

EU GENDER EQUALITY LAW

TRIER 24-25 NOVEMBER 2014

RECONCILIATION OF WORK AND FAMILY LIFE:

(1) PROTECTIVE MEASURES FOR PREGNANT WORKERS

(2) MATERNITY LEAVE

(3) PARENTAL LEAVE

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A RELEVANT DIRECTIVES

(1) Pregnant Workers Directive (92/85/EEC)

Background

1. The genesis of the Pregnant Workers Directive was, broadly, the Union's commitment to social policy objectives, as can be seen from Article 118 of the Treaty of Rome:

"Without prejudice to the other provisions of this Treaty and in conformity with its general objectives, the Commission shall have the task of promoting close co-operation between Member States in the social field, particularly in matters relating to: -

- *employment;*
- *labour law and working conditions; -*
- *basic and advanced vocational training; -*
- *social security; -*
- *prevention of occupational accident, and diseases;*
- *occupational hygiene; -*
- *the right of association, and collective bargaining between employers and workers."*

2. Article 21 of the SEA introduced an obligation on Member States in relation to improvements in workers' health and safety. It provided, at Article 118a(1):

"Member States shall pay particular attention to encouraging improvements, especially in the working environment, as regards the health and safety of workers, and shall set as their objective the harmonization of conditions in this area, while maintaining the improvements made."

3. Article 33 of the TEU, replacing the first sub-paragraph of 118a(2) of the Treaty of Rome, provided competence to the European institutions to legislate for the purpose of setting minimum requirements for the harmonisation of conditions relating to health and safety of workers:

“ In order to help achieve the objective laid down in the first paragraph, the Council, acting in accordance with the procedure referred to in Article 189c and after consulting the Economic and Social Committee, shall adopt by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States.”

4. Article 16(1) of the Framework Health & Safety Directive 89/391/EEC (enacted pursuant to Article 118a) provided for the adoption of individual directives in the context of, amongst other things, work places and work equipment.

Substance

5. As its long title makes clear, the Pregnant Workers Directive was made pursuant to the Article 16(1) of the Framework Health & Safety Directive.
6. The long title and Article 1 of the Pregnant Workers Directive explain that its purpose is to encourage improvements in the safety and health at work of pregnant workers, workers who have recently given birth and those who are breastfeeding:
 - (a) The long title provides that *“on the introduction of measures to encourage improvements in the safety and health of pregnant workers and workers who have recently given birth or are breastfeeding”*;
 - (b) Article 1(1) provides that the purpose of the Directive is to *“encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or who are breastfeeding”* and it is a floor not a ceiling. Accordingly:

“may not have the effect of reducing the level of protection afforded to pregnant workers, workers who have recently given birth or who are breastfeeding as compared with the situation which exists in each Member State on the date on which this Directive is adopted.”

7. The Preamble emphasises that that the Community regards pregnant workers, workers who have recently given birth and workers who are breastfeeding as particularly vulnerable groups.
8. The relevant Recitals state:

8th Recital

“Whereas pregnant workers, workers who have recently given birth or who are breastfeeding must be considered a specific risk group in many respects, and measures must be taken with regard to their safety and health”;

9th Recital

“Whereas the protection of the safety and health of pregnant workers, workers who have recently given birth or workers who are breastfeeding should not treat women on the labour market unfavourably nor work to the detriment of directives concerning equal treatment for men and women”;

14th Recital

*“Whereas the **vulnerability** of pregnant workers, workers who have recently given birth or who are breastfeeding makes it necessary for them to be granted the right to maternity leave of at least 14 continuous weeks, allocated before and/or after confinement, and renders necessary the compulsory nature of maternity leave of at least two weeks, allocated before and/or after confinement” (Emphasis added)*

15th Recital

“Whereas the risk of dismissal for reasons associated with their condition may have harmful effects on the physical and mental state of pregnant workers, workers who have recently given birth or who are breastfeeding; whereas provision should be made for such dismissal to be prohibited”;

16th Recital

“Whereas measures for the organization of work concerning the protection of the health of pregnant workers, workers who have recently given birth or workers who are breastfeeding would serve no purpose unless accompanied by the maintenance of rights linked to the employment contract, including maintenance of payment and/or entitlement to an adequate allowance”;

17th Recital

“Whereas, moreover, provision concerning maternity leave would also serve no purpose unless accompanied by the maintenance of rights linked to the employment contract and or entitlement to an adequate allowance”;

18th Recital

“Whereas the concept of an adequate allowance in the case of maternity leave must be regarded as a technical point of reference with a view to fixing the minimum level of protection and should in no circumstances be interpreted as suggesting an analogy between pregnancy and illness”

9. It should be noted that the Recitals specifically link breastfeeding with the rights afforded by the Directive and the Equal Treatment Directives. The 14th Recital specifically links the vulnerability of workers covered by the Directive with the right to maternity leave.
10. Article 2(c) defines a “*worker who is breastfeeding*” as a “*worker who is breastfeeding within the meaning of national legislation and/or national practice and who informs her employer of her condition in accordance with that legislation and/or practice.*”
11. Article 8(1), dealing with Maternity Leave, specifies that Member States have an obligation “*to ensure that workers within the meaning of Article 2 are entitled to a continuous period of maternity leave of a least 14 weeks allocated before and/or after confinement in accordance with national legislation and/or practice.*” This includes women who are breastfeeding.
12. Article 11(2)(b) provides that Member States must ensure the “*maintenance of a payment to, and/or entitlement to an adequate allowance for, workers within the meaning of Article 2.*”
13. Article 10, dealing with dismissal, states:

“Prohibition of dismissal

In order to guarantee workers, within the meaning of Article 2, the exercise of their health and safety protection rights as recognized under this Article, it shall be provided that:

1. Member States shall take the necessary measures to prohibit the dismissal of workers, within the meaning of Article 2, during the period from the beginning of their pregnancy to the end of the maternity leave referred to in Article 8 (1), save in exceptional cases not connected with their condition which are permitted under national legislation and/or practice and, where applicable, provided that the competent authority has given its consent;

2. if a worker, within the meaning of Article 2, is dismissed during the period referred to in point 1, the employer must cite duly substantiated grounds for her dismissal in writing;

3. Member States shall take the necessary measures to protect workers, within the meaning of Article 2, from consequences of dismissal which is unlawful by virtue of point 1”

14. Article 11, dealing with health risks, states:

“Article 11 of Directive 92/85 , entitled “Employment rights”, reads as follows

“In order to guarantee workers within the meaning of Article 2 the exercise of their health and safety protection rights as recognised in this Article, it shall be provided that:

1. in the cases referred to in Articles 5, 6 and 7, the employment rights relating to the employment contract, including the maintenance of a payment to, and/or entitlement to an adequate allowance for, workers within the meaning of Article 2, must be ensured in accordance with national legislation and/or national practice;

2. in the case referred to in Article 8, the following must be ensured:

(a) the rights connected with the employment contract of workers within the meaning of Article 2, other than those referred to in point (b) below;

(b) maintenance of a payment to, and/or entitlement to an adequate allowance for, workers within the meaning of Article 2;

3. the allowance referred to in point 2(b) shall be deemed adequate if it guarantees income at least equivalent to that which the worker concerned would receive in the event of a break in her activities on grounds connected with her state of health, subject to any ceiling laid down under national legislation;
4. Member States may make entitlement to pay or the allowance referred to in points 1 and 2(b) conditional upon the worker concerned fulfilling the conditions of eligibility for such benefits laid down under national legislation. These conditions may under no circumstances provide for periods of previous employment in excess of 12 months immediately prior to the presumed date of confinement.”

(2) Recast Directive (2006/54/EC)

Background

15. The Recast Directive was made pursuant to powers in Article 141(3) EC (ex Article 119 Treaty of Rome, now Article 157 TFEU), which requires the European Parliament and the Council to adopt measures:

“... to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation...”

16. Article 141(4) EC affirms the need to ensure *“full equality in practice between men and women in working life”*. That sub-Article was added to Article 141 EC as a result of the Treaty of Amsterdam, and in recognition of the requirements of Article 16 of the *Community Charter of the Fundamental Social Rights of Workers*. Article 16 of that Charter, under the heading *“Equal treatment for Men and Women”*, declares that:

“Equal treatment for men and women must be assured. Equal opportunities for men and women must be developed.

To this end, action should be intensified wherever necessary to ensure the implementation of the principle of equality between men and women as regards in particular access to employment, remuneration, working conditions, social protection, education, vocational training and career development. Measures should also be developed enabling men and women to reconcile their occupational and family obligations.”

17. The Recast Directive must be viewed in the context of other directives concerning equal treatment and the burden of proof. These are dealt with in the following paragraphs, in chronological order.

Equal Treatment Directive (76/207/EEC)

18. Council Directive 76/207/EEC was made so as to enact the principle of equal treatment for men and women. It did not define the concept of direct discrimination. However, at Article 2(1) it is said that such a principle shall mean there shall be:

“... no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status”.

i. Burdon of Proof Directive (97/80/EC)

19. Article 1 of Directive 97/80 explains that its purpose is to ensure that the measures taken by the Member States to implement the principle of equal treatment are made more effective, in order to enable all persons who consider themselves wronged because the principle of equal treatment has not been applied to them to have their rights asserted by judicial process after possible recourse to other competent bodies.
20. Recital 2 of Directive 97/80/EC notes that the *Community Charter of the Fundamental Social Rights of Workers* recognises the importance of combating every form of discrimination, including discrimination on grounds of sex, colour, race, opinions and belief.

21. Recital 9 acknowledges that Council Directive 92/85/EC introduces measures to encourage improvements in the safety and health at work of pregnant workers but states that *“that Directive should not work to the detriment of [Directives such as 76/207/EEC] on equal treatment”*. Accordingly, the protections afforded by the Pregnant Workers Directive are in addition to those afforded by the Recast Directive.

Framework Directive (2000/78/EC)

22. The purpose of the Framework Directive was *“to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.”*
23. Article 2 states:

“Article 2
Concept of discrimination
1. For the purposes of this Directive, the 'principle of equal treatment' shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.
2. For the purposes of paragraph 1:
(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1”

Equal Treatment Directive (2002/73/EC)

24. Council Directive 2002/73/EC amended Council Directive 76/207/EEC¹.

¹ Council Directive 76/207/EEC was repealed on 15 August 2009, following the coming into force of the Recast Directive.

25. Recital 6 of Directive 2002/73/EC notes that Directive 76/207 does not define the concept of direct discrimination. Recital 6 observes that, on the basis of Article 13 of the Treaty, the Race Directive and Framework Directive have been adopted. Recital 6 concludes:

*"It is thus appropriate to insert definitions **consistent with these Directives in respect of sex**" (emphasis added).*

26. The definitions of direct sex discrimination and harassment introduced by Directive 2002/73/EC are therefore substantively the same as the definitions of harassment and direct discrimination on grounds of (a) race or ethnic origin in the Race Directive, and (b) religion or belief, disability, age or sexual orientation in the Framework Directive.
27. The definitions of direct sex discrimination and harassment in the Recast Directive are also in substantively the same terms as those in the Framework Directive and Race Directive.
28. Recital 12 expressly provides that the provisions of Directive 2002/73/EC were "*without prejudice*" to the Pregnant Workers Directive "*which aims to ensure the protection of the physical and mental state of women who are pregnant, women who have recently given birth or women who are breastfeeding.*" Recital 12 recalls that the Pregnant Workers Directive requires that the protection of the safety and health of workers who have recently given birth or workers who are breastfeeding "*should not involve treating women who are on the labour market unfavourably nor work to the detriment of Directives concerning equal treatment for men and women.*"

Equal Treatment Directive (2004/113/EC)

29. Directive 2004/113/EC was enacted to implement equal treatment between men and women in the access to and supply of goods and services. It was made having regard to

the Treaty establishing the European Community, and in particular Article 13(1) thereof (rather than Article 141(3)). (It will be recalled that Article 13 EC empowers the Council to take appropriate action to combat discrimination “*based on sex, racial and ethnic origin, religion or belief, disability, age or sexual orientation*”.)

30. The definition of direct discrimination at Article 2(a) of Directive 2004/113/EC is identical to Article 2(1)(a) of the Recast Directive. Protection is given from less favourable treatment “*on grounds of sex*”, rather than on grounds of the sex of the victim (for example, “*on grounds of her sex*”).
31. Article 2(c) of Directive 2004/113/EC defines harassment in identical terms to Article 2(1)(c) of the Recast Directive.
32. (Directive 2010/41/EU postdates the Recast Directive. It was made on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity, and repeals Council Directive 86/613/EEC. It, like the other directives referenced above, also defines “*direct discrimination*” and “*harassment*” in terms identical to those in the Recast Directive.)
33. The above instruments reflect the progressive realisation of rights for women in the workplace directed at securing substantive equal treatment. This has been achieved by the creation of prohibitions against discrimination and protections against harm to women who have given birth and/or who are breastfeeding, and their babies.

Substance

34. The Recast Directive came into force on 15 August 2006 and the deadline for transposition was 15 August 2008.

35. The Recitals assist in showing the width of the protection which the Recast Directive is meant to provide².
36. As Recital 1 makes clear, the Recast Directive draws together into a single text various Directives, which had as their purpose, the implementation of the principle of equal treatment between men and women. Recital 1 also explains that the Recast Directive implements “*certain developments arising out of the case law of the Court of Justice*”.
37. Recital 2 reaffirms that equality between men and women is “a fundamental principle of Community Law under Article 2 and Article 3(2) of the Treaty and the case-law of the Court of Justice”. Also, that those Treaty provisions proclaim equality between men and women as a “*task*” and “*aim*” of the Community and impose a positive obligation to promote it in all its activities.
38. At Recital 3, it is noted that the Court of Justice has held that the scope of the principle of equal treatment for men and women:

“...cannot be confined to the prohibition of discrimination based on the fact that a person is of one or other sex”.

Hence the principle must also apply to discrimination arising from gender reassignment -in accordance with decisions of the Court of Justice in cases such as *P. v. S. and another* (Case C-13/94).

39. At Recital 5 of the Recast Directive, reference is made to Article 21 of the *Charter of Fundamental Rights of the European Union*, (2000/C 364/01), which it is said prohibits “*any discrimination on grounds of sex*”.

² The Court of Justice has noted the importance of recitals in the proper interpretation of Directives, for example in *Sonia Chacon Navas v. Eurest Colectividades SA* (Case C-13/05).

40. Recital 5 also refers to Article 23 of that Charter. (It is to be recalled that Article 23 sets out the need to ensure “equality between men and women in all areas”, and affirms that the principle of equality “shall not prevent the maintenance or adoption of measures providing for specific advantages in the favour of the under-represented sex³”.)

41. Recital 26 refers to the Resolution of 29 June 2000 of the Council and of the Ministers for Employment and Social Policy. That Resolution, at Recital 5, recognises that both men and women, without discrimination on grounds of sex, have a right to reconcile family and working life. Recital 11 of that Resolution recognises that:

...the beginning of the 21st century is a symbolic moment to give shape to the new social contract on gender, in which the de facto equality of men and women... will be socially accepted as a condition for democracy, a prerequisite for citizenship and a guarantee of individual autonomy and freedom, and will be reflected on all European Union policies...

42. Certain Recitals expressly concern themselves with the particular protection to be afforded to women, and to women who are pregnant. For example:

(a) Recital 23 notes that it is clear from the case-law of the Court of Justice that unfavourable treatment of a woman related to pregnancy or maternity constitutes direct discrimination on grounds of sex. It is noted that “such treatment should therefore be expressly covered by the Recast Directive.”

(b) Recital 24 notes the Court of Justice’s consistent recognition of the legitimacy, as regards the principle of equal treatment, of protecting a woman’s biological condition during pregnancy and maternity, and of introducing maternity protection as a means of achieving substantive equality. It is therefore noted that the Recast Directive should be without prejudice to the health and safety measures introduced by Council Directive 92/85/EEC for pregnant workers and those who have recently given birth.

³ See further *Association Belge des Consommateurs Test-Achats v. Council des Ministres* (C-236/09), wherein it was opined at [AG29] that the principle of equal treatment and non-discrimination between men and women “is now specifically laid down as a fundamental right in Art 21(1) and Art 23(1) of the Charter”, and that “there is no fundamental difference... between the concepts “principle of equal treatment”, “principle of non-discrimination” and “prohibition of discrimination” in such context”.

(c) Recital 25 notes that it is appropriate to make express provision for the employment rights of women on, and returning from, maternity leave.

43. The definition of direct discrimination under the Recast Directive in Article 2(1)(a) is as follows:

*"... where one person is treated less favourably **on grounds of sex** than another is, has been or would be treated in a comparable situation" (emphasis added).*

44. Indirect discrimination is defined under Article 2(1)(b) as:

"... where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary."

45. Harassment is defined under Article 2(1)(c) as:

*"... where unwanted conduct **relating to the sex of a person** occurs with the purpose or effect of violating the dignity of **a person**, and of creating an intimidating, hostile, degrading, humiliating or offensive environment" (Emphasis added).*

46. Accordingly, women who have recently given birth and/or are breastfeeding are entitled to both the protection of the Pregnant Workers Directive and the non-discrimination rights afforded by the Recast Directive, as is made clear by Recitals 23 and 24 of the Recast Directive.

47. Article 2(2) provides that for the purposes of the Recast Directive, discrimination includes:

- a) *harassment and sexual harassment, as well as any less favourable treatment based on **a person's** rejection of or submission to such conduct;*
- b) *instruction to discriminate against persons on grounds of sex;*
- c) *any less favourable treatment **of a woman related** to pregnancy or maternity leave within the meaning of Directive 92/85/EEC (emphasis added).*

48. Article 2(2) of the Recast Directive includes examples, rather than a definitive list, of what constitutes discrimination. The example at Article 2(2)(c) is doubtless provided in accordance with the requirements of Recital 23 of the Recast Directive.
49. As regards Article 2(2)(c) of the Recast Directive, it is submitted that, in appropriate circumstances, the partner of a pregnant woman, or someone else who is associated with her, may also claim protection from less favourable treatment “*related to pregnancy*”.
50. Article 14(1)(c) prohibits “*direct or indirect discrimination on grounds of sex*” in relation to “*employment and working conditions, including dismissals, as well as pay as provided for in Article 141 of the Treaty.*”

(3) Parental Leave Directive (2010/18/EU)

51. Article 1 states:

“Article 1

This Directive puts into effect the revised Framework Agreement on parental leave concluded on 18 June 2009 by the European cross-industry social partner organisations (BUSINESSEUROPE, UEAPME, CEEP and ETUC), as set out in the Annex.”

52. Article 3 states that the deadline for compliance is 8 March 2012, although Members States can have a one year grace period.
53. The Annex contains 24 “General Considerations”, the most important of which are:

*“2. Having regard to Articles 137(1)(c) and 141 of the EC Treaty ** and the principle of equal treatment (Articles 2, 3 and 13 of the EC Treaty ***) and the secondary legislation based on this, in particular Council Directive 75/117/EEC on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women 1; Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the*

safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding 2; Council Directive 96/97/EC amending Directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes 3; and Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) 4;

3. Having regard to the Charter of Fundamental Rights of the European Union of 7 December 2000 and Articles 23 and 33 thereof relating to equality between men and women and reconciliation of professional, private and family life;

5. Having regard to the objective of the Lisbon strategy on growth and jobs of increasing overall employment rates to 70 %, women's employment rates to 60 % and the employment rates of older workers to 50 %; to the Barcelona targets on the provision of childcare facilities; and to the contribution of policies to improve reconciliation of professional, private and family life in achieving these targets;

6. Having regard to the European social partners' Framework of Actions on Gender Equality of 22 March 2005 in which supporting work-life balance is addressed as a priority area for action, while recognising that, in order to continue to make progress on the issue of reconciliation, a balanced, integrated and coherent policy mix must be put in place, comprising of leave arrangements, working arrangements and care infrastructures;

7. Whereas measures to improve reconciliation are part of a broader policy agenda to address the needs of employers and workers and improve adaptability and employability, as part of a flexicurity approach;

8. Whereas family policies should contribute to the achievement of gender equality and be looked at in the context of demographic changes, the effects of an ageing population, closing the generation gap, promoting women's participation in the labour force and the sharing of care responsibilities between women and men;

11. Whereas certain aspects need to be adapted, taking into account the growing diversity of the labour force and societal developments including the increasing diversity of family structures, while respecting national law, collective agreements and/or practice;

12. Whereas in many Member States encouraging men to assume an equal share of family responsibilities has not led to sufficient results; therefore, more effective measures should be taken to encourage a more equal sharing of family responsibilities between men and women;

13. Whereas many Member States already have a wide variety of policy measures and practices relating to leave facilities, childcare and flexible working arrangements, tailored to the needs of workers and employers and aiming to support parents in reconciling their professional, private and family life; these should be taken into account when implementing this agreement;

15. Whereas this agreement is a framework agreement setting out minimum requirements and provisions for parental leave, distinct from maternity leave, and for time off from work on grounds of force majeure, and refers back to Member States and social partners for the establishment of conditions for access and modalities of application in order to take account of the situation in each Member State;

16. Whereas the right of parental leave in this agreement is an individual right and in principle non-transferable, and Member States are allowed to make it transferable. Experience shows that making the leave non-transferable can act as a positive incentive for the take up by fathers, the European social partners therefore agree to make a part of the leave non-transferable;

17. Whereas it is important to take into account the special needs of parents with children with disabilities or long term illness;

18. Whereas Member States should provide for the maintenance of entitlements to benefits in kind under sickness insurance during the minimum period of parental leave;

19. Whereas Member States should also, where appropriate under national conditions and taking into account the budgetary situation, consider the maintenance of entitlements to relevant social security benefits as they stand during the minimum period of parental leave as well as the role of income among other factors in the take-up of parental leave when implementing this agreement;

20. Whereas experiences in Member States have shown that the level of income during parental leave is one factor that influences the take up by parents, especially fathers;

21. Whereas the access to flexible working arrangements makes it easier for parents to combine work and parental responsibilities and facilitates the reintegration into work, especially after returning from parental leave;

22. Whereas parental leave arrangements are meant to support working parents during a specific period of time, aimed at maintaining and promoting their continued labour market participation; therefore, greater attention should be paid to keeping in contact with the employer during the leave or by making arrangements for return to work;

23. Whereas this agreement takes into consideration the need to improve social policy requirements, to enhance the competitiveness of the European Union economy and to avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium sized undertakings;

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24. Whereas the social partners are best placed to find solutions that correspond to the needs of both employers and workers and shall therefore play a special role in the implementation, application, monitoring and evaluation of this agreement, in the broader context of other measures to improve the

reconciliation of professional and family responsibilities and to promote equal opportunities and treatment between men and women.”

54. Clause 1 (purpose and scope)

*“2. This agreement applies to all workers, men and women, who have an employment contract or employment relationship as defined by the law, collective agreements and/or practice in force in each Member State.
3. Member States and/or social partners shall not exclude from the scope and application of this agreement workers, contracts of employment or employment relationships solely because they relate to part-time workers, fixed-term contract workers or persons with a contract of employment or employment relationship with a temporary agency.”*

55. Clause 2 (parental leave)

*“1. This agreement entitles men and women workers to an individual right to parental leave on the grounds of the birth or adoption of a child to take care of that child until a given age up to eight years to be defined by Member States and/or social partners.
2. The leave shall be granted for at least a period of four months and, to promote equal opportunities and equal treatment between men and women, should, in principle, be provided on a non-transferable basis. To encourage a more equal take-up of leave by both parents, at least one of the four months shall be provided on a non-transferable basis. The modalities of application of the non-transferable period shall be set down at national level through legislation and/or collective agreements taking into account existing leave arrangements in the Member States.”*

56. Clause 3 (modalities of operation)

*“1. The conditions of access and detailed rules for applying parental leave shall be defined by law and/or collective agreements in the Member States, as long as the minimum requirements of this agreement are respected. Member States and/or social partners may, in particular:
(a) decide whether parental leave is granted on a full-time or part-time basis, in a piecemeal way or in the form of a time-credit system, taking into account the needs of both employers and workers;
(b) make entitlement to parental leave subject to a period of work qualification*

and/or a length of service qualification which shall not exceed one year; Member States and/or social partners shall ensure, when making use of this provision, that in case of successive fixed term contracts, as defined in Council Directive 1999/70/EC on fixed-term work, with the same employer the sum of these contracts shall be taken into account for the purpose of calculating the qualifying period;”

(c) define the circumstances in which an employer, following consultation in accordance with national law, collective agreements and/or practice, is allowed to postpone the granting of parental leave for justifiable reasons related to the operation of the organisation. Any problem arising from the application of this provision should be dealt with in accordance with national law, collective agreements and/or practice;

(d) in addition to (c), authorise special arrangements to meet the operational and organisational requirements of small undertakings.

2. Member States and/or social partners shall establish notice periods to be given by the worker to the employer when exercising the right to parental leave, specifying the beginning and the end of the period of leave. Member States and/or social partners shall have regard to the interests of workers and of employers in specifying the length of such notice periods.

3. Member States and/or social partners should assess the need to adjust the conditions for access and modalities of application of parental leave to the needs of parents of children with a disability or a long-term illness.”

57. Clauses 5 and 6 (Employment rights and non-discrimination/Return to Work

“Clause 5: Employment rights and non-discrimination

1. At the end of parental leave, workers shall have the right to return to the same job or, if that is not possible, to an equivalent or similar job consistent with their employment contract or employment relationship.

2. Rights acquired or in the process of being acquired by the worker on the date on which parental leave starts shall be maintained as they stand until the end of parental leave. At the end of parental leave, these rights, including any changes arising from national law, collective agreements and/or practice, shall apply.

3. Member States and/or social partners shall define the status of the employment contract or employment relationship for the period of parental leave.

4. In order to ensure that workers can exercise their right to parental leave, Member States and/or social partners shall take the necessary measures to protect workers against less favourable treatment or dismissal on the grounds of an application for, or the taking of, parental leave in accordance with national law, collective agreements and/or practice.

5. All matters regarding social security in relation to this agreement are for

consideration and determination by Member States and/or social partners according to national law and/or collective agreements, taking into account the importance of the continuity of the entitlements to social security cover under the different schemes, in particular health care.

All matters regarding income in relation to this agreement are for consideration and determination by Member States and/or social partners according to national law, collective agreements and/or practice, taking into account the role of income - among other factors - in the take-up of parental leave.

Clause 6: Return to work

1. In order to promote better reconciliation, Member States and/or social partners shall take the necessary measures to ensure that workers, when returning from parental leave, may request changes to their working hours and/or patterns for a set period of time. Employers shall consider and respond to such requests, taking into account both employers' and workers' needs. The modalities of this paragraph shall be determined in accordance with national law, collective agreements and/or practice.

2. In order to facilitate the return to work following parental leave, workers and employers are encouraged to maintain contact during the period of leave and may make arrangements for any appropriate reintegration measures, to be decided between the parties concerned, taking into account national law, collective agreements and/or practice.”

58. Clause 7 deals with time off from work on grounds of Force Majeure. The right is for time off for *“urgent family reasons in cases of sickness or accident making the immediate presence of the worker indispensable”*.

B. APPLICABLE EUROPEAN UNION LAW PROVISIONS

(1) Treaty measures and gender based discrimination

59. Treaty measures addressing equality and, in particular, gender discrimination have been in place since 1957: see Article 119 of the Treaty of Rome.
60. Both the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) (as consolidated following the amendments made by the Treaty

of Lisbon), which came into force on 1 December 2009, have emphasised the importance of equality and, in particular, gender equality.

TEU

61. The TEU:

(a) has identified the value of equality as a founding value of the Union (Article 2):

Article 2: *“The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Members States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”*

(b) provides, at Article 3:

Article 3: *“The Union ...shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.”*

TFEU

62. The TFEU provides at Articles 8 and 10:

Article 8: *“In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women...”*

Article 10: *“In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation”.*

63. It provides, at Article 157(3), that *“measures shall be adopted”* to ensure *“the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value”* (Article 157(3)).

64. Further, Article 157⁴, TFEU provides for the EU's gender equality guarantee (in the context of employment, pay and benefits) pursuant to which the Recast Directive was enacted. Article 157 has both vertical and horizontal direct effect (*Defrenne v. SABENA (No.2)* Case 43/75 [1976] ECR I-455) and as such binds the domestic courts and tribunals and as a matter of EU and domestic law (section 2, European Communities Act 1972) takes precedence over any incompatible domestic law.

(2) The Charter

65. The Charter is recognised as having the same legal value as the Treaties (see Article 6 TEU).

66. The relevant provisions of the Charter concerning issues of dignity, equality and family, are:

- a) Article 1, concerning human dignity, provides that *"Human dignity is inviolable. It must be respected and protected."*
- b) Article 7, concerning respect for private and family life, states: *"Everyone has the right to respect for his or her private and family life, home and communications."*
- c) Article 9, concerning the right to marry and right to found a family, states: *"The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights."*
- d) Article 20, concerning equality before the law, states *"Everyone is equal before the law."*
- e) Article 21(1), concerning non-discrimination, states *"Any discrimination based on any ground such as sex,... genetic features..., ..., birth,shall be prohibited."*
- f) Article 23, concerning equality between men and women, states *"Equality between men and women must be ensured in all areas, including employment, work and pay" and "The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex."*

⁴ At the time of enactment of the Recast Directive, the relevant provision was numbered Article 141.

g) Article 24, concerning the rights of the child, states “(1) *Children shall have the right to such protection and care as is necessary for their well-being ...*(2) *In all actions relating to children, whether taken by public authorities or private institutions, the child’s best interests must be a primary consideration ...* (3) *Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.*”

67. The Charter is binding in EU and domestic law (in the sphere of EU law) (Article 6, TEU and *NS v Secretary of State for the Home Department* C-411/10).

(3) European Convention on Human Rights

68. The Union is to accede to the European Convention on Human Rights. Further, the rights guaranteed by the Convention constitute general principles of the Union’s law (see Article 6 TEU).

“2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union’s competences as defined in the Treaties.
3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.”

69. Both Article 8 and Article 14 of the European Convention on Human Rights are engaged.

“Article 8
1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and

freedoms of others.”

“Article 14

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

70. The European Convention on Human Rights is binding in EU and domestic law (in the sphere of EU law) (Article 6, TEU).

(4) International Covenant on Economic, Social and Cultural Rights

71. Article 10 states:

“The States Parties to the present Covenant recognize that:

1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.

*2. **Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.***

3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation.....”

(5) Convention on all forms of Elimination of Discrimination Against Women (CEDAW)

72. Articles 1, 2, 5 and 11 state:

“Article 1

For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of

sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Article 2

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

(a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;

(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;

(c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;

(d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;

(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;

(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;

(g) To repeal all national penal provisions which constitute discrimination against women.

Article 5

States Parties shall take all appropriate measures:

(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;

(b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.

Article 11

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of

equality of men and women, the same rights, in particular:

(a) *The right to work as an inalienable right of all human beings;*

(b) *The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;*

(c) *The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;*

(d) *The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;*

(e) *The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;*

(f) *The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.*

2. *In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:*

(a) *To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;*

(b) *To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;*

(c) *To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities;*

(d) *To provide special protection to women during pregnancy in types of work proved to be harmful to them.*

3. *Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary."*

(6) United Nations Convention on the Rights of the Child (UNCRC)

73. The relevant Convention rights must be read consistently with the UNCRC. In particular: Article 3 UNCRC provides that children are entitled to such care as is necessary for their well-being and Article 9 which states that children should not be separated from their parents.

“Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

Article 9

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.”

C DEVELOPMENT OF CONCEPTS

(1) Protective measures for pregnant workers

74. There are a number of themes that characterise the thinking of the CJEU in relation to mothers. These are:

- (1) the development of the concept relating to giving special protection for women in view of the harmful effects that a risk of dismissal may have on their physical and

- mental state (“the **Special Protection development**”). It is to be noted that this concept is aimed at biology and is distinct from the following concept.
- (2) the development of the concept of the protection of the special relationship between a mother and child during the maternity leave period (“the **Special Relationship development**”);
 - (3) the development of the concept of maternity protection measures as a means of providing substantive equality between men and women (“the **Substantive Equality development**”).⁵

Special Protection

75. It has long been recognised that special protection must be afforded to women during and after pregnancy.
76. As was held by the Court of Justice in (*Webb v. Emo Air Cargo*, Directive 76/207/EEC Case C-32/93)⁶ the core principles of equal treatment include the need to protect:

“20. ... a woman’s biological condition during and after pregnancy and... the special relationship between a woman and her child over the period which follows pregnancy and childbirth...”⁷

77. The special protection accorded to pregnant workers is, in the context of pregnancy dismissal, evidenced by the CJEU’s description of the legislative intention, in *Webb* (C-32/93) at §21 as follows:

⁵ It should be noted that breastfeeding workers are entitled to protection not just in relation to Maternity Leave (Article 8), Dismissal (Article 10) and Employment Rights (Article 11) but also in relation to night work, risk assessments and exposure to physical, biological and chemical agents pursuant to Articles 4-7 and Annex I and Annex II of the Pregnant Workers Directive. Employers are required to take action to avoid such hazards: see *Brugsforeninger* (Case C-66/96 [1998] ECR I-7327).

⁶ Directive 76/207/EEC forms part of the various provisions which were recast and brought together in a single text by the Recast Directive.

⁷ [1994] 2 CMLR 729, p.10

“In view of the harmful effects which the risk of dismissal may have on the physical and mental state of women who are pregnant, have recently given birth or are breastfeeding, including the particularly serious risk that pregnant women may be prompted voluntarily to terminate their pregnancy, the Community legislature subsequently provided, ... for special protection to be given to women, by prohibiting dismissal during the period from the beginning of their pregnancy to the end of their maternity leave.”

78. This view was endorsed by the Court in *Brown* C-394/96⁸ at §18:

*“18 It was precisely in view of the harmful effects which the risk of dismissal may have on the physical and mental state of women who are pregnant, women who have recently given birth or women who are breastfeeding, including the particularly serious risk that pregnant women may be prompted voluntarily to terminate their pregnancy, that the Community legislature, pursuant to Article 10 of Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive adopted within the meaning of Article 16(1) of Directive 89/391/EEC) (OJ 1992 L 348, p. 1), which was to be transposed into the laws of the Member States no later than two years after its adoption, provided for special protection to be given to women, by prohibiting dismissal during the period from the beginning of their pregnancy to the end of their maternity leave. Article 10 of Directive 92/85 provides that there is to be no exception to, or derogation from, the prohibition of dismissal of pregnant women during that period, save in exceptional cases not connected with their condition (see, in this regard, paragraphs 21 and 22 of the judgment in *Webb*, cited above).”*

79. Similarly, in *Tele Danmark* (C-109/00)⁹, the Court said:

“26 It was also in view of the risk that a possible dismissal may pose for the physical and mental state of pregnant workers, workers who have recently given birth or those who are breastfeeding, including the particularly serious risk that they may be encouraged to have abortions, that the Community legislature, in Article 10 of Directive 92/85, laid down special protection for those workers by prohibiting dismissal during the period from the start of pregnancy to the end of maternity leave.”

⁸ *Brown v Rentokil Limited* [1998] 2 CMLR 1049.

⁹ *Tele Danmark A/S v Handells –og Kontorfunktion AERernes Forbund I Danmark (acting on behalf of Brandt-Nielsen)* [2002] 1 CMLR 5

80. In *McKenna* C-191/03¹⁰, the Court said this at §§47-48:

“47. The Court accordingly ruled that protection against dismissal had to be accorded to women not only during maternity leave but also for the entire duration of their pregnancy, after stressing that the risk of dismissal may detrimentally affect the physical and mental state of female workers who are pregnant or have recently given birth, including the particularly serious risk that pregnant women may be prompted voluntarily to terminate their pregnancy. The Court held that dismissal of a female worker during pregnancy for absences due to incapacity for work resulting from her pregnancy is linked to the occurrence of risks inherent in pregnancy and must therefore be regarded as essentially based on the fact of pregnancy. From this the Court concluded that such a dismissal can affect only women and therefore constitutes direct discrimination on grounds of sex (Brown, cited above, paragraphs 18 and 24).

“48. In view of the harmful effects which the risk of dismissal may have on the physical and mental state of pregnant workers, workers who have recently given birth or those who are breastfeeding, Article 10 of Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) (OJ 1992 L 348, p. 0001) laid down a prohibition of dismissal during a period from the beginning of pregnancy to the end of maternity leave.”

81. In *Paquay* (C-460/06)¹¹, the Court said at §30:

“30. It is precisely in view of the harmful effects which the risk of dismissal may have on the physical and mental state of women who are pregnant, have recently given birth or are breastfeeding, including the particularly serious risk that pregnant women may be prompted voluntarily to terminate their pregnancy, that, pursuant to Article 10 of Directive 92/85, the Community legislature subsequently laid down special protection for women, by prohibiting dismissal during the period from the beginning of their pregnancy to the end of their maternity leave (Case C-32/93 Webb [1994] ECR I-3567, paragraph 21; Brown, paragraph 18; C-109/00 Tele Danmark [2001] ECR I-6993, paragraph 26; and McKenna, paragraph 48).”

82. In *Mayr* (C-506/06)¹², the Court noted:

¹⁰ *Northwestern Health Board v McKenna* [2006] 1 CMLR 6

¹¹ *Paquay v Societe D’Architectes Hoet + Minne SPRL* [2008] 1 CMLR 12

¹² *May Sabine Mayr v Backerei und Konditorei Gerhard Flockner OHG* [2008] 2 CMLR 27

“34. It is precisely in view of the harmful effects which the risk of dismissal may have on the physical and mental state of women who are pregnant, have recently given birth or are breastfeeding, including the particularly serious risk that pregnant women may be prompted voluntarily to terminate their pregnancy, that, pursuant to Article 10 of Directive 92/85, the Community legislature laid down special protection for women, by prohibiting dismissal during the period from the beginning of their pregnancy to the end of their maternity leave (Case C-32/93 Webb [1994] ECR I-3567, paragraph 21; Brown, paragraph 18; Case C-109/00 Tele Danmark [2001] ECR I-6993, paragraph 26; McKenna, paragraph 48; and Paquay, paragraph 30)”.

(2) Protection of the special relationship between mother and child

83. The purpose of the protection provided by the Pregnant Workers Directive is to protect the special relationship between a mother and child during the maternity leave period.

84. In *Hofmann* (Case 184/83)¹³, the Court opined, at §25:

*“25 It should further be added, with particular reference to paragraph (3), that, by reserving to Member States the right to retain, or introduce provisions which are intended to protect women in connection with ' ' pregnancy and maternity ' ' , the Directive recognizes the legitimacy, in terms of the principle of equal treatment, of protecting a woman ' s needs in two respects. First, it is legitimate to ensure the protection of a woman ' s biological condition during pregnancy and thereafter until such time as her physiological and mental functions have returned to normal after childbirth; secondly, it is legitimate to protect the **special relationship between a woman and her child over the period which follows pregnancy and childbirth**, by preventing that relationship from being disturbed by the multiple burdens which would result from the simultaneous pursuit of employment.” (Emphasis Added)*

85. In *Habermann-Beltermann* (Case C-421/92), the Court said, at §§21-22:

“21 In the first place, so far as concerns the purpose of Article 2(3) of the directive, by reserving to Member States the right to retain or introduce provisions which are intended to protect women in connection with "pregnancy

¹³ Hofman v Barmer Ersatzkasse [1986] 1 CMLR 242 at 264-265

*and maternity", that article recognizes the legitimacy, in terms of the principle of equal treatment, first, of protecting a woman's biological condition during and after pregnancy and, second, of protecting **the special relationship between a woman and her child over the period which follows pregnancy and childbirth** (see the judgment in Case 184/83 Hofmann v Barmer Ersatzkasse [1984] ECR 3047, paragraph 25).*

22 As the Court has held (see the Hofmann judgment cited above, paragraph 27), the directive leaves Member States with a discretion as to the social measures which must be adopted in order to guarantee, within the framework laid down by the directive, the protection of women in connection with pregnancy and maternity and to offset the disadvantages which women, by comparison with men, suffer with regard to the retention of employment." (Emphasis Added)

86. In *Webb* (Case C-32/93), the Court noted, at §20:

*"20 Furthermore, by reserving to Member States the right to retain or introduce provisions which are intended to protect women in connection with 'pregnancy and maternity', Article 2(3) of Directive 76/207 recognizes the legitimacy, in terms of the principle of equal treatment, first, of protecting a woman's biological condition during and after pregnancy and, second, **of protecting the special relationship between a woman and her child over the period which follows pregnancy and childbirth** (Habermann-Beltermann, cited above, paragraph 21, and Case 184/83 Hoffmann v Barmer Ersatzkasse [1984] ECR 3047, paragraph 25)." (Emphasis Added)*

87. In *Brown* (Case C-394/96), the Court said at §17:

*"17 As the Court pointed out in paragraph 20 of its judgment in Webb, cited above, by reserving to Member States the right to retain or introduce provisions which are intended to protect women in connection with 'pregnancy and maternity', Article 2(3) of Directive 76/207 recognises the legitimacy, in terms of the principle of equal treatment, first, of protecting a woman's biological condition during and after pregnancy and, second, **of protecting the special relationship between a woman and her child over the period which follows pregnancy and childbirth.**" (Emphasis Added).*

88. In *Commission v Austria* Case (C-203/03)¹⁴, the Court said at §43

"43. As the Court pointed out in Case C-394/96 Brown [1998] ECR I-4185,

¹⁴ [2005] 2 CMLR 14

paragraph 17, by reserving to Member States the right to retain or introduce provisions which are intended to protect women in connection with 'pregnancy and maternity', Article 2(3) of Directive 76/207 recognises the legitimacy, in terms of the principle of equal treatment, first, of protecting a woman's biological condition during and after pregnancy and, second, **of protecting the special relationship between a woman and her child over the period which follows pregnancy and childbirth.**" (Emphasis Added).

89. The Court reasoned, at paragraph 46 of *Sari Kiiski v Tampereen kaupunki* C-116/06:

46. "It is precisely that inevitable course which the Community legislature took into account when making available to pregnant workers a special right, that is to say a right to maternity leave of the kind provided for in Directive 92/85, which is intended, first, to protect a woman's biological condition during and after pregnancy and, second, to **protect the special relationship between a woman and her child over the period which follows pregnancy and childbirth**, by preventing that relationship from being disturbed by the multiple burdens which would result from the simultaneous pursuit of employment (see, to that effect, Case [C-366/99 Griesmar](#) [2001] ECR I-9383, paragraph 43; (Emphasis added))."

90. It is obvious that new mothers, and particularly new mothers who are breastfeeding, are often vulnerable and merit protection by virtue of their own status as new mothers.

91. The Court reasoned, in *Sari Kiiski v Tampereen kaupunki* (C116/06)¹⁵, that:

29. "It is true that Directive 92/85 aims, in accordance with the first, fifth and sixth recitals of its preamble, to improve the working environment in order to protect the health and safety of workers, especially the pregnant woman at work. Nevertheless, according to the 14th recital to the preamble of that Directive, the Community legislature took the view that the **vulnerability** of pregnant workers, workers who have recently given birth or **who are breastfeeding** made a right to maternity leave necessary." (Emphasis added)

92. Accordingly, an interpretation which fails to recognise the need to protect new Intended Mothers, and particularly those who are breastfeeding, would be inconsistent with the fundamental principle of the protection of the vulnerable. The same point can be made

¹⁵ [2008] 1 CMLR 5 at p92

with regard to new mothers who are vulnerable because of their association with the Surrogate Mother.

93. In *Alvarez v Sesa Start* (Case C-104/09), the Court opined at §27:

*“27. First of all, as regards the **protection** of women in connection with pregnancy and **maternity**, the Court has repeatedly held that, by reserving to Member States the right to retain or introduce provisions which are intended to ensure that **protection**, Article 2(3) of Directive 76/207 recognises the legitimacy, in terms of the principle of equal treatment of the sexes, first, of protecting a woman's biological condition during and after pregnancy and, second, of **protecting the special relationship between a woman and her child over the period which follows childbirth** (see Case 184/83 Hofmann [1984] ECR 3047, paragraph 25; Case C-32/93 Webb [1994] ECR I-3567, paragraph 20; Case C-394/96 Brown [199 8] ECR I-4185, paragraph 17; and Case C-203/03 Commission v Austria [2005] ECR I-935, paragraph 43).” (Emphasis Added).*

Substantive Equality

94. The Recast Directive, at Recital 24, expressly provides that maternity protection measures are a means to achieve substantive equality:

“(24) The Court of Justice has consistently recognised the legitimacy, as regards the principle of equal treatment, of protecting a woman's biological condition during pregnancy and maternity and of introducing maternity protection measures as a means to achieve substantive equality. This Directive should therefore be without prejudice to Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding 12. This Directive should further be without prejudice to Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC.”

95. The Court has emphasised the importance of substantive equality, meaning the reduction of de facto inequality:

96. In *Kalanke* (Case C-450/93)¹⁶, the Court opined at §19

“19 It thus permits national measures relating to access to employment, including promotion, which give a specific advantage to women with a view to improving their ability to compete on the labour market and to pursue a career on an equal footing with men.”

97. In *Thibault* (C-136/96)¹⁷, the Court stated, at §26:

“26 The conferral of such rights, recognised by the Directive, is intended to ensure implementation of the principle of equal treatment for men and women regarding both access to employment (Article 3(1)) and working conditions (Article 5(1)). Therefore, the exercise of the rights conferred on women under Article 2(3) cannot be the subject of unfavourable treatment regarding their access to employment or their working conditions. In that light, the result pursued by the Directive is substantive, not formal, equality.”

98. In *Mahlburg* (C-207/98)¹⁸, the Court held: at §26:

“26 Lastly, the Court has held, in Case C-136/95 Thibault [1998] ECR I-2011, paragraph 26, that the exercise of the rights conferred on women under Article 2(3) of the Directive cannot be the subject of unfavourable treatment regarding their access to employment or their working conditions and that, in that light, the result pursued by the Directive is substantive, not formal, equality.”

99. In *Abrahamsson and Anderson* (Case C-407/98)¹⁹, the Court said this, at §48:

“48 The clear aim of such criteria is to achieve substantive, rather than formal, equality by reducing de facto inequalities which may arise in society and, thus, in accordance with Article 141(4) EC, to prevent or compensate for disadvantages in the professional career of persons belonging to the under-represented sex.”

100. In *Briheche* (Case C-319/03)²⁰, the Court said, at §25:

¹⁶ *Kalanke v Freie Hansestadt Bremen* [1996] 1 CMLR 175

¹⁷ *Caisse Nationale d'Assurance Vieillesse des Travailleurs Salaries (Cnauts) V Thibault* [1998] 2 CMLR 516.

¹⁸ *Mahlburg v Land Mecklenburg-Vorpommern* [2001] 3 CMLR 40

¹⁹ *Abrahamson and Anderson v Fogelqvist* [2002] ICR 932

²⁰ *Briheche v Ministre de L'Interieur and others* [2005] 1 CMLR 4

“25. Article 2(4) of the Directive thus authorises national measures relating to access to employment which give a specific advantage to women with a view to improving their ability to compete on the labour market and to pursue a career on an equal footing with men. The aim of that provision is to achieve substantive, rather than formal, equality by reducing de facto inequalities which may arise in society and, thus, in accordance with Article 141(4) EC, to prevent or compensate for disadvantages in the professional career of the persons concerned (see, to that effect, Case C-450/93 Kalanke [1995] ECR I-3051, paragraph 19, and Case C-407/98 Abrahamsson and Anderson [2000] ECR I-5539, paragraph 48).”

101. In *Alvarez v Sesa Start* (C-104/09)²¹, the Court opined, at §34:

“34. The aim of Article 2(4) is to achieve substantive, rather than formal, equality by reducing de facto inequalities which may arise in society and, thus, in accordance with Article 157(4) TFEU, to prevent or compensate for disadvantages in the professional career of the relevant persons (see, to that effect, Kalanke, paragraph 19; Case C-407/98 Abrahamsson and Anderson [2000] ECR I-5539, paragraph 48; and Case C-319/03 Briheche [2004] ECR I-8807, paragraph 25)”

102. It has long been established that less favourable treatment based on the gender-specific condition of pregnancy is direct sex discrimination: *Dekker v Stichting Vormingscentrum Voor Jong Volwassenen (VJV-Centrum) Plus* (Case 177/88)²²; *Handels- Og Kontorfunktionaerernes Forbund I Danmark (acting for Hertz) v Dansk Arbejdsgiverforening* (acting for Aldi Marked K/S) (Case 179/88)²³; *Habermann-Beltermann v Arbeiterwohlfahrt, Bezirksverband Ndb/Opf eV* (Case C-421/92)²⁴.

103. The protection given to pregnant women by the (now) Recast Directive has been explained by the CJEU in *Webb* (C-32/93) and cases following *Webb*: the Court has held that the length or type of employment is irrelevant to the question of whether, in the context of dismissal, pregnancy discrimination constitutes sex discrimination. See, for

²¹ *Alvarez v Sesa Start Espana ETT SA* [2011] 1 CMLR 28

²² [1992] ICR 325

²³ [1992] ICR 332

²⁴ [1994] 2 CMLR 681

example, *Webb* (C-32/93), *Tele Danmark* (C-109/00), *Jimenez Melgar* (C-438/99)²⁵ and *Mahlburg* (C-207/98).

104. The protection under both the Pregnant Workers Directive and the Recast Directive has further been held to be applicable to cases beyond those involving recruitment and dismissal of pregnant women: any less favourable treatment of a woman on grounds of pregnancy will constitute automatic sex discrimination under the Recast Directive. For example:
- (a) denial of access to a performance assessment where that assessment informs subsequent pay reviews because a woman is on maternity leave: *Thibault* C-136/95;
 - (b) taking preparatory steps in relation to a dismissal before the end of the protected period: *Pacquay* (C-460/06).
105. The CJEU has developed the concept of pregnancy-related discrimination, and, consequently, the protection afforded to pregnant women as falling within the gender equality guarantees, and given wide reach to the Pregnant Workers Directive. Similarly, wide reach has been given to the Recast Directive: the CJEU has developed the concept of direct discrimination so as to include women undergoing IVF treatment (see *Mayr*) and, in the context of disability discrimination, associative discrimination: *Coleman v Attridge Law* C-303/06²⁶²⁷.
106. The principle of equality articulated, *inter alia*, in the Pregnant Workers Directive and the Recast Directive, then, will protect an Intended Mother, particularly as here where she is breastfeeding. This is necessary to give effect to the aim of substantive equality for women in the workplace.

²⁵ *Jimenez Melgar v Ayuntamiento de los Barrios* [2003] 3 CMLR 4

²⁶ This case was determined under the Framework Directive 2000/78/EC but the meaning afforded direct discrimination is the same under the Recast Directive.

²⁷ [2008] 3 CMLR 27

(2) Maternity leave

107. In the context of maternity leave, the European Court has taken a broad approach. For example (1) in *Gillespie* (Case C-342/93²⁸), the Court ruled that the principle of equal pay in Article 119 of the EEC Treaty and set out in Council Directive 75/117/EEC on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women requires that, to the extent that pay is calculated on the basis of pay received by a women before the commencement of maternity leave, the amount of benefit must include pay rises awarded between the beginning of the reference period and the end of maternity leave. This ruling was approved in *Alabaster* (Case C-147/02)²⁹.
108. There have been two cases concerning surrogacy, involving different issues, but which were delivered on the same day, 18 March 2004, which are noteworthy: *Z v A* (C-363/12) and *CD v ST* (C-167/12).
109. The similar factual issues in both cases were that women, who were unable to support a biological pregnancy, had babies through a surrogacy arrangement. The problem is that under most national laws, maternity leave is only available to women who have literally given birth. Furthermore, normally adoption leave is not available in these situations.
110. In *Z v A*, a woman asked the CJEU to give her maternity leave on the basis that, as she was genetically unable to have children herself because she had a rare condition that meant that she had no uterus, she had a baby through a surrogacy arrangement. She argued that (1) she should be protected by the Recast Directive (2006/54) on the basis that the refusal to give her maternity leave constituted discrimination on the grounds of sex, and, (2) that she had a disability and was the refusal to give her maternity leave constituted disability discrimination pursuant to the Framework Directive (2000/78).

²⁸*Gillespie v Northern Ireland Health and Social Services Boards* [1996] ECR I -475

²⁹*Alabas Her secondary contention was that she was discriminated against on the grounds of sex under the Recast Directive. ter v Woolwich plc and Secretary of State for Social Security* [2004] ECR I -3101

111. Both arguments failed.

(1) Her argument under the Recast Directive failed because the AG (in this case, AG Wahl) and the Court (the Grand Chamber) considered that a commissioning father would have been treated in the same way (paragraph 52 of the Court's judgment and paragraph 63 of the AG's opinion. Consequently the refusal of maternity leave was not direct or indirect sex discrimination pursuant to Article 2 (1) (a) and (b) of the Recast Directive (paragraph 55 of the Court judgment).

(2) Her argument under the Framework Directive failed because the AG and the Court found that the inability to have a child by conventional means does not, in itself, in principle, prevent the commissioning mother from having access to, participating in or advancing in employment and her condition did not make it impossible for her to carry out her work and nor did it constitute a hindrance to the exercise of her professional activity (paragraphs 95-97 AG's opinion and paragraph 81 of the Court's judgment). Accordingly, the woman was not covered under the definition of disability and so could not gain the protection she sought (paragraph 82 of the Court's judgment).

112. In *CD v ST*, CD argued that, as an intended mother, she should be entitled to paid leave because she was a new mother, breastfeeding and wanting time to bond with her baby. She argued that there is a peculiar anomaly in the law relating to which mothers qualify for maternity leave. Biological mothers get it. Adoptive mothers get it. But mothers who have a baby through a surrogacy arrangement, intended mothers, don't. She asked the Court of Justice of the European Union (CJEU), but they said 'no'. Because of that, the position remains that the anomaly continues: intended mothers are the only mothers who can't have maternity leave.

Facts

113. CD, a midwife sonographer, works for an NHS Trust. She wanted to have a child and entered into a surrogacy arrangement compliant with the Human Fertilisation and

Embryology Act 2008. The surrogate (biological) mother gave birth to a baby on August 26, 2011 and CD, the intended mother, began to mother and breastfeed the baby within an hour of the birth. She breastfed for a total of three months. CD and her partner were granted parental responsibility for the child on December 19, 2011.

114. The respondent hospital (ST) had provision for paid maternity and adoption leave but told her that she did not qualify for either of these because of her status as an intended mother. CD applied for paid leave but her request was rejected on the basis that there was no legal right to paid time off for surrogacy.
115. CD presented a claim to the ET on 7 June 7, 2011 and, at a pre-hearing review on December 19, 2011, the tribunal determined that it would make a reference to the CJEU.

Arguments before the Court of Justice

116. CD's main contention was that, on a purposive approach, she qualified for protection under the Pregnant Workers Directive (92/85) (PWD) when read together with the Charter of Fundamental Rights of the European Union.
117. She said that she should be entitled to maternity leave under Articles 2 and 8 of the PWD because, as an intended mother – and, particularly, as a breastfeeding intended mother - she was analogous to a biological mother. Furthermore, the principle of protecting the special relationship between mothers and babies in the vulnerable period following pregnancy and childbirth applied to her as an intended mother because she was in the same position as a biological mother - a new mother bonding with her baby (*Kiiski C-116/06*).
118. Her secondary contention was that she was discriminated against on the grounds of sex under the Recast Directive both directly and indirectly (the refusal of maternity leave put female workers at a particular disadvantage).
119. ST countered that she should not be protected because she had not been pregnant and had not given birth.

Advocate General's opinion

120. AG Kokott's opinion, delivered on September 26, 2013, considered that intended mothers did have the right to receive maternity leave under Articles 2 and 8 PWD, where surrogacy is permitted, even where the intended mother does not breastfeed, although the intended mother and the biological mother must share the period of leave. (paragraph 90).
121. AG Kokott opined that intended mothers who breastfeed should be included in the protection given by Article 2 PWD on the basis of the PWD's objectives of (1) protecting vulnerable workers, and (2) protecting the special relationship between a woman and her child over the period following pregnancy and childbirth:
122. Breastfeeding intended mothers were just as vulnerable as breastfeeding biological mothers - in both cases there are health risks and particular time demands arising from childcare (paragraph 44).
123. Moreover, as maternity leave is designed partly to protect the special relationship between mothers and children, that relationship would be adversely affected where the mother simultaneously pursues employment (paragraph 45).
124. Furthermore, using a teleological analysis, the AG's view was that intended mothers who do not breastfeed should also be protected under the PWD because the PWD must be understood in functional rather than monistic terms: an intended mother takes the place of the biological mother after the child is born and, from that point on, must have the same rights (paragraph 48 and 63).
125. In relation to the sex discrimination argument, the AG found that there was no discrimination on the grounds of sex because the disadvantage was not vis-à-vis men but with other women who have not had recourse to a surrogate mother.

CJEU judgment

126. However, the CJEU took a different view. It found that member states are not required to provide maternity leave to intended mothers (whom they referred to as 'commissioning mothers').
127. In an interesting take on the PWD, the court focused almost completely on the protection given to a woman's biological condition, and downplayed the issue of the

protection of the special relationship between a mother and child. It said, in terms, that the purpose of maternity leave is to protect the health of the mother in the 'especially vulnerable situation arising from her pregnancy' (paragraphs 35-36). It concluded that, even where an intended mother is breastfeeding, she is not entitled to protection, presumably because her vulnerable situation does not arise from pregnancy (although, of course, it arises from the, arguably, equally vulnerable situation of looking after a new baby).

128. In relation to the sex discrimination arguments, like the Court in *Z v A*, the Court found that there was no difference in treatment because a commissioning father would have been treated the same way (paragraph 47 of the Court's judgment).

Conclusion

129. Given the purpose of the PWD and the approach taken by AG Kokott, arguably, the court's approach is open to question in treating new intended mothers differently from other mothers:

- (1) First, breastfeeding intended mothers are in as equally a vulnerable position, in terms of their biological condition, as breastfeeding biological mothers;
- (2) Secondly, the protection afforded to the special relationship between new mothers and babies applies equally to all new mothers, whether they are biological or not. That is why there is maternity leave and adoption leave.
- (3) Thirdly, the relationship that new mothers (who are also intended mothers) have with their babies will be adversely affected where they must simultaneously pursue employment because they are not entitled to paid leave and this is contrary to the purpose of the PWD.

(3) Parental Leave

130. If an employer unilaterally terminates the employment relationship, it is precluded from paying compensation to a worker based on a reduced salary because of parental leave: *Meerts* (C-116/08).

131. In *Chatzi v Ypourgos Oikonomikon* (C-149/10), the Court considered what length of parental leave is required for twins. It found that one, not two, periods of parental leave is what was required because the directive does not confer an individual right parental leave on the child. The grant of the right is only to the parents (see paragraph 23 of the AG Kokott opinion).
132. In *Montull v Instituto Nacional de la Seguridad Social (INSS)* (C-5/12), Mr Montull complained that he had been refused maternity benefit because the child's mother was not covered by a state social security scheme and this was contrary to, inter alia, the Parental Leave Directive. The Court found that, where both parents are employed persons, the father can, with the mother's consent, take maternity leave for the period following the compulsory six-week period except where the mother's health is at risk but where a father is an employed person but the mother is not, then he can't take such leave because the mother is not covered by a State social security scheme (paragraph 66 Court's judgement).
133. In *Riezniece v Zemkopibas* (C-7/12), following a period of parental leave, R was assessed with a view to transferring her to another post in the context of a re-organisation and her original post was made redundant. She argued that she had the right to return to the same post.
134. The Court held that an employer is allowed to reorganise its departments in order to ensure efficient management of its organisation, subject to compliance with the applicable rules of European Union law (paragraph 36 Court's Judgment).
135. But the Court found that, although it is for the national court to verify, there may have been indirect discrimination which placed workers who have taken parental leave at a disadvantage in relation to the assessment procedure because such assessment may not have complied with a certain number of requirements: (1) to encompass all workers liable to be affected by the abolishment of the post, (2) to be based on criteria which

are absolutely identical to those which apply to workers in active service (3) not to involve the physical presence of the workers because this is a condition which a worker on parental leave is unable to fulfil (paragraph 43 Court's judgment).

(4) The Jurisprudence of the ECtHR

136. The European Court of Human Rights has taken a broad approach to Article 8 and the concept of family life.

- (a) Family life can, for example, exist between those without a blood link: *X, Y and Z v UK*, judgment on 22 April 1997 (Application No 21830/93)³⁰. This is because, firstly, such a relationship is otherwise indistinguishable from that enjoyed by the traditional family and secondly, that (in that case) the transgendered parent participated in the AID process as the child's father.
- (b) Family life may exist between children and their grandparents since they play a significant part in family life: *Marckx v. Belgium*, judgment of 13 June 1979³¹, para. 45.
- (c) Siblings, both as children and as adults, also fall within the meaning of family life: *Olsson v. Sweden*, judgment of 24 March 1988 (Application No 10465/84)³²; *Boughanemi v. France*, judgment of 24 April 1996 (Application No 22070/93)³³.
- (d) The relationship between an uncle or aunt and his/her nephew or niece may fall within the meaning of family life where there is particular evidence of close personal ties. In *Boyle v. the United Kingdom* (Application No 16580/90), family life was found to exist between an uncle and his nephew, in the light of the fact that the boy stayed for

³⁰ (1997) 24 EHRR 143

³¹ (1979-1980) 2 EHRR 330

³² (1989) 11 EHRR 259

³³ (1996) 22 EHRR 228

weekends with his uncle, who was deemed by the domestic authorities to be a “*good father figure*” to him (§9, p180).³⁴.

- (e) Family life may exist between parents and children born into second relationships, or those children born as a result of an extra-marital or adulterous affair, particularly where the paternity of the children has been recognised and the parties enjoy close personal ties: *Jolie & Lebrun v. Belgium*, judgment of 14 May 1986 (Application No 11418/85.).³⁵

137. There are *de facto* family relations between adoptive parents and children: *Pini and Others v. Romania*, (Application Nos. 78028/01 and 78030/01)³⁶.

138. The relationship between adoptive parents and children will, in principle, attract the protection of Article 8: *X v. Belgium and the Netherlands*, Commission decision of 10 July 1975 (Application No 6482/74)³⁷; *X or A v. France*, Commission decision of 5 October 1982 (Application No. 9993/82)³⁸; *Söderbäck v. Sweden*, judgment of 28 Oct 1998.³⁹

139. The relationship between an adoptive parent and an adoptive child can be of the same nature as a family relationship protected by Article 8: *X v Belgium and the Netherlands Application* (§2 on page 76).

140. A judicial decision separating two persons united by the bond of adoption may amount to an interference with the right to respect for the adopting parent's and/or the adopted child's family life within the meaning of Article 8(I) of the Convention: *X v France* (p244).

³⁴ (1995) 19 EHRR 179

³⁵ Decisions and Reports 47, p243.

³⁶ (2005) 40 EHRR 13

³⁷ Decisions and Reports 7, p75

³⁸ (1983) 5 EHRR CD 302

³⁹ (2000) 29 EHRR 95

141. The relationship between adoptive parents and children constitutes a family tie, protected by Article 8 of the Convention: *Abdulaziz, Cabales and Balkandali v. the United Kingdom* (judgment of 28 May 1985, Series A no. 94)⁴⁰, *Eriksson v. Sweden* (judgment of 22 June 1989, Series A no. 156)⁴¹, *Marckx v. Belgium* and *Ignaccolo-Zenide v. Romania* (Application No. 31679/96,)⁴².
142. The relationship between Intended Mother and child must in view of the case law above be regarded as protected by Article 8.
143. The Court had held on many occasions that parental leave, as well as parental and child benefits, came within the scope of Article 8 and that Article 14, taken together with Article 8, was applicable (see *Weller v. Hungary*, judgment of 31 March 2009 at §29 (Application No 44399/05); *Okpiz v. Germany*, judgment of 25 October 2005 at §32 (Application No 59140/00)⁴³; *Niedzwiecki v. Germany*, Judgment of 25 October 2005 at §31 (Application No 58453/00)⁴⁴;
144. Furthermore, protection should be given to an Intended Mother because the European Convention of Human Rights must be read consistently with (1) the UN Convention on the Rights of the Child (“*UNCRC*”) and (2) the International Covenant on Economic, Social and Cultural Rights (“*ICESCR*”).

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ESSEX COURT CHAMBERS
17 NOVEMBER 2014**

⁴⁰ (1985) 7 EHRR 471

⁴¹ (1990) 12 EHRR 183

⁴² (2001) 31 EHRR 7

⁴³ (2006) 42 EHRR 32

⁴⁴ (2006) 42 EHRR 33