of choice which were considered in Chapter 2. The use of a socio-legal methodology has been found useful in the consideration of legislative contribution of the EU to addressing the complex and diverse matters surrounding the interaction between work and caring responsibilities for children and adult dependants. It has enabled a full discussion of the legal, social, historical and political landscape surrounding the development of reconciliation policies and the legislative process used for their introduction.[1123] The reliance on post-modern feminisms in the legal analysis of provisions on parental leave and leave for dependants has ensured the consideration of implications of these legislative measures for various groups of women and men. The concept of choice is at the core of this thesis and it facilitated the consideration of whether, or not the Directive and its national implementations in the UK and Poland can assist diverse groups of workers in making real work-care choices.[1124]

As seen in Chapters 3-5, the existence of legislation providing for effective rights, which respond to various individual needs of female and male workers could contribute to enabling them to make genuine work-family choices. However, the content of legislative provisions is often conditioned by the legislative process used to

[1123] G. Holborn (2006) op. cit., and J. Knowles and Ph. Thomas (2006) op. cit.
[1124] Cf. R. Crompton (2006) op. cit., C. Hakim (2000) op. cit., and S. McRae (2003) op. cit.,

enact the law, the instruments used for its introduction and the commitment of the legislator to advancing the legislative protection in a given area. This has been illustrated in the EU with reference to the legislative action taken on reconciliation policies.

In Chapters 1 and 3 the legislative commitment of the EU to promoting effective reconciliation policies that could contribute to enabling workers to make genuine work-family choices has been identified as being largely limited to the soft law provisions and the legally binding Directives, outlining the minimum standards that need to be enacted by Member States. The rhetoric of the EU institutions emphasises the necessity of ensuring more equality in the distribution of caring responsibilities within a family, to enable female and male workers to make genuine work-family choices during the different stages of their lives. However, the focus of the EU reconciliation policies remains limited to enhancing women's labour market participation and not enabling different groups of male and female workers to make genuine reconciliation choices. Additionally, the *Charter*[1125] fails to recognise the importance of a father's involvement in the provision of care, as the gender neutral right to parental leave is not fully recognised, and it does not even refer to leave for urgent family reasons and its paramount importance for reconciliation.

The need to provide workers with effective legislative rights enabling them to make genuine work-family choices has so far not been fully recognised by the EU policy makers.[1126] The lack of focus of EU policies on equality in the distribution of work and caring responsibilities within a family indicates that economic and market participation arguments are still more important for the EU policy makers than the equality objectives. The current approach of EU to introducing binding reconciliation measures through Directives is inadequate as the minimalist and weak provisions of the Directive on parental leave which were discussed in Chapter 3 are lacking the economic force to enable working parents to make genuine reconciliation choices.

[1125] Article 33 of the European Charter of Fundamental Rights.
[1126] Communication from the Commission on `Strategy for equality between women and men 2010-2015, Brussels, 21/09/2010, COM (2010) 491 final.

Unless the EU primary source of law provides all workers with caring responsibilities for children or adult dependants with the right to reconciliation that effectively responds to their various reconciliation needs, without imposing on workers either financial or employment security constraints, the EU will continue failing to provide workers with legislative rights that could enable them to make real work-family choices. The EU also needs to become a driving force in introducing effective reconciliation rights at national level and not merely ensuring the existence of minimum standards. Hence, as seen in Chapters 4 and 5 where national governments do not recognise the importance of providing workers with effective reconciliation rights the lowest common denominator provisions of reconciliation Directives are implemented, which do not provide workers with real work-family choices. The uniformity in EU reconciliation rights also needs to be ensured in order to eliminate the disparities in leave entitlements across EU Member States which impose unnecessary constraints on workers' free movement rights. Workers with caring responsibilities for children may be prevented from settling in Member States where weak and inadequate leave provisions exist.

Additionally, the analysis of legislative process providing for enhanced involvement of Social Partners in EU decision-making process and its impact on provisions of the Directive on parental leave in Chapter 3 has revealed that the change in the legislative process in favour of framework Directives has resulted in further watering down of provisions of the Draft 1983 with negative consequences for reconciliation and choice. The involvement of Social Partners did not stimulate the introduction of reconciliation rights because the majority of Social Partners (the UNICE and CEEP) participating in negotiations did not fully recognise the importance of enabling both parents to make real work-family choices and therefore relied on subsidiarity in order to protect companies' interests. This became evident in negotiations which preceded the adoption of the Directive on parental leave. Consequently, as discussed in Chapter 3, as long as EU binding reconciliation measures continue to be introduced via framework Directives working parents will not be provided with reconciliation rights enabling them to make real reconciliation choices because it is *ultra virus* for Social

Partners to agree on measures that could have the economic power to enable workers to achieve the desired reconciliation. The introduction of effective reconciliation rights through framework Directives would therefore require the full support of employers' organisations for introducing such measures and the absence of financial cost for workers with caring responsibilities (considered in Chapter 3). The introduction of a specific legal base for adopting EU reconciliation laws which requires Qualified Majority Voting would need to be ensured in order to enable the Council to adopt reconciliation Directives which have the economic power to help workers with making work-family choices. The right to paid maternity leave under the *Pregnant Workers Directive* indicates that EU Directives drafted by the Commission and based on the legal base which requires Qualified Majority Voting can have the economic power to enable mothers (parents) to make better work-family choices. However, the recent failure to extended the right to paid maternity leave as indicated in Chapter 1 reveals that despite the reconciliation rhetoric of Member States they continue failing to recognise the importance of childcare for the EU long-term economic development and therefore remain unwilling to invest in families by providing them with longer paid leave entitlements.

The existence of a specific legal base on reconciliation matters which does not require the unanimous vote in the Council could also improve the bargaining position of the ETUC in negotiations preceding the conclusion of framework agreements. The UNICE and CEEP would no longer be able to insist on agreeing the lowest common denominator provisions in order to secure the unanimous vote in the Council. Additionally, it could have prevented the adoption of the Directive providing for the lowest common denominator provisions on parental leave and leave for family reasons. The legal analysis of provisions of Directive on parental leave in Chapter 3 was informed by socio-legal methodology and feminist perspectives. It revealed that the Directive does not contain the necessary provisions on leave periods that could enable various groups of parents with different work-family preferences to make genuine reconciliation choices. Additionally, it was identified that the Directive aims at traditional families, reinforces dominant ideologies of motherhood and parenthood

and does not provide for reconciliation needs of fathers and single parent families. This indicates a major deficiency of the Directive for reconciliation and choice which was further reaffirmed by rulings of the Court of Justice.[1127] Minimalist and weak provisions of the Directive also show the limited commitment of EU law makers to introducing effective reconciliation rights as the task of introducing stringent measures on leave periods depends on the extent to which national legislators recognise the need of providing workers with effective reconciliation rights.

Although the implementation of the Directive has brought about the introduction of new legislative rights to parental leave and time off work in the UK. The legal analysis of national leave provisions and their judicial interpretations in Chapter 4 reveals that UK implementation of the Directive is minimalist, weak and fails to provide different groups of working parents with real work-family choices. The analysis of national measures on childcare leave and leave for family dependants in Poland reveals that the lowest common denominator provisions of the Directive have failed to enhance the existing national leave schemes. Hence, Polish leave arrangements do not provide working parents with leave entitlements that could enable them to make unconstrained work-family choices (considered in Chapter 5). Since, this thesis consists of an exploration of the Directive in terms of how it shapes law on parental leave and leave for dependants in Poland and the UK, in view of considering what lessons could be learned from these national implementations of the Directive, an analysis of national leave provisions is undertaken in this Chapter, which uses comparative law methodologies.

In Chapter 2 comparative law was identified as providing an appropriate methodology for analysing UK and Polish implementations of the Directive on parental leave. By relying on comparative methodology law can be analysed as an on-going social, political and economic debate in relation to the appropriate balance between the

[1127] For example in *Evangelina Gómez-Limón Sánchez-Camacho v. Instituto Nacional del la Seguridad Social (INNS), Tesoreria General dle la Seguridad Social (TGSS), Alcampo SA*, Case C-537/07 and in *Wiebke Bush v. Klinikum Neustadt GmbH & Co. Betriebs-KG* Case C-320/01 [2003] ECR I-2041, Celex No. 601J0320.

frequently conflicting interests of employees and employers.[1128] Hence, laws on parental leave and leave for family reasons which seek to address ever conflicting issue of work-life balance can be analysed using the comparative methodology. Comparative analysis can be particularly useful methodology for considering the difficulties associated with introducing balanced legislation on parental leave and leave for family reasons in the UK and Poland. The use of comparative law within the area of employment law allows to take account not only of the existing law in various jurisdictions under consideration but also enables to consider the socio-political factors, which form the context in which the law in question has developed.[1129]

Thus, the comparative methodology provides the necessary tools for comparing the existing laws on parental leave and leave for family reasons by also considering the relevant socio-political factors. Comparative analysis will be very useful for considering whether the approach to discussed leave entitlements, which has been taken by a legislator in one jurisdiction, can offer functional solutions that can be implemented in another jurisdiction. Although, legal transplants are constrained by various factors[1130] sensitive transplants of rules should be possible (see Chapter 2).[1131] Comparative analysis of the selected national provisions aims to determine the existence of similarities and differences between national leave entitlements in order to consider parameters for further development in this area. Hence, the comparative methodology is useful when looking ahead at how the law might be improved in order to better respond to parents' various reconciliation needs.

Following this approach the key UK and Polish provisions on parental leave and leave for urgent family reasons shall now be contrasted, the good practice areas identified, and the potential transplants considered. As it is the objective of this research also to outline the way forward for further development of law, the comparison and evaluation of national leave provisions which implemented the

[1128] M. Salter & J. Mason (2007) op. cit., p.183.
[1129] O. Kahn-Freund in M. Salter & J. Mason (2007) op. cit., p.183.
[1130] O. Kahn-Freund (1974) op. cit., pp.1-27.
[1131] H. Collins (1991) op. cit., p 398.

requirements of the Directive on parental leave will consider the approaches, rules and standards that are least functional and those that should be adopted or reinforced in law in order to ensure that the leave entitlements become more effective in enabling various groups of female and male workers to make genuine reconciliation choices.

6.1 Comparative Analysis of Parental Leave Arrangements in the UK and Poland and the Way Forward.

The analysis of provisions of both the UK and Polish implementations of the Directive on parental leave in Chapters 4 and 5 revealed that national leave schemes in these Member States have failed to fully recognise the importance of the reconciliation objectives of the Directive. This failure derives from that neither the UK nor Polish national law on parental leave or leave for dependants expressly recognise the importance of these leave entitlements for reconciliation. The lack of express recognition of leave entitlements for reconciliation as seen in Chapters 4 and 5 constitutes a major deficiency of the UK and Polish implementations of the Directive. Additionally, it indicates the lack of commitment of these national legislators to providing workers with caring responsibilities children and adult dependants with adequate leave entitlements that could enable them to make real reconciliation choices. Although, the Directive merely recognised the importance of reconciliation in relation to parental responsibilities (discussed in Chapter 3), its national implementations in the UK and Poland do not expressly recognise parents' reconciliation needs that need to be catered for. Hence, there is no specific legislative right to reconcile work and family responsibilities either in Poland or in the UK. By not including the concept of reconciliation in the legislation on parental leave and leave for dependants both the UK and Polish legislators have downplayed the importance of reconciliation policies in enabling both working parents to make genuine work-life choices. Thus, these national legislators reaffirmed the legitimacy of traditional division of responsibilities within a family, which disadvantages women in

the labour market as the care for children and adults remains primarily provided by women.[1132]

The existence of a gender neutral national legislative right to reconciliation, or at least clear references to the reconciliation objective of the Directive in the body of the UK and Polish legislation would recognise that work and family responsibilities can be compatible. It would also send a powerful message that both female and male workers have equal rights to reconciliation, and that equality in the distribution of caring responsibilities within a family needs to be achieved. The existence of a positive right to reconciliation is of paramount importance for the UK where the implementation of the Directive resulted in the introduction of new legislative entitlements, and for Poland where until recently only women had the legislative right to childcare leave and time off for family dependants.

Consequently, unless there is a legally binding requirement deriving from the EU requiring Member States to expressly incorporate the reconciliation principle into national legislation, emphasis of the UK and Polish national laws on leave entitlements failing to acknowledge the reconciliation objective will continue to limit the impact of the Directive in enabling working mothers and fathers to make better work-family choices. In order to fully recognise that workers with caring responsibilities for adult dependants also face very difficult work-care choices, the Directive and its national implementations need to include the reconciliation principle which expressly recognises these workers' reconciliation needs.

As seen in Chapters 4 and 5, national implementations of the Directive in the UK and Poland have further reinforced its lowest common denominator provisions by failing to provide for special regime in relation to single parents for whom it may be particularly difficult to make real work-family choices. Thus, in order to better respond to the enhanced reconciliation needs of single mothers and fathers, new rights to parental leave and leave for dependants need to be introduced in the UK and Poland which

[1132] Report (2011) op. cit., pp. 25-29.

provide for special regimes in relation to single parent families. The new legislative regime in relation to fathers also needs to be introduced that could address diverse reconciliation needs of working fathers in Poland and the UK because as seen in Chapters 4 and 5 fathers also experience difficulties with making real work-family choices which need to be reconciled. The introduction of a leave regime for fathers could help to address the imbalance in distribution of family responsibilities within a family and enable fathers with preferences for family life to be more involved in the provision of care.

Although wide-spread availability of parental leave is of paramount importance in enabling various groups of working parents to make real work-family choices, the analysis of national provisions on parental leave in the UK and Poland (in Chapters 4 and 5) has revealed that national implementations of the Directive in these Member States have failed to recognise the necessity of enabling all working parents to make better reconciliation choices as the right to parental leave is merely available to natural or adoptive parents (**Appendix, Table 16**). This as seen in Chapter 4 significantly limits the availability of parental leave as there will be situations where it would be more convenient for a grandmother or other relative to use a portion of parental leave entitlement in order to provide the required personal care when it is needed. This constraint of parental leave can particularly limit single parents' work-family choices as they often do not receive any help from the other parent and the possibility of delegating their right to leave to another carer could enable them to remain in employment. Thus, in order to enable all parents to make better reconciliation choices the right to parental leave needs to be extended in both jurisdictions to cover individuals who actually care for the child and not merely natural or adoptive parents. The introduction of parental leave for grandparents in the UK and Poland should not encounter any major difficulties as this leave option already exists in Czech Republic (**Appendix, Table 13**).

Parents' work-family choices are further constrained because both in the UK and in Poland the right to parental leave is limited to employees (**Appendix, Table 16**). This

as seen in Chapters 4 and 5 clearly disregards the reconciliation needs of those working parents whose employment relationship does not fall within the remits of the definition of an employee under the national law. The lack of right to parental leave for self-employed parents constitutes a major deficiency of the right to parental leave in both jurisdictions. This derives from the fact that mothers in particular become self-employed in order to alleviate the negative impact of gender pay gap; seek flexible working patterns in order to better balance the demands of work and the family and being self-employed also enables them to better deal with limited availability of affordable formal childcare. As more and more UK[1133] and Polish[1134] mothers and fathers become self-employed in order to make better reconciliation choices,[1135] the universal right to parental leave for all workers with caring responsibilities needs to be introduced.

The lack of legislative entitlement to unpaid parental leave may not appear to disadvantage self-employed parents in terms of leave arrangements, but non-employee status could prevent self-employed parents from receiving means-tested state benefits associated with parental leave, if they are exclusively available to employees on parental leave (as it is the case in Poland). The existence of universal right to parental leave, which is not restricted by the employment relationship or its duration would significantly improve the availability of parental leave in the UK and Poland, and remove disadvantages currently experienced by those parents who are not employees. The universal right to parental leave would also elevate the importance of parenthood, and the extended availability of parental leave would better cater for parents' various work-care preferences and could enable them to make better work-family choices. This is attainable as Sweden already provides all

[1133] J. Philpott (2012) `The Rise of Self-employment`, Chartered Instituted of Personnel and Development, CIPD, January 2012.
[1134] Ł. Sienkiewicz (2010), `EEO Review Self-employment in Poland`, European Employment Observatory, Warsaw School of Economics, July 2010 pp. 1-9. Z. Wiśniewski and K. Zawadzki (2010) `Aktywna polityka rynku pracy w Polsce w kontekście europejskim,` Poland, Torun: Pracowania Sztuk Plastycznych.
[1135] Cf. European Commission (2010) `European Employment Observatory Review, Self-employment in Europe`, Luxembourg: Publications Office of the European Union.

parents with the right to parental leave and does not restrict the availability of parental leave to employees only (addressed in Chapter 4).

The entitlement to parental leave is further limited by the necessity of complying with the qualifying period requirement which as **Appendix**, **Table 16** indicates render parental leave merely to be available to employees ho can comply with this requirement. Consequently, as seen in Chapters 4 and 5 national parental leave entitlements in Poland and the UK ignore reconciliation needs of those parents who have caring needs which need to be reconciled and yet do not qualify for parental leave. The excessively long continuous employment service requirement under the MPLR merely implements the minimum requirements of the Directive; is more restrictive then the requirement set out in the Polish Labour Code and unnecessarily restricts the availability of parental leave for the UK working parents. Although the qualifying employment requirement set out in the Polish Labour Code may appear to be functional and better balancing the needs of employees and employers than that in the MPLR, both the UK and Polish employment requirements belong to the more restrictive parental leave schemes because as seen in Chapters 4 and 5 there are well-established and new Member States, which provide all employees with the right to parental leave.[1136] This indicates that it is possible to provide all employees with the right to parental leave without imposing excessive burdens on businesses.

The UK reluctance to provide all employees with the right to parental leave derives from its failure to recognise the need of enabling all workers to reconcile work and family responsibilities; its focus on employers' needs rather than workers' reconciliation needs (discussed in Chapter 4) and the failure of the Directive to ensure that all workers are provided with parental leave (addressed in Chapter 3). The recent extension of qualifying employment requirement for unfair dismissal claims (from one to two years) proves that business needs are the priority for the UK government and therefore parental leave qualifying period is unlikely to be reduced in

[1136] There is no qualifying period requirement in referred to Members States such as Germany, Sweden, Czech Republic and Slovakia.

the near future. However, a sensible transplant of the Polish qualifying period requirement should be possible and it could significantly improve leave access for the UK parents. In particular parents with shorter employment and those who regularly change employment in order to progress in their careers would benefit from the more flexible and shorter parental leave qualifying employment requirement. Childcare leave accessibility could also be improved in Poland by removing the qualifying period requirement and making childcare leave available to all employees as in Germany, Sweden, Czech Republic, and Slovakia. The lack of parental leave qualifying period requirements in these Member States clearly proves that parental leave constraints deriving from the qualifying period requirement which significantly limit parents' leave access in the UK, and to a lesser extent in Poland are not indispensable for ensuring proper functioning of businesses; unnecessarily constrain parents' work-care choices and therefore should be removed.

The failure of the Directive to clearly specify whether or not parental leave should be the individual and non-transferable right has been further reinforced in Poland where family right to leave was retained as seen in Chapter 5. The UK implementation of the Directive exceeded its minimum requirements and resulted in the introduction of individual and non-transferable right to parental leave (considered in Chapter 4). However, as observed by Caraciolo di Torella,[1137] the objective of reconciliation policies and legislation is not limited to promoting measures allowing fathers to play an active role in sharing of the family responsibilities but the real challenge is to ensure that those measures meet fathers' expectations. James[1138] also recognises the importance of the role of law in enabling parents to make genuine choices as to the division of work and caring responsibilities within a family, and that the changes in attitudes and behaviour regarding parenting and work should be reflected in the relevant legislation. She further observes that although a positive change in the attitudes towards parenting responsibilities can be identified, and an increasing number of parents try to achieve more equality in the distribution of responsibilities

[1137] Eugenia Caracciolo di Torella (2007) op. cit., pp.318-319.
[1138] G. James (2009a) op. cit., pp. 274-275.

within a family, there are still UK families who either prefer or are forced to follow the traditional division of roles within a family. A similar pattern can be observed in Poland, although a change in fathers' attitudes towards their involvement in sharing of the family responsibilities needs to be further stimulated and encouraged.[1139]

Despite two different approaches which have been adopted by the UK and Polish legislators to regulating parental leave, as observed in Chapters 4 and 5 neither the UK non-transferable right to parental leave nor the Polish family right to childcare leave adequately address parents' different reconciliations needs as they create both opportunities and disadvantages for working parents. Despite some changes in the fathers' attitudes towards the distribution of caring responsibilities within a family, in both jurisdictions, the identified constraints associated with parental leave (Chapter 4) and childcare leave (Chapter 5) influence fathers' attitudes towards the taking of leave. Hence, fathers' leave take up rates remain very low and mothers continue to be the primary care providers (**Appendix, Tables 9 and 14**). This comparison reveals that the existence of non-transferable right to parental leave on its own neither can adequately promote the social change nor ensures the existence of equality in how work and care responsibilities are allocated between working parents because work-family decisions are made in the particular context of each family and are influenced by various constraints which as associated with the right to parental leave. Consequently, the equality benefits deriving from the non-transferable right to leave are offset by various disadvantages which are associated with the taking of parental leave in the UK.

For the UK and Polish leave arrangements to become effective in ensuring more equality in the distribution of caring responsibilities within a family they would need to contain measures on parental leave, which adequately meet fathers' needs and expectations. In order to promote social change and encourage more fathers to be

[1139] Cf. A. Kwiatkowska, A. Nowakowska (2006), *Mezczyzna Polski, Psychospoleczne Czynniki Warunkujace Pelnienie Rol Zawodowych i Rodzinnych*, Bialystok: Wydawnictwo Wyzszej Szkoly Economicznej w Bialym Stoku and I. E. Kotowska, U. Sztanderska, and I. Wójcicka (eds.) (2007), *Aktywnosc zawodowa i edukacyjna a obowiazki rodzinne w swietle badan empirycznych*, Warszawa: Wydawnictwo Nukowe.

involved in caring responsibilities, adequate incentives (e.g. financial, enhanced leave flexibility and the absence of financial and employment security costs of taking parental leave) would need to be provided to those fathers who use their entitlement to parental leave. The MPLR and Polish Labour Code apart from providing fathers with the right to parental leave do not contain any measures or incentives that could encourage fathers to take the leave. Thus, parental leave is predominately taken by mothers and the traditional caring patterns are reinforced to the detriment of working mothers. The wide range of disadvantages associated with the taking of parental leave, which have been identified in Chapters 4 and 5 hamper the effectiveness of UK and Polish leave arrangements as reconciliation measures. As long as working parents continue to be penalised for taking parental leave, the existence of right to parental leave regardless of whether it is the non-transferable or the family right will remain of a symbolic value to families. This is because the pragmatic reasons, such as job security, stable income or higher father's wage shall continue forcing parents to arrange their lives in accordance with traditional gender roles.

Considering the advantages and disadvantages of the non-transferable and the family right to leave (addressed in Chapters 4 and 5); the importance of ensuring that the right to parental leave responds to the individual family needs, and promotes equality in the distribution of family responsibilities, it is of paramount importance for reconciliation and choice that the right to parental leave enables parents to choose which family model they want to follow and families that follow more traditional work-care patters are not penalised. A combination of an individual non-transferable right and the individual transferable right offers a balanced workable model for further development of the parental leave rights in Poland and the UK.[1140] The transferable part of individual right to parental leave would need to be supported by a formal process whereby a parent could give up his/her part of parental leave in favour of the other parent. While preserving the flexibility of parental leave arrangements this

[1140] This model would reflect the intentions of Social Partners who proposed that only the minimum duration of parental leave outlined in the Directive on parental leave could be subject to the non-transferability and the additional leave entitlement would be offered as family rights e.g. Swedish model discussed in Chapter 4.

process would reinforce the concept that men have caring rights and obligations in relation to their offspring, which must not be taken for granted. This could promote a shift in how women with parental responsibilities are perceived by employers, and improve their position in the labour market, as caring responsibilities would no longer be primarily associated with women.

The high leave take up rates in Sweden where parents are provided with both the family and non-transferable parental leave entitlements indicate that this parental leave model effectively responds to various reconciliation needs of working fathers and mothers and therefore offers real benefits if introduced in the UK and Poland (**Appendix, Table 9**). As seen in Chapter 4, the current UK leave arrangements which provide for the non-transferable right to parental leave disadvantage single parents by not providing them with the right to share the parental leave of the missing parent. This deficiency needs to be addressed and a special regime for single parents needs to be introduced providing single parents with the right to access the share of parental leave which could otherwise be allocated to the other parent.

In contrast with the UK's fully gender neutral right to parental leave, the Polish leave entitlement does not refer to the term parental leave but continues to rely upon the term childcare leave, which has traditionally been associated with mothers. This, in conjunction with the transferable family right to childcare leave hampers the reconciliation process and contributes to reaffirming the traditional division of responsibilities within a family. The new concept of parental leave (*urlop rodzicielski*), could be introduced which is not connected with the traditional division of roles within a family. It could be more effective in encouraging fathers' involvement in family life and enabling both parents to better share family responsibilities.

As discussed in Chapters 4 and 5 the flexibility of leave arrangements is crucial for enabling the UK and Polish parents to make real work-family choices. The Regulations and Labour Code represent two different approaches towards providing parents with the entitlement to parental leave and its flexibility (**Appendix, Table 16**).

The UK right to parental leave which exceeds the requirement of Clause 2(1) of the Directive, may in principle be seen as better catering for the needs of parents with multiple right, such as twins or triplets, than the Polish right, because the UK parents are provided with additional leave entitlement in relation to each child rather than each birth, as it is the case in Poland. As seen in Chapter 5, the lack of right to simultaneous parental leave in relation to each child who is born during the same birth significantly limits the flexibility of parental leave arrangements under the Polish Labour Code and could further prevent fathers from being more involved in the provision of care.

The UK right to parental leave in relation to each child born during the same birth offers a real potential if introduced in Poland. The expansion of Polish childcare leave entitlement to cover all children born during the same birth could in particular improve the availability of simultaneous childcare leave which is of crucial importance in encouraging fathers' involvement in the provision of care. Additionally, it would better equip parents to deal with the intensity of care which needs to be provided to twins or triplets by enabling fathers to assist mothers in the provision of care. Although, the financial cost of taking parental leave will undoubtedly constrain work-family choices of some fathers, the leave entitlement in relation to each child born could also enhance reconciliation choices of more well-off families. This comparison revealed that although the right to parental leave in relation to each child born during the same birth provides parents with a longer leave entitlement it does not automatically encourages more fathers to be involved in the provision of care as very few UK fathers take parental leave (**Appendix, Tables 9**). Consequently, the extension of Polish leave entitlement to all each child born during the same birth would need to be accompanied by financial incentives enabling parents to make unconstrained work-family choices.

As seen in Chapter 3, the Directive aims at enabling both parents to reconcile work and family responsibilities by providing them with the right to parental leave. The national leave arrangements should aim at enabling parents to achieve the desired

work-family balance, and not merely provide parents with the right to exit the labour market for the duration of parental leave set out in the national law. It was seen in Chapters 4 and 5 that the duration of parental leave entitlement is pivotal in enabling parents to make real work-care choices, as the short duration of parental leave would not adequately cater for parents' caring needs, and the excessively long entitlements to parental leave would facilitate parents' exit from the labour market rather than enabling them to achieve reconciliation. Fegan and Hebson[1141] rightly observe that entitlements to parental leave can create opportunities and obstacles for working parents and in particular for mothers who primarily take the leave both in the UK and Poland (**Appendix, Tables 9 and 14**).

Appendix, Table 16 exemplifies two different approaches which have been taken by national legislators in Poland and the UK towards setting the duration of parental leave. Various disadvantages and advantages for reconciliation and choices deriving from the long duration of childcare leave in Poland and short duration of parental leave in the UK were addressed in detail in Chapters 4 and 5. The analysis highlights that the UK short duration of parental leave does not provide working parents with sufficient time off work in order to care for the qualifying children and the Polish long leave entitlement aims at facilitating parents' (mothers') exit from the labour market rather than meeting parents' reconciliation needs. This comparison indicates that because of various constraints associated with the taking of parental leave (considered in Chapters 4 and 5) neither the very long nor the short duration of parental leave on its own enables parents to make real work-family choices, which is confirmed by low leave take up rates in Poland and the UK (**Appendix, Tables 9 and**

[1141] C. Fegan and G. Hebson (2005), op. cit., pp.91-2.

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14).[1142] Additionally, neither of the leave arrangements appears to enable mothers to effectively reconcile work and family responsibilities because there is significant percentage of mothers who are unable to work because of caring responsibilities both in Poland and the UK.[1143]

There is no agreement amongst the scholars as to what would be the right duration of parental leave that could effectively enable parents to make real work-family choices without disadvantaging them in the labour market, because various groups of parents have different work-family needs and preferences. Although, Albrecht[1144] appears to suggest that parental leave of the duration not exceeding twelve months would produce least negative effects on women's wages, the issue as to when the duration of parental leave begins disadvantaging women in the labour market, remains unresolved. Consequently, it could be argued that in order to better assist UK parents with their reconciliation and reduce the negative effects on women's wages the parental leave entitlement should be extended up to twelve months. The longer parental leave entitlement would provide family-centred mothers and fathers with the right to provide long-term care to children which at present does not exit in the UK. It is of paramount importance for reconciliation and choice that national leave arrangements also enable parents to follow the traditional work-care patterns and that parents are provided with the right to long-term care for children. At present many UK mothers are forced to leave their employment as the right to parental leave does not enable them to provide long-term care to children, which needs to be ensured in the absence of affordable childcare facilities. Hence, the introduction of longer parental

[1142] In the discussed jurisdictions, parental leave is primarily taken by women, but more negative effects on employment opportunities were identified in Poland where the duration of childcare leave is very long, and where it is often taken as the continuation of maternity leave. The long duration of parental leave may also have negative effects and prevent women from achieving the desired reconciliation as employers may be more hesitant to employ women if their leave entitlements are very long. Cf. P. Moss and F. Deven (ed.) (1999), op. cit., pp. 69-84. Pylkänen and Smith recognise the existence of the link between the gender pay gap and the long periods of leave which is taken by women. Cf. E. Pylkänen and N. Smith (2003), `Career Interruption due to Parental Leave: A Comparative Study of Denmark and Sweden`, *OECD Social, Employment and Migration Working Papers* No. 1, Paris.

[1143] 68 per cent of UK mothers and over 70 percent of Polish mothers are inactive due to care responsibilities in 2010. Report (2011) op. cit., pp. 23-24.

[1144] J. W Albrecht., *et al.* (1999), `Career Interruptions and Subsequent Earnings: A Re-examination Using Swedish Data`, *The Journal of Human Resources*, 34(2) pp. 294-311.

leave in the UK could significantly enhance mothers' work-family choices and they would not have to leave their employment in order to provide the needed long-term care. The long leave entitlement would also need to be supported by adequate flexible leave arrangements. As seen in Chapter 4 the inflexible leave arrangements prevent UK parents from using their short leave entitlements in a manner which best responds to parents' individual work-care needs.

The long duration of childcare leave can also enhance parents' reconciliation choice on condition that parents are in a position to make genuine work-family choices. As seen in Chapter 5, mothers' attitudes towards long leave entitlements are shaped by the context in which work-care decisions are made and structural constraints (e.g. availability of childcare) influence mothers' attitudes towards the long entitlements to parental leave. In the past Polish mothers were provided with long leave entitlement but very few mothers took childcare leave because there was affordable formal childcare which enabled them to remain in the labour market. This indicates that support policies (childcare policies) play crucial roles in enabling parents to remain in employment whilst providing the needed care. The high rates of inactive women out of the labour market due to care responsibilities in the UK and Poland cannot solely be attributed to the availability of right to parental leave but largely derives from the lack of affordable childcare facilities in both of these countries (addressed in Chapters 4 and 5). The failure of Open Method Coordination to ensure the availability of affordable childcare services in the UK and Poland must be remedied to ensure that parents are provided with the access to affordable formal childcare. By addressing the scarcity of affordable childcare in Poland women's situation in the labour market could improve, and the well-established dual breadwinner family model could be reaffirmed and thereby the emerging single male breadwinner model could be challenged.[1145]

The Directive has failed to ensure that adequate leave arrangements and supporting measures have been introduced at the national level (seen in Chapter 3). The

[1145] S. Saxonberg, & D. Szelewa (2007) op. cit., 351-379.

current economic situation both in Poland and the UK where budgetary cuts have been made to childcare funding may indicate that the availability of affordable childcare facilities is not going to improve and may even decline in the near future. Unless there is a legally binding obligation deriving from the EU requiring Member States to provide working parents with access to affordable childcare, the Barcelona 2002[1146] soft law targets on childcare will remain ineffective in ensuring the existence of affordable childcare in Poland and the UK, where the importance of affordable childcare for enabling parents to make genuine work-care choices has not been recognised by national governments.

Although the high rates of employment amongst Polish women was ensured in the past by the availability of affordable childcare, the burden of bringing up children primarily rested with mothers (discussed in Chapter 5). This indicates that the existence of affordable childcare services may merely contribute to improving women's employability and market participation, but it does not ensure more equality in the distribution of caring responsibilities within a family, which is conditioned by the social and cultural factors in each country. Consequently, in addition to providing working parents with the right to affordable childcare services, steps should be taken to challenge the traditional division of roles within a family, and promote father's role as the caregiver on equal footing with the mother. An important step toward ensuring more equality in the distribution of caring responsibilities within a family could be encouraging father's involvement during the period after the birth of the child, which at present asserts women as the primary caregivers. The enhanced father's involvement in the provision of care during what is at present called maternity leave could ensure father's early involvement in providing personal care to the offspring, and the continuity with parental leave.

[1146] The Barcelona 2002 soft law targets merely require Member States to provide children with access to formal childcare but there is no requirement as to its affordability. So far nine of twenty seven Member States have met the Barcelona childcare targets (the UK met the target but Poland did not). Cf. Report (2011) op. cit., pp. 28-36.

A father's early involvement in the provision of care is of particular importance for Poland where parental leave is taken as the continuation of maternity leave, and the lack of a father's sufficient involvement in the provision of care during the time following the birth of the child contributes to reinforcing the traditional division of responsibilities within a family. Thus, the parent who provides personal care to children during the very early stages of their lives continues providing that care during the period of parental leave. Consequently, a father's limited involvement in the provision of care during the period following the birth of the child (paternity leave) contributes to reasserting mother's role as the caregiver, which continues during parental leave with the father's role as the breadwinner and not the care provider. In order to address this imbalance in the distribution of caring responsibilities during maternity leave, which can influence father's attitudes towards their involvement in caring responsibilities, maternity leave should be shortened merely to cover the period which is required to enable mothers to physically recover from the birth. The remaining part of the entitlement to maternity leave should be replaced with the gender neutral entitlement to the leave. In order to encourage the father's involvement in the provision of care adequate incentives and flexibility in parental leave arrangements would need to be ensured.

Shortening the duration of Polish childcare leave in the absence of affordable childcare facilities could further disadvantage parents in the labour market (mothers), as the lack of legislative right to longer leave periods, accompanied by the limited right to return to work would force parents out of the current employment without the right to return. The long duration of childcare leave can also positively contribute to helping both parents with making reconciliation choices if the leave is equally shared by both working parents. Thus, the focus of national reconciliation policies should be on encouraging men to be more involved in family life rather than on shortening the leave entitlement. Reconciliation should not only mean being able to remain in employment whilst bringing up children, but above all the right to parental leave should enable parents to be able to spend enough time with their children.

The success of parental leave as a reconciliation measure is also conditioned by employers' attitudes towards parental leave, and those who exercise their right to parental leave. Both in the UK and Poland, the time spent on parental leave is mainly perceived by employers in terms of the disruption to businesses; additional costs on employers and not in terms of the positive contribution to the labour market that working parents make. This, as seen in Chapter 5, is particularly evident in Poland where long leave entitlements exist, the contribution of working mothers with caring responsibilities is not fully recognised by employers and the high unemployment rates particularly affect women.[1147] Thus, unless employers fully recognise the contribution that working parents make to the labour market, the taking of parental leave will continue disadvantaging the leave takers (mothers) in the labour market and fathers will be discouraged from taking parental leave. The right to parental leave in the UK Regulations and Polish Labour Code also aims at traditional families as in both jurisdictions the enhanced reconciliation needs of single parent families have not been recognised and no additional leave entitlements exist for those families (considered in Chapters 4 and 5). For parental leave arrangements to become more responsive to reconciliation needs of contemporary families the national laws on parental leave would need to provide for additional entitlements to parental leave for the single parents for whom it may be particularly difficult to remain in employment whilst bringing up children.

As seen in Chapters 4 and 5 the effectiveness of national provisions on the duration of parental leave in assisting parents with making work-family choices depends on the child's upper age limit by when the entitlement to parental leave expires. The long entitlement to parental leave does not *per se* guarantee that the leave shall be effective in responding to parents' various caring needs. Only the right combination of the entitlement to parental leave of a long duration, and the extensive child's age limit by which the entitlement to parental leave expires could provide working parents with the needed leave flexibility. **Appendix, Table 16** indicates that the Directive has

[1147] I.E. Kotowska, (2004) 'Making work pay' debates from a gender perspective – the Polish national report, European Commission's Expert Group on Gender, Social Inclusion and Employment report for the Equal Opportunities Unit, DG Employment.

failed to ensure the existence of flexible leave arrangements both in the UK and Poland because the right to parental leave expires when the child is still very young. This comparison indicates that regardless of the duration of leave entitlement the availability of parental leave only in relation to small children significantly constrains parents' work-family choices, as it forces them to use their leave entitlement when the child is still very young. Consequently, as discussed in Chapters 4 and 5 in the UK and Poland working parents do not have the right to parental leave in relation to older children which may prevent some parents from making real work-care choices. Additionally, the UK and Polish restrictive rights to time off for dependants do not enable parents to personally care for older children.

Both the UK and Polish legislators appear to assume that caring responsibilities stop on expiry of the right to parental leave, as in either jurisdiction there is no right to provide care to the older children who no longer qualify for parental leave and are not subject to the jurisdiction of emergency leave. Although in both jurisdictions the governments (in principle) support reconciliation policies, the parents of older children are not entitled to benefit from these reconciliation policies. James[1148] observes that if the government wants to help working parents to reconcile work and family responsibilities it should consider the needs of all parents and not merely the parents with the very young children.

Since parents' ability to provide care also to older children is of paramount importance in enabling the UK and Polish parents to make genuine work-family choices the restrictive child's age limit should be extended in both jurisdictions. Extending the upper age limit to a child's eighth birthday as outlined in the Directive could be the first step in ensuring more flexibility in the leave arrangements. As parental leave is already available to children up to eight years of age in Ireland, Germany and Sweden (and there has been greater take up), the introduction of upper age limit for parental leave in the UK and Poland should also be possible. This would provide parents with more flexibility in terms of how they use their parental leave. It could

[1148] G. James (2009) op. cit., p. 45.

also help to challenge the dominant ideologies of motherhood and parenthood (particularly in Poland) by allowing parents to take parental leave when their children are older and therefore no longer linking parental leave with maternity leave. The extended availability of parental leave is of paramount importance for single parents fro whom it may be particularly difficult to care for older children whilst working. Additionally, the availability of parental leave in relation to older children could contribute to recognising the provision of care for older children as an important social function and that parents with older children make difficult work-care choices which need to be reconciled.

Alternatively, the specific right to leave for parents with older children could be introduced in order to address their work-care needs. It is of paramount importance that reconciliation needs of parents with older children are fully recognised by the EU and national legislators and the marginalisation of those parents' needs is brought to an end. All parents with caring responsibilities should be provided with equal opportunities in achieving the desired work-life balance. Considering the attitudes of national governments towards introducing reconciliation policies, and the current economic climate in the UK and Poland it is hard to envisage the extension of qualifying age requirements in either jurisdiction in the current climate.

Another deficiency of parental leave arrangements in enabling working parents to make better work-family choices derives from that neither the UK Regulations nor Polish Labour Code provide working parents with the extended entitlement to parental leave if it is taken on a part-time basis (**Appendix, Table 16**). The availability of parental leave could be significantly improved if its duration depended on the modality of parental leave actually taken. This could particularly help mothers in the UK who often work part-time and for whom the possibility of spending more time with children by taking parental leave on a part-time basis could significantly improve their reconciliation choices. Unlike the Polish Labour Code which allows parents to take childcare leave on a part-time basis in the form of reduced working hours, the UK Regulations limit the modality of parental leave to the full-time option.

This as seen in Chapter 4 significantly limits UK parents' choice in use of their right to parental leave; may discourage fathers' involvement in sharing of the family responsibilities, and subsequently could further reaffirm the mother's role as the primarily carer within the family.

Although the Polish Labour Code provides working parents with the possibility of taking parental leave on a part-time basis, it does not provide them with the unqualified right to reduce their working time in lieu of parental leave. The Polish right to request working part-time in lieu of parental leave does not offer the "way forward" for introducing more flexible leave arrangements in the UK because the existing right to request flexible working,[1149] already provides parents with the right to request to working part-time. Both the right to part-time parental leave in the Polish Labour Code and the UK right to request flexible working are of symbolic value for working parents as the application for flexible working or part-time parental leave may be rejected because of various business operational reasons.[1150] Working reduced hours can be seen as an effective reconciliation tool if parents are provided with the right to reduce their working time in order to provide the required care when it is needed, and not when the business operational circumstance allow it. The lack of an unqualified right to take parental leave on a part-time basis in both jurisdictions reaffirms the pro business stance of the UK and Polish legislators toward introducing parental leave policies. It further reinforces the traditional division of caring responsibilities, as women are more often than men likely to request parental leave in the form of reduced working time, and if the request is denied they may have no choice but to exit the labour market. This is evident in Poland where the absence of right to work part-time during childcare leave forces mothers out of the labour market for lengthy periods of time making their reintegration in the labour market very difficult.

In order for parental leave to be more effective in responding to parents' reconciliation needs, the unqualified right to parental leave in the form of a reduced working time

[1149] Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002, SI 2002/3236.
[1150] Section 80G(1)(b) ERA 1996 and Article 186 LC.

would need to be provided in both jurisdictions. Unlike the present entitlement to part-time leave in the Polish Labour Code, which prevents both working parents from reducing their working time in order to simultaneously use their entitlement to leave, the fully flexible right to the leave would need to provide parents with the freedom to decide how the leave is taken. The existence of a right to simultaneous part-time parental leave could further encourage fathers to be more involved in the provision of care, and enable them to spend more time with their families. The current part-time leave arrangements in the Polish Labour Code do not provide the leave takers with the right to full remuneration whilst on part-time childcare leave, and also discourage parents from choosing this option of childcare leave because the right to childcare allowance is lost if childcare leave is taken on a part-time basis. This as seen in Chapter 5, renders the part-time option less attractive to working parents, and reinforces the traditional division of responsibilities within a family, because it would not be economically viable for parents to take childcare leave on a part-time basis.

In order to improve the effectiveness of part-time parental leave in enabling parents to make better work-family choices, and ensure more equality in the distribution of caring responsibilities within a family, the existence of an unqualified right to part-time parental leave should be ensured. Additionally, in order to encourage more fathers to take parental leave various incentives should be offered to parents who choose this option of the leave. The disadvantages which make the part-time option less attractive should be removed such as future disadvantages deriving from the lower contributions to various social funds during the period of parental leave and entitlements to various allowances, which can be restricted by the mode of parental leave. The availability of financial support to those who remain in employment by taking part-time parental leave is crucial, as the financial support provided to those parents lessens the burden of childcare costs. The availability of financial support whilst on part-time parental leave is of particular importance for poorer families, as it may constitute a decisive factor predetermining those parents' ability to take the part-time leave, exit the labour market or remain in the full-time employment (considered in Chapters 4 and 5).

Working parents should also be given the freedom to decide on the extent to which they want to reduce their working hours and the length of time during which they would like to work reduced hours.[1151] The protection from detriment or dismissal should cover the full duration of part-time parental leave, as it would put at risk of dismissal or detriment parents (mothers) who take advantage of the part-time option. It would also be necessary to ensure that parents who reduce their working time in lieu of parental leave have the right to return to their previous working arrangements. The flexible leave arrangements which would need to be ensured as Caraciollo Di Torella[1152] observes must respond to the individual needs of working parents and must distinguish between diverse needs of mothers and fathers. The low take up rates by women and even lower by men in Poland and the UK may indicate that the current leave arrangements do not respond to parents' individual needs (**Appendix, Tables 9 and 14**). Thus, Polish and the UK governments should consider revising the existing leave arrangements in order to accommodate working parents' individual caring needs (in particular working fathers'), and amplify that caring responsibilities rest with both parents, and not only with mothers, as it was traditionally assumed and remains to be reinforced by the UK and Polish legislation. In order to stimulate changes at the national level, the differences in the individual needs of fathers and mothers in relation to parental leave should also be recognised in the Directive on parental leave.

Although working on a part-time basis can be seen as playing an important role in reconciliation by enabling parents to remain in employment whilst providing the needed care, because of various disadvantages associated with working part-time it

[1151] As seen in Chapter 5, the present arrangements under Article 186(8) LC impose restrictions on the extent to which the working time could be reduced in lieu of the leave, and indirectly prevent working parents from taking the leave for the needed period of time, as the legislative protection from dismissal is lost if the cumulative length of childcare leave exceeds twelve months.
[1152] E. Caraciollo Di Torella (2007) op. cit., pp. 323-324.

cannot be considered (in its current format) as offering an adequate solution to the reconciliation dilemma for all working parents (discussed in Chapters 4 and 5).[1153]

The existing gender pay gap both in the UK and to a lesser extent in Poland,[1154] which is reinforced by the fact that primarily women work on a part-time basis, continues disadvantaging women in the labour market. The recent EU initiatives have attempted to widen women's participation in the labour market by promoting flexible working patterns, which have contributed to enhancing the availability of part-time employment and thereby women's employment rates (considered in Chapter 1). However, working on a part-time basis in order to achieve reconciliation does not provide women with equal career opportunities with men who often work on a full-time basis, and tend to earn more than women. Thus, unless the disadvantages associated with working part-time are removed, and employers recognise the value of part-time workers at the same level as the full-time workers, the option of taking parental leave in the form of part-time working is not going to enable parents to make real work-family choices.

The promotion of part-time employment without tackling the equality issues associated with working on a part-time basis can further reinforce the existing disadvantages associated with it, which particularly affect women in the labour market who often undertake this type if employment. Consequently, for parental leave to become effective in facilitating the reconciliation for working parents the Directive on parental leave and its national implementations in the UK and Poland would need to provide working parents with enhanced flexibility enabling them to remain in full-time employment whilst being able to provide the needed care to their children. Parents' and in particular mothers' ability to remain in a full-time employment is conditioned by the availability of affordable childcare, the availability of full-time employment and the

[1153] The disadvantages include such as lower rates of pay (lower graded jobs) and limited career prospects in comparison with those who work on a full-time basis. Cf. J.Rubery, D. Grimshaw and H. Figueiredo (2005) op.cit., pp. 184-213.

[1154] Gender pay gap in the UK is 20.4 per cent and in Poland 9.8 per cent. Cf. P. Foubert, S. Burri and A. Numhauser-Henning (2010) `The Gender Pay Gap in Europe from a Legal Perspective (including 33 country reports)`, European Commission Directorate-General for Employment, Social Affairs and Equal Opportunities Unit EMPL/G/2.

availability of enhanced leave arrangements, which enable working parents to take parental leave when it is most needed.

Although the dual earner/dual care giver model is seen as being the least traditional and recognises the equality in the distribution of work and care-giving responsibilities,[1155] it is of paramount importance that the law provides workers with family responsibilities with genuine choices, as to which family model responds to the individual family needs and individual aspirations of both working parents. The existence of flexible leave arrangements that enable working parents to remain in a full-time employment could contribute to ensuring more equality in the distribution of family responsibilities by providing parents with genuine reconciliation choices. As seen in Chapters 4 and 5, the UK and Polish leave arrangements which are contrasted in **Appendix**, **Table 16** are very restrictive and therefore significantly constrain parents' work-family choices. Hence, regardless of their individual reconciliation needs the UK parents are forced to take leave in blocks of time which are subject to various restrictions. Polish parents' work-family choices are also constrained as the Labour Code merely guarantees that parents will be able to take childcare leave on a full-time basis (one block of time). Unlike the UK leave arrangements which provide working parents with short parental leave enabling parents to spend more time with their children, the Polish full-time childcare leave arrangements reinforce the traditional view that parenthood is not compatible with employment and therefore the leave should not be taken in more than one block of time.

This comparison reveals that current leave arrangements in both jurisdictions do not provide working parents with the required flexibility in order to achieve the desired reconciliation whilst ensuring equality in employment opportunities for both parents. The emphasis of the national leave arrangements remains on facilitating parents' exit from the labour market for shorter or longer periods of time rather than helping

[1155] Cf. R. Crompton (1999) (ed.) *Restructuring Gender Relations and Employment*, Oxford: Oxford University Press in G. James (2009) op. cit., pp. 107-108.

parents to find the most suitable work arrangements, which would allow them to remain in a full-time employment whilst bringing up children. In both jurisdictions the actual availability of flexible leave arrangements will depend of employers' willingness to accommodate employees' caring needs and not their legislative right parental leave. Additionally, both in Poland and the UK the failure of the Directive to provide for flexible leave arrangements has been reinforced to the detriment of working parents by national legislators who have failed to recognise the importance of enabling working parents to make genuine work-family choices.

Appendix, **Table 16** clearly shows that national implementations of the Directive both in Poland and the UK do not provide for the enhanced flexibility of parental leave which is particularly required by the work-centred parents. This derives from the fact that neither the UK Regulations nor the Polish Labour Code provides working parents with the possibility of taking parental leave on a daily or even hourly basis without the burden of complex notification procedure. The possibility of taking the leave on a daily or even hourly basis as the Swedish experience confirms would significantly improve the flexibility of the UK and Polish leave arrangements by enabling working parents to fully utilise their entitlement to parental leave whilst remaining in a full-time employment. The possibility of taking short periods of parental leave without negative impact on employment associated with long absences could also encourage more fathers to take parental leave. The higher leave take up rates amongst working fathers could both ensure more equality in the distribution of caring responsibilities within a family, and contribute to moving away from stereotyping of the division of responsibilities within a family in favour of the dual carer and wage earner model. More fathers' involvement in family life through parental leave could also improve the position of women in the labour market, as the provision of care would no longer be primarily associated with women. The introduction of flexible leave arrangements could encourage more parents to take parental leave and thereby render parental leave to be more effective as the reconciliation measure. The high take up rates by both mothers and fathers in Sweden where flexible leave arrangements are provided and low take up rates both by mothers and fathers in Poland and the UK further

reaffirm that flexible leave arrangements play an important role in enabling working parents to make genuine work-family choices (**Appendix**, **Table 9 and 14**).

Flexible leave arrangements would also need to be supported by procedural requirements ensuring that parental leave can be taken when it is requested and that working parents are not deprived of their right to parental leave when it is most needed. Both the UK Regulations and Polish Labour Code legislation make the availability of parental leave subject to compliance with notice requirements which safeguard employers' interests and do not distinguish between longer and shorter leave absences (**Appendix**, **Table 16**). It is undisputable that the proper functioning of any business requires that employers are given notice of disruptions in order to enable them to put into place the needed arrangements. Although employers would always be in favour of the longest possible notice requirements, notices should not be too excessive, as it would significantly reduce the needed flexibility of parental leave, and make it unavailable when it is most needed by the family. The comparison between the duration of parental leave in both jurisdictions, and the length of notice required in order to secure the leave entitlement indicates that, the twenty one day notice requirement under the UK Regulations, where the duration of parental leave is limited to four weeks per year appears to be excessive in comparison with the two weeks' notice that Polish parents need to give to their employer in order to be away from employment up to three years. The UK notice requirements clearly favour the interests of employers over reconciliation needs of working parents with family responsibilities, as the inflexibility of parental leave deriving from the long notice requirement may discourage parents from applying for the leave, or deprive them from taking leave if it needs to be taken at a short notice (see Chapter 4). The Polish notice requirements better cater for reconciliation needs of working parents by making childcare leave available at much shorter notice than that envisaged by the UK Regulations (see Chapter 5).

The Polish short notice requirements indicate that employers can effectively accommodate the absences of employees at much shorter notice, and therefore the

UK notice requirements are unnecessarily too restrictive. Hence, the notice requirements under the Polish Labour Code contain the basis for the introduction of shorter leave notices in the UK that could significantly improve parental leave accessibility and thereby enable parents to use their leave entitlements in a matter that better responds to their individual reconciliation needs. Additionally, the accessibility of parental leave both in the UK and Poland could be improved by introducing notices which are conditioned by the duration of the requested leave. This would enable parents who request short periods of parental leave to take it at a very short notice or even without any notice at all, in some circumstances. The short absences from work due to worker's illness can easily be accommodated by employers even though no notice of the absence is provided. Arguably, employers should also be able to accommodate short absences for reasons related to the taking of parental leave without the necessity of providing them with the lengthy notice requirements.

Access to parental leave when it is actually needed by parents is of paramount importance if the leave is to be an effective reconciliation tool. **Appendix**, **Table 16** highlights that the UK parental leave arrangements are more restrictive than the Polish leave arrangements because employers have the right to postpone parental leave for unreasonably long periods of time. This as seen in Chapter 4 constitutes a major deficiency of the UK implementation of the Directive which significantly constrains reconciliation choices of different groups of working parents and can further discourage fathers from being more involved in family life. The Polish leave arrangements do not bestow on employers the right to postpone childcare leave and employers have for many years been able to accommodate the needs of businesses without the need to exercise the legislative powers to postpone the granting of the leave. The right to parental leave under the Polish Labour Code means the right to take childcare leave when it is requested, and not merely the right to request childcare leave without the guarantee that it can be taken during the requested period of time as it is the case in the UK.

The elements of the Polish workable parental leave scheme, which do not impose excessive notice requirements on working parents, and do not provide employers with the right to postpone childcare leave, should be transplanted into the UK Regulations. The removal of employers' right to postpone parental leave, or at least shortening the postponement, and the introduction of restrictions on how many times parental leave may be postponed could significantly improve the availability of parental leave in the UK, and thereby ensure that parental leave arrangements better respond to parents' reconciliation needs. The removal of employers' right to postpone parental leave could in particular improve the leave accessibility for key workers employed by small and medium-sized companies who due to business operation reasons may often be prevented from taking parental leave.

The comparative analysis of the UK and Polish provisions on parental leave also revealed that neither the Polish Labour Code nor the UK Regulations recognise the existence of additional difficulties that single parent families and families with many children face as they do not provide for different regimes on notice requirements for those parents. As seen in Chapter 4, the employer's right to postpone parental leave may in particular prevent single parents from achieving the desired work-life balance. Hence, in order to better cater for the reconciliation needs of single parent families the UK and Polish legislation would need to provide single mothers and fathers with less restrictive leave notice requirements without the possibility of parental leave being postponed by the employer. The possibility of taking parental leave at the time when it is needed most by single parents is crucial for enabling them to make real work-family choices as the absence of second parent often means that single parents must take the leave at the requested time.

Unlike the Polish Labour Code, which provides parents with the possibility of altering the previously requested leave arrangements by providing the employer with notice, the UK Regulations do not provide employees with the clear right to alter the previously approved leave arrangements (**Appendix**, **Table 16**). The lack of employee's clear right to postpone or delay the taking of parental leave when the

family circumstance change constitutes a major deficiency of the UK Regulations in enabling working parents to make work-family choices, as it is likely that the leave arrangements would need to be altered. The restrictive approach of the UK Court of Appeal[1156] to the issues surrounding the flexible use of parental leave and more family focused approach towards the changing family circumstances adopted by the Court of Justice[1157] towards altering the previously agreed leave arrangements were addressed in Chapters 3 and 4.

As family caring needs are prone to change,[1158] the leave application process should ensure flexibility thereby enabling working parents to alter previously requested leave arrangements. The vast experience of the Polish legislator in balancing the needs of businesses and employees in the context of the right to postpone the taking of childcare leave indicates that this right does not impose excessive burdens on business and therefore could be adapted by the UK Regulations on parental leave. The UK right to postpone the taking of parental leave without having to comply with the lengthy notice requirements would enable working parents to make better work-family choices. Comparing the short length of the UK parental leave that can be taken each year with the long periods of childcare leave which can be taken by Polish parents, the UK legislator should be in a position to provide working parents right to delay taking parental leave with much shorter notices than envisaged by the Polish Labour Code.

Comparative analysis of the provisions of the UK Regulations and Polish Labour Code also identified that in both jurisdictions working parents do not have the right to paid leave (**Appendix**, **Table 16**). As seen in Chapters 3-5 the right to pay whilst on parental leave constitutes one of the key factors influencing parents' decision, as to whether to use their leave entitlement. Both the UK and Polish implementation of the Directive are minimalist, weak and do not enable working parents to make genuine reconciliation choices as they provide for the right to unpaid leave. Hence, the

[1156] Court of Appeal *South Central Trains Ltd v. C. Rodway* A2/2004/1818, 18 April 2005 paras 24-39.
[1157] Case C-116/06 *Sari Kiiski v Tampereen Kaupunki,* Celex No. 606J0116, ECR [2007] 00000.
[1158] Especially caring needs of single parent families and families with many children.

Directive on parental leave has failed to ensure the existence of parental leave entitlements that could adequately respond to parents' reconciliation needs as financial security whilst on parental leave is crucial for allowing parents to make genuine work-family choices (addressed in Chapter 4 and 5).

Permitting Member States to adopt the national regulations, which do not provide for paid parental leave, indicates that the Directive and its implementations in the UK and Poland are largely orientated towards women and their traditional roles in family.[1159] The UK Regulations and the Polish Labour Code, which do not provide for paid parental leave, are not designed to promote gender equality but merely recognise the importance of mother's work.[1160] The lack of paid parental leave reinforces the existing gendered division of unpaid work and promotes inequality in the workplace and society. The UK's unpaid parental leave arrangements appear to be one of the most unequal among the well-established Member States (addressed in Chapter 4).[1161] The Polish right to the unpaid parental leave is also more restrictive than the parental leave schemes in the selected new Member States (see Chapter 5).

Since work-family decisions are made in the context of each family and financial constraints associated with parental leave influence parents' attitudes to parental leave, the lack of paid parental leave in Poland and the UK influences parents' attitudes towards parental leave. Consequently, in both jurisdictions unpaid parental leave merely assists in making work-family choices for those parents who can afford to take leave and is of symbolic value to all others parents who cannot afford to take leave. This is evident in the UK and Poland where parental leave is unpaid, the leave is unpopular among mothers; mothers may also be prematurely forced back to work

[1159] Council of the European Union, *Review of the Implementation by the Member States of the EU and the European Institutions for the Beijing Platform for Action: relationship between family life and working life,* Brussels, 23 October 2000, 12577/00, p.27.
[1160] Cf. K.J. Morgan and K. Zippel (2003) `Paid to Care: the Origins and Effects of Care Leave Policies in Western Europe`, *Social Politics* 49.
[1161] *EOC*, `The Government Must not Close the Door to Payment of Leave for Fathers`, 10 October 2005 and F. Deven, P. Moss (2002) `Leave Arrangements for Parents: Overview and Future Outlook`, *Community, Work and Family,* 5/237.

in order to secure income and reaffirm their job security.[1162] Very often the huge cost of bringing up children determines that many main earners in the family (often men) cannot afford to take the unpaid parental leave and are also forced to increase their working hours in order to compensate for mothers' lost wages.

The right to parental leave could provide the UK and Polish parents with genuine reconciliation choices if the Directive, the UK Regulations and Polish Labour Code provided all working parents with the right to some form of payment compensating for the loss of income whilst on the leave. The aim of parental leave is to enable parents to reconcile work and family responsibilities, and not encouraging parents to exit the labour market for long periods of time by providing them with generous leave allowances as seen in the case of Hungary (considered in Chapter 5). Consequently, the UK Regulations and Polish Labour Code would need to enable working parents to make genuine work-family choices by providing all parents with the right to paid parental leave or other universal childcare allowance that could substitute the loss of wage whilst on leave. The high cost of childcare constitutes a real difficulty for parents in the UK[1163] and Poland[1164] and influences parents' attitudes towards parental leave (see Chapters 4 and 5). By helping parents to alleviate the high costs of childcare in the UK and Poland, and loss of earnings (where the working hours have been reduced in lieu of the leave), the allowance[1165] could encourage more parents to stay in employment, or use the flexible leave arrangements (outlined earlier in this Chapter) instead of taking the full-time leave. In order to encourage parents to spend less time away on parental leave (and therefore be better integrated in the labour market) they should be provided with choice as to whether to take shorter parental leave (full-time or part-time options should be available) which is better compensated or the long leave which is less well compensated.

[1162] A. Plomien (2009) op.cit., pp. 136-151 at pp. 143-144.
[1163] G. James (2009a) op.cit., pp.278-279.
[1164] A. Plomien (2009) op. cit., pp. 136-151
[1165] In Poland, the means-tested allowance, which is currently available to the qualifying parents effectively prevents working parents from the reconciliation, as it is available only if a parent provides personal care to a child, and it is lost if a parent engages in any paid employment or use childcare services. The childcare allowance reaffirms mother as the care-giver and financially punishes all parents who try to remain in employment while bringing up children (discussed in Chapter 5).

Since parents make their work-family decisions in unique contexts of their families the possibility of choosing between different leave arrangements would significantly enhance parents' work-family choices by enabling them to choose the leave arrangements that best suit their reconciliation needs. The right to financial support (paid from social funds) whilst on the long parental leave (which may be attractive to home-centred mothers) would contribute to recognising childcare as an important social function. A similar scheme has recently been introduced in the Czech Republic and could be seen as offering the way forward for introducing parental leave schemes that better respond to parents reconciliation needs in the UK and Poland (**Appendix, Table 13**). The recent reduction in the amount of means-tested childcare allowance reaffirms the lack of commitment of the Polish government to providing parents with genuine reconciliation choices (see Chapter 5). The recent reforms of the welfare system in the UK also resulted in reducing the availability of financial support for families. Hence, unless there is a requirement deriving from the EU to provide parents with the financial assistance whilst on parental leave, it is unlikely that in the near future the UK and Polish leave takers who do not qualify for any means-tested benefits will be able to make real work-family choices when deciding to take parental leave.

Since the leave is unpaid the majority of fathers do not take it and therefore bringing up children remains women's responsibility (**Appendix Tables 9 and 14**). The comparative analysis of the data (**Appendix, Tables 7 and 9 and Tables 13 and 14**) indicates that there is no evidence that parental leave take-up rates by men solely depend on the level of the financial support because the take up rates by fathers remain low even where the leave is paid. Brandth and Kvande [1166] consider limitations on take-up by men as deriving from gender stereotypical ideas about the division of responsibilities within a family. This may conflict with the workplace culture and employer's expectations about the appropriateness of the behaviour for men,

[1166] B. Brandth and E. Kvande (2006) 'Care politics for fathers in a flexible time culture' in D. Perrons, C. Fagan, L. McDowell, K. Ray and K Ward (eds.), *Gender divisions and working time in the new economy*, London, Edward Elgar Publishing, 2006.

which may lead to discrimination against men willing to exercise their right to parental leave. In Poland childcare leave has traditionally been available to women, and therefore there have been instances that employers were reluctant to allow fathers to take the leave. In same cases fathers were refused to take the leave.[1167] Although there is no UK case law to support this argument in the context of parental leave, the case law[1168] on the time off supports this argument as some employers do not expect men to be involved in providing care for children and other dependants (see Chapter 4).[1169]

Changing national perceptions about the distribution of responsibilities within a family is a complex and time consuming process depending on social changes in society. Schmidt[1170] recognises the necessity of safeguarding the right of families to organise the internal distribution of tasks freely and insists that national legislators should refrain from introducing national laws attempting to change social attitudes to the division of roles within a family by providing generous financial incentives for the families where both parents take parental leave and abolishing financial incentives for the families supporting the traditional role model. This became evident in Germany where in order to remove the financial disincentives associated with the taking of parental leave (encouraging fathers) the childcare benefit was replaced with parent benefit (Elterngeld).[1171] However, the new German parent benefit is more beneficial only for families where both parents take parental leave, and financially penalises families supporting the traditional role model.

The approach taken by German government to ensuring more equality in how work and care responsibilities are allocated within a family does not offer the way forward for introducing parental leave policies in the UK and Poland. Since, taking parental

[1167] Panstwowa Inspekcja Pracy (2000), Ocena przestrzegania przez pracodawcow przepisow dotyczacych ochrony pracy kobiet oraz zakazu dyskryminacji ze wzgledu na plec, *Prawo i Plec*, 2.
[1168] E.g. *Sutton v. East Kent Joineries*, Employment Tribunal Case Number 11/00728/2004.
[1169] Employers are also reluctant to allow fathers switch to flexible working Cf. E. Caracciolo Di Torella (2007) op. cit., pp.319-320.
[1170] M. Schmidt (2006) `Employment, the Family, and the Law: Current Problems in Germany`, *Journal Comparative Labour Law & Policy* 27:451.
[1171] Cf. BT-Drs. 16/1889 of 20 June 2006 in ibid.

leave by fathers is not fully accepted by society (particularly not by employers) in Poland and to lesser extend in the UK, the introduction of parental leave allowances which disadvantage families where fathers do not take leave would put further pressure on families which support the traditional work-care model. Hence the introduction of financial incentives for families if the leave is taken by fathers without the necessary change in society would not increase fairness in the distribution of responsibilities within a family, but could further financially disadvantage the vast majority of Polish and UK mothers who predominately care for children. The role of EU and national legislators in this process is to enact adequate laws having the power to stimulate the desired changes within society without disadvantaging families which choose to follow the traditional model. Forcing social change by promoting certain patterns of behaviour, and discouraging the well-established social patterns without considering the individual family's needs, and depriving parents of their choice, as to how the caring responsibilities should be divided within a family should be discouraged, but the voluntary incentives encouraging fathers to be more involved in the provision of care should be encouraged by the Directive on parental leave and its national implementations in the UK and Poland.

At present neither the UK nor Polish unpaid parental leave schemes provide for any incentives that could encourage more fathers to exercise their right to parental leave (**Appendix, Table 16**). The importance of financial incentives for fathers in promoting the change in men's attitudes towards their involvement in family responsibilities is well recognised in the literature.[1172] The absence of financial incentives aiming at encouraging more fathers to take parental leave indicates the lack of legislative commitment of the UK and Polish legislators to ensuring more equality in the distribution of responsibilities within a family. It also shows those governments' lack the desire to tackle the inherent difficulties that mothers face when trying to reconcile work and family responsibilities. The low leave take up rates by mothers and fathers in both jurisdictions indicate that the present parental leave schemes fail to adequately address reconciliation needs of both working parents (**Appendix, Tables**

[1172] C. Fagan and G. Hebson (2005) op. cit., and J. Plantenga & Ch. Remery (2005) op.cit.,

9 and 14). The loss of earning associated with the taking of parental leave, the absence of financial incentives that could compensate for the lost wage, and encourage more fathers to take the leave, renders parental leave to be mainly taken by mothers in both jurisdictions. Thus, unless the right to paid leave is introduced, and adequate financial incentives are offered to fathers who exercise their right to parental leave, it will remain ineffective in ensuring more equality in the distribution of responsibilities within a family both in the UK and Poland. The Swedish parental leave scheme, which financially rewards families if parental leave is taken by both parents, offers the way forward for reforming the existing parental leave schemes contained in the Directive, the UK Regulations and Polish Labour Code (see Chapter 4).

The comparison between the provisions of the UK Regulations and the Polish Labour Code also shows that they do not provide parents with genuine reconciliation choices as they perpetuate the disregard for the value of care by finically punishing parents who choose to exercise their right to the leave. The financial disadvantages associated with the taking of the leave not only cover the period of the leave but also involve the future financial disadvantages such as mothers' lower wage earning power than fathers', and the lower contributions to the various pension schemes made whilst on the leave significantly reduce the amount of the future pension that mothers receive (see Chapter 3).[1173] This particularly affects women with multiple births who took the leave in relation to different children. The financial disadvantages associated with the taking of the leave, and in particular their negative future effects would affect more parents (mothers) in Poland than in the UK because of the lengthy duration of the leave under the Labour Code, which is often taken as the continuation of maternity leave.

The importance of parental leave and the involvement of both parents in the provision of care is further undermined in that maternity leave, which reaffirms the position of a

[1173] A. Plomien (2009) op. cit., pp136-151 and W. Olsen and S. Walby (2004) *Modelling Gender Pay Gap*, Manchester: EOC.

mother in the provision of care, involves some payment and parental leave is unpaid both in the UK and Poland. Although maternity and parental leave constitute two distinct periods of the leave, the right to some form of payment during maternity leave, and not parental leave, which is a gender neutral leave may indicate the lack of willingness of the national legislators to provide both parents with the right to parental leave that could actually be relied upon, and frequently used by working parents.

Since, the UK and Polish legislators have so far failed to fully recognise the importance of care-giving and the value of reconciliation policies, it is very difficult to envisage that financial situation of the leave takers is going to improve in the near future. As the introduction of the UK right to parental leave was forced by the need to implement the Directive, and Polish parental leave arrangements worsened over the years, unless there is a legally binding requirement deriving from the Directive to provide parents with the right to paid parental leave, and the needed incentives to ensure that parental leave is taken by both parents, the situation of the UK and Polish parents is unlikely to improve. Taking into account that the EU commitment to promoting reconciliation measures is limited to introducing directives, which outline the minimum requirements, and the soft law provisions not having any legally binding force, unless there is a major shift in the EU commitment to introducing effective reconciliation policies the interests of businesses, as the discussion leading to adoption of the Directive on parental leave confirmed, shall prevail over the reconciliation needs of working parents. Meanwhile, in the absence of the adequate financial support during parental leave; affordable childcare and the legislative initiative to effectively tackle the disadvantages associated with absences from the labour market for reasons related to bringing up children, the mother's caring and the father's wage earning roles will be reinforced.

The UK and Polish provisions on the status of employment relationship during parental leave implement the minimum requirements of the Directive as they do not provide the leave takers with their full employment rights and merely ensure that employment relationship is preserved during the period of parental leave (**Appendix**,

Table 16). The failure to ensure that in all aspects of employment those on parental leave are not treated in the same way as the employees in the active employment attaches a stigma to parental leave. Furthermore, parents taking the leave are not considered as an integral part of the workforce, but as those being away on leave. Since the leave is primarily taken by mothers, the lack of right to benefit from all contractual terms whilst on parental leave primarily disadvantages women with caring responsibilities, and may contribute to dissuading fathers from being more involved in family life. The lack of requirement deriving from the Directive to treat those on parental leave in the same way as those in active employment has been further reinforced by UK and Polish legislators to the detriment of the leave takers. As seen in Chapter 3, the legitimacy of this disadvantage under the Directive and the EU equality legislation has been reaffirmed by rulings of the Court of Justice. [1174] Consequently, only the acquired rights or those in the process of being acquired prior to the leave are being preserved, which merely ensures that the bare minimum of the employment relationship is preserved during the leave and that employers do not alter the status of the employment when parental leave is taken.[1175] Hence, taking parental leave in both jurisdictions entails various disadvantages which as seen in Chapters 4 and 5 constrain parents' work-family choices.

The lack of right to annual leave that is accrued during the time spent on parental leave and lower contributions which are made to various social funds during the period of parental leave have far reaching consequences for Polish than for the UK parents, as the duration of the leave under Polish Labour Code is significantly longer than that under the UK Regulations. The possibility of accruing the entitlement to the annual leave during the period of parental leave would provide Polish parents who spend for example the full year on the leave with right to their full entitlement of the paid annual leave. Since, parental leave is unpaid, and the annual leave is paid the entitlement to the annual leave for the period spent on parental leave would to a

[1174] Case C-537/07 Evangelina Gómez-Limón Sánchez-Camacho v. Instituto Nacional del la Seguridad Social (INNS), Tesoreria General dle la Seguridad Social (TGSS) and Alcampo SA, 16/07/2009, [2009] All ER (D) 2008 (Aug). *Meerts v Proost NV*, C-116/08 [2009] All ER (D) 259 (Oct). Case C-486/08 *Zentralbetriebsrat der Landeskrankenhäuser Tirols v. Land Tirol* (22 April 2010) para 56.
[1175] *Meerts v Proost NV*, C-116/08 [2009] All ER (D) 259 (Oct).

certain extent compensate working parents for the loss of wage during the leave. This would also have major implications for the employer's contributions to various social funds, which would need to be made in full for the period of the annual leave. The possibility of accruing the entitlement to the annual leave during the period of parental leave would further reaffirm the existence of employment relationship between the employer and the leave taker (reaffirmation that the leave takers are a part of the workforce). Additionally, ensuring that during parental leave contributions to various social funds are not reduced would remove parents' future financial disadvantages and reaffirm the importance of the provision of care for children.

The leave taker's loss of contact with the employer, and the sense of belonging to the workforce, as perceived both by the employer and the employee may prevent parents who spend a long time away from the workforce from returning to work. This in particular affects Polish women who often use their full entitlement to childcare leave, and during the time spent on the leave are no longer treated by employers as employees for taxation purposes. During the time of socialism in Poland, parents on childcare leave were considered, as a part of the workforce for all purposes including taxation, which facilitated an easy reintegration into the labour market, and encouraged mothers' returns from the leave ensuring very high levels of female employment. In order to improve the position of mothers in the labour market the national legislators would need to ensure that employers are required to stay in touch with employees, who exercise their right to the long periods of parental leave, and that the leave takers are fully recognised by employers as constituting an integral part of the workforce. In order for the right to parental leave to be more effective in ensuring more equality in the distribution of caring responsibilities within a family, the Directive, the UK legislation and the Polish Labour Code would need to recognise the importance of care, which is provided by working parents by preserving their full employment statues during the period of the leave. This would remove the contractual disadvantages associated with the taking of parental leave; contribute to ensuring more equality in the distribution of the caring responsibilities within a family by making the leave more attractive to working fathers. More fathers' involvement in

family life would prevent employers from targeting women as the primary care providers, and could contribute to improving women's position in the labour market in terms of their equal opportunities and employment access.

The comparison between the UK and Polish provisions also indicates that in both jurisdictions merely the minimum requirements of the Directive have been implemented and therefore the legislative protection from detriments or dismissal for reasons related to parental leave merely covers the period from when the application for the leave is submitted until the day on which the requested leave expires (**Appendix**, **Table 16**). This as seen in Chapters 4 and 5 constitutes a major deficiency of the protection which is afforded to working parents entitled to parental leave as employers are not prevented from dismissing parents before the leave application is submitted and after their return from parental leave. The inadequate level of the legislative protection from dismissal or detriment for reasons related to parental leave renders the leave very unattractive to working parents, and limits their genuine reconciliation choices, as the taking of the leave always involves job security risks that many parents cannot afford to take, especially in the current economic climate.

In order to alleviate the employment security risks associated with parental leave, the Directive and its implementation in the UK and Poland would need to provide all parents eligible for parental leave with the legislative protection from detriment or dismissal also covering the period prior to the submission of the leave application. The protection from dismissal or detriment should also be extended beyond the duration of the leave to cover the period of adjustment to the new reality of employment after the return back to work. The existence of legislative protection from detriment or dismissal during the period following employee's return back to work is of a particular importance to Polish mothers, who often exit the labour market, and on return to work having been offered jobs corresponding with their employment contract are vulnerable to detriments forcing their resignation or dismissal. By extending the legislative protection to all detriments associated with requesting or the taking of the

leave, the UK and Polish legislators would provide working parents with the additional level of job security, which is indispensable in ensuring the popularity of the leave especially among fathers. Considering the high unemployment rates in Poland; the increased fears of dismissal for reasons associated with childcare leave, it is very unlikely that the leave take up rates are going to improve unless parents perceive the leave arrangements as ensuring adequate levels of employment security. The existing leave arrangements in Germany (which provide the leave takers with additional legislative protection from dismissal) and Sweden (which provide protection on grounds of the future application for parental leave) indicates that it should also be possible for the UK and Polish legislators to ensure that the right of working parents are adequately protected (**Appendix**, **Table 7**).

The legislative protection from dismissal under the UK Regulations and Polish Labour Code is further eroded by the existence of exemptions providing for the possibility of the legitimate termination of employment relationship with the leave takers (see Chapters 4 and 5). This constitutes a major deficiency of the UK and Polish parental leave schemes, as the lack of employment security disadvantages in particular mothers in the labour market and hampers the reconciliation objective of the Directive. The lack of adequate guarantees of job security for the leave takers in particular affects Polish mothers who use their long leave entitlements. Employers may discourage the leave takers from returning back to work by offering them jobs corresponding with their employment contract, and imposing other conditions in order to force their resignation or terminating contracts of employment with parents who do not wish to cooperate, on grounds of the employee's conduct.[1176]

Analysis of provisions of the UK Regulations and the Polish Labour Code also shows that legislative protection which is afforded to the Polish leave takers is less than their UK counterparts as parents on childcare leave can be dismissed from work on grounds of redundancy if they take leave exceeding three months' and work for

[1176] Article 186(1)(1) LC enables an employer to terminate the contract with the leave taker on the grounds of his/her conduct.

companies employing more than twenty employees (**Appendix, Table 16**).[1177] This constitutes a major deficiency of this provision as mothers who request childcare leave longer than three months could legitimately be selected for redundancies by employers employing more than twenty workers.[1178] The limited employment security that the leave takers are provided with by the Polish Labour Code contributes to worsening women's situation in the labour market, as mothers on childcare leave can be selected for redundancies, and they experience more difficulties with finding employment than men.[1179]

As discussed in Chapter 5, the employment security risks associated with childcare leave significantly constrain parents' work-family choices and dissuade fathers from taking childcare leave. Hence, it is crucial that legislative protection from detriments or dismissal covers the full duration of childcare leave and all leave takers are provided with adequate legislative protection from dismissal and nor merely those working for small companies as it is the case in Poland. The legislative protection from dismissal under the UK Regulations which provides all leave takers with the legislative protection from dismissal on grounds of redundancy and covers the full duration of parental leave may offer the way forward for enhancing childcare leave rights in Poland. Thus, in order to ensure childcare leave becomes a more effective reconciliation tool for both working parents, the disadvantages deriving from the limited protection of employment security would need to be removed and all parents should be provided with the legislative protection from dismissal on grounds of redundancy. Improved employment security of the leave takers could contribute to

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[1177] Under the UK Regulations, the legislative protection from dismissal covers the full duration of the leave, and redundancy cannot be used as a valid reason for terminating the employment contract with the leave takers. This contrasts the protection under the Polish Labour Code, which provides working parents with the right to childcare leave, which significantly longer than that set out in the Directive, and it merely ensures the legislative protection from dismissal on grounds of redundancy, if the leave does not exceed three months' for employees working for companies employing more than twenty employees.

[1178] This was reaffirmed by the recent decision of the Polish Supreme Court (Uchwala Sadu Najwyzszego – Izaba Pracy, Ubezpieczen Spolecznych i Spraw Publicznych) 2006/02/15, II PZP 13/05, OSNAPiUS, rok 2006, Nr 21-22, poz.315, str. 889.

[1179] K. Machovcová ed.(2007) *Women on the Labour Market: Today and in the Future, Gender Studies*, Praha, Czech Republic, Heinrich-Böll-Foundation, pp.4-11.

encouraging more fathers to take childcare leave and enable families to make better reconciliation choices.

Another deficiency of the legislative protection from detriment or dismissal derives from that neither the Directive, UK Regulations nor the Polish Labour Code adequately respond to the needs of contemporary families as they do not recognise the vulnerable position of single mothers and fathers in the labour market, and do not provide them with the enhanced legislative protection from detriment or dismissal. As seen in Chapters 4 and 5 employment security constraints may particularly prevent single parents from making genuine reconciliation choices. Hence the way forward for introducing parental leave entitlements that better recognise reconciliation needs of different families would include providing single parent families with enhanced protection from dismissal or detriments for reasons related to parental leave. By ensuring single parents' enhanced employment security protection the UK Regulations and Polish Labour Code would recognise the vulnerable situation of these parents in the labour market and minimised the negative impact that parental leave may have on their employment.

The failure of the Directive to provide leave takers with the right to return to the same job has been further reinforced by the UK and Polish legislation which merely provides parents with the possibility of returning to a similar, equivalent job or the job corresponding with the employment contract (**Appendix**, **Table 16**). The right to return to their previous jobs is of paramount importance for reconciliation and its lack as considered in Chapters 4 and 5 significantly constrains parents' work-family choices. The key difference between the right to return under UK Regulations and the Polish Labour Code derives from that UK leave arrangements provide parents with the right to return to the same job if the set leave thresholds are not exceeded, and the Polish Labour Code does not provide the leave takers with the right to return to the same job regardless of the time spent on childcare leave. The introduction in the Polish Labour Code of the right to return to the same jobs if shorter periods of childcare leave are taken could significantly improve employment security of the leave

takers, and encourage parents to take shorter periods of childcare leave, which can be seen as better balancing the demands of work and family. In order to achieve this, the flexibility of childcare leave arrangements would also need to be enhanced by removing the limit on the number of blocks in which the leave needs to be taken and extending the time by when the right to the leave expires.

However, the UK right to return to the same jobs does not enable genuine reconciliation choices to those parents who would like to spend more time with their children (see Chapters 4). This indicates a failure of the Directive to ensure that UK and Polish parents are provided with parental leave entitlements enabling them to spend enough time on parental leave without jeopardising their employment security. The UK Regulations and Polish Labour Code by not providing all the leave takers with an absolute right to return to the previously held post but merely requiring employers to facilitate the right to return to the similar or equivalent post where it is *reasonable practicable* or *it is possible*[1180] significantly limit the effectiveness of parental leave as a reconciliation measure. Both the UK Regulations and Polish Labour Code prevent an employer from terminating the employment contract with the leave taker on condition that the employer is in a position to provide those returning from leave with at least a suitable and appropriate job[1181] or job corresponding with the employee's contract of employment. This involves a subjective assessment undertaken by the employer which enables employers to prevent parents from retuning back to work if they exercised their right to parental leave.

As seen in Chapter 5 the lack of legislative right to return to the previously held post has far reaching implications for Polish working parents (mothers) who use their entitlement to the full-time childcare leave, and exit the labour market for long periods of time measured in years rather than in weeks or months as it is the case in the UK. In the absence of the absolute right to return back to work, to many Polish mothers the decision to use their full entitlement to the leave implies the necessity of exiting

[1180] The Decision of Polish Supreme Court on 29 January 2008, Sygn. Akt II PK 143/07, 1-10.
[1181] Regulation 20(7) MPLR.

the labour market without a real possibility of returning back to working for the same employer. Thus, the taking of childcare leave involves sacrificing professional career in favour of family. The fear of losing a job if the leave is taken, also significantly hampers the effectiveness of parental leave as a reconciliation measure.[1182] The lack of absolute legislative right to return to the previously held posts in both jurisdictions indicates the lack of commitment of national legislators to providing working parents with effective reconciliation rights. Additionally, it reaffirms the existence of the legislative support for the traditional divisions of responsibilities within a family, and reaffirmation that employment and bringing up children remain incompatible.[1183]

Thus, in order to provide parents with genuine reconciliation choices, apart from providing working parents with the flexible leave arrangements and adequate financial support, the leave takers should also be provided with the appropriate protection in terms of their job security, enabling them to exercise their right to parental leave with a real possibility of being able to return to their previous work posts, regardless of the duration of parental leave that has been taken. The existing parental leave arrangements in Czech Republic which provide the leave takers with the right to return to the same post for up to three years indicate that it is possible for the UK and Polish legislators to ensure that parents are provided more family-friendly right to return (**Appendix**, **Table 13**). Hence, the Czech leave arrangements can be seen as constituting the basis for enhancement of parental leave schemes in the UK and Poland.

The possibility of returning back to work prior to the expiry of the requested leave period is of paramount importance to working parents in the UK and Poland where the leave is unpaid, and the time of the unneeded leave may impose unnecessary financial burden on families (see Chapters 4 and 5). **Appendix**, **Table 16** indicates that only Polish parents are provided with the possibility of altering their leave

[1182] I. Kotowska and A. Baranowska (2006) National Survey *Praca a Obowiazki Rodzinne w 2005*, Glowny Urzad Statystyczny (GUS), Warsaw, 2006.
[1183] This is further supported by the high percentage of inactive women out of the labour market for family reasons both in the UK (67per cent) and Poland (68 per cent on increase), EU overage 55.3 per cent. Cf. Report (2011) op. cit., p.23.

arrangements, and returning back to work prior to the expiry of the agreed leave. Although, Polish employees are provided with the right to alter their leave arrangements, and prematurely return back to work, there is no right to an immediate return back to work when family circumstances change, as thirty day notice need to be given to the employer. Despite, the restrictive character of the right to the premature return back to work, the reconciliation needs of working parents have been better recognised by the Polish Labour Code than UK Regulations that primarily safeguard the interest of employers by preventing employees from prematurely returning back to work. As seen in Chapter 4, the absence of entitlement to early return from parental leave in the UK imposes significant constraints on the leave takers which limit their work-family choices. Thus, in order to better respond to the constantly changing parents' individual caring needs and enable parents to efficiently use their short leave entitlements, UK parents should be provided with the right to alter the previously agreed leave arrangements. This as indicated earlier in this Chapter would need to be accompanied by the removal of restrictions on minimum duration of parental leave in order to enable parents to use their leave entitlement in a manner that best responds to their individual needs. A more balanced flexible right to return could be introduced in both jurisdictions, which takes into account the needs of employers and employees by making the right to early return subject to the reasonable notice requirement, which corresponds with the duration of the requested leave.

Although achieving desired reconciliation may require working parents to return from the leave to part-time working, neither the UK Regulations nor Polish Labour Code provides parents with a right to switch to part-time work on expiry of the entitlement to parental leave. The lack of possibility of returning back to part-time employment may prevent in particular UK mothers who often work part-time from rejoining the labour market if family circumstances and the limited availability of affordable childcare prevent parents (mothers) from being able to work on a full time basis. There is evidence that the vast majority of UK mothers returning to work from parental leave are unable to resume work to the same extent as before the leave and that they ask

employers for reduced working hours (**Appendix, Table 10**). Hence the introduction of the right to return from parental leave to part-time working would significantly improve UK mothers' work-family choices by enabling them to remain in employment whilst providing the needed care. The scarcity of part-time work in Poland, and the limited availability of the affordable childcare contribute to forcing mothers out of the labour market after the expiry of their entitlement to parental leave.[1184] As seen earlier in this Chapter, unless the availability of affordable childcare is improved in both jurisdictions parents (mothers) will be prevented from fully being able to reconcile work and family responsibilities. However, as the availability of part-time work improves in Poland the right to return from childcare leave to part-time working could enhance mothers' reconciliation choices and enable more mothers to remain in employment whilst providing the needed care.[1185]

6.2 Comparative Analysis of Leave for Dependants in the UK and Poland and the Way Forward

Having considered the UK and Polish provisions on parental leave, this section comparatively analyses the national implementations of Clause 3(1) the Directive in Poland and the UK. It requires Member States to ensure the existence of the right to time off work for urgent family reasons in relation to children and adult dependants (see Chapter 3). The UK and Polish legislative provision on time off for dependants are contrasted in **Appendix**, **Table 17**. In contrast with the UK where the implementation of the Directive on parental leave has resulted in the introduction of the new legislative right to time off for dependants, the implementation of Clause 3(1) of the Directive in Poland merely reaffirmed the existing legislative regime on the time off. The UK right to time off for dependants and the Polish right to time off for family members provide the qualifying employees with the right to time off and do not expressly recognise the importance of this leave for reconciliation. This as seen in

[1184] Cf. I. E. Kotowska, E. Słotwińska-Rosłanowska, M. Styrc, A. Zadrożna (2007), *Sytuacja kobiet powracających na rynek pracy po przerwie spowodowanej macierzyństwem i opieką nad dzieckiem*, Warszawa: EFS.

[1185] In 2010 less than 10 per cent of Polish women worked part-time (more than 40 per cent of UK women). Cf. Report (2011) op. cit., pp.24-25.

Chapters 4 and 5 indicates that both legislators merely implement the requirements of the Directive and do not expressly seek to provide workers with caring responsibilities for children and adult dependants with leave rights that could assist them in making better work-care choices.

Unlike the UK right to time off, which merely provides working parents with the right to request the time off work in order to deal with unexpected matters involving the dependants, there are two distinct leave entitlements in Poland. These are the right to time off for children in relation to foreseeable matters[1186]and the right to time off for children and adult family members in relation to unforeseeable matters.[1187] It must be emphasised that there is no UK equivalent of the Polish right to time off for children in relation to foreseeable matters, as the UK right to request the time off for dependants aims at assisting employees in dealing with various emergencies involving their dependants (**Appendix**, **Table 17**). As seen in Chapter 5, Poland has a long tradition of providing workers with the legislative rights to time off for dependants and therefore Polish legislators are more experienced in balancing the interests of employees and employers that the UK legislator could also benefit from. The Polish right to time off in relation to foreseeable matters contains provisions that could enhance work-family choices of the UK parents. The introduction of this type of the leave in the UK could contribute to helping working parents with reconciliation, as they would be provided with the right to additional paid leave that extends beyond the period of parental leave, and covers all foreseen events involving both small and older children. It must be emphasised that all Polish employees have the right to time off in relation to foreseeable matters and the UK employees are merely provided with the right to request the time off in order to deal with urgent matters. The existence of this new right to the leave would contribute to removing difficulties encountered by UK working parents when requesting the time off to deal with foreseeable events. It would also provide parents with the additional right to the time off in order to participate in joyous events involving qualifying children.[1188]

[1186] Article 188 LC.
[1187] Articles 32 and 33 Ministerial Order of 25 June 1999.
[1188] E.g. taking a child to a Christmas party

However, the Polish right to time off in relation to foreseeable matters also contains provisions which could be enhanced in order to enable working parents to make better work-care choices. Although the family right to leave accompanied by full wage is to be seen as enabling parents to choose who takes the leave, the existence of the individual right to the leave that could be transferred with the explicit consent of the parent would reaffirm that caring responsibilities rest also with fathers, and ensure that the entitlement to leave would not be lost if the father decided not to use it. The existence of a flexible, individual right to the leave could contribute to challenging the gendered nature of parenting, and ensure that parenthood and care-giving responsibilities are associated with both parents and not only with mothers. In order to improve the effectiveness of this leave as a means of reconciliation, the right to the leave in the Polish Labour Code, which is at present set at two days could be extended to provide parents with the a significantly longer right to the time off. The existence of flexible leave arrangements enabling parents to use their entitlement on an hourly basis or half-day working would significantly enhance the duration of the leave, as working parents could only use the required portion of the leave entitlement, and the outstanding entitlement would be reserved for the future use.

The leave entitlement would also need to recognise the additional burden of bringing up children that rests with parents of many children, and single parent families for whom it may be particularly difficult to reconcile work and family responsibilities. In order to better respond to the needs of those families, the entitlement to time off should be accrued of the basis on the number of children in the family. This would ensure more equality in the distribution of the entitlement, and provide working parents of many qualifying children with the enhanced leave entitlement capable of addressing their family needs. The introduction of a leave regime for single parent families would indicate the legislator's departure from the traditional perception of family. The extension of this right to time off to all workers with caring responsibilities both for children and adult dependants could enhance reconciliation choices of workers with caring responsibilities for older children and adult dependants. At

present neither the UK nor Polish workers have the right to paid leave in order to respond to known matters involving older children and adult dependants.

As highlighted in **Appendix**, **Table 17** the Polish right to time off for children under the 1999 Order is less restrictive than the UK employees' right to request the time off in the ERA 1996, because it provides all ensured workers with the right to compensated leave in order to deal with unforeseen circumstances, or providing care to children and adult dependants. Hence, the Polish right to time off in the 1999 Order better responds to the reconciliation needs of working parents with caring responsibilities for dependants than the UK right to time off in the ERA 1996, because it provides all insured workers regardless of their employment status with the right to paid time off. The introduction in the UK of the similar right to that in the Polish 1999 Order would extend the availability of time off to various groups of workers, which are currently excluded from the leave entitlement under the UK ERA 1996.

Since the availability of this Polish right to time off is conditioned by contributions to the national health scheme, regardless of whether the contributions are voluntary or compulsory, the UK workers with family responsibilities who are not subject to compulsory contributions would be in a position to choose if they want to benefit from the right to the time off by making voluntary insurance contributions. The UK legislative recognition of caring needs that all workers have (not only employees) by providing all workers with the legislative right to time off for dependants would significantly contribute to enabling all groups of workers to better reconcile work and caring responsibilities for their dependants.

Both in the UK and Poland the time off for dependants is not restricted to cases of unforeseen illness or accidents involving dependants, and workers can use their leave entitlement in order deal with other circumstances involving the provision of care for healthy children (**Appendix**, **Table 17**). Unlike the UK ERA 1996, the Polish 1999 Order recognises the extended caring needs of parents with small children up the age of eight by providing those parents with the additional leave entitlements.

The possibility of taking the time off to respond to various unforeseen circumstances unrelated to the health of the child significantly improves the availability of the leave, and therefore as seen in Chapters 4 and 5 also enhances working parents' work-care choices.

In contrast with the Polish 1999 Order, the UK ERA 1996 does not restrict the possibility of taking the leave in order to deal with the unforeseen circumstances involving healthy children by the age of the child. Thus, the UK entitlement to time off may in principle be seen as better responding to the needs of working parents with healthy children over the age of eight who may require the same amount of attention as the younger healthy children. The Polish Order 1999 by limiting the availability of the leave for children older than eight years of age, and younger than fourteen only to cases of unforeseen illness or accidents, the Polish legislator has failed to recognise the burden of bringing up the older children, who require as much attention as the younger children (see Chapter 5).

In order to improve the availability of the leave and thereby better recognise the reconciliation needs of parents with older children, the right to time off under the Polish 1999 Order should be extended to provide parents of all children with the right to take time off in order to deal with all unforeseen events involving their children. Considering the short duration of leave for foreseeable matters under Article 188 LC, and the lack of right to time off in order to respond to joyous events involving children in the Polish 1999 Order and the UK ERA 1996, the specific right to the leave in relation to joyous events involving children and adult family dependants would need to be introduced in both jurisdictions in order for the right to time off for dependants to become more responsive to reconciliation needs of workers with caring responsibilities. The introduction of the right to time off in relation to healthy older children and adults who are being cared for by workers would contribute to enabling workers to make better work-care choices and recognise the importance of the provision of care for children and adults.

Both the UK and Polish leave arrangements constrain workers' work-care choices by restricting availability of the right to time off to adult *dependants* under the UK ERA 1996, or adult *family members* in the Polish 1999 Order. As seen in Chapters 4 and 5, the necessity of satisfying the requirements of the definition of a dependant or a family member in order for the entitlement to time off to occur significantly restricts workers' work-care choices. The eligibility of the leave only in relation to the adult family members as narrowly defined by the Polish 1999 Order is more restrictive than the definition of a dependant in the UK ERA 1996, as it does not provide workers with the right to leave in order to care for those who are not relatives, and yet are often provided with the needed care.[1189] In order to improve the availability of time off in relation to adults, and better respond to caring needs of the contemporary society, where the composition of families no longer follows the traditional patterns, the right to leave under the Polish 1999 Order and the UK ERA 1996 should be extended to ensure that the leave is available in relation to all adults who are being cared for by workers.

In contrast with the UK entitlement to the time off which is merely intended to enable parents to put into place needed care arrangements,[1190] the Polish right to time off provides workers with the positive right to provide personal care to children up to the age of fourteen, and adult family members of the annual duration not exceeding sixty working days (**Appendix**, **Table 17**). The right to time off in the Polish 1999 Order focuses on the needs of parents with children up to the age of fourteen, and it fails to recognise the importance of the provision of care for older children and adult family members. This, as seen in Chapter 5, constitutes a deficiency of this right to leave in assisting workers with caring responsibilities for older children and adults in making better reconciliation choices.

The positive right to time off in the Polish 1999 Order which specifies the duration of leave entitlement better caters for reconciliation needs of workers with caring

[1189] E.g. providing care to the neighbour
[1190] Cf. *Qua v Morrison Solicitors*, Appeal No. EAT/884/01 and *Darlington v. Allders of Croydon*, Case Number 2304217/01, ET on 5th December 2001.

responsibilities for children and adult family members than the UK ambiguous right to request the time off, which does not enable workers to make effective work-care choices. [1191] The ERA 1996 neither provides employees with a clear right to the leave when it is needed nor specifies the duration of the leave that could be taken each year in order to respond to that arise caring needs. This as seen in Chapter 4 constitutes a major deficiency of the UK right to the time off. In order to improve the situation of workers with caring responsibilities for children and adult dependants in the UK, a legislative right similar to that outlined in the Polish 1999 Order would need to be introduced, which provides workers with the specific, long leave entitlements that could be used in order to provide the needed long-term care both to children and adult dependants. In order to enable workers with caring responsibilities for older children and adults to make better work-care choices the duration of leave for dependants under the Polish 1999 Order would also need to be extended to better reflect the actual caring needs of workers with older children and adult dependants. Additionally, the UK and Polish rights to leave would need to fully recognise the social importance of the provision of care for older children and adult dependants and not merely focus on caring needs of parents with small children. At present neither the UK nor Polish leave arrangements recognise enhanced caring needs of single parent families for whom it may be particularly difficult to make real work-care choices. The Hungarian leave arrangements for dependants which provide single parents with double leave entitlements may offer the way forward for introducing leave entitlements that better respond to single parents' reconciliation needs in the UK and Poland (**Appendix**, **Table 15**).

The comparison between the leave provisions of the Polish 1999 Order and the UK ERA 1996 reveals that neither the Polish nor the UK leave arrangements seek to challenge the lack of equality in how work-care responsibilities are distributed within families. This derives from the fact that the Polish right to time off provides for the family right to leave and the UK ERA 1996 merely provides employees with the right to request leave which does not need to be granted by the employer (**Appendix**,

[1191] G. James (2009) op. cit., p.50.

Table 17). As it is rightly observed by James[1192] despite the utmost importance of the right to time off work in enabling workers to effectively respond to the arising emergencies, the UK right to the leave fails to provide workers with effective rights capable of promoting real choices or supporting the needed changes in the traditional division of responsibilities within a family, and thereby ensure more equality in how caring responsibilities are allocated within a family and society in general.

Thus, the failure of Polish and the UK legislator to provide workers with the right to the time off capable of enabling both male and female workers with caring responsibilities for children and adult dependants to make genuine reconciliation choices indicates the lack of initiative on the part of those legislators to address the imbalance in families and society, as to how caring responsibilities are allocated, and the care is provided. The lack of adequate rights to the time off further perpetuates the disadvantages that women as the primary carers experience in the labour market.[1193] Although the existence of a legislative right to time off for dependants on its own cannot bring about the change in the men's attitudes towards the provision of care in family and society, the legislative right, which responds to the individual needs of working women and men can contribute to promoting the needed change in the perception of caring responsibilities, and thereby ensure more substantive equality between men and women.

The existence of individual right to time off for dependants could contribute to improving women's situation in the labour market by shifting the burden of provision of care away from women by facilitating more men's involvement in caring for children and adult dependants. This could contribute to challenging the dominant ideologies of motherhood and parenthood in the UK and Poland. As already indicated in the context of the Polish right to time off in Article 188 LC, the effectiveness of individual rights to the leave in ensuring social change in the men's attitudes towards the

[1192] G. James (2009) op. cit., p.50.

[1193] In Poland and the UK the care to children and adult dependants is largely provided by women. Cf.Report (2011) op. cit., pp. 40-44 and National Statistical Office (2006) *Work and Family Responsibilities in 2005* (*Praca a Obowiazki Rodzinne w 2005*), Glowny Urzad Statystyczny (GUS), Warsaw 2006.

provision of care could be reinforced by introducing restrictions on the transferability of this right. In order to enable workers to fully utilise their right to the leave and achieve better reconciliation, the flexibility of leave arrangements would need to be assured by providing workers with the possibility of choosing the most appropriate modality of the leave (subject to worker's individual circumstances), ranging from the leave taken on an hourly basis to longer periods of the leave. The right to leave should not unnecessarily facilitate carer's exit from the labour market, and it should focus on helping workers in achieving reconciliation. It should also provide workers with the possibility of exiting the labour market when it is necessary and thereby enabling workers to make genuine work-family choices.

Appendix, **Table 17** shows that the Polish right to time off for family members better responds to families' reconciliation needs than the UK right to unpaid time off for dependants[1194] because the Polish leave takers are entitled to the leave allowance. As seen in Chapter 4, financial constraints associated with the UK right to time off indicate the UK minimalist approach to providing workers with effective reconciliation rights and the financial cost of taking leave significantly limits workers work-care choices. As the allowance is paid from contributions to the national insurance scheme it imposes no financial burden on employers. Considering that Poland has more limited financial resources than the UK, the introduction of the right to the time off, which is paid at the percentage equal to that in Poland, should not pose any major financial difficulties for the UK government. As seen in Chapter 4, the lack of the UK government's full commitment to providing workers with effective reconciliation rights and putting the interests of the business before those of the workers with caring responsibilities, which has been reaffirmed by the present Coalition government could be seen as the main obstacle preventing the introduction of the right to paid time off for dependants. The analysis of the provisions of national entitlements to leave for family reasons in **Appendix**, **Table 11** and **Table 15** explicitly shows that there is no economic rationale for the UK not providing workers

[1194] *Nardone v. David Fox Transport,* Employment Tribunal, Case Number 2502457/04 on 3 June 2003 para 16.

with the right to some form of pay whilst on leave as most of the selected Member States provided workers with the right to compensated leave. However, this analysis also reaffirms the failure of the Directive to ensure the introduction of national leave schemes capable of enabling workers with caring responsibilities for children and adult dependants to make genuine reconciliation choices. This derives from the fact all well-established Member States which introduced new schemes on time off for dependants provide for very restrictive leave entitlements, which barely implement the minimum requirements of the Directive and do not provide the leave takers with the right to paid or compensated leave.

The existence of the right to paid time off could encourage UK fathers to be more involved in caring for children and adult dependants. The provision of care often involves the need to acquire additional skills and the need to overcome the traditional perceptions about the distribution of caring responsibilities. Apart from providing workers with adequate legislative rights to leave, incentives should also be provided encouraging men to be more involved in the provision of care. A public awareness campaign could also promote the dual role of men as carers and workers, and outline men's role in the provision of care. Both the right to leave in the UK ERA 1996 and Polish 1999 Order aim at traditional families, and do not provide for the special regime on the leave allowances for single parent families for whom it may be particularly difficult to respond to the unexpected emergencies or illness of the dependant whilst coping with the loss of the needed income. Thus, the legislative right to time off should ensure that the extended needs of those families are recognised, and adequately catered for by providing those families with the additional allowances. Considering the existence of the gender pay gap in the UK and Poland; that taking the time off involves the wage loss, and that the legislation does not provide for any incentives aiming at encouraging men's involvement in caring for dependants, it is very unlikely that the division of caring responsibilities within the UK and Polish families is going to change in the near future.

Apart from ensuring the availability of paid time off that can be taken when it is most needed by workers, adequate level of employment security would need to be provided to the leave takers ensuring that the taking of the leave does not disadvantage workers in the labour market, or hampers their employment security. **Appendix**, **Table 17** shows differences in the legislative protection from dismissal or detriments which is afforded in the UK and Poland. The absence of employment security risks is of paramount importance in enabling workers with caring responsibilities for children and adult dependants to make effective work-care decisions (as considered in Chapter 5). The level of protection provided to the UK leave takers by the MPLR and ERA 1996 that renders the leave automatically unfair is superior to the inadequate protection under the Polish 1999 Order, which merely requires employers to comply with the contractual notice requirements when the leave is taken to care for a child. Additionally, those Polish workers who take leave in order to care for adult dependants do not receive any legislative protection from detriment or dismissal for reasons related to the taking of the leave (see Chapter 5). Considering the long duration of the leave, which is mainly taken by women, and the failure of 1999 Order to ensure the adequate legislative protection of the leave takers, the taking of the leave is likely to disadvantage more women than men in the labour market. There is no explicit right to return from the leave either in the UK or Poland. The lack of a right to return under the Polish 1999 Order is more disadvantageous to the leave takers than its absence in the UK ERA 1996 and MPLR because of the longer duration of the leave, which is offered to the Polish workers.

The UK legislative protection from detriment or dismissal which better protects the interest of the leave takers offers the way forward for enhancing the legislative protection from detriment or dismissal which is afforded to the Polish leave takers. In order to remove the disadvantages suffered by Polish women who mainly take the leave, and provide workers with genuine reconciliation choices, the adequate protection from dismissal and other detriments associated with the taking of the leave would need to be provided by the Polish 1999 Order. Dismissal for reasons associated with requesting or the taking of the leave should be considered as

automatically unfair, and the protected detriments would need to specifically cover the negative impact on the career that the taking of the leave can have (e.g. being passed for promotion). The protection from detriment or dismissal should also cover those who are likely to apply or take the time off for dependants.

As the Polish right to time off enables workers to exit the labour market for long periods of time, it is paramount that all leave takers are provided with the right to return to their previously held posts. The Polish 1999 Order also needs to be amended to remove the disadvantages suffered by workers providing care to adult family members as it may contravene the ruling of the Court of Justice in *Coleman v. Attridge Law,*[1195] and the EU equality directives. Although, the existence of excessive legislative protection of the leave takers could further disadvantage women in the labour market if the leave continues to be mainly taken by women, in the absence of adequate legislative protection the disadvantages associated with the taking of the leave will further discourage men from being involved in the provision of care. Unless disadvantages associated with the taking of the leave are removed, in both jurisdictions workers with caring responsibilities for dependants will continue facing difficulties whilst trying to reconcile work and caring responsibilities for dependants. Additionally, in order for the issue of equality in the distribution of caring responsibilities between men and women to be effectively addressed, the legal framework on time off for dependants in both jurisdictions needs to set a level playing field, ensuring that female and male workers can make genuine reconciliation choices, and not the choices which are born out the necessity, and are inherently disadvantageous for families.

The effectiveness of time off for dependants in facilitating reconciliation is further conditioned by easy access to the leave and its availability when it is needed by workers (see Chapters 4 and 5). Unlike the right to time off in the Polish 1999 Order, which is not restricted by the necessity of complying with the notice requirements for the leave to be taken, and enables workers to take the leave when it is needed, the

[1195] Case C-303/06 [2008] ECR I-5603.

UK right to time off is conditioned by the necessity of complying with the notice requirements. This, as observed in Chapter 4, constitutes a major deficiency of the UK right to time off for dependants which can prevent workers from being able to take leave when it is needed most by the family. In order for the right to the leave to become an effective reconciliation tool workers with the responsibilities for dependants should not be hampered by the notice requirement access to the time off when it is most needed. Polish time off arrangements enable workers to take leave when it is actually needed by families without the necessity of complying with notice requirements. This indicates that leave notices are not indispensable in the administration of the right to time off and that it is possible for business to provide workers with flexible leave accesses.

In contrast with the UK right to the leave in the ERA 1996, the Polish 1999 Order refers to concept of a traditional family, and the assumption that the extended family would be actively participating in the provision of care as the leave cannot be taken if there are other family member who can provide such care (**Appendix**, **Table 17**). This reaffirms that the right to leave in the Polish 1999 Order seeks to cater for the needs of traditional families, and reinforces the traditional caring patterns (as considered in Chapter 5). It does not aim at enabling workers to effectively reconcile work and caring responsibilities, ensuring more equality in the distribution of caring responsibilities between men and women, as in principle it does not allow the leave to be simultaneously taken by both parents. The involvement of both male and female workers in the provision of care should be promoted by providing workers with the right to simultaneous time off, as the initial father's involvement in the provision of care under the mother's supervision may provide him with the skills and the desire to provide the needed independently. The German implementation of the Directive which provides workers with the right to time off irrespective of other persons being able to care for the child can offer the way forward for enhancing the leave arrangements in Poland (**Appendix**, **Table 11**).

Consequently, the EU, Polish and UK legislators should amend the existing legal provisions so that the legislative rights to parental leave and leave for dependants provide workers with caring responsibilities for children and adult dependants with genuine work-family choices.

As the EU law on parental leave and leave for urgent family reasons continues developing further research will be needed to explore the extent to which the recently adopted Directive [1196] on parental leave has addressed the deficiencies of its predecessor identified in this thesis, and whether or not it can ensure that all EU workers with caring responsibilities for children and adult dependants are provided with better reconciliation choices.

[1196] 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 the Directive 96/34/EC.

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Appendix

Figure 1: Response to questionnaire of 30/05/2006 from the most senior official at UNICE at the time of the adoption of the framework agreement on parental leave

Framework agreement on parental leave and the leave for urgent family reasons annexed to EC Directive 96/34/EC

General information on the negotiation process

1 List of the organisations participating in the negotiation process and the names of their representatives.

I personally did not participate in the actual negotiations. The UNICE team was led by Dan McAuley, former Director General of the Irish Employers' Federation.

2 Number of meetings.

On the Trade Union side was the European Trade Union Confederation (ETUC).
On the Employer side, there was The Union of Industrial and Employers' Confederations of Europe (UNICE), and CEEP (Confédération Européenne des Entreprises Publiques), which later changed the "translation" of its acronym to "Conf. Eur. des Entreprises avec Participation Publique", to reflect the fact many of its members were undergoing privatisation.
If my memory serves me correctly, UNICE invited Eurocommerce (the Retail Trades Assoc.) and possibly Hotrec (the Hotels and Restaurants Assoc.) as observer members of its negotiating team, but you must check that with UNICE.

3 Dates of those meetings

I have no idea how many negotiating sessions were held. That in my view is unimportant. The most difficult meetings, for both sides, were internal, during which each organisation requested a negotiating mandate from its members. Also of great importance were the numerous unofficial meetings between the sides held at "Secretariat" level, at which the difficult issues at stake could be calmly and rationally discussed. I did participate in most of these.

4 Meetings' agenda and minutes
I cannot answer this question.

There was never an "Agenda" as such, nor were official minutes produced. The sole subject was "Parental Leave". Of course, each side produced internal reports for information of its members, but these had no official status.

The Commission proposal for the Directive

1 What were the provisions proposed in the outline provided by the Commission? (A copy of the original needed if possible)

2 Was ETUC satisfied with the proposal provided by the Commission?

3 Did the proposal cover all areas envisaged by the ETUC and if not which areas were not covered?

4 Any other issues?

NB: This question is wrongly put. The 2-stage consultation of the Social Partners by the Commission (according to the Agreement on Social Policy attached to the Protocol agreed at Maastricht in 1991) consists of: Stage 1: The Commission asks the Social Partners to give an opinion on whether EU action is desirable in a particular area of social policy. At this stage, there is no detail as to what form EU action might take.
Stage 2: Having received answers to Stage 1, if the Commission believes action at EU level is required, it consults the Soc. partners on the "possible content" of an EU measure. There is no detailed proposal for a Directive at this stage. It is during this stage that the Soc. partners may decide amongst themselves whether they wish to deal with the matter through a negotiation. They then have 9 months within which to reach agreement.

1. I do not have any documents. However, these are on public record and you should be able to get them from the Commission. If I remember correctly, the Commission helpfully supplied the Soc. partners with details of already existing
Parental Leave legislation in all member states. In fact, only some 3 countries had no such legislation.
2. I can't remember UNICE being particularly dissatisfied with documents from the Commission, but I emphasise, there was no "proposal" from the Commission.
It was up to the Soc. partners to negotiate a proposal.
3. This question is irrelevant because there was no proposal.
4. No.

Negotiations leading to the adoption of the framework agreement

1 Did the social partners bargain against each other or reached an agreement on way forward?

Your question is wrongly put. Negotiators do not "bargain against each other". They look for areas of agreement. When difficulties arise because of differing views and interests, negotiators look for a compromise which can be accepted by both sides.

2 Do you think the fact that the framework agreement on the works council was not concluded put additional pressure on the social partners? Was this pressure visible during the negotiation process? Did this influence the provisions of the concluded framework agreement on parental leave? Were the social partners afraid of the consequences if the consensus is not reached?

The answer to all four questions you put under this heading is an emphatic "no". The failure to reach an agreement to negotiate on Works Councils had absolutely no effect on the later Parental Leave negotiation. There never was a negotiation on Works Councils. Only a series of meetings to see if agreement could be reached to enter negotiations, as per Stage 2 mentioned above. The main reason why no negotiation took place was because in this instance, there was already a Commission Directive on the table. For the ETUC, a negotiation

could only mean a compromise with UNICE less attractive to Trade Unions than the Directive. ETUC and UNICE were happy to negotiate on Parental Leave because there was no proposal for a Directive, so their hands were not tied in any way. It was up to them to come up with a mutually acceptable solution.

3 Which aspects of parental leave and the leave for urgent family reasons where of particular interest to ETUC and you? Was ETUC and you satisfied with the provisions of the concluded framework agreement? What were the missed opportunities, if any?

For UNICE, as for ETUC, it was important not to undermine already existing agreements or legislation at national level. Both Soc. Partners were conscious of their responsibility to respect subsidiarity and to negotiate a "framework" agreement which would leave Soc. Partners in member states the flexibility to adapt the EU-level agreement to local circumstances. It was necessary to set "minimum standards", without preventing better conditions from existing elsewhere. For Employers, it was of course necessary to ensure that the costs of any eventual agreement would be acceptable to companies and would not undermine competitiveness. In the event, both sides were satisfied with the outcome, which set a minimum standard of three months Parental Leave, without any obligation for this to be paid.

Particular provisions

1 Did you start with a maximum/minimum position and then compromise? For example: Did ETUC want parental leave to be transferable or non-transferable? What was preferred by other social partners? Was this issue a contested area, if so explain how the compromise was reached?

UNICE of course had to obtain a negotiating mandate from its membership. This was not too difficult because, as mentioned earlier, many mamber states already had legislation or collective agreements on Parental Leave, while in countries without such legislation most companies in any case voluntarily gave workers Parental Leave. With the provisos that any settlement should respect subsidiarity and not cause unacceptable expense, UNICE obtained a very flexible mandate. ETUC's position was very reasonable, so it was not especially difficult to reach agreement. If my memory is correct the question of transferability was never an issue.

2 Entitlement to parental leave (the age limit). Was this one of the contested areas? Differences between what was originally proposed and finally agreed?

No, this was not a contested area. As already mentioned, nothing was "originally proposed".

3 Duration of parental leave and leave for urgent family reasons. Was it intended that the leave should be longer or shorter? What was the length of the leave proposed by the Commission? Was it one of the contested areas? How was the compromise reached?

Again, the Commission made no proposals. The Social Partners fairly rapidly decided that three months would be an acceptable minimum standard for European Union member states. Higher standards already existed in many of them and that would continue. I do not recall any insistence from ETUC for a longer minimum period.

4 Did the Social Partners intend that the parental leave and the leave for urgent family reasons should be paid? Was it one of the contested areas? How the compromise was reached? Was it argued at all at the leave should be paid? What influenced that decision to make parental leave unpaid? What was the position of the ETUC on this matter?

5 Were you as the Secretary General of the ETUC fully satisfied with the concluded provisions of the framework agreement? Were the concluded provisions what you and ETUC intended or merely reflect what was possible to compromise on (duration of leave, qualifying age, pay etc)?

You must remember that any matter concerning remuneration or the level of Social Security payments is not allowed even to be discussed at EU level. There was therefore never any question of negotiating payment to workers taking Parental Leave, nor did ETUC try to do so.

6 Are the provisions of the concluded framework considered by ETUC and you as enabling working parents to reconcile family responsibilities and paid employment? Was this aspect clearly emphasised during the negotiation process? Is unpaid parental leave seen by ETUC as a family-friendly measure?

In a successful negotiation, both sides are "winners". If one side feels it has "lost" and the other has "won", you can be sure it is a bad agreement which will not last. In this first ever negotiation, the EU Social Partners proved themselves fully capable of reaching a sensible agreement, respecting subsidiarity and the need to preserve competitiveness and to make the new Treaty provisions a reality. Nowhere in the whole World has there ever been such a multinational negotiation between Social Partners, so of course both sides were quite pleased that they had succeeded.

7 What were the missed opportunities, if any?

Bearing in mind that most member states already had and continue to have Parental Leave provisions of a higher standard than the minimum conditions negotiated by the EU Soc. Partners, I believe we did what was necessary. Remember that we also had to bear in mind the future entry of new EU members and it would have been irresponsible to set standards impossible for most of those new members to meet. I do not respond to your question about paid/unpaid Parental Leave since this is completely outside the scope of EU action. It is also useful to mention the fact that, in countries where Parental Leave has been granted for many years, the actual use made of such leave is rather limited.
As for reconciling work/family obligations, yes, the agreement we negotiated is a step in the right direction. However, the work/family dilemma has many more aspects to it than simply the matter of Parental Leave.

I see no missed opportunities.

Many thanks for your help

Figure 2: Response to questionnaire of 06/06/2006 from the senior negotiator representing in the negotiations the Confederation of Netherlands Industry and Employers VNO-NCW (member of UNICE; employers' delegation).

Please answer any questions you can. Many thanks for your help.

Framework agreement on parental leave and the leave for urgent family reasons annexed to EC Directive 96/34/EC

General information on the negotiation process

1 The capacity in which you participated in the negotiations

representing the Confederation of Netherlands Industry and Employers VNO-NCW (member UNICE; employers delegation)

2 List of the organisations participating in the negotiation process and the names of their representatives.

?????

3 Number of meetings.

I guess about 6 meetings

4 Dates of those meetings

?????

5 Meetings' agenda and minutes

I don't think (formal) minutes were made. Conclusions/agreement between social partners were reflected in a developing text of the agreement.

The Commission proposal for the Directive

1 What were the provisions proposed in the outline provided by the Commission? (A copy of the original needed if possible)

There was a Commission proposal for a Directive on parental leave for family reasons (issued in the eighties), but no agreement in Council could be reached.
I don't have a copy of this proposal anymore.

2 Was UNICE satisfied with the proposal provided by the Commission?

No, UNICE rejected this proposal for an EC directive.

3 Did the proposal cover all areas envisaged by the UNICE and if not which areas were not covered?

According to my memory this proposal was too broad and too precise, leaving little room for member states and social partners at national level.

4 Any other issues?
No.

Negotiations leading to the adoption of the framework agreement

1 Did the social partners bargain against each other or reached an agreement on way forward?

It was a bargaining process, but from the beginning it was clear that the period of parental leave would be 3 months.

2 Do you think the fact that the framework agreement on the works council was not concluded put additional pressure on the social partners? Was this pressure visible during the negotiation process? Did this influence the provisions of the concluded framework agreement on parental leave? Were the social partners afraid of the consequences if the consensus is not reached?

Yes, the fact that the negotiations on a framework agreement on information and consultation failed, was one of the reason to start negotiations and to do our utmost best to get an agreement. Don't forget in this respect that the European social partners took the initiative to draft the text for the Social Protocol that was annexed to the Treaty of Maastricht. We therefore felt responsible for making it work.
This pressure was not really visible during the negotiation process, but it would have been if there had been serious threat of failure during the negotiation process.
UNICE was not prepared to conclude an agreement at all price. There was a negotiation mandate provided by the UNICE Board that had to be respected.

3 Which aspects of parental leave and the leave for urgent family reasons where of particular interest to UNICE and you? Was UNICE and you satisfied with the provisions of the concluded framework agreement? What were the missed opportunities, if any?

UNICE initially wanted to restrict the agreement to parental leave. As a gesture of compromise leave for urgent family reasons was introduced as a concession to the ETUC. For UNICE and VNO-NCW clause 2, point 3 was very important: it leaves room for member states and social partners to decide on the conditions of access.
For the Netherlands it was in particular important that parental leave could be granted on a full-time or part-time basis.
In clause 2, point 3f special reference to the needs of small undertakings was also an important provision for the employers delegates.
Another very important aspect of the agreement is that no obligations are introduced with respect to pay or income during the period of leave: no additional financial burden on companies or member states.
Clause 4, point 3 (the right of management and labour to conclude agreements adapting the provisions of this agreement) was, for reasons of principle, also an important provision. It can be considered a missed opportunity that we were not able to introduce a possibility for management and labour (at national level) to fully departure from the provisions in the European agreement. The trade unions didn't fully trust their own members.

Particular provisions

1 Did you start with a maximum/minimum position and then compromise? For example: Did UNICE want parental leave to be transferable or non-transferable? What was preferred by other social partners? Was this issue a contested area, if so explain how the compromise was reached?

UNICE did have a mandate (maximum position) approved by the Board. As far as I remember the transferability was not part of the mandate. As far as I remember the employers delegates was not very opposed to transferability, but the trade unions were. Transferability would put pressure on women to take the leave and would therefore create(more) inequality between men and women.
Transferability was, if I remember well, especially an issue in the Scandinavian countries. The compromise could be reached in combination with reference to the three months period. Transferability would be allowed for parental leave that goes beyond three months.

2 Entitlement to parental leave (the age limit). Was this one of the contested areas? Differences between what was originally proposed and finally agreed?
The age limit was indeed a contested area. Initially the trade unions proposed, I think, 12 or 14 years.

3 Duration of parental leave and leave for urgent family reasons. Was it intended that the leave should be longer or shorter? What was the length of the leave proposed by the Commission? Was it one of the contested areas? How was the compromise reached?

It was clear form the beginning that UNICE would not accept a parental leave that goes beyond three months, so this was not a mayor point of discussion.
Provision on leave for urgent family reasons was a concession to the trade unions. UNICE wanted to limit the agreement to only parental leave.
There was a discussion (within the employers delegation and with the trade unions) whether the right to leave for urgent family reasons should be limited to a certain amount of days per year. The wording 'force majeur', 'urgent family reasons' and 'making the immediate presence of the worker indispensable' made this text acceptable for the employers delegation (would make it possible to prevent abuse of the provision).

4 Did the Social Partners intend that the parental leave and the leave for urgent family reasons should be paid? Was it one of the contested areas? How the compromise was reached? Was it argued at all at the leave should be paid? What influenced that decision to make parental leave unpaid? What was the position of the UNICE on this matter?

Paid leave to be paid by employers would have been a no go area for UNICE. Trade unions were in favour of paid leave but were in particular advocating benefits from the state or social security authorities. The employers delegates argued that no provisions could be introduced on social security benefits for parental leave because that would make it impossible for Council to approve the Directive transposing the agreement of the social partners. As a compromise some reference is made in the paragraph on 'general considerations' (point 10 and 11) to social security aspects.

5 Were you as the Secretary General of the UNICE fully satisfied with the concluded provisions of the framework agreement? Were the concluded provisions what you and UNICE intended or merely reflect what was possible to compromise on (duration of leave,

qualifying age, pay etc)?

VNO-NCW (Dutch employers) and UNICE were satisfied with the agreement.

6 Are the provisions of the concluded framework considered by UNICE and you as enabling working parents to reconcile family responsibilities and paid employment? Was this aspect clearly emphasised during the negotiation process? Is unpaid parental leave seen by UNICE as a family-friendly measure?

In the agreement minimum provisions were introduced. It is up to management and labour at national level to conclude, if necessary, on further rights (such as paid leave) in the context of (collective) agreements on working conditions (don't forget: pay and leave are the most important elements of these agreements and further provisions to reconcile work and family life should be weighed against other wishes of workers).
In the Netherlands a lot of parents reconcile work and family life by working part-time. For the time they don't work they are not paid neither.
Finally, it is up to member states to decide whether they want to introduce a social security benefit for workers who are on parental leave.

7 What were the missed opportunities, if any?

No.

Many thanks for your help

Figure 3: Response to the questionnaire of 16/05/2006 from the most senior negotiator for the ETUC.

Framework agreement on parental leave and the leave for urgent family reasons annexed to EC Directive 96/34/EC

General information on the negotiation process

Concerning the first chapter (General Information) I realise that I do not have the concrete information you need. However I am told by the ETUC Secretariat in Brussels that all relevant papers have been sent to the International Archive in Amsterdam (STICHTING beheer IISG, Conquiusweg 31, 1019 AT Amsterdam) and you may inquire there. On the second chapter (Commission Proposal) I can say the following:

1 List of the organisations participating in the negotiation process and the names of their representatives.

2 Number of meetings.

3 Dates of those meetings

4 Meetings' agenda and minutes

The Commission proposal for the Directive

1 What were the provisions proposed in the outline provided by the Commission? (A copy of the original needed if possible)

The Commission proposal addressed essentially parental leaves for women as an extension of maternity leaves. ETUC approach was more innovative taking into account the need to reconcile professional and family life both for women and men. We saw the initial Commission proposal as a minimum to be built upon. Two points were not covered at all: the non-transfer ability of the right between parents and the leaves for urgent family reasons.

2 Was ETUC satisfied with the proposal provided by the Commission?

3 Did the proposal cover all areas envisaged by the ETUC and if not which areas were not covered?

4 Any other issues?

Negotiations leading to the adoption of the framework agreement

1 Did the social partners bargain against each other or reached an agreement on way forward?

2 Do you think the fact that the framework agreement on the works council was not concluded put additional pressure on the social partners? Was this pressure visible during the negotiation process? Did this influence the provisions of the concluded framework agreement on parental leave? Were the social partners afraid of the consequences if the consensus is not reached?

On the **third chapter** (Negotiations):
The negotiations were conducted in a positive climate. Both sides were willing to reach a balanced agreement which could give legitimacy to an European contractual space. After the failure on EWC both sides felt the need to prove that the negotiation mechanism could deliver.
However it must be said that the willingness of the Commission to act via legislation has always been a crucial element to bring UNICE to the negotiating table.
Even in the case of parental leaves, an issue much less charged with ideological implications than the EWC, UNICE entered into negotiation after having responded negatively to the first round of consultation by the Commission and only when they started the second round giving a clear indication of the intention to legislate.

3 Which aspects of parental leave and the leave for urgent family reasons where of particular interest to ETUC and you? Was ETUC and you satisfied with the provisions of the concluded framework agreement? What were the missed opportunities, if any?

All our major demands were met in the agreement.
From the outset the ETUC was looking for
a) equal access to parental leaves for women and men on the basis of an individual and not transferable right
b) flexible implementation of the right over a certain number of years in relation with the child needs
c) all economic sectors to be affected by the agreement. SMEs also to be part of it with specific negotiated provisions for implementation
d) urgent family needs to be extended beyond children to consider also dependent ageing parents and disable family member
e) 3 months leaves as a minimum with possibility of improvement
f) guarantee against dismissal related to parental leaves and right of worker to return to previous or equivalent job

g) no regression clause at national level
h) possibility of social partners to be actively involved in national transposition

Particular provisions

1 Did you start with a maximum/minimum position and then compromise? For example: Did ETUC want parental leave to be transferable or non-transferable? What was preferred by other social partners? Was this issue a contested area, if so explain how the compromise was reached?

ETUC internal regulations provide for the negotiating team, directed by the Secretariat, to be given a mandate by the Executive Committee with the team regularly reporting back on proceedings and a final decision taken by the Executive.
The mandate was drawn up on the basis of an evaluation of the situation in all Member States and in view of harmonise/improve existing provisions.

ETUC was clearly in favour of non-transferable right to promote a better division of task in family life between women and men and it took some effort to convince the employer side to take into consideration the need to better reconcile professional and family life.

2 Entitlement to parental leave (the age limit). Was this one of the contested areas? Differences between what was originally proposed and finally agreed?

The most contested point was however the age limit finally settled at 8 years, and especially the possibility of a flexible implementation of the right, in multiple periods over the years and not simply in one go.
This was hard to win and it is clearly and added value.

3 Duration of parental leave and leave for urgent family reasons. Was it intended that the leave should be longer or shorter? What was the length of the leave proposed by the Commission? Was it one of the contested areas? How was the compromise reached?

4 Did the Social Partners intend that the parental leave and the leave for urgent family reasons should be paid? Was it one of the contested areas? How the compromise was reached? Was it argued at all at the leave should be paid? What influenced that decision to make parental leave unpaid? What was the position of the ETUC on this matter?

ETUC was looking for leaves to be paid. The confrontation here was essentially with the Member States (Council) which objected strongly to the social partners being able, via their agreement, to impose anything on them since the payment should have been made by the national social protection systems. The employer side was ambiguous on the matter but rather happy to hide behind the governments position.

5 Were you as the Secretary General of the ETUC fully satisfied with the concluded provisions of the framework agreement? Were the concluded provisions what you and ETUC intended or merely reflect what was possible to compromise on (duration of leave, qualifying age, pay etc)?

At the end of the day all contractual agreements are resulting from compromise but in this case the outcome was largely satisfactory, in our view.

I believe that the agreement as given a strong signal on the need to enable working parents to reconcile family responsibilities and professional life.

6 Are the provisions of the concluded framework considered by ETUC and you as enabling working parents to reconcile family responsibilities and paid employment? Was this aspect clearly emphasised during the negotiation process? Is unpaid parental leave seen by ETUC as a family-friendly measure?

7 What were the missed opportunities, if any?

The single major set back was on paid leaves, which is of particular relevance for parents with modest incomes. It must be noted however that the agreement does not prevent to address this issue at national level. And indeed this has happened in a number of cases. In Belgium for instance, where by the way no provisions existed for parental leaves, on the occasion of the transposition into national law, a tripartite agreement was reached improving the European accord including a replacement revenue for the parent concerned.

I do not see any missed opportunity. On the contrary the European social partners were able to agree in 7 months on an issue which has been blocked for 10 years in the Council of Ministers.

Many thanks for your help

Figure 4: Response to questionnaire of 23/04/2006 from senior negotiator for the CEEP.

Framework agreement on parental leave and the leave for urgent family reasons annexed to EC Directive 96/34/EC

General information on the negotiation process

1 List of the organisations participating in the negotiation process and the names of their representatives.

Les organisations participant aux négociaions sont les organisations signataires de l'accord : UNICE,CEEP, CES

2 Number of meetings.

Tres nombreuses, pour un chiffre précis, necessité de consulter les archives au siège du CEEP

3 Dates of those meetings

Cf archives

4 Meetings' agenda and minutes

Il n'y avait pas d'agenda ni dordre du jour, mais des textes, parties de l'accord à réaliser, étaient discutés de séances en séances

5 Your role in the negotiations

Le rôle du partenaire négociateur représentant les entreprises de service public et à participation publique

The Commission proposal for the Directive

1 What were the provisions proposed in the outline provided by the Commission? (A copy of the original needed if possible)

A nouveau cf archives du CEEP

2 Was CEEP satisfied with the proposal provided by the Commission?

Les négociateurs du CEEP avaient reçu un mandat écrit de l'assemblée générale du CEEP cf archives

3 Did the proposal cover all areas envisaged by the CEEP and if not which areas were not covered?

Pas de réponse

4 Any other issues?

Negotiations leading to the adoption of the framework agreement

1 Did the social partners bargain against each other or reached an agreement on way forward?

Les partenaires sociaux ont négocié ensemble pendant neuf mois pour arriver à un accord avec toutes les difficultés inhérentes à ce type de négociation où il faut conciler les positions de différentes catégories au sein

d'une même organisation (ex très grandes ,moyennes et petites entreprises du côté patronal ; différentes catégories de travailleurs du côté syndical) et pprovenant de quinze états ayant des législations avec des niveaux différents d'avancement dans le domaine

2 Do you think the fact that the framework agreement on the works council was not concluded put additional pressure on the social partners? Was this pressure visible during the negotiation process? Did this influence the provisions of the concluded framework agreement on parental leave? Were the social partners afraid of the consequences if the consensus is not reached?

Je pense que les partenaires sociaux avaient la volonté d'aboutir; ils avaient tiré les leçons de l'éches des négociations sur les work councils. Les dispositions du Traité leur donnaient le droit d'aboutir à des accords, droit qu'ils avaient eux mêmes revendiqué , par conséquent ils étaient conscients de leur pouvoir et entendaient s'en servir.

3 Which aspects of parental leave and the leave for urgent family reasons where of particular interest to CEEP and you? Was CEEP and you satisfied with the provisions of the concluded framework agreement? What were the missed opportunities, if any?

L'assemblée générale du CEEP ayant ratifié l'accord, on peut supposer que cet accord lui donnait satisfaction. Il s'est agi d'un progrès considérable si l'on songe que dans certains etats membres un tel dipositif n'existait pas.

Particular provisions

1 Did you start with a maximum/minimum position and then compromise? For example: Did CEEP want parental leave to be transferable or non-transferable? What was preferred by other social partners? Was this issue a contested area, if so explain how the compromise was reached?

2 Entitlement to parental leave (the age limit). Was this one of the contested areas? Differences between what was originally proposed and finally agreed?

3 Duration of parental leave and leave for urgent family reasons. Was it intended that the leave should be longer or shorter? What was the length of the leave proposed by the Commission? Was it one of the contested areas? How was the compromise reached?

4 Did the Social Partners intend that the parental leave and the leave for urgent family reasons should be paid? Was it one of the contested areas? How the compromise was reached? Was it argued at all at the leave

should be paid? What influenced that decision to make parental leave unpaid? What was the position of the CEEP on this matter?

5 Were you (CEEP) fully satisfied with the concluded provisions of the framework agreement? Were the concluded provisions what the CEEP intended or merely reflect what was possible to compromise on (duration of leave, qualifying age, pay etc)?

6 Are the provisions of the concluded framework considered by CEEP and you as enabling working parents to reconcile family responsibilities and paid employment? Was this aspect clearly emphasised during the negotiation process? Is unpaid parental leave seen by CEEP as a family-friendly measure?

7 What were the missed opportunities, if any?

Une réponse à ces questions nécessiterait d'analyser les nombreuses différentes versions de textes . Avec de la chance, peut être ces textes sont-ils encore conservés au CEEP !?

Many thanks for your help

Christopher

Figure 5: Response to questionnaire of 05/05/2006 from the senior negotiator for the ETUC.

Framework agreement on parental leave and the leave for urgent family reasons annexed to EC Directive 96/34/EC

General information on the negotiation process

1 List of the organisations participating in the negotiation process and the names of their representatives.

2 Number of meetings.

3 Dates of those meetings

4 Meetings' agenda and minutes

5 Your role in the negotiations

*A member of ETUC negotiating team

The Commission proposal for the Directive

1 What were the provisions proposed in the outline provided by the Commission? (A copy of the original needed if possible)

2 Was ETUC satisfied with the proposal provided by the Commission?

3 Did the proposal cover all areas envisaged by the ETUC and if not which areas were not covered?

4 Any other issues?

Negotiations leading to the adoption of the framework agreement

1 Did the social partners bargain against each other or reached an agreement on way forward?

2 Do you think the fact that the framework agreement on the works council was not concluded put additional pressure on the social partners? Was this pressure visible during the negotiation process? Did this influence the provisions of the concluded framework

agreement on parental leave? Were the social partners afraid of the consequences if the consensus is not reached?

*It has an impact on the negotiations process. There was a pressure to finish the negotiations.

3 Which aspects of parental leave and the leave for urgent family reasons where of particular interest to ETUC and you? Was ETUC and you satisfied with the provisions of the concluded framework agreement? What were the missed opportunities, if any?

*The missed opportunity was that parental leave was not extended elderly members of families.

Particular provisions

1 Did you start with a maximum/minimum position and then compromise?

The ETUC was satisfied with what they have achieved. What was achieved was realistic in implementation.

2 For example: Did ETUC want parental leave to be transferable or non-transferable? What was preferred by other social partners? Was this issue a contested area, if so explain how the compromise was reached?

a. The ETUC wanted parental leave to be non-transferable but at the same time recognised the fact that the parents should not be forced to take the leave, or families should not be deprived their entitlement. The right should not be taken away from women.

b. Psychological aspect must be taken into account. The cultural influences must be taken into consideration. Social and domestic culture of each Member.

c. The attitude of men their involvement in family life needs to change in order to have a real impact on helping both parents in achieving work-life balance.

3 Entitlement to parental leave (the age limit). Was this one of the contested areas? Differences between what was originally proposed and finally agreed?

4 Duration of parental leave and leave for urgent family reasons. Was it intended that the leave should be longer or shorter? What was the length of the leave proposed by the Commission? Was it one of the contested areas? How was the compromise reached?

a. ETUC was satisfied with the length of parental leave. The objective of having a shorter leave was to insure that the leave could be paid for. The representative of employers did not object as long as the leave was not paid.
b. Originally the leave for urgent family reasons was not going to cover elderly dependants but because of the fact that extension of parental leave to elderly dependants was rejected the compromise was reached by including elderly dependants under the provisions of the leave for urgent family reasons.

5 Did the Social Partners intend that the parental leave and the leave for urgent family reasons should be paid? Was it one of the contested areas? How the compromise was reached? Was it argued at all at the leave should be paid? What influenced that decision to make parental leave unpaid? What was the position of the ETUC on this matter?

a. The ETUC insisted that the leave should be paid. The idea was to have a shorter leave and to ensure that the leave is paid. Although this was discussed but the representatives of the employers rejected the idea of having a paid leave. Thus, the compromise was reached and parental leave remained unpaid. No support from employers.
b. There was also a fear that if the agreement was not reached due to the issue of pay the Directive would need to be adopted following unanimous voting in the Council and the prospects of adoption were very slim.

Leave for urgent family-reasons paid? Duration?

6 Were you fully satisfied with the concluded provisions of the framework agreement? Were the concluded provisions what the ETUC intended or merely reflect what was possible to compromise on (duration of leave, qualifying age, pay etc)?

*It was not possible to reach agreement on pay issue due to the objection of the employers.

7 Are the provisions of the concluded framework considered by ETUC and you as enabling working parents to reconcile family responsibilities and paid employment? Was this aspect clearly emphasised during the negotiation process? Is unpaid parental leave seen by ETUC as a family-friendly measure?

8 What were the missed opportunities, if any?

a. Originally the ETUC intended that agreement should be implemented by the organisations but UNICE had not structure to implement at that time and therefore the agreement was implemented by the EC Directive
b. The ETUC were not keen of implementing through the means of directive but Regulation.
c. The concept of enabling Member States to adopt the most suitable national measures was there too.

Many thanks for your help

Table 1: The Evolution of EU Reconciliation Policies

Early Initiatives: The Introduction of Equal Pay	
Policy	**Rationale**
The Treaty of Rome 1957	Focus on the economic development of the Community and social policy aspects were only considered if it was required for the proper functioning of the market.
Article 119 EEC (now 157 TFEU)	The right to equal pay for equal work must be seen as laying down a foundation for the future expansion of equality rights, including the reconciliation principle.[1197] The social legislation was born as the by-product of the economic integration.[1198] The importance of Article 119 EEC[1199] as an equality measure was expanded by CoJ in *Defrenne*[1200] where the direct effect of this article was established.[1201] This effectively forced national legislators to address the issues surrounding the equality in pay between men and women in employment.
The Equal Treatment Directive 76/207[1202]	It ensured more equality in treatment for men and women in access to employment.
The Emergence of the Reconciliation Concept (soft law initiatives)	
The 1974 Social Action Program.[1203]	The concept of reconciliation was used for the first time. It addressed the reconciliation needs of women with caring responsibilities. Reconciliation was limited to maternal care and excluded care for elderly dependants, flexible working arrangements and the sharing of family responsibilities between parents.

[1197] C. Bernard (1996), The Economic Objectives of Article 119, in T. Hervey and D. O'Keeffe (1996), Sex Equality in European Union, London: Wiley, pp.321-334. The right to equal pay was established purely in order to ensure fairer competition between different industries across the MSs and particularly industries, which predominantly employed women. The impetus to ensure equality in pay was fostered by the French government (France already implemented ILO Convention 100 on equal pay), which was concerned about the potential competitive disadvantage of the relatively high-paid female labour in France that could be undercut by lower-paid labour in other MSs. If there had been no economic benefits deriving from the right to equal pay it is very likely that the right to equal pay would not have been introduced. C. Hoskyns (1992), `The European Community's Policy on Women in the Context of 1992`, Women Studies International Forum, 15/1, pp.21-28.

[1198] H. Macrae (2010), `The EU as a Gender Equal Polity: Myths and Realities`, Journal of Common Market Studies, 48(1):155-174.

[1199] Now Article 157 TFEU (former 141 EC) and.

[1200] Derenne v. SA Belge de Navigation Aerienne (SABENA) (No.2) (Case43/75) [1976] ECR 455 [1976] 2 CMLR 98.

[1201] The principle of direct effect has significantly enhanced the effectiveness of this article in ensuring equality in pay across MSs because in the absence of the equivalent national entitlement workers could directly rely on Article 119 EEC (now Art 157 TFEU).

[1202] Council Directive 76/207/EEC (now also Consolidated Directive 2006/7) and Equal Pay Directive Council Directive 75/117/EEC. The Directive 2006/54 replaces Directive 76/207.

[1203] Social Action Programme 1974 (OJ C13/1 12/02/1974). Reconciliation was used in the context of furthering the gender equality strategy; equal opportunities, and it focused on enabling women to reconcile work and family life. The 1974 action program considered reconciliation as a problem associated with female labour force participation and therefore falling under Article 119 EEC (now Art 157 TFEU). The programme sought to ensure equality for women as the reconciliation concept only covered maternal care and work.

The Community Charter of the Fundamental Social Rights of Workers 1989	The necessity of development of the reconciliation measures was recognised.[1204] The concept of reconciliation covered both men and women. The Charter ensured that reconciliation is no longer associated with women and that it involves *equal sharing* of family responsibilities between men and women.
Reconciliation as an equality policy in 1990s (move towards hard law directives)	
The Agreement on Social Policy annexed to the Treaty on European Union 1992 (TEU).[1205]	It expanded the EU competences into the area of social policy and thereby the equality matters have received more attention at the EU level. Article 151 TFEU[1206], sets out the objectives of the EU Social Policy.[1207]
The Childcare Recommendation[1208]	It aimed at helping both working parents to reconcile paid employment with family responsibilities. None binding character defeated the progressiveness of this recommendation.
The Pregnant Workers Directive[1209]	The first legally binding, reconciliation provisions which provided mothers with the unqualified right to fourteen weeks' maternity leave. Father's right to care has not been recognised.
The Working Time Directive[1210]	It contains provisions that can aid the reconciliation such restrictions on working time, workers' right to an annual leave. It ensures that workers can spend more time with their families.
The 1994 White Paper on European Social Policy[1211]	It recognised the necessity of reconciliation as deriving from the interest of society that working life and family life should be more *mutually reinforcing*. It addressed the difficulty in reconciliation, and the difficulty with sharing caring responsibilities between men and women.
The Parental Leave Directive[1212]	Makes clear references to enabling parents to reconcile work and family responsibilities. Provide workers with legislative rights to parental leave and leave for urgent family reasons.
The Part-time Workers Directive[1213]	It sought to remove discrimination against part-time workers (mainly women) – facilitating reconciliation by removing disadvantages associated with working part-time.
The *Fixed-term Workers Directive*[1214]	It sought to remove discrimination against workers on fixed-term contracts (principles: non-discrimination, prevention of abuses, information and consultation on non discrimination).
Reconciliation as an Employment Policy	
The European Employment Strategy (EES)[1215]	It recognised the creation of jobs for women as a priority.

[1204] Paragraph 16 of the Community Charter of the Fundamental Social Rights of Workers 1989 on Equal Treatment for Men and Women.
[1205] This Treaty was signed in Maastricht on 7th February 1992 (Maastricht Treaty (MT). The legal significance of annexed documents will be further address in this Chapter.
[1206] Former 136 EC.
[1207] Objectives such as promotion of employment, improved living and working conditions, promotion of harmonisation in the labour market, improving social protection, promoting dialogue between management and labour, development of human resources, improving employability and the combating of exclusion.
[1208] Recommendation 92/241/EEC of 31/03/1992 on childcare, OJ L123/16, 08/05/1992.
[1209] Directive 92/85/EEC of 19/10/1992 on the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, OJ L348/1, 28/11/1992.
[1210] Council Directive 93/104/EEC OJ, 307/18, 1993 and 2003/88/EC
[1211] European Commission (1994) A White Paper – European social policy. A way forward for the Union, COM(94) 333, 27 July 1994, Luxembourg: Office for Official Publications of the European Communities p.43.
[1212] Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, *Official Journal* L 145, 19/06/1996 P. 0004-0009 as amended by the *Council Directive 97/75/EC Official Journal* L 010, 16/01/1998 P. 0024-0024
[1213] Directive 97/81/EC, concerning the framework agreement on part-time work concluded by ETUC, UNICE and CEEP, OJ, L14/9, 1998.
[1214] Directive 99/70/EC concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, OJ, L175/43, 1999.
[1215] Conclusions of the Essen European Council, 9th and 10th December 1994).

The Treaty of Amsterdam 1997 (ToA)	It put employment in the centre of EU law. *ToA* did not directly address the reconciliation issues but it stated the promotion of equality was an objective of the Union.[1216] It also introduced the concept of gender mainstreaming, which prohibited inequalities between men and women.[1217]
The Agenda 2000	The adoption of a common employment policy was progressed by the *ToA* in the Agenda 2000. This included a declaration that in future MS would treat employment as a common concern, and would co-ordinate their actions in this sphere.
The 1998 Employment Guidelines[1218]	The reconciliation as one of the four pillars of the *Employment Tile* annexed to the Treaty. This aimed at strengthening polices for equal opportunities, by removing gender pay gaps, by helping to reconcile work and family life, and by facilitating a return to work for those (especially women) who have been absent from the work force for some time.[1219].
The Lisbon European Council (2000)[1220]	Placed its emphasis on the creation of new jobs, tackling social exclusion and improving women's participation in the labour market.
The Council Resolution (2000).[1221]	It made direct reference to the equal sharing between working fathers and mothers of the caring responsibilities for children and other dependants which included the elderly and the disabled.[1222]
The 2001 Employment Guidelines on reconciliation of work and family life.[1223]	Contained the more precise approach of the EES's towards reconciliation issues.[1224]
The Barcelona European Council (2002)[1225]	Placed its emphasis on the availability of childcare, to enable women to adapt to the needs of businesses.
The 2003 Guidelines[1226]	Issues concerning reconciliation were addressed in the context of improving the adaptability mobility in the labour market and

[1216] Article 2 EC (now Art 3 TEU).
[1217] Article 3 EC.
[1218] European Commission (1998) The 1998 Employment Guidelines. Council Resolution of 15 December 1997 on the 1998 employment guidelines, Luxembourg: Office for Official Publications of the European Communities p.12, amended by Council Resolution of 22 February 1999 on the 1999 Employment Guidelines (OJ[1999] C69/2).
[1219] The objective of strengthening the policies did not provide for the making of directives and was limited to the promulgation of guidelines, recommendations and adoption of incentive measures in the area family-friendly employment, V. Craig (1997) op. cit., p.6.
[1220] Lisbon European Council: Presidency Conclusions of 23rd and 24th March 2000. Target 60 per cent by 2010.
[1221] Resolution of the Council of 29 June 2000 on the balance participation of women and men in family and working life in Official Journal C218, 31/07/2000 p. 0005. The Resolution focused on the necessity of ensuring the application of the principle of equality between men and women in employment and the necessity of the balanced participation of women and men both in the labour market and family life.
[1222] The balanced participation of men and women in work and family life was recognised as a necessity deriving from the development of society and that both women and men, without discrimination on the grounds of sex, had the right to reconcile family and working life. The Resolution had no legally binding force and merely recognised the necessity of facilitating the reconciliation. It emphasised the key role of MSs and national governments in reinforcing measures to encourage a balanced sharing between working parents.
[1223] Council Decision 2001/63/EC OJ [2001] L22/18.
[1224] The importance of policies on career breaks, parental leave, part-time work and flexible working arrangements were recognised as being of particular importance to employers and employees. The existence of good quality care for children and other dependants was seen ensuring continued participation of men and women in the labour market. An equal sharing of family responsibilities between working parents and was identified as a crucial equality factor and the returning to the labour market after an absence needed to be facilitated.
[1225] Barcelona European Council: Presidency Conclusions of 15th and 16th of March 2002.
[1226] The Council Decision of 22nd July 2003 on guidelines for the employment policies of the Member States in OJ L197, 05/08/2003 p.0013-0021.

	employment of those groups of employees who experience difficulties with entering the labour market.[1227]
The Commission Communication on improving equality of work (2003).[1228]	Reconciliation policies used as a means of utilising women's contribution to the labour market.
The European Pact for Gender(2006)[1229]	It recognised that in order to promote a better work-life balance for all there must be provision of childcare facilities and also the provisions of care facilities for other dependants must be improved.
The 2006 Roadmap for Equality[1230]	Reconciliation as the key objective, and the reconciliation policies were seen as facilitating the flexible working patterns whilst improving equality between men and women in the labour market. The importance of the care facilities was recognised in the context of participation in the labour market.
The Commission Communication (2008).[1231]	Change in the terminology from *reconciling work and family life* to more inclusive term reconciling *work, private and family life. A better work-life balance* primarily seen as a means of achieving the employment targets set by out by the Lisbon Strategy and reconciliation remained its' accessory. Proposed new initiatives aimed at improving reconciliation of family and professional life by extending entitlements to family related leave periods;[1232] ensuring more equality in the treatment of the self-employed[1233] and improving the availability of an affordable and accessible childcare.
The 2008 proposals to amend the *Pregnant Workers Directive*[1234]	Failed calls for 20 weeks maternity leave.
The adoption of the new Parental Leave Directive (2010)[1235]	It extends the duration of parental leave to four months and requires parental leave to be an individual and non-transferable entitlement.
The Commission Communication (2010)[1236]	It recognised the necessity of offering genuine choices equally to men and women during the different stages of their lives.[1237]

[1227] The Guidelines further recognised the necessity of giving particular attention to reconciling work and private life. This was to be achieved through the provision of care services for children and other dependants, encouraging the sharing of family and professional responsibilities and facilitating easier return to work after a period of absence.

[1228] COM (2003) 728 final.

[1229] Presidency Conclusions, Brussels European Council, 23-24 March 2006, Annex II.

[1230] Commission from the Communication, `A Roadmap for Equality between Women and Men 2006-2010`, COM(2006) 92 final.

[1231] Communication from the Commission, `A better work-life balance: stronger support for reconciling professional, private and family life, COM(2008) 635 final.

[1232] Adoption leave, paternity leave and filial leave.

[1233] Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principal of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Directive 86/613/EEC (OJ L 180, 15.7.2010).

[1234] Proposal for a Directive 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 breast feeding, COM (2008) 637.

[1235] 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.

[1236] Communication from the Commission on `Strategy for equality between women and men 2010-2015, Brussels, 21/09/2010, COM (2010) 491 final.

[1237] It was recognised that parenthood continues restricting women's participation in the labour market and the equality in the division of work within a family remains to be achieved. Although the Communication recognised the differences in the impact of parenthood on women's and men's participation in the labour market, no strategy was proposed to address the lack of equality in the distribution of responsibilities within a family. Instead, the emphasis was placed on the increased women's participation in the labour market and the recently adopted directives. The availability of affordable high-equality care was identified as the area where further progress needed to be made in order to strengthen the reconciliation policies.

Table 2: The Evolution of the Parental Leave Directive (1983-2010)

Initiatives	Rationale
The first Commission proposal for a directive regarding parental leave and leave for family reasons dates back to a draft directive submitted to the Council of Ministers in November 1983 (Draft 1983).[1238] A revised proposal was submitted in November 1984.[1239]	It aimed to promote equal opportunities for women[1240] and apart from its main goal i.e. approximation of laws, it relied upon the Article 136 EC (now 151 TFEU), which has as its objective the promotion of employment, improved living and working conditions of the labour force. It aimed at establishing common minimum standards of parental leave in EEC countries, and the need to achieve the wide policy objective of equal opportunities for women in society and the labour market.[1241] The need to enable men and women to achieve work-life balance.
In 1985 the UK *vetoed* the Commission proposal for a Directive on parental leave and leave for family reasons (the Draft 1983) - using Article 100 (now 115 TFEU).	The UK government argued that the Draft 1983 imposed an additional burden on business (in particular the right to leave for urgent family reasons). The German and Belgian governments were also hesitant to accept Draft 1983 because its provisions were more progressive than the proposed national measures in the area. Member State's own initiatives resulted that since January 1986 nine of the twelve Member States have had some statutory parental leave scheme (**Appendix, Table 3**).[1242]

[1238] COM [83] 686 final, 22 November 1983.
[1239] COM (84) 631 final, 15 November 1984.
[1240] Council Resolution of 12 July 1982 OJ NoC186, 21.7.1982, p.3
[1241] The proposed measure was seen as having a positive contribution to family policy by improving childcare facilities of working parents. It would also offer a greater flexibility in the organisation of working time and contribute to the reduction of unemployment through promoting voluntary, temporary withdrawal of workers from the labour market and thereby enabling other unemployed workers to re-enter to labour market even if on temporary basis. The Draft 1983 was considered as offering greater opportunities of finding work experience for young people, who could be engaged in order to replace those working parents who used their right to parental leave. Article 7 of Draft Directive on parental leave COM(83) 686 as amended by COM(84) 631 foresaw the necessity of engagement of the temporary replacement workers.
[1242] Evelyn Ellis (1988) *Sex Discrimination Law*, Aldershot, USA pp.303-305.

The Belgian Council Presidency in 1993.[1243] Renewed attempts to introduce the right to parental leave and leave for family reasons. Despite 11 out 12 Member States agreeing on the proposed Directive, it was not adopted due to the UK *veto* on 22nd September 1994.	The UK firstly tried to gain the derogation from the directive (the Social Council's sessions 23 November 1993) and then announced its opposition (insisted that the leave should be granted only to mothers – sex discrimination).
On 22nd February 1995, the Commission consulted Social Partners under Article 154(2) TFEU about the possible direction of EU action in the area of reconciliation – parental leave and leave for family reasons.	In its first consultation, due to the existing differences in national rights to parental leave, the Commission indicated that the specific objective of promoting reconciliation and establishing common rules ensuring fair competition was required at the Union level.[1244]
On 21st June 1995, the Commission for the second time consulted management and labour regarding the substance of the foreseen proposal, as requested by Article 154(3) TFEU.	The Commission outlined that the right to parental leave should be linked to employment, the length of parental leave should be at least three months, the flexibility was desired in the modalities of the leave, and the social security rights should be maintained during the period of the leave.[1245]
On 5th July 1995, UNICE, CEEP and the ETUC informed the Commission of their willingness to initiate the procedure provided for in Article 139 EC (now 155 TFEU).[1246]	The ETUC's mandate was drawn on the basis of an evaluation of the situation in all MSs with the objective of harmonising/improving existing provisions.[1247] It was very easy for UNICE to obtain a negotiating mandate from its members because many MSs already had legislation or collective agreements on parental leave, while in countries without such legislation most companies voluntarily gave workers parental leave. Thus, UNICE obtained a very flexible mandate, on condition that any concluded agreement would respect subsidiarity and should not impose unacceptable expense on employers.[1248] It was reported that SP expressed their clear and positive wish to hold negotiations that should lead to an agreement.[1249]

[1243] The change in the attitude towards adoption of the directive on parental leave and leave for family reasons was brought about by the changes in the Belgian government, where Liberals were replaced with the Socialists who formed a coalition with Christian Democrats.

[1244] In its first consultation, the Commission indicated that 'the specific objectives of promoting reconciliation between family and professional life, lying down minimum standards of protection and establishing common rules ensuring fair competition within the Union cannot be sufficiently achieved by MSs acting alone and can therefore, by reason of the scale and effects of the proposed action, be better achieved by general framework arrangements operating at Community level'. The European Commission (1995) *The Consultation Document on Parental Leave* pp1-6. Also G. Falkner (2000) 'The Council or the Social Partners? EC Social Policy Between Diplomacy and Collective Bargaining', *Journal of European Public Policy*, 7:5, 705-724 at p.708

[1245] The seventeen interest groups in their answers expressed their support for promotion of equal opportunities and saw the need for EU legislative action in the target area, at least in a form of a recommendation. *Agence Europe*, 22 June 1995:14.

[1246] *Agence Europe*, 8 July 1995:7

[1247] In relation to the ETUC their internal regulations provide for the negotiating team, directed by the secretariat, to be given a mandate by the Executive Committee with the team regularly reporting back on proceedings and the final decision is taken by the Executive Committee. E-mail communication of 16/05/2006 with the most senior official of the ETUC who represented the unions in the negotiations on the framework agreement on parental leave pp.1-4.

[1248] Response to questionnaire of 30/05/2006 from the most senior official at UNICE at the time of the adoption of the framework agreement on parental leave Appendix, Figure 1 pp. 1-4 .

[1249] J. Walgrave (the Chair of the Belgian National Labour Council, chaired the first session) *Aide-memoire* on the first meeting held on 12th July 1995 obtained from CEEP's archives.

	The objective was to conclude a framework agreement that takes account of the real situation of workers and companies. It was also emphasised that the measure on parental leave was supposed to help workers to combine work and family by eliminating workers' worries about their families and thereby making them more effective at work. The parental leave measure also needed to take into account that good work organisation is necessary for smooth operation of all companies. The task of the Social Partners was to conclude a framework agreement consisting of the minimum rules, which according to the social protocol, could become binding if ratified by the Council.
Social Partners concluded draft agreement on parental leave on 6th November 1995. It took them only five months (9 months limit) to reach the consensus.	The negotiations revealed a significant number of differences in the positions of ETUC and UNICE deriving mainly from their individual mandates and showed that Social Partners were not willing to reach the compromise at all cost.[1250] **Appendix, Table 4** exemplifies the position on the issue of the Social Partners and the Council. It contained only a few minimum requirements and provided for the granting of the right to parental leave in three Member States where this right did not exist (Ireland, United Kingdom and Luxembourg).[1251]
The framework agreement was officially concluded and signed by the Social Partners on 14th December 1995.	By signing the agreement, the ETUC, UNICE and CEEP set up minimum provisions for parental leave and leave for urgent family reasons, which were seen as reconciliation measures, and promoting equal opportunities for men and women in employment.
On 29th of March 1996, the Council examined a legislative proposal for parental leave directive.[1252]	The difficulties associated with the adoption of the Directive 96/34/EC revealed the uncertainty of the Council about the effectiveness of agreements concluded by Social Partners.[1253] Serious disputes among the Council delegations were prevented because the provisions of the agreement adopted under this procedure were extremely flexible and often non-binding in their character.[1254] The text of the framework agreement was not included in the Council directive but annexed to it.[1255]
The framework agreement was implemented through a Council Directive 96/34/EC, which was adopted unanimously without a debate on 3rd June 1996. The Council directive was	The Directive on parental leave which was under discussion for 13 years, was finally concluded with the aim of facilitating reconciliation and promoting equality of opportunities for men and women.

[1250] *Agence Europe*, 23/24 October 1995:13

[1251] During the discussed period the UK opted out from the provisions on social policy.

[1252] The agreement concluded between SP was considered by the Council during the meeting organised under Italian presidency on 29th of March 1996. The Presidency's aim was to reach a political consensus on the directive that would later be formally adopted during the session in early June in Luxembourg. *Agence Europe* 29 March 1996:8

[1253] The framework agreement concluded between SP brought about some difficulty and perplexity. Some delegations claimed that its content gave rise to too many questions of interpretation. The difficulty concerned the problem of reconciling respect of the framework agreement and the autonomy of SP with the interest of MSs to have a precise knowledge of their obligations regarding the implementation of the framework agreement. SP were also said to have neglected the respective competencies of the Union and MSs e.g. setting out, themselves, the final provisions on delay of transposition, and a non-regression clause. *Agence Europe* 29 March 1996:8

[1254] G.Falkner (2000) op. cit., p.718.

[1255] I.e. was implemented as it stood, *Agence Europe* 1 February 1996:7.

signed on 29th March 1996.	
The deadline for the implementation of the Directive expired on the 3rd June 1998[1256].	Member States were given a maximum additional period of one year in case of special difficulties in the implementation process

Table 3: Domestic Parental Leave Schemes Prior to the Directive 93/34/EC[1257]

Country	Length of leave	Payment	Restrictions on take-up
Austria	24 months full-time, 48 months part-time leave	Low flat-rate benefit	Primarily available to women; single-income couples excluded
Belgium	12 months full-time (career break scheme)	Low flat-rate benefit	Consent of employer necessary
Denmark	6 months if taken before child's first birthday, otherwise 3 months	60 per cent of ordinary unemployment benefit	-
Finland	8 month full-time plus part-time leave until child is seven years old	70per cent of previous salary during first six months and lower flat-rate benefit until child is three years old	-
France	36 months	Low flat-rate benefit	-
Germany	36 months	Low-flat rate benefit payable for up to two years	Single-income couples excluded
Greece	3.5 months	-	Employees working in SMEs and single-income couples excluded
Ireland	-	-	-

[1256] Articles 2-3 of PLD. 14 countries, at that time only Ireland, and Luxembourg had no law on parental leave and Belgium scheme did not cover all workers. The United Kingdom and Northern Ireland opted out from the 1989 Social Charter and the Agreement on social policy and therefore were not covered by the adopted Directive. On 15th December 1997, subsequent amendment by the *Council Directive 97/75/EC* of the *Council Directive 96/34/EC* extended the provisions of the Directive to the United Kingdom and Northern Ireland with the deadline for its implementation 15th December 1999.

[1257] Source O. Treib and G.Falkner (2004) 'The First EU Social Partner Agreement in Practice, Parental Leave in the 15 Member States', *Political Science Series* 94, Institute for Advanced Studies, Vienna.

Italy	6 months	30 per cent of previous salary	Primarily available to women
Luxembourg	-	-	-
Netherlands	6 months (only possible on part-time basis)	-	Part-time workers with less than 20 hours weekly working time excluded
Portugal	6 months (prolongation of up to 24 months possible)	-	Single-income couples excluded
Spain	12 months (prolongation of up to 36 months possible)	-	-
Sweden	18 months full-time leave plus part-time leave until child is 8 years old	80 percent of previous salary during first year; lower flat-rate benefit for a further six months	-
United Kingdom	-	-	-

Table 4 Comparative table of UNICE and ETUC positions vis-à-vis Council and Commission texts[1258]

1. Nature of the instrument

Commission	ETUC	UNICE	Council
Directive	Directive or framework agreement extended erga omnes by Council decision	Framework agreement extended erga omnes by Council decision to avoid a directive	Directive
Minimum requirements No reduction in levels already achieved in Member States	Minimum requirements	Minimum requirements	Minimum requirements

[1258] The table of 10th July 1995 obtained from CEEP's archives, internal document s/6.6/aj/social/tab2en.doc. The table seeks to place the positions of UNICE side by side with those of ETUC, the Council and the Commission. The positions attributed to the Commission and the Council were prepared on the basis of the Commission's second consultation document and the Belgian Presidency's compromise proposal dated 30th November 1993. The position attributed to ETUC was prepared on the basis of its response to the fist consultation plus the demands that the UNICE Secretariat expected.

2. Areas covered

Commission	ETUC	UNICE	Council
	All leave for family *reasons*, i.e.:		
Parental leave (birth and adoption)	Parental leave	Parental leave (access conditions to be defined in Member States)	Parental leave (birth and adoption) to care for a child up to a certain age (determined in Member States).
Leave to care for family members	Leave to care for family dependants		Leave for family-linked *force majeure*
Leave for serious family reasons	Leave for urgent family reasons		Possibility for Member States to make provisions for other situations to give right to parental leave
Possible extension to training leave			
Right linked to employment	Right linked to employment	Right linked to employment Reference to national provisions to define a work relationship	Right linked to employment Reference to national provisions to define a work relationship
Individual right	Individual right	Possibility open to individual negotiations between the employee and his employer in a framework defining certain rights, including at European level	Right to parental leave

3. Duration of parental leave

Commission	ETUC	UNICE	Council
3 months minimum	3 months minimum	OK for definition of a minimum leave period at European level, but not exceeding 3 months	3 months

4. Access conditions for parental leave

Commission	ETUC	UNICE	Council
Natural and adoptive children	Natural and adoptive children Encourage take-up by men	Access conditions to be defined in Member States Encourage take-up by men	Natural and adoptive children Possibility of making the right subject to length of service Conditions and practical arrangements for father and./or mother to be defined in Member States

5. Practical arrangements for parental leave

Commission	ETUC	UNICE	Council
Full-time or part-time work	Full-time or part-time work	Full-time or part-time work	Full-time or part-time work
Flexibility to take account of the specific situation of SMEs	Specific additional measures for SMEs	Scope to exclude companies with fewer than 50 employers	
Or flexibility to take account of employers' real difficulties		General arrangements for application to be defined in Member Sates (including the possibility for the employer to defer or refuse parental leave)	Member Sates may authorise the social partners to determine the forms of an arrangements for leave Possibility of providing for deferral of leave by the employer if damaging consequences for the smooth functioning of the company (deferral substantiated by the employer + opinion of worker representatives)
Exact arrangements to be determined by the employer and worker representative	Adaptations negotiated at company level	Exact arrangements to be determined by the employer and employee (no additional obligation to consult worker representatives)	*Member States may* authorise the social partners to determine the forms and arrangements for leave on condition that the leave corresponds at least to the number of hours provided for in national legislation

6. Consequences of parental leave

Commission	ETUC	UNICE	Council
Job guarantee Right to interrupt a career for a certain period Provisions could be included to encourage replacement of workers on leave	Protection against dismissal Guarantee return to the work post or an equivalent work post	Guarantee of return to a post corresponding to the work contract	Guarantee of return to a job on remuneration in line with the work contract Protection against dismissal because of application for or taking parental leave
Worker rights Worker rights must be maintained including aspects such as promotion, length of service and access to in-house training Ensure that qualifications of workers on leave do not become obsolete	Worker rights must be maintained including aspects such as promotion, length of service and access to in-house training, trade union rights, etc.	At the end of the leave maintenance of rights acquired or in the process of being built up at the start of leave	At the end of the leave maintenance of rights acquired or in the process of being built up at the start of leave, in line with national practice
Remuneration A minimum allowance during leave would encourage real promotion of reconciliation		Suspension of work-contract No remuneration obligation	Suspension of work–contract Obligations linked to the actual work performed
Social security Preserve workers' social-security right	Maintain all social-protection rights, including health care and pension rights	Reference to national provisions for everything linked to social security	Maintain workers' rights to sickness insurance benefits in kind for duration of leave

7. Implementation

Commission	ETUC	UNICE	Council
Transposition period of 2 years		Long transposition period to take account of countries which do not have this right	Transposition deadline not specified
Transposition by Member States and/or the social partners	Implementation by the social partners, but Member States guarantee transposition	Usual clause on implementation by the social partners Possibility of derogation via collective agreement, including at company level	Implementation by Member States and/or social partners, but guaranteed by Member States

Table 5: The Provisions of the Parental Leave Directive (96/34/EC) & the 1983 Draft Parental Leave Directive (Draft 1983)[1259]

The Parental Leave Directive	The Draft 1983
Parental Leave	
The purpose defined as introducing minimum requirements on the leave periods with the aim of facilitating the reconciliation of parental and professional responsibilities for both working parents.[1260]	The purpose of parental leave was to enable the person entitled under Article 1, often a parent either male of female to stay at home in order to look after the child concerned.[1261] It aimed to ensure the elimination of discrimination on grounds of sex (direct and indirect), in particular on grounds of marital or family status.[1262]
The entitlement for those with employment contract or relationship.[1263]	The entitlement to leave periods was granted to *all wage earners*, both female and male, including those working in the public sector.[1264] Full-time and part-time workers were provided with equal leave entitlements.[1265]
The right to parental leave granted to natural or adoptive parents.[1266]	Parental leave was granted to take the sole or principal charge of a child.[1267]

[1259] The first Commission proposal for a directive regarding parental leave and leave for family reasons dates back to a draft directive submitted to the Council of Ministers in November 1983 COM [83] 686 final, 22 November 1983. a revised version of the proposal was submitted in November 1984 (the Draft 1984) COM (84) 631 final, 15 November 1984 OJ 27.11.84, No C316/7. (the Draft 1983);
[1260] Clause 1(1) Council Directive 96/34/EC on the Framework Agreement on parental leave.
[1261] Article 4(1) Draft Directive on parental leave COM(83) 686 as amended by COM(84) 631.
[1262] Article 2(2) Draft Directive on parental leave COM(83) 686 as amended by COM(84) 631.
[1263] Clause 1(2) Council Directive 96/34/EC on the Framework Agreement on parental leave.
[1264] Article 3(1) Draft Directive on parental leave COM(83) 686 as amended by COM(84) 631.
[1265] Article 3(2) Draft Directive on parental leave COM(83) 686 as amended by COM(84) 631.
[1266] Clause 2(1) Council Directive 96/34/EC on the Framework Agreement on parental leave.
[1267] Article 3(1) Draft Directive on parental leave COM(83) 686 as amended by COM(84) 631.

	It implied the effective supervision of a child by a qualifying person, and not only taking time off in order to arrange for someone else to look after a child.[1268]
Member States have the power to introduce and specify notice requirements that have to be complied with in order to request or terminate the leave.[1269]	Notice period not to exceed 2 months[1270]
Due to some business operational reasons parental leave can be postponed (Member States decide)[1271]	X
Duration of parental leave at least 3 months[1272] to be defined by Member States and/or collective agreements.	The length of parental leave at least 3 months[1273]
Each birth	Parental leave entitlement for each birth or adoption (each born or adopted child) – multiple birth covered.
X	The length of parental leave could be extended for single parents, one-parent families or both parents in cases where the child is handicapped and lives at home.[1274]
The right to parental leave is available up to child's eighth birthday, subject to national laws.[1275] Regime in relation to adoption left to Member States	Parental leave available until the child reached the age of two[1276] (disabled children the age of five).[1277] In case of the adoption of a child under five years of age the entitlement to the leave ceased two years after the adoption of the child.
No absolute right to non-transferable parental leave (only in principle).[1278]	Non- transferable right to parental leave[1279]
The conditions of access and specific rules in relation to applying for the leave will not be defined by the EU but the law and/or collective agreements in Member States.[1280] The national availability of the flexible leave arrangement is not guaranteed.	Parental leave could be taken as a continuous period of the leave on full-time basis or, with the agreement of both parties concerned as part-time leave, and extended proportionately if parents preferred.[1281] Where parental leave was taken in part, the remaining part of the leave was lost.[1282]

[1268] Article 4(2) Draft Directive on parental *leave COM(83) 686 as amended by COM(84)* 631.
[1269] Clause 2(3)(d) Council Directive 96/34/EC on the Framework Agreement *on parental leave.*
[1270] Article 4(3) Draft Directive on parental leave COM(83) 686 as amended by COM(84) 631.
[1271] Clause 2(3)(e) Council Directive 96/34/EC on the Framework Agreement on parental leave.
[1272] Clause 2(1) Council Directive 96/34/EC on the Framework Agreement on parental leave.
[1273] Article 4(4) Draft Directive on parental leave COM(83) 686 as amended by COM(84) 631. (three months for each parent, six months in total).
[1274] Article 4(5) Draft Directive on parental leave COM(83) 686 as amended by COM(84) 631.
[1275] Clause 2(1) Council Directive 96/34/EC on the Framework Agreement on parental leave.
[1276] Article 4(6) Draft Directive on parental leave COM(83) 686 as amended by COM(84) 631.
[1277] The original text in Article 4(5) of the Draft 1983 stated that in addition to the handicapped child, the right to parental leave in case of an adopted child was also to be exercised before the child reached the age of five.
[1278] Clause 2(2) Council Directive 96/34/EC on the Framework Agreement on parental leave.
[1279] Article 4(7) Draft Directive on parental leave COM(83) 686 as amended by COM(84) 631.
[1280] Clause 2(3) Council Directive 96/34/EC on the Framework Agreement on parental leave.
[1281] Article 5(1) Draft Directive on parental leave COM(83) 686 as amended by COM(84) 631.
[1282] Article 5(2) Draft Directive on parental leave COM(83) 686 as amended by COM(84) 631.

Parental leave subject to qualifying periods or length of service requirements not exceeding one year.[1283]	Parental leave - length of service or employment not exceed one year.[1284]
X	The leave could be suspended in the event of an illness of the leave taker.[1285]
Rights acquired or in the process of being acquired by the worker on the date on which parental leave begins are maintained as they stand until the end of parental leave.[1286]	The worker's entitlements under acquired rights or the rights in the process of being acquired were protected during the period of parental leave and leave for family reasons.[1287]
Take parental leave may involve reducing entitlements to social security benefits (up to Member States).[1288]	Periods of parental leave or family leave were to be credited in the same way as periods of maternity leave for the purpose of periods of insurance as regards sickness, unemployment, invalidity benefits and old-age pension.[1289]
At the end of parental leave workers have the right to return to the same job or equivalent.[1290]	On termination of the leave, the worker was entitled to return to the same job or equivalent.[1291]
Member States are to ensure that national laws are adopted, protecting workers against dismissal on the grounds of an application for, or the taking of parental leave.[1292]	Member States were required to introduce necessary measures in order to protect against the dismissal workers using their leave entitlements.[1293]
Unpaid parental leave[1294]	Article 6 of Draft 1984 provided that workers on parental leave could receive a parental leave allowance, which if granted should be paid from public funds.
Leave for Family Reasons	
Member States are required to provide workers with an entitlement to time off work on grounds of force majeure for urgent family reasons in cases of sickness or accident making the immediate presence of the work indispensable.[1295] No specific duration set.	Workers were entitled to a minimum determined number of days of leave per year for `pressing family reasons`.[1296] No specific duration of the leave defined.

[1283] Clause 2(3)(b) Council Directive 96/34/EC on the Framework Agreement on parental leave.
[1284] Article 5(3) Draft Directive on parental leave COM(83) 686 as amended by COM(84) 631.
[1285] Article 5(4) Draft Directive on parental leave COM(83) 686 as amended by COM(84) 631.
[1286] Clause 2(6) Council Directive 96/34/EC on the Framework Agreement on parental leave.
[1287] Article 5(5) Draft Directive on parental leave COM(83) 686 as amended by COM(84) 631.
[1288] Clause 2(6)(8) Council Directive 96/34/EC on the Framework Agreement on parental leave.
[1289] Article 5(6) Draft Directive on parental leave COM(83) 686 as amended by COM(84) 631.
[1290] Clause 2(5) Council Directive 96/34/EC on the Framework Agreement on parental leave.
[1291] Article 5(7) Draft Directive on parental leave COM(83) 686 as amended by COM(84) 631.
[1292] Clause 2(4) Council Directive 96/34/EC on the Framework Agreement on parental leave.
[1293] Article 10 Draft Directive on parental leave COM(83) 686 as amended by COM(84) 631.
[1294] Clause 2(1) Council Directive 96/34/EC on the Framework Agreement on parental leave.
[1295] Clause 3(1) Council Directive 96/34/EC on the Framework Agreement on parental leave.
[1296] Article 8(1) Draft Directive on parental leave COM(83) 686 as amended by COM(84) 631.

Limited to cases of sickness or accidents	Pressing family reasons also covered joyous events involving dependants.[1297]
	Leave for 'pressing family reasons' could be extended for single parent families or where three or more children (under age limit to be determined) were living at home with the beneficiary.[1298]
No qualifying period required.	No qualifying period of employment required
Unspecified whether the entitlement was transferable or non-transferable.	Unspecified whether the entitlement to family leave was transferable or non-transferable.
	Workers who requested either parental leave or the leave 'for pressing family reasons', were protected against discrimination on grounds of their request to take the leave.[1299]
Unpaid leave	The leave for pressing family reasons was to be paid directly by employers, and for the purpose of remuneration it amounted to paid holidays.[1300]

Table 6: The Evolution of the UK Work-life Balance Policies (1998-2010)

Policy	Rationale
The White Paper *Fairness at Work* (FaW)[1301]	The work-life conflict recognised by Labour Government. The intention of was not to overburden businesses with the additional regulation of the labour market but to encourage companies to introduce policies on a voluntarily basis. The rationale for introducing family-friendly polices was described as deriving from the necessity of securing Britain's modern, flexible and efficient labour market that ensures the UK's prosperity and fairness at work.[1302] It recognised the existing conflict between parenthood and work, and the necessity of enabling working parents to spend more time with their children.[1303] It also accepted the necessity of providing adequate child care facilities to workers. The Government's rationale for introducing family-friendly policies was that by facilitating parents' reconciliation, the productivity of individual workers could also be increased. Hence, the mutual benefit of employees and businesses could be achieved by promoting family-friendly culture in business.
The *Working Time Regulations 1998.*	They introduced in the UK the 48-hour working time week, provided workers with the entitlement to 4 weeks of annual paid leave, regulated rest breaks and set restrictions on working at night. The implementation of the provisions of the Working Time Directive[1304] was of paramount importance in enabling workers to reconcile work and family

[1297] These included the illness of a spouse, death of close relative, the wedding of a child, illness of a child or the person caring for the child. Article 8(2) Draft Directive on parental leave COM(83) 686 as amended by COM(84) 631.
[1298] It should be noted that the original text of Draft 1983 was amended to include the possibility of extending the leave to the beneficiary responsible for the care of a disabled person living in the same household, Article 8(3) Draft Directive on parental leave COM(83) 686 as amended by COM(84) 631.
[1299] Articles 9 and 10 Draft Directive on parental leave COM(83) 686 as amended by COM(84) 631.
[1300] Article 8(4) Draft Directive on parental leave COM(83) 686 as amended by COM(84) 631.
[1301] The White Paper *Fairness at Work* CM 3968, Presented to Parliament on 21 May 1998.
[1302] Section 1 of the White Paper *Fairness at Work*.
[1303] The White Paper *Fairness at Work,* Section 5(2).
[1304] Council Directive 93/104/EEC OJ, 307/18, 1993 and 2003/88/EC

	responsibilities as it addressed the problem of the excessively long working week and the lack of the national restrictions on the duration of the working week. It also provided workers with the right to the longer periods of annual leave which enabled workers to spend more time with their families.
The *National Childcare Strategy* 1998.	The national initiatives aiming at improving the availability of affordable childcare were initiated.[1305]
The *Maternity and Parental Leave etc Regulations* 1999 (MPLR)[1306] and *Employment Relations Act 1999* (ERA 1999)	Implemented in the UK the provisions of the Pregnant Workers Directive[1307] and the Parental Leave Directive[1308]. The MPLR and ERA 1999 introduced a new framework for maternity leave and pay, provided parents with the right to parental leave and time off work for dependants.
Part–time Workers (Prevention of Less Favourable Treatment) Regulations 2000[1309] (PTWR) and *Employment Act 2002* (EA 2002) that came into force in April 2003.	Implemented the *Part-time Workers Directive.*[1310] Intended to help working parents in reconciliation by removing discrimination against part-time workers, extending the rights of part-time workers and increasing the quality and access to part-time work. The enhancement of the rights of part-time workers was of particular importance to female workers who often choose part-time employment in order to achieve reconciliation.
The Green Paper, Work and Parents: Competitiveness and Choice (GWPCC)[1311]	It aimed to *achieve a society where being a good parent and a good employee were not in conflict.*[1312] The Labour Government's family-friendly initiative expressed in the *GWPCC* sought to review the maternity rights, parental and paternity leave and set out the case for flexible working hours as a means of reconciliation for working parents. The key legislative initiatives in relation to maternity rights included improving the complexity of notification requirements,[1313] increasing the duration of unpaid maternity leave up to one year, and increasing the statutory maternity pay.[1314] It introduced longer periods of maternity leave, higher rates of maternity pay, introduced paid paternity leave, adoption leave, paternity leave[1315] and a right to apply for flexible working.[1316] The introduction of the right

[1305] For more details on the UK childcare see Ch. Skinner (2005) `Coordination Points: A Hidden Factor in Reconciling Work and Family Life`, *Journal of Social Policy*, 34(1):99-119 and T. Warren, E. Fox and G. Pascall (2009) `Innovative Social Policies: Implications for Work-life Balance among Low-waged Women in England`, *Gender, Work and Organisation*, 16(1):126-150.
[1306] *Maternity and Parental Leave etc Regulations* 1999 (SI 3312)
[1307] Directive 92/85/EEC of 19/10/1992 on the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, OJ L348/1, 28/11/1992.
[1308] Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, *Official Journal* L 145, 19/06/1996 P. 0004-0009 as amended by the *Council Directive 97/75/EC Official Journal* L 010, 16/01/1998 P. 0024-0024
[1309] *Part–time Workers (Prevention of Less Favourable Treatment) Regulations* 2000 (SI 1551)
[1310] Directive 97/81/EC, concerning the framework agreement on part-time work concluded by ETUC, UNICE and CEEP, OJ, L14/9, 1998.
[1311] Cmnd 5005 December 2000.
[1312] Foreword p.1 See also speech Foreword p.1 See also speech Rt. Hon. Stephen Byers - Former Secretary of State for Trade and Industry (Dec 1998 - Jun 2001), *Work and Parents: Competitiveness and Choice*, National Family and Parenting Institute, London, October 23, 2000, http://www.dti.gov.uk/ministers/archived/byers231000.html accessed on 04/11/2006.
[1313] Chapter 5, p.3.
[1314] Chapter 3, pp.6-7.
[1315] *Paternity Leave and Adoption Leave Regulations 2002* (as amended) (SI 2002 No. 2788)
[1316] *The Flexible Working* (Eligibility, Complaints and Remedies) *Regulations* 2002 and *The Flexible Working* (Procedural Requirements) *Regulations* 2002 (SI 3207).

	to paid paternity leave is of a particular importance for the development of reconciliation policies, as it sends a powerful message to fathers that caring for children is not mothers' exclusive responsibility.[1317] It proposed that the duration of parental leave entitlement should be increased for parents of disabled children[1318] and that a payment should be provided to those who exercise their right to parental leave.[1319] It proposed to introduce measures promoting flexible working hours as a means of enabling working parents to better balance the demands of work and family. The proposed measures included introducing the right for mothers to work reduced hours until the end of the leave if they decided to return to work early.[1320] The availability of this right was subject to the condition that reduced employee's hours were not going to harm the business and smaller employers were exempted.[1321]
The Employment Act 2002.[1322] .	It introduced longer periods of maternity leave, higher rates of maternity pay, introduced paid paternity leave, adoption leave, paternity leave[1323] and a right to apply for flexible working.[1324]
The *Work and Families* Act 2006[1325] (WFA)	It further expanded the rights of workers in areas such as maternity leave and pay, paternity leave and pay, adoption leave and pay, extended the rights to request flexible working to care of adults and introduced *keeping in touch days* for employees on maternity leave.
The *Childcare Act 2006*	It sought to implement the soft law targets on the availability of childcare set out by *Barcelona European Council* (2002)[1326] It provided local authorities with the statutory responsibility of ensuring the availability of childcare.
The *Additional Paternity Leave Regulations 2010*	It amended leave entitlement so that mothers and fathers can actually share entitlement using additional paternity leave rights.
The Equality Act 2010	The equality in the distribution of caring responsibilities within a family in the reconciliation context not addressed.

[1317] For the discussion on the evolvement of the role of the UK fathers in reconciliation see M. Kilkey (2006) `New Labour and Reconciling Work and Family Life: Making it Fathers' Business?` *Social Policy and Society*, 5(2):167-175.
[1318] Chapter 5, p.9.
[1319] Chapter 5, p.9.
[1320] Chapter 4, p.5.
[1321] Chapter 4, p.6.
[1322] The Employment Act 2002 received Royal Assent on 8 July 2002 and came into force in April 2003.
[1323] *Paternity Leave and Adoption Leave Regulations 2002* (as amended) (SI 2002 No. 2788)
[1324] *The Flexible Working* (Eligibility, Complaints and Remedies) *Regulations* 2002 and *The Flexible Working* (Procedural Requirements) *Regulations* 2002 (SI 3207).
[1325] Cf. *The Maternity and Parental Leave etc. and the Paternity and Adoption Leave (Amendment) Regulations 2006* SI 2006 No. 2014.
[1326] European Council of Barcelona, 15-16 March 2002, SN 100/1/02.

Table 7: Parental Leave Arrangements in Belgium, Germany, Ireland, Luxembourg, Sweden and UK[1327]

Country	Service needed	Duration of leave	Time limit	Flexibility Staggered Option	Allowance	Individual or family	Job security return
Belgium	Employees only 12 months employment with present employer (during last 15 months) No qualification in public sector.	3 months full-time 6 months part-time	Up to child's 6th birthday (was 4th) 6 years in private sector (8 years if child seriously disabled) 10 years in public sector (for unpaid scheme. But in the scheme of parental leave, combined with a career break with benefits paid by the unemployment scheme, the conditions are the same as in the private sector.)	Full-time or part-time option (6 months) or one day per week for 15 months Half-time leave, the total duration is 6 months, it can be split into blocks of time with the minimum duration of 2 months For one-fifth leave, the total duration of 15 months can still be split into blocks, minimum 5 months instead of 3. Possibility to combine different forms of leave according to the following rule: 1 month at full time + 2 months at half time + 5 months at one-fifth. Leave can be postponed for up to 6 months where	€653.22 per month net of taxes	Individual entitlement Non-transferable	Employment contract remains in existence during leave although its execution is suspended. Acquired rights remain as essential conditions of the job in which the worker must be reinstated. Right to return to same, or if not possible, equivalent or similar job Refusal to reinstate employee to same or equivalent job would be construed as constructive dismissal plus fixed damages equal to six months pay Two sets of provisions in private sector: • 'ministerial' provisions (where parental leave occurs as part of career break scheme): no dismissal other than on serious

[1327] Various sources used Department for Business Innovation & Skills (2009), *International Review of Leave Policies and Related Research 2009*, Employment Relations Research Series No. 102, September 2009, J. Plantenga and Ch. Remery (2005), `Reconciliation of work and private life: a comparative review of thirty European countries. Synthesis report prepared by the Group of Experts on Gender, Social Inclusion and Employment for the Unit Equality for women and men` Directorate-General Employment, Social affairs and Equal opportunities European Commission. Final report, June 2005, EIRO national centres answers to study questionnaire on "Family and parental leave provision and collective bargaining" (November 2003). COM 2003 (358) final,

				`business cannot cope` The leave must be requested not less than 2 months and not more than 3 months in advance			grounds or for reasons unrelated to the leave from application until 3 months after end of leave. • 'social partner' provisions: almost identical except that protection ceases 2 months after end of leave and allows for fractioned leave. In public sector, permanently appointed staff members may not be dismissed except for limited reasons
Germany	All employees can take parental leave Allowance: only those working more than 30 hours a week	Until 3 years after childbirth (leave take as a block)	The final year can be taken up to up to 8th birthday with employer's consent Collective and individual agreements can extend to 12 or 18 years in public sector.	Childrearing benefit may be spread over 24(+ 4) the is spread payment remains the same Parents receiving the benefit may work up to 30 hours per week (if less than 15 employees the consent of employer needed). The income is taken into account when calculating the amount of the benefit 4 weeks notice needed Up to 4 blocks	Income related pay received for 12 months at 67% of earnings before the childbirth No means testing applies. Upper ceiling €1,800 and minimum of €300 per month Parents with earnings lower than €1,000 per months receive additional benefit. In case of multiple births the benefit increased by €300 per month for each additional child. The benefit is extended to 14 months if the father takes at least two months of the leave	Family Both parents can take the leave at the same time Both parents can take up to two leave intervals No period of the leave reserved for fathers	Employment contract continues to exist during parental leave, although duties of work and salary are not in force. Parental leave is accredited for sickness and pension insurance purposes, without contributions being paid, but does not count for purposes of calculating unemployment benefit periods. Each month spent on parental leave reduces employee's annual leave entitlement by one twelfth. Right to return to same or comparable job During parental leave and from the day of application for parental leave (if not more than eight weeks before parental leave begins) dismissal of the parent is subject to permission of state

							authorities for work place safety. At end of parental leave, parent can only be dismissed with three months notice. In any case, dismissal for reason of taking parental leave is illegal.
Ireland	12 months qualifying period required (continuous service with present employer)	14 weeks per child It is doubled for twins, tripled for triplets etc. Parents with disabled children qualify for care's leave	Up to 8th birthday (was 5th) Up to 16 children with disabilities	Full-time as single block Leave can be taken in blocks of a minimum 6 continuous weeks (shorter blocks or days with employer's permission) Reduced working hours up to 14 weeks (employer's consent needed) Leave an be postponed by up to 6 months (if substantial adverse effect on the business) Leave can be suspended due to illness of the leave taker. 6 weeks' written notice. Additionally, employee must confirm 4 weeks before leave due to begin, commencement date of leave, its duration and manner in which to be taken	None	Individual Non-transferable Since 2008 parents may transfer their parental leave entitlements to each other (working for the same employer with employer's agreement)	Employee on parental leave is deemed to be in the employment of the employer and employment rights are regarded as continuing, apart from right to remuneration, superannuation benefits or any obligation to pay contributions. Such time off work is deemed to be continuous with the previous period of employment. When an employee is on leave, he/she may be credited as being in employment for the purposes of future social welfare entitlements. Time spent on parental leave does not affect entitlement to statutory annual leave and public holidays Right to return to same, or if not reasonably practical, similar job Dismissal, wholly or mainly due to exercise or proposed exercise of right to parental leave is unfair.

Luxembourg	Employees 1 years service + 20 hours per week 12 months of service with the same employer (15 months prior to birth or adoption) The rule does not apply if employee forced to change job for economic reasons	6 months per child uninterrupted (full-time) 12 months (part-time)	Up to 5th birthday One parent must to take the leave immediately after the birth of the child and second parent up to child's 5th birthday	Full-time, as single block Part-time, with agreement of employer No staggered option 4 months notice needs to be given Parental leave that must be taken immediately following maternity leave may not be postponed, but the second period of leave may be postponed for up to 2 months for the reasons set out in Directive For firms with less than 15 employees, and in relation to seasonal work, employer can delay granting parental leave for up to 6 months	Allowance €1.651,38 FT €825,69 PT	Individual Non-transferable Each parent can benefit from leave of up to 6 months, It is usually only the mother (whose earnings are usually lower than those of the father) who takes the 6 months leave. Some special leave (for caring a sick child, *inter alia*) cannot be taken simultaneously.	Worker retains the benefit of all advantages acquired before the start of leave. Parental leave is taken into account in calculation of rights linked to seniority, is regarded as a *stage* period for purposes of social insurance and entitles the worker to full unemployment indemnity rights. However, parental leave does not give any right to annual leave. During parental leave employment contract is suspended. Right to return to same or similar job corresponding to worker's qualifications and at wage at least equivalent to that of former job Dismissal during parental leave or as from final day for prior notification of intention to take leave is null and void.
Sweden	All parents entitled to paid parental leave Paid leave at 80% of earnings conditioned by income over SEK180 a day for 220	1) 480 days (60 days reserved for the mother and 60 days reserved for the father (father's and mother's quota) 360 days (180 days each parent)	Up to child's 8th birthday or the end of first school year (for part-time leavers)	To enhance flexibility of use the leave counted in days Paid and unpaid leave can be combined to allow parents to spend more time at home Modes of the leave: Full-time Half-time Quarter-time One-eight time	1) Paid 390 days at 80% of earnings up to the ceiling of SEK428,000 per year (€39,817) (2009); The remaining 90 days at a flat rate payment of SEK180 per day (€17). Non-eligible parents receive SEK180 a day for 480 days. Founded	Family/individual If days are to be transferred the parent giving up his right must sign a consent form Allocated portion of the leave cannot be transferred	An employee who requests or exercises right to leave is not required to accept reduced employment benefits or less favourable working conditions than those necessitated by the leave or any other transfer than that which may occur in context of the employment agreement and which is necessitated by the leave. Employment contract continues during parental

	days prior to the expected delivery or adoption	2) Each parent can take unpaid leave The right to parental leave arises in relation to an additional child born or adopted within 30 months of the birth or adoption of an earlier child (crucial for parents who reduced working time in lieu of parental leave)	2) Until the child is 18 months old – unpaid leave	(the length of leave extended accordingly) Leave can be taken as one continuous period or several blocks of time Employee has the right to stay away from work on parental leave up to three periods each year. Single parents are entitled to all allocated days In 2008: *gender equality bonus* was introduced to encourage more equality in sharing of the leave. The bonus is paid to the parent who spent the longest time on the leave on return to work when the other parent takes the leave. The bonus also applies to parents who do not live together It aims at encouraging low income fathers to take more parental leave	by Social Insurance Agency (contributions made are by employer's and self-employed) Multiple births – parents are entitled to additional paid leave (90 days at 80% of earnings and 90 days at flat rate of SEK 180 a day, for every further child and additional 180 days at 80% of earnings) **In 2008 benefit payments were reduced by 3% to 77.6% of earnings** A common collective agreement provide for 90% of earnings to be paid. 2 months notice needed, but where not practicable, duty to give notice as early as possible		leave. Leave counts for length of service. Right to return to equivalent employment conditions and benefits, but only under the condition that the leave has not made changes in tasks and benefits necessary. Transfer to other tasks must be within the limits of the employment contract. Dismissal only because the employee has requested or taken parental leave is invalid; if employee is in any event dismissed on notice or summarily, dismissal may be declared invalid at employee's request Since 2006: Legislative protection from being refused employment on grounds of the future application for parental leave Parents on the leave are protected from layoffs during their leave; notice of termination cannot begin until a parent has returned to work (short-term jobs not covered)
UK	Employees 12 months continuous employmen t employer	13 weeks per child: e.g. parents of twins 26 weeks Part-time: pro-	Up to child's 5th birthday (up to 18th for the disabled)	Full-time. No part-time option Right to request flexible working As general rule, may	Unpaid	Individual Non-transferable	Employment contract continues during period of parental leave, although only certain terms and conditions relating to termination, redundancy and discipline and grievance procedures

	Have or expected to have parental responsibility for a child	rata entitlement (13 times employee's normal working week) 18 weeks in case of child entitled to disability living allowance.		not be taken in periods other than a week or multiple of a week (restriction does not apply to disabled children) Employee may not take more than 4 weeks leave in respect of any one child in a 12 month period 21 days notice required Employers can postpone the leave for up to 6 months `where business cannot cope`			will apply. Rights relating to seniority and pensions acquired prior to start of leave are preserved. On returning to work, parent will benefit from any improvement in other terms and conditions (including those relating to pay). At end of period of leave of up to 4 weeks, employee entitled to return to same job. Where parental leave longer than 4 weeks, employee entitled to return to same, or if not reasonably practicable, similar position. Variation on these provisions applies where parental leave immediately follows maternity leave Dismissal unfair where principle reason is that employee takes or seeks to take parental leave

Table 8: A Typology of European Welfare States (2000)[1328]

Type		Country groupings
Nordic	'everyone a breadwinner'	Sweden Denmark Finland
		Netherlands
Continental 1	'modified male breadwinner'	Belgium France
Continental 2	'male breadwinner'	Germany Austria Luxembourg
Liberal	'more than one breadwinner'	U.K.
		Ireland
Mediterranean	'family as breadwinner'	Italy Greece Portugal Spain

[1328] Source M Latta and W. O'Conhaile, (2000) *Aspirations, Restrictions and Choices – Combining Life and Work in the EU,* in http://www.eurofound.ie/publications/files/3768en.doc p .20 of 31 accessed on 20/12/00.

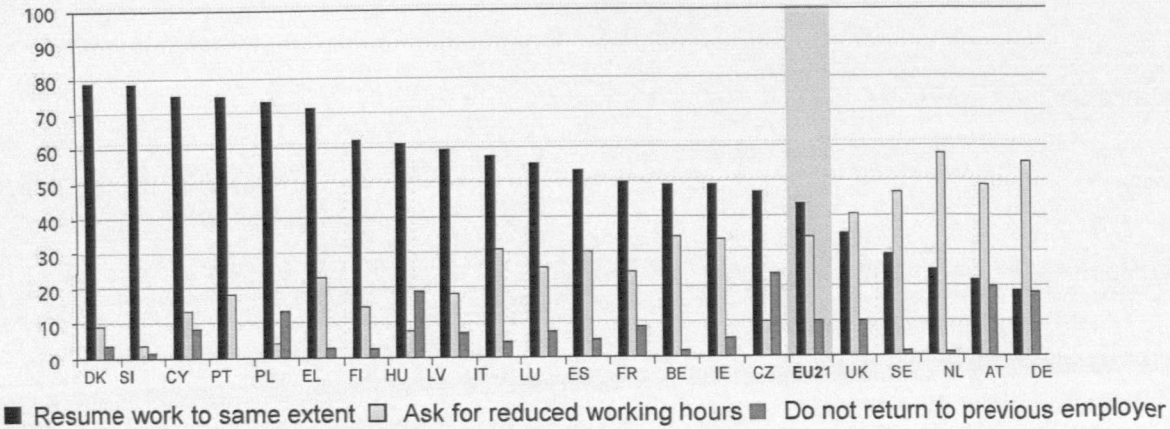
Table 9: Parental Leave Take up in Belgium, Germany, Ireland, Luxembourg, Sweden and UK [1329]

Country	Take up	Take up Men	Take up Women
Belgium	Before 2004: 7% of parents took the leave No data available on those who do not qualify for the leave	Increase among fathers taking the leave, 2004-2008, the total number of users increased by 40%. The share of father taking the leave increased from 16 to 22%.	Mainly taken by women
Germany	Reduced number of parents taking 12months leave Only 10% of parents prolonged the leave up to 2 years paid at 33.5% of previous income (2008).	3.3% in 2006 10.5% in 2007 (new law introduced) 13.7% in 2008	2004 – 75% of mother took the leave Primarily taken by women
Ireland	2004: 14% of eligible employees took the leave (unpaid leave state to be the reason for low take up)	5% of fathers	Mainly taken by women
Luxembourg	Very low take up		2004: 83% of leave takers were mothers
Sweden	Almost all families take paid parental leave. The leave is mainly taken before the child reaches the age of two.	In 1987: fathers took 7% of total parental leave days In 2008: fathers took 21.5% of total parental leave days The introduction of a father's quota of the leave in 1995 and its extension in 2002 encouraged more father to take the leave	Mothers take most of the leave In 2008: 78.5% of total parental leave days The leave to care for sick children is more often t by mothers (64.4% of days taken in 2008).

[1329] Various sources used Department for Business Innovation & Skills (2009), *International Review of Leave Policies and Related Research 2009*, Employment Relations Research Series No. 102, September 2009, J. Plantenga and Ch. Remery (2005), `Reconciliation of work and private life: a comparative review of thirty European countries. Synthesis report prepared by the Group of Experts on Gender, Social Inclusion and Employment for the Unit Equality for women and men` Directorate-General Employment, Social affairs and Equal opportunities European Commission. Final report, June 2005, EIRO national centres answers to study questionnaire on "Family and parental leave provision and collective bargaining" (November 2003). COM 2003 (358) final, and European Foundation for the Improvement of Living and Working Conditions (2007), *Parental Leave in European Companies, Establishment Survey on Working Time 2004-2005*,Luxembourg 2007 pp.1-51.

		Fathers working in the public sector are more likely to take the leave (higher compensation)	
UK	**No precise data exists** Not used widely and mainly taken for short periods of time In 2007: 14 % of parents took the leave (no change since 2003) [1330]	About 8% of eligible fathers (surveyed)	Mainly taken by mother In 2002: 8% of mothers took parental leave In 2005: 11% of mothers took the leave (mainly c

Table 10: Establishments according to the choices of mothers to resume employment following parental leave, by country (%) 2005[1331]



[1330] Department for Business Enterprise and Regulatory Reform (2007), *The Third Work-Life Balance Study: Results from the Employer Survey – Main Report*, Employment Relations Research Series No.86, October 2007 pp.52-53.

[1331] Source *Parental Leave in European Companies: Establishment Survey on Working Time 2004-2005* (2007) op. cit., pp.25-27. 44% of the surveyed EU establishments reported that the majority of female employees returned to the same job after the leave, in 34% establishments female employee returned to work and worked reduced hours, only in 10% of establishments women did not return to work (13% of companies did not answer at all).

Table 11: Time off Work to Care for Dependants in Belgium, Germany, Ireland, Luxembourg, Sweden and UK[1332]

Country	Employee's entitlement covers	Age Limit	Allowance	Duration	Entitlement: Family or Individual	Employment protection
Belgium[1333]	`for urgent reasons` force majeure to deal with unexpected or sudden circumstances Legislation defines 'urgent' as making it 'obligatory and necessary' to be present at home instead of being at work (e.g. such as illness, accident or hospitalisation of a member of the household).		1) Unpaid 2) Benefits paid subject to the same conditions as parental leave. 3) Benefits paid subject to the same conditions as parental leave. 4) Paid as parental leave	1) Up to 10 days a year 2) Severely ill family member: employee can take full-time leave from 1 to 12 months (up to 24 months part-time) to be taken in blocks of 1 to 3 months. 3) Palliative care: up to 2 months of leave (full or part-time) in blocks of 1 months 4) Foster parents: 6 days of leave to fulfil administrative or legal requirements.		
Germany	1) Sickness of a child 2) Relatives of care dependant persons	1) Under 12 years	1) 80% of earnings from health insurance 2) Unpaid	1) 10 days of leave (20 for single parent) Up to 25 days per year per family (if more than one child) Up to 50 days for single parent families. 2) 10 days of short term leave and	1) per parent per child Leave is granted irrespective of other persons being able to	

[1332] Various sources used Department for Business Innovation & Skills (2009), *International Review of Leave Policies and Related Research 2009*, Employment Relations Research Series No. 102, September 2009, J. Plantenga and Ch. Remery (2005), `Reconciliation of work and private life: a comparative review of thirty European countries. Synthesis report prepared by the Group of Experts on Gender, Social Inclusion and Employment for the Unit Equality for women and men` Directorate-General Employment, Social affairs and Equal opportunities European Commission. Final report, June 2005, EIRO national centres answers to study questionnaire on "Family and parental leave provision and collective bargaining" (November 2003). COM 2003 (358) final,

[1333] Prior to PLD in Belgium 10 day leave for urgent family reasons was available covering hospitalisation, accident, or sickness of persons living under the same roof see Convention Collective du Travail No 45 of 19 December 1989.

	(unexpected illness) 3) Since 2009 grandparents are entitled to parental leave	3) Up to 18 years in education or vocational training		six months of long-term care leave	care for the child. Further, if an urgent reason exists (for example, serious illness of a child who has no one else, who can care for him) the employee may stay at home (right to "Child Sickness Leave").	
Ireland	1) Force majeure 3) full-time care for a dependant (e.g. disabled child)		3) Unpaid but may be entitled to a means-tested carer's benefit	1)Up to 3 days in 12 months Up to 5 days in 36 months For family emergencies caused by injury or illness, known as *force majeure* leave. Right to leave applies in the case of serious illness in respect of close relation or partner with whom employee is living as husband or wife. 3) Employees with 12 months continuous service: up to 65 weeks to provide full time care. Can be taken in blocks of time. Employee may work up to 10 hours per week (income limits)		

Luxembourg[1334]	For family reasons if child under 15 in employee's care, and in respect of whom family benefits are payable, suffers serious illness or accident or if some other imperious health reason requiring presence of one of the parents	Up to 15 years		2 days (per child) per year special leave		During leave, legal provisions concerning social security and employment protection, in particular protection against dismissal, continue to apply
Sweden	Care for sick children Employee entitled to time off work on grounds of *force majeure* for urgent family reasons in cases of sickness or accident making the immediate presence of the worker indispensable.	Up to 12 years Children 12-15 years doctor's certificate needed	Paid at 80% or earnings	120 days a year per child (60 days can be used to stay at home looking after small children if regular caregiver is sick) 10 days of paternity leave can be used by a father to care for other children when the mother is in a hospital.	Family entitlement Since 2001 the leave can be taken by somebody from outside the family on condition that the person is eligible under the social insurance system, care for a sick child if parents cannot miss work.	
UK	To deal with domestic incident such as sudden		Unpaid	A reasonable amount of time off work		

[1334] In order to implement PLD the pre-existing rules on the leave for urgent family reasons were extended (some collective agreements regulated it). See M. Feyereisen (1999) *Family Leave Introduced in Luxembourg.* EIROonline, Document LU9903296N, Dublin, European Foundation for the Improvement of Living and Working Conditions, http://www.eiro.eurofound.ie/1999/03/InBrief/LU9903296N.html accessed on 01/02/00.

	illness or accident of dependant or to make arrangements for looking after children due to sudden illness or incapacity of normal carer. Term "dependant" widely defined to include persons other than members of employee's family.					

Table 12: The Evolution of Family-Friendly Polices in Poland (until 2010)

Policy	Rationale
Stage One: The Reconciliation Policies & Era of Socialism (prior to 1989)	
	During this period, all responsibilities associated with a family and bringing up children were seen as belonging to women. Legislation emphasised women's caring and men's breadwinning responsibilities. Apart from being solely responsible for bringing up children, women were also expected to play an active role in the workforce (dual breadwinner family model). Women's high activity rates derived from the rapid expansion of industry; labour shortages during the post-war period and the demand that women embrace men's jobs and thereby reaffirm their equality with men in the labour market.[1335] Work was often seen as preventing women from fulfilling their main reproductive role.[1336] Despite having better qualifications and skills than men, women rarely attained management level positions.[1337]
Childcare	The existing social policy supported the dual breadwinner family model; the upbringing of children was closely regulated by the State, which ensured the availability of affordable childcare and health facilities; extensive maternity leave entitlements and subsidised canteens for working women.[1338]

[1335] In 1988, activity rates for Polish women were much higher than in the Western Economies and peaked to 85.5 per cent. M. Gora, I. Kotowska, T. Panek and J. Podgorski (1993) in A. Gregory, M. Ingham and H. Ingham (1998) `Women's Employment in Transition 1992-4: the Case of Poland`, *Gender Work and Organization*, 5(3):133-147, pp. 134.

[1336] The double burden which was imposed on women was very difficult to carry out especially in times of economic difficulties when it was very difficult to provide families with basic supplies.

[1337] U. Nowakowska, A. Swedrowska, `Women in the Labour Market`, *Polish Women in the 90s*, http://free.ngo.pl/temida/labour.htm accessed on 15/05/2003.

[1338] Ibid. pp.134-135.

Constitution of the Polish People's Republic 1952 (Constitution 1952), the Labour Code (LC) and Collective Agreements.	Provided women with the legislative protection in order to enable them to perform their child rearing and bearing responsibilities whilst ensuring their involvement in the labour market.
The *Constitution of the Polish People's Republic 1952*	Focused on the protection of women's reproductive functions and the family as a unit.[1339]
The *Constitution of the Polish People's Republic 1976* (Constitution 1976).	Article 79 reaffirmed that the priority of the state was to ensure special levels of protection to the maternity, family and children. It recognised the importance of the family and motherhood, but failed to recognise the importance of parenthood and the involvement of men in bringing up children.
Articles 67 and 78 of the Constitution 1976.[1340]	Attempted to promote equal treatment for men and women and protecting a family as a unit which resulted in preventing women from performing jobs deemed to pose a hazard to women's health and family duties. Due to their physiological makeup and child-rearing responsibilities female workers were provided with more legislative protection than men in order to secure their important role as the family childcare providers. This over protectionist approach hampered women's chances for total equality in Polish society and the workforce.[1341]
Article 179 of the Labour Code (LC)	In order to enable women to combine work and reproductive functions, they were provided with the special legislative protection during pregnancy and the right to maternity leave.[1342] Fully paid maternity leave aimed at enabling women to physically recover from the birth and be able to care for the newborn child. The right to leave could be transferred to the father only in cases of the death or illness of the mother. The existence of the fully paid maternity leave accompanied by the protection from dismissal during pregnancy and maternity leave, and the right to return to the same or equivalent job must be considered as playing an important role in enabling women to achieve reconciliation in the 1980s in Poland.
The employment participation rates of women in child bearing years was very high (85.5 per cent).[1343]	This could be attributed to the very generous maternity leave entitlements whereby women on leave officially remained part of the labour force, the availability of affordable childcare (subsidised) or the help of the extended family.[1344]

[1339] Articles 66 and 67 of the Constitution 1952.

[1340] It provided men and women with equal rights in all spheres of life including the right to work, equality in pay for equal work, availability of childcare, protection during pregnancy, maternity, right to full remuneration whilst on maternity leave and access to childcare facilities.

[1341] C.L Czarnecki (1989), `Women in Poland's Workforce: Why Less Than Equal is Good Enough`, *Comparative Labour Law*, 11(91):91-117, p.95.

[1342] Article 179 LC created a number of obligations that employers had to comply with in order to ensure the well-being of pregnant women at work e.g. an obligation to transfer the pregnant woman to a different job without a loss in pay if her preset job is forbidden or dangerous for pregnant women. It also provided women with the protection against the dismissal on grounds of pregnancy and maternity and the right to return to the same or comparable job. Initially maternity leave was limited to three months (until 1972). In 1975, Article 180 LC increased to length of the leave to sixteen weeks for the first child, eighteen weeks for each subsequent child and twenty six weeks in case of multiple births.

[1343] In 1988, activity rates for polish women were much higher than in the Western Economies and peaked to 85.5 per cent. M. Gora, I. Kotowska, T. Panek and J. Podgorski (1993) in A. Gregory, M. Ingham and H. Ingham (1998) `Women's Employment in Transition 1992-4: the Case of Poland`, *Gender Work and Organization*, 5(3):133-147, pp. 134-135.

In 1968, unpaid childcare leave (*urlop wychowawczy*) introduced.	Similarly to maternity leave, childcare leave provided women with the additional time off work in order to care for a child.[1345] The legislator did not intend for this leave to be taken by men because men were not expected by society to be actively involved in child rearing activities. The unpaid childcare leave was intended to help women to reconcile work and childcare responsibilities but because it was unpaid only 8.3 per cent of Polish mothers took advantage of this leave in 1972.[1346]
In 1968, leave for family reasons (*urlop opiekuńczy*) introduced	Leave for family reasons[1347] was primarily available to women in order to help them to respond to various family emergencies. Leave periods merely enabled women to perform their reproductive function and allocated to them caring responsibilities.
Part-time work and flexible working	Although women were expected to work and care for children, the existing national labour laws did not provide for special flexible or part-time working arrangements, which could help women to reconcile work and family responsibilities.[1348] In 1971 part-time work was not as effective in helping women in reconciliation because only 6 per cent of women worked part-time hours and more than half of them did have caring responsibilities. [1349] Most young women were not interested in part-time work because they considered it as disruptive as full-time employment. Working part-time also involved very low earnings and had a negative impact on women's careers.[1350]
Collective Agreements	Regulated the working hours of mothers[1351] and were used to impose further restrictions on mothers' working time and working conditions in order to ensure their well-being at work. Shorter working hours meant lower wages for working mothers but also more free time to look after their children. Consequently, the focus of reconciliation policies was on mothers, their family responsibilities and not on equality in distribution of work-care responsibilities within a family.
Stage Two: Reconciliation Policies & Transitional Period (1990s)	
Political and economic transformation.	This transformation had a profound impact on the labour market and in particular on women's status. Women remained responsible for all matters associated with family and bringing up children. In 1990s, the availability of employment significantly diminished, and finding employment for women (especially with childcare responsibilities) became very difficult

[1344] A. Gergory, M. Ingham, H. Ingham (1995) op. cit., pp.134-139.
[1345] Order of the Council of Ministers of July 17, 1981 regarding childcare leave which repealed the Order of November 29, 1975 on unpaid leave with caring responsibilities for young children.
[1346] Lobodzinska (1978) `The Education and Employment of Women in Contemporary Poland, *Journal of Women in Culture and Society*, 691(4).
[1347] Article 188 LC.
[1348] Concerning the working arrangements, Article 129 of LC defined full-time employment as an employment of the duration 42 hours per week. All working arrangements falling below the requirement of full-time employment were considered as part-time employment.
[1349] Sokolowska (1981), `Women in Decision-making Elites: The Case of Poland, *Access to Power: Cross-National Studies of Women and Elites* 109, pp.261-262.
[1350] Article 187 of LC provided women nursing an infant(s) with additional breaks for childcare (two breaks 45 minutes). Women working part-time (over four hours) were also entitled breaks for childcare. In both cases the breaks could be combined to enable working mother to finish work earlier.
[1351] The Collective Agreement for the Machine-Building Industry, 30th December 1974.

	because they were considered less effective at work than men. The gravity of discrimination and the unfavourable position of women in the labour market were recognised because of high unemployment amongst women.[1352]
Articles 67 and 78 of the 1976 Constitution (in force in 1990s)	It ensured women's equality with men in all fields including the labour market. The Constitution of 1976 reinforced the traditional division of labour within the family (women had exclusive parental responsibility).
Article 79 of the 1976 Constitution.	Limited legislative protection to motherhood and childhood and it did not cover parenthood. Furthermore, men's role in the family did not include physically participating in child-rearing duties.
Articles 179 and 186 of the Labour Code	Women as sole carers for their children, provided with generous protection during pregnancy and entitlements to maternity and childcare leave.
The Constitution of the Republic of Poland of 2nd April 1997[1353] (Constitution 1997)	Article 18 reaffirmed the legislative protection of family and motherhood and also extended the legislative protection to parenthood. Article 33 gave equal rights to men and women in family life. No right to reconciliation but it provides parents with the freedom to decide the level of involvement of each parent in the family life. Article 65 guaranteed the freedom of choice of employment and the place of work. The restrictions on working conditions of pregnant and breast feeding women remained in place.[1354]
The 1996 amendment of the Labour Code. Article 11(2)(3)	The amendment concerned the principle of equal treatment between men and women in terms of access to employment, treatment at work and protection against discrimination on various grounds including sex discrimination.[1355]
The 1999 amendment of the Labour Code. Article 180.	The duration of maternity leave was extended[1356] and the legal obligation forcing mothers to take maternity leave (regardless of their personal needs) remained in force. The extended maternity leave was seen by women as disadvantaging them in the labour market as employers would have been more reluctant to employ women who could be absent from work for six months.
The amended Articles 186 and 189 of the Labour Code	Addressed the inequality concerns and provided both parents with the right to childcare leave.

[1352] Cf. U. Nowakowska, A. Swedrowska, `Women in the Labour Market` op. cit., and U. Nowakowska, `The Position of Women in the Family` *Polish Women in the 90s*, http://free.ngo.pl/temida/family.htm on 15/05/2003.

[1353] The Constitution of the Republic of Poland (Konstytucja Rzeczypospolitej Polskiej) of 2nd April 1997, Dz.U. z 1997 r. Nr.78, poz.483, 2001 r. Nr.28 poz. 319, z 2006 r. Nr.200, poz. 1471.

[1354] Executive Order of 10 September 1996, Dz.U. 96.114.545. It must be emphasised that until 1996, the ministerial executive order which accompanied Article 176 of LC banned women from over ninety occupations deemed to be dangerous to women (e.g. bus and truck driver). The relaxation of the occupational restrictions was of vital importance as it improved women's job opportunities in the labour market.

[1355] This amendment was of a symbolic importance because at the time, in Poland, unlike in the EU, the burden of proof in claims alleging discrimination was on the claimant, and therefore most claims were unsuccessful. The provisions of the Polish law which restricted women's right to work continued contriving the ILO and EU standards.

[1356] Article 180 LC extended the duration of maternity leave to 26 weeks.

Childcare facilities	The removal of childcare subsidies in 1990 rendered childcare facilities unaffordable to many families and forced many mothers out of the labour market.[1357] An erosion of the social policies (especially childcare), which previously enabled women to remain economically active whilst bringing up children meant that the reconciliation became increasingly more difficult for women. This brought about the shift from the well-established under the socialism dual-earner model to the single male breadwinner model.[1358]
Stage Three: The EU Membership & Reconciliation Policies.	
EU Membership since 1st May 2004	Poland was required to harmonise its notional laws in various fields with the requirements of the EU. In the field of employment and social policy, this involved the transposition into the national law the key social directives, which included the four reconciliation directives (The *Working Time Directive* (WTD)[1359], *the Pregnant Workers Directive* (PWD),[1360] the *Parental Leave Directive* (PLD)[1361], the *Part-time Workers Directive* (PTD)[1362]). The implementation of these directives did not require a complete overhaul of the national labour law regulations because the main source of labour law, the Labour Code was amended in the 1990s, bringing the national law in line with the EU requirements.[1363]
Maternity Rights	Prior to the accession, Poland already had a very well-established policy protecting pregnant workers' rights which in certain areas exceeded the requirements of PWD. The duration of maternity leave set out in Article 180(1) of LC exceeded the minimum duration set in the PWD (14 weeks').[1364] Some adaptations were required in the area of protection of workers who were breastfeeding. Article 178(1) LC bans pregnant women from working overtime, which may imply a significant loss of earnings during pregnancy and lower maternity leave benefits calculated on the basis of the last salary.
Parental leave and leave for family reasons	The PLD was implemented in Poland through Articles 186 and 188 LC (discussed in detail in Chapter 5).

[1357] Cf. J. Kocourkova (2002), `Leave Arrangements and Childcare Services in Central Europe: Policies and Practice before and After the Transition`, *Community, Work and Family*, 5(3), pp.301-318. It must be recalled that during the time of early socialism in Poland subsidised childcare was available which contributed to the high rates of women's economic activity.

[1358] Cf. G. Pascal and N. Manning (2000), `Gender and Social Policy: Comparing Welfare States in Central and Eastern Europe and Former Soviet Union`, *Journal of European Social Policy*, 10(3):240-266.

[1359] Council Directive 93/104/EEC OJ, 307/18, 1993 and 2003/88/EC.

[1360] Directive 92/85/EEC of 19/10/1992 on the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, OJ L348/1, 28/11/1992.

[1361] Council Directive 96/34/EC of 3 June 1996 on the Framework Agreement on parental leave concluded by UNICE, CEEP and the ETUC, *Official Journal* L 145, 19/06/1996 P. 0004-0009 as amended by the *Council Directive 97/75/EC Official Journal* L 010, 16/01/1998 P. 0024-0024.

[1362] Directive 97/81/EC, concerning the framework agreement on part-time work concluded by ETUC, UNICE and CEEP, OJ, L14/9, 1998.

[1363] The national employment policies already regulated the matters covered in the reconciliation directives but the exact adaptation of the provisions of those directives was not achieved until 1st of January 2004.

[1364] In 2004, the duration of the leave for a single birth was 16 weeks' and from 1st January 2010 it is set at 20 weeks' for a single birth, 31 weeks if twins, 33 weeks triplets, 35 weeks quadruplets, 37 weeks if five or more children are born at the same time (Article 180(1) of LC). It must be noted that the duration of maternity leave in 1996, was raised to 26 weeks' and the reduction of the duration of the leave in 2001 did not breach PWD because it was above the minimum requirements of PWD.

Working Time	The normal weekly working time in Article 129 LC, set at 40 hours in 2003 (currently applies)[1365] exceeded the requirements of WTD. Implementation of the WTD resulted in extending the annual leave entitlement to 20 days (was 18 days)[1366] for employees with ten or less years' in employment.
Part-time Workers	The implementation of the non-discrimination principle contained in the PTD has resulted in the introduction of the new legal principle[1367] protecting part-time workers from less favourable treatment with comparable full-time workers. A certain degree of flexibility in the part-time workers' contract has been ensured by Article 29(1) LC, which requires employers to consider employees' requests to change their working arrangements.
No Legislative right to reconciliation of work and family life	Since Poland has joined the EU in 2004, the issues concerning reconciliation have received more attention from the Polish policy makers.
2007, Right to teleworking introduced	More flexibility into the organization of the working time was introduced by the new right to teleworking (Article 67(5) LC).
Flexible working	Polish labour law provides for flexibility in working time arrangements,[1368] and Article 29 LC ensures equality in treatment with those in full time employment.
2010, Shared maternity leave introduced	The new right to additional maternity leave was introduced, which can be shared between parents.[1369] This leave is of a vital importance to working parents because it introduced more equality in the distribution of caring responsibilities within a family by providing for the enhanced involvement of the father. Additional maternity leave is also paid (SMP)[1370] and provides parents with flexibility.[1371] Although fathers in limited circumstances can take the leave, the wording of Article 182(1) clearly refers to the leave as being a female employee's right.
2010, Paternity Leave introduced	The involvement of fathers in bringing up children is further supported by the new right to paternity leave of the duration of one week (two weeks in 2012).

[1365] Article 129 LC. The recent amendments which came into force on 25th July 2010 did not alter the duration of the normal working week (8 hours per day and 40 hours per week)
[1366] Article 154(1) LC.
[1367] Article 29 LC.
[1368] E.g. fixed-term work, part-time work, teleworking, job-sharing, weekend work or shortened week.
[1369] 14 days in 2010/11, Articles 182(1)(2) and 183 LC. Introduced by Ministerial Order of 6 December 2008 (Ustawą z dnia 6 grudnia 2008 r. o zmianie ustawy – Kodeks pracy oraz niektórych innych ustaw (Dz. U. Nr 237, poz. 1654)).
[1370] Art. 5 and 5a Ministerial Order of 25 June 1999 on social benefits during illness and maternity (Ustawa z dnia 25 czerwca 1999 r. o świadczeniach pieniężnych z ubezpieczenia społecznego w razie choroby i macierzyństwa (Dz. U. z 2005 r. Nr. 31, poz. 267, z późn. zm.)).
[1371] It can be taken on a part-time basis and can be used by either working parent to reconcile work and family responsibilities. The duration this leave will progressively increase up to 6 weeks in 2014 and needs to taken weekly blocks. The right to additional maternity leave is a family right and can only be taken by the father if mother returns to work after 14 weeks of maternity leave or uses the full entitlement to maternity leave and does not intend to use the additional maternity leave.

Government's family policy for 2007-2014[1372]	It refers merely to the need of enabling women to achieve the reconciliation and does not focus on the role of men in the family.
Childcare facilities	Poland has failed to meet the soft law Barcelona (2002) targets on the availability of affordable childcare facilities.[1373] The limited availability of the affordable childcare facilities indicates the failure of OMC in ensuring the availability of affordable childcare facilities in Poland, which may hamper the effectiveness of other reconciliation policies in providing workers with genuine work-family choices. The draft policy on childcare for children up to the age of three that is currently debated by the Polish Parliament aims at improving the availability of childcare but it does not ensure its affordability.[1374]

Table 13: Parental Leave in Czech Republic, Hungary, Slovakia and Poland [1375]

Country	Service Needed	Duration of leave	Time limit	Part-time option	Staggered Option	Allowance	Individual or Family	Job security return
Czech Republic	None	Up to 3rd birthday (was 4th)	Up to 3rd birthday (was 4th)	Yes Right of	No	Until 2008 110 Euro per month up to 4th birthday	Individual (only one parent entitlement to benefit, the leave can be taken at the same	Same post up to 3 years Protection from dismissal except when enterprise

[1372] The Polish Government Family Policy (draft) for 2007-2014 in http://66.102.9.132/search?q=cache:rGCLzgTmh5IJ:217.149.246.88/archiwum/politykarodzinna.doc+%22program+polityki+rodzinnej%22&cd=8&hl=pl&ct=clnk&gl=pl&lr=lang_pl accessed on 25/01/2010.

[1373] Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Implementation of the Barcelona objectives concerning childcare facilities for pre-school-age children Brussels, 3.10.2008, COM(2008) 638 final.

[1374] For more details on childcare in Poland see D. Szelewa and M.P. Polakowski (2008)`Who cares? Changing patterns of childcare in Central and Eastern Europe`, *Journal of European Social Policy*; 18:115-131, pp.115-131., A. Plomien (2009), op. cit., pp. 138-140. European Commission (2008), *Early Childhood Education and Care in Europe: Tackling Social and Cultural Inequalities,* EURYDICE 2008.

[1375] The Table has been complied on the basis of the following sources: Department for Business Innovation & Skills (2009), *International Review of Leave Policies and Related Research 2009*, Employment Relations Research Series No. 102, September 2009, European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities, `Bulletin of the Commission's network of legal experts on the application of Community Law on equal treatment between women and men`, *Bulletin Legal Issues in Gender Equality*, No. 2/2005, J. Plantenga and Ch. Remery (2005), `Reconciliation of work and private life: a comparative review of thirty European countries. Synthesis report prepared by the Group of Experts on Gender, Social Inclusion and Employment for the Unit Equality for women and men` Directorate-General Employment, Social affairs and Equal opportunities European Commission. Final report, June 2005,C. Fegan and G. Hebson (2005), European Commission, 'Making work pay' debates from a gender perspective: A comparative review of some recent policy reforms in thirty European countries, Luxembourg, Office for Official Publications of the European Communities and Council of Europe (2005) *Parental Leave in Council of Europe Member States*, CDEG (2004) 14 Final, Strasbourg 2005.

			Fathers may take parental leave whilst mother is on maternity leave Benefit paid up to 4th birthday	workin g parents to reduce workin g hours		Since 2008 Lowest rates of parental benefit long leave (3-4 years) €265 (40% of overage earnings) Higher benefit if 2 year leave taken €428 Possibility of working without loosing the allowance Additional allowance for single parent families Disabled child allowance paid up to 7th birthday	time) Equal right for men and women from 2001 Parental leave can be take by beneficiaries (not only parents)	closes, is relocated or for disciplinary reasons related to the employee Normally leave taken up to 3 years (do not want to loose the job)
Hungary	None for non-insured: For insured:180 days in last 2 years	2 years	Up to child's 3rd birthday Parents of more than three children can take childcare leave in the form of reduced working time up to 4 hours per day (between 3rd-8thbirthday) Time at home considered as paid work. Disabled	Yes	No	In 2008 Non-insured parents: Flat rate state benefit €97 Insured: benefit of 70% of earnings up to €329 Paid by National Health insurance Uninsured parents over 12 months can work unlimited hours and receive state allowance	Family Lack of individual right for both mother and father Insured parents: up to child's first birthday only mother can take the leave	Dismissal whilst on leave prohibited No protection against dismissal in application for the leave No right to return to same/equivalent job Full employment status is guaranteed Seniority and social security rights preserved if in employment prior to leave Normally taken between

			children 14th birthday					18 months to 2years Well-educated mothers take shorter leave
Poland	6 Months	3 years Can be taken as one block or up to 4 separate blocks Up to 3months can be taken simultaneously Up to 6 years for disabled children	Child's 4th birthday (disabled 18th birthday)	Since 2003 Yes Right of parents to reduce workin g time up to 50%	Yes The leave can be taken in blocks of time (up to 4 blocks of time)	Unpaid <u>Means tested allowance</u> available for the poorest families up to €117 per month for 24 months (up to 36 months for multiple births and single parent families) 72 months for parents of disabled children Prior to 2004 Parents can work and claim parental allowance if working does not prevent them from caring responsibilities May work for a different employer	Family	Right to return to same or similar post on the same conditions Protection from dismissal (exemptions) Since 2004 the time on parental leave accounts as the time in employment
Slovakia	None	3rd birthday Disabled 6th birthday	Child's 3rd birthday	Yes	No	Means tested parental allowance €95 (2004) approx 55% of wage (used to be 90%)	Family	Same or similar post Protection from dismissal Special protection from dismissal to single parents (child under age of 3)

Table 14: Parental Leave Take UP in Czech Republic, Hungary, Poland and Slovakia[1376]

Country	Take up	Take up Men	Take up Women	Returning to work after the leave
Czech Republic	1971 Czechoslovakia	In 2001 0.77% 2003 0.99% 2006 1.4% Most fathers take up to 1 year	90% of mothers took childcare leave (partially paid) 99% of women take parental leave Most mothers take 2-3 years of the leave	23% of mothers do not resume work
Hungary	1970 2007		70% of mothers took childcare leave (paid 30% of overage wage) Leave mainly taken by mothers The average monthly numbers in 2007 were: 164,832, or 68.4 recipients per thousand women of fertile age, for GYES (non insured); 93,973, or 39 recipients per thousand women of fertile age, for GYED (insured); and 42,776, or 17.7 recipients per thousand of women of fertile age, for GYET. Well-educated take up to 3-6 months	Falling employment after parental leave to 45% Resistance of employer to employ the returning women 19% of mothers do not resume work

[1376] Compiled on the basis of the following sources of information MPiPS (Ministerswo Pracy i Polityki Spolecznej) (2006), *Aktywnosc kobiet na rynku pracy:* Badanie jakoscowe i ilosciowe, Warsaw: MPiPS., I. Kotowska, E. Slotwinska-Roslanowska, M. Styrc, and Zadrozna, A. (2007), *Sytuacja kobiet powracajacych na rynek pracy po przerwie spowodowanej macierzynstwem i opieka nad dzieckiem*, Raport 'Wieloaspektowa diagnoza sytuacji kobiet na rynku pracy', Warszawa. Department for Business Innovation & Skills (2009), *International Review of Leave Policies and Related Research 2009*, Employment Relations Research Series No. 102, September 2009. J. Plantenga and C. Remery (2005), European Commission, Reconciliation of work and private life: A comparative review of thirty European countries, Luxembourg, Office for Official Publications of the European Communities. European Foundation for the Improvement of Living and Working Conditions (2007), *Parental Leave in European Companies, Establishment Survey on Working Time 2004-2005*,Luxembourg 2007 pp.1-51.

			No data available on leave take up by men	
Poland	1972 1993-2000 drop from 366,100 to 138.800	2% men In 2007 2.5%	8.3% of mothers took childcare leave (unpaid) 50% mothers 40% of mothers takes 2-3 years In 2007 50% Leave is taken mainly by mothers with lowest qualifications 61% (also single mothers) 70% of those entitled to the allowance took leave 7% of mothers take leave in more than one block of time 93% take leave as a single block of time	13% of mothers do not resume work
Slovakia	1971 Czechoslovakia 2002		90% of mothers took childcare leave (partially paid) In 2002, 49,800 men and women took parental leave	

Table 15: Time off work for dependants in Czech Republic, Hungary, Poland and Slovakia[1377]

Country	Employee's entitlement covers	Age Limit	Allowance	Duration	Entitlement: Family or Individual	Employment protection
Czech Republic	Sick child/relative	1) Child up 10 year old Otherwise only if serous illness 2) Children up to 15 years old (single parents)	1) Sickness benefit 60% of daily earnings up to €29 per day Single parents 69% of daily wage per day 2) 60% of daily wage (base statutory sick pay)	1) Up to 9 days in one block of time No limits on frequency of taking leave. From 2007 parents can care in turns without loosing the allowance (can divide 9 days' block) Looking after a child up to 10 years old if a mother is recovering from birth of another child (new) 2) 16 days	Family	
Hungary	Sick child/relative	1) Up to 12 year olds 2) Adult	1) 70% of earnings 2) Means tested allowance	1)Child under one year – unlimited 12-35 months old – up 84 days per child per year 36-71 months old – 42 days 6 to 12 years – 14 days Lone parents double entitlement 2) Taking care of sick relative up to 2 years	Family	Job guarantee for all periods
Poland	Child/relative	1) Child up to 14 years old	1) Full pay	1) 2 days off work can be taken (no emergency needed or justification needed)	Family	Protection from dismissal

[1377] Various sources used Department for Business Innovation & Skills (2009), *International Review of Leave Policies and Related Research 2009*, Employment Relations Research Series No. 102, September 2009, J. Plantenga and Ch. Remery (2005), `Reconciliation of work and private life: a comparative review of thirty European countries. Synthesis report prepared by the Group of Experts on Gender, Social Inclusion and Employment for the Unit Equality for women and men` Directorate-General Employment, Social affairs and Equal opportunities European Commission. Final report, June 2005, EIRO national centres answers to study questionnaire on "Family and parental leave provision and collective bargaining" (November 2003). COM 2003 (358) final,

		2) Up to 8 years old (up to 14 years old disabled or chronically ill child) 3) 14 years or older 4) 18 years	2) 80% of earnings (sickness benefit) 3) 80% of earnings (sickness benefit)	Employee's right 2) Up to 60 days a year (regardless of the number of children): To cover unforeseen circumstances involving healthy children (up to 8 years old). This covers unforeseen disruption of childcare or school and illness of a spouse who provides care. Illness of a child up to 14 years old Time off can only be taken if other members of the household cannot provide care (except for children up to 2 years old). 3) Up to 14 days a year to provide personal care: illness of a child older than 14 years or other family member 4) Up to 3 years children with chronic illness or disability		
Slovakia	Child/relative	Up to 10 years old Adults	60% of earnings	Examination or treatment (up to 7 days a year) Accompanying a family member to a medical facility (up to 7 days a year) Death of a spouse or child (2 days off with full pay)	Family	Job guarantee

Table 16: Parental Leave Arrangements in Poland and the UK

Poland	UK
Reconciliation objective no expressly recognised.	Reconciliation objective no expressly recognised.
No special regime single parents. No special provisions for fathers.	No special regime single parents. No special provisions for fathers.
Limited to employees who are natural or adoptive parents[1378]	Limited to employees are natural or adoptive parents[1379]
6 months' employment required[1380]	12 months' continuous employment required with the same employer[1381]
Family right, fully transferable[1382]	An individual non-transferable right[1383]
Entitlement in relation to each birth regardless of the number of children.[1384]	Entitlement in relation to each child born during the same birth.[1385]
Duration: 3 years for each qualifying child[1386]	Duration: 13 weeks for each qualifying child.[1387]
Age limit: 4 years[1388]	Age limit: 5 years[1389]
Right to request reduced working time in lieu of childcare leave (part-time leave).[1390]	Part-time parental leave unavailable.
Up to 4 blocks of time[1391] (no right to four blocks of time)	Minimum duration: 1 week[1392] Maximum duration: 4 weeks in calendar year
Notice requirement: 2 weeks[1393]	Notice requirement: 21 days[1394]
No right to postpone childcare leave	Employer's right to postpone parental leave for up to 6 moths[1395]

[1378] Article 186 LC.
[1379] Reg 13(1)(b) MPLR.
[1380] Article 186(1) LC.
[1381] Regulation 13(1) MPLR.
[1382] Article 186(1) LC.
[1383] Regulation 14 MPLR.
[1384] Article 186(1) LC.
[1385] Regulation 14(1) MPLR.
[1386] Article 186(1) LC.
[1387] Regulation 14(1) MPLR.
[1388] Article 186(1) LC.
[1389] Regulation 15(1-4) MPLR.
[1390] Article 186(7) of LC.
[1391] Article 186 LC.
[1392] Regulation 14(4) MPLR.
[1393] Paragraph 1 of the Ministerial Order of 16 December 2003 on the detailed conditions for granting childcare leave of Rozporzadzenia Ministry Gospodarki, Pracy i Polityki Spolecznej of 16 December 2003 specifying the detailed conditions of granting parental leave, Dz.U nr 230, poz.2291.
[1394] Schedule 2(3) MPLR.
[1395] Schedule 2 (6)(c) MPLR.

Right to alter previously approved leave arrangements – 7 days notice needed.	No clear right to alter previously approved leave arrangements.
Unpaid leave	Unpaid leave
Rights acquired or in process of being acquired prior to leave are protected [1396]	Rights acquired or in process of being acquired prior to leave are protected [1397]
Protection from detriments or dismissal for reasons related to the application or the taking of the leave.[1398] The legislative protection from dismissal on grounds of redundancy, if the leave does not exceed three months' for employees working for companies employing more than twenty employees.	Protection from detriments or dismissal for reasons related to the application or the taking of the leave.[1399] Redundancy cannot be used as a valid reason for terminating employment contract with leave takers.
Right to return to the similar, equivalent job or the job corresponding with the employment contract.[1400] Right to premature return back to work should family circumstances changed (notice required)[1401] No right to return to part-time work.	Up to 4 weeks' leave during calendar year, right to return to the same job. Longer periods return to equivalent job.[1402] No right to an early return back to work should family circumstances changed. No right to return to part-time work

Table 17: Leave for Dependants in Poland and the UK

Poland	UK
Reconciliation objective no expressly recognised.	Reconciliation objective no expressly recognised.
No special regime single parents. No special provisions for fathers.	No special regime single parents. No special provisions for fathers.
Right to time off for children in relation to foreseeable matters.[1403] Right to time off for children and adult family members in relation to unforeseeable matters.[1404]	Right to time off for children and adult dependants.[1405]
*Restricted to employees #Right of insured workers	Restricted to employees
*#No qualifying employment requirement	No qualifying employment requirement
*Family right to time off. Duration: 2 days leave per calendar year (regardless of the number of children	Right to request leave Unspecified duration (reasonable duration)

[1396] Article 186 LC.
[1397] Section 77 ERA 1996.
[1398] Article 186(1) LC.
[1399] Regulation 19(1) MPLR.
[1400] Article 186(4) LC.
[1401] Article 186(3) LC.
[1402] Regulation 18 MPLR.
[1403] Article 188 LC.
[1404] Articles 32-35 Ministerial Order of 25 June 1999. .
[1405] Regulation 57(A) (B) ERA 1996.

in the family). #Family right to time off: - up to 60 working days per calendar year (children not older than 14 years). Children - up to 14 working days per calendar year (older children 14 years and adult family members)	
Age limit: *Children 14 years. # Children 14 years #No age limit for adult family members	No set age limit
*Right to time off in relation to any family matters involving children. Joyous events covered. #Children up to the age of 8, unforeseen events not related to health covered. #Children 8-14 years of age and adult family members, only unforeseen illness or accidents.	Leave limited to emergencies requiring employee's presence (subject to employer's scrutiny).
*Application: employer's permission needed to take leave. #Leave can be taken without any notice	Need to comply with the notice requirements.[1406]
*Paid leave #Compensated leave (80% of earnings).[1407]	Unpaid leave
#The time spent on leave considered as a justified absence,[1408] employment relationship with leave takers can be terminated by providing them with contractual notices.[1409]	Dismissal automatically unfair if for reasons related to exercising the right to time off for dependants.[1410]
No explicit right to return	No explicit right to return

*Leave in relation to children, covers foreseeable matters (Article 188 LC).
#Right of insured workers which covers unforeseeable matters involving children and adult family members (Articles 32-35 Ministerial Order of 25 June 1999).

[1406] Section 57A(2) ERA.
[1407] Article 35 Ministerial Order of 25 June 1999.
[1408] Ministerial Order of 20 December 1974 on justified absences from work and the rules on time off work, paragraph 10(2)(3) (Rozporządzenie Rady Ministrów z 20 grudnia 1974r w sprawie regulaminów pracy oraza zasad usprawiedliwiania nieobecności w pracy i udzielania zwolnień od pracy).
[1409] During the period of justified absence employment contracts cannot be terminated without giving a notice, exemptions insolvency or liquidation of the company (Article 41 LC). An employment contract cannot be terminated without a notice if the employee uses the entitlement to time off work in order to care for the child (Article 53(2) LC).
[1410] Section 99 ERA 1996 and Regulation 20 MPLR.