

**THE EMERGING CHILDCARE STRATEGY
IN EUROPEAN UNION LAW:
THE STRUGGLE BETWEEN CARE, GENDER EQUALITY AND THE
MARKET**

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Abstract

This thesis explores the European Union's (EU) emerging engagement with childcare law and policy. It assesses the extent to which the EU has adopted a childcare strategy which responds to the needs of caregivers (who are predominantly but not exclusively women), the requirement of gender equality and the well-being of children, whilst also supporting the EU's economic aims. The institutions of childcare in EU law are analysed respectively from two broad perspectives: the interrelated and complementary provisions relating to childcare services and the rights of caregivers are considered separately based on their different legal bases. Although the building of an EU childcare strategy designed to set minimum common standards around childcare services appears to be relevant to employment and economic growth, this thesis argues that the EU has made little progress in relation to the adoption of such a coordinated strategy. It acknowledges the difficulties of regulating childcare services at the EU level because of the lack of clear competence alongside heavily socio-cultural influences and some resistance from the Member States themselves. It shows that the role of the EU is mainly limited to encouraging Member States to adopt (preferably publicly subsidised) available, affordable and quality out-of-home childcare provisions as well as to provide a forum for information sharing. The thesis then moves on to provide a critical perspective on the Barcelona targets and the subsequent policies which, it is demonstrated, have failed to contribute effectively to gender equality and other EU values. It concludes that the EU's ability to influence childcare regulation is limited to principle setting.

Nonetheless, the thesis does establish that the EU actively addresses the rights of caregivers (especially mothers). The thesis notes how the EU has developed these rights along two broad areas - while rights to work-life reconciliation have mainly contributed to supporting the employment of women in the labour market, the Court of Justice of the EU has tied the concept of care to that of citizenship - and how the development of parents' rights in these areas signifies the EU's commitment to supporting childcare and the work of caregivers. However it is also clear that the rights to protect and empower caregivers have been patchy, insufficient and, in some areas, legally uncertain.

The thesis concludes that poor EU leadership has resulted in a fragmentation of childcare policy across the Member States. Consequently, female access to the labour market, the mitigation of work-family conflicts and the realisation of gender equality objectives as a whole remain variable across the Member States depending on the availability of childcare services and the level of rights afforded to carers. This ultimately contributes to variable social justice impacts and an inconsistent ability to tackle poverty and social exclusion at the European level. It is argued that the EU must engage more firmly with childcare in a way that reflects EU values that are embedded in the Treaties.

Abbreviations

CJEU	Court of Justice for the European Union
COFACE	European Confederation of Family Organisation
EAT	Employment Appeal Tribunal
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
EEC	European Economic Community
EES	European Employment Strategy
EPIC	European Platform for Investing in Children
EU	European Union
EU-SILC	EU Survey on Income and Living Conditions
ILO	International Labour Organisation
OMC	Open Method of Coordination
SIP	Social Investment Package
TFEU	Treaty on the Functioning of the European Union
TEU	Treaty on the European Union

Chapter 1

The Emerging Childcare Strategy in European Union Law: The Struggle between Care, Gender Equality and the Market

Introduction

Caring is an essential human need¹ akin to food, water or “unpolluted air”.² At some point, because of age and/or illness, most of us will require care and, equally, most of us will become caregivers, either as parents and/or for dependent adults.³ Care and caring are compelling issues that affect people from all walks of life on a daily basis. Care is not an exception to the norm but rather a universal experience⁴ and an inalienable element of most individuals’ lives.⁵

Given that the provision of good quality, formal childcare policies is considered to be essential for children’s development and their well-being - as well as being a necessary condition for equal opportunity in employment for women and for men⁶ - this thesis explores the emerging and tantalising engagement of European Union (hereafter the EU) law with childcare. So, to what extent has, so far, the EU addressed childcare in law and policy? Is the level of engagement sufficient to respond to the fast changing needs of an ageing society where women who traditionally provided care are now pervasively “activated” into working in paid employment? To what extent has the concept of care been determinant in guiding the development of the EU’s agenda on childcare? Perhaps more importantly, should the EU be concerned with childcare in the first place? Traditionally childcare was addressed by Member

¹ K. Lynch, ‘Affective Equality: Who Cares?’ (2009) 52(3) *Development* 410-415; M. Fineman, *The Autonomy Myth* (New Press 2004) xvii; T. Levy, ‘The Relational Self and the Right to Give Care’ (2006) 28(4) *New Political Science* 547-570; F. Williams, ‘The Presence of Feminism in the Future of Welfare’ (2002) 31 *Economy and Society* 502-519.

² W. Hollway, *The Capacity to Care: Gender and Ethical Subjectivity* (Routledge 2007) 11.

³ See also Office of National Statistics, *Working and Workless Households, 2013 – Statistical Bulletin*, (Office of National Statistics 2013) <http://www.ons.gov.uk/ons/dcp171778_325269.pdf> accessed on 28 October 2015.

⁴ See, *inter alia*, V. Held, *The Ethic of Care* (Oxford University Press 2006).

⁵ S. Sevenhuijsen, ‘The Place of Care: the Relevance of the Feminist Ethic of Care for Social Policy’ (2003) 4 *Feminist Theory* 179-197.

⁶ G. Esping Andersen, *Incomplete Revolution: Adapting Welfare States to Women's New Roles* (Polity 2009).

States as a component of social welfare⁷ and, as such, it remains in the Member States' competences. The original Treaty, in line with a neo-liberalist philosophy, was more concerned with economic rather than social issues.⁸ Childcare was perceived as a private matter deemed to be of little concern for the legislator. But increasingly childcare is no longer about choosing between the provision of care done by mothers and the provision of care done outside of the family: childcare in the EU has become multidimensional, involving various familial and non-familial actors and incorporating different elements of employment law (parental leave and flexible working arrangements, for example) *and* social welfare. In this sense, childcare impacts on *both* the private and the public spheres and therefore it has become difficult for the EU to ignore this issue.

As a consequence, a rhetoric on childcare has permeated the EU legal agenda which has led to some legal, albeit soft, intervention. For example, the European Commission (hereafter the Commission) has adopted a Recommendation on Childcare⁹ and a Recommendation on Investing in Children¹⁰ as well as numerous Communications, reports and staff working documents.¹¹ Both the Council of the European Union and the European Parliament have also participated in building a policy on childcare.¹² Furthermore, the Court of Justice of the European Union (hereafter the CJEU or the Court) has been very proactive in this area. However, so far, this judicial intervention has been *ad hoc* and it has not led to the creation of a coherent set of principles, let alone the devising of satisfactory solutions. In spite of such policy building, to date childcare remains largely unregulated at the EU level. So far the EU has not adopted any hard, legally-binding legislation with regard to childcare.

Nevertheless, there is a growing academic awareness of the connection between the EU and childcare but the academic legal debate remains timid and the topic of EU childcare law and policy is largely unexplored. This thesis assesses critically the evolution of the EU childcare legal strategy. It pays specific attention to the growing importance of the concept of care in

⁷ N. Busby and G. James, 'Regulating Working Families in the European Union: A History of Disjointed Strategies' (2015) 37(3) *Journal of Social Welfare & Family Law* 295-308.

⁸ W. Streeck, 'Neo-Voluntarism: A New Social Policy Regime' (1995) 1 *European Law Journal* 31-58.

⁹ Council Recommendation 92/241/EEC of 31 March 1992 on child care, OJ [1992] L123/16.

¹⁰ European Commission Recommendation 2013/112/EU of 20 February 2013, Investing in children: breaking the cycle of disadvantage, OJ [2013] L59/5.

¹¹ All of these will be explored further in Chapters 3 and 4.

¹² See for instance: European Council, Presidency Conclusions, Barcelona European Council, 15 and 16 March 2002, SN 100/1/02 REV 1 <http://ec.europa.eu/invest-in-research/pdf/download_en/barcelona_european_council.pdf> Accessed on 14 October 2015.

the construction of the EU childcare strategy and adopts a feminist perspective. It provides recommendations to devise a clear agenda for the development of a coherent EU legal framework on childcare that embraces varied feminist viewpoints and the ethics of care. Ultimately, the thesis aims to assess whether an EU normative framework could contribute to rebalancing the relationship between paid and unpaid work for carers of children. The thesis argues that the EU should take the lead in developing a fully-fledged childcare strategy by taking into account the concept of care in normative development by adopting a more proactive approach to protect carers against discrimination and unfavourable treatment at work as well as to support caregivers positively in the labour market.

This thesis focuses on childcare as opposed to other forms of care, such as care for the elderly, care for disabled people and generally the care of other dependants. The rationale for this is that childcare represents the most advanced normative aspect of care at the EU law level. As will be demonstrated in the course of this thesis, EU law addresses childcare issues in a specific and unique fashion compared to other types of care. Childcare has been placed within the realm of the internal market and, as such, it has become a relevant aspect of EU economic policy whereas the other types of care remain in the arguably nebulous area of EU human rights and general principles of law. As childcare has become a component of the internal market, it has also become an important element to support the achievement of the EU's economic integration. In other words, since childcare has become an element of the market, there is traction for normative advancement. Thus, it is submitted that childcare is sufficiently specific under EU law to be critically assessed. It is also put forward that the normative evolution of childcare can be adequately addressed separately from other types of care under EU law.

The introduction to this thesis is divided into three main parts. The first section considers the concept of childcare and, more broadly, the concept of *care* itself. It will differentiate between childcare and other forms of care in order to identify the parameters of the subsequent analysis. It examines the gendered aspect of childcare and reflects upon its implications for EU law. It also considers the impact of the globalisation of care. The second section outlines the reasons why the EU should be concerned with childcare. The third and final section will present the methodology used in this research as well as providing a general overview of the thesis.

Section 1: Unpacking Childcare

“[N]ot everything that can be counted counts, and not everything that counts can be counted”.¹³

This section seeks to critically outline the concept of childcare. It first aims to establish a definition of care, which is a key and essential part of childcare. By relying on a number of sources outside the legal realm, the goal is not to provide an exhaustive review of this concept but rather to try to give it shape which can make it visible in a legal context. It is only when a clear definition is established, that normative regulation can be envisaged and established. The section starts by unpacking the concept of care. It then moves on to analyse different types of care and highlights the difference between childcare and those other types of care. The section finishes by considering who provides childcare and what the implications are of this “who does what” picture for the construction of an EU childcare strategy.

Concepts of Care

Care features in many legal aspects of many legal systems.¹⁴ It is a broad and fascinating topic that is increasingly discussed in academic political and social literature.¹⁵ Political and social literature is important as it helps us to understand the reasons as to why such an essential element of everybody’s life remains, to date, undervalued. However, in order to build on these findings and to take the position to the normative domain, it is important to approach care from a legal perspective: legal literature on this topic is arguably growing,¹⁶ but

¹³ W. Cameron, *Informal Sociology: A Casual Introduction to Sociological Thinking* by William Bruce Cameron (Random House 1963).

¹⁴ J. Herring, *Caring and the Law* (Hart Publishing 2013).

¹⁵ See, for instance: J. Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* (Routledge 1993); J. Lewis, ‘Childcare Policies and the Politics of Choice’ (2008) 79(4) *The Political Quarterly* 499-507; M. Daly, ‘Care as a Good for Social Policy’ (2002) 31 *Journal of Social Policy* 251-270; M. Daly and J. Lewis, ‘The Concept of Social Care and the Analysis of Contemporary Welfare States’ (2000) 51(2) *British Journal of Sociology* 281-298; N. Gerstel, ‘The Third Shift: Gender and Care Work outside the Home’ (2000) 23(4) *Qualitative Sociology* 467-483; B. Pfau-Effinger, ‘Welfare State Policies and the Development of Care Arrangements’ (2005) 7(2) *European Societies* 321-347; B. Pfau-Effinger and B. Geissler, *Care and Social Integration in European Societies* (Policy Press 2005); and S. Sevenhuijsen, ‘The Place of Care: The Relevance of the Feminist Ethic of Care for Social Policy’ (2003) 4 *Feminist Theory* 179-197.

¹⁶ See, for example: N. Busby, *A Right to Care? Unpaid Care Work in European Employment Law* (Oxford University Press, 2011); A. Masselot, ‘EU Childcare Strategy in Austerity Time’, (2015) 37(3) *Journal of Social Welfare & Family Law* 345-355; N. Busby and G. James, *Care Giving and Paid Work: Challenging Labour Law in the 21st Century* (Edward Elgar 2011); and R. Horton, ‘Caring for Adults in the EU: Work-Life Balance and Challenge for EU law’ (2015) 37(3) *Journal of Social Welfare & Family Law* 356-367.

still remains limited. This thesis seeks to help fill this void. Broadly, as for the relationship between care and the law, three main areas can be identified. The first area is where care and caring are found to be within an *individual relationship*. The most obvious example is that of family law where the vast majority of caring relationships develop.¹⁷ Employment¹⁸ and medical law¹⁹ are also arenas that are affected by the existence of individual caring relationships. The second area is when the State *plays a direct role as the carer*. This entails the organization of the care structure and when the State takes the responsibility for vulnerable children (children in care), or for ill, frail or dependent adults (social and health care).²⁰ These are often provisions of social welfare, social security and/or health care law.²¹ The third area is more general and involves care *as an overarching principle*. For example, education policy,²² the management of care in the context of business organizations²³ and the duty of care as envisaged in tort law.²⁴

In all of these areas, the law's answer has been different based on the cultural traditions and available resources of individual Member States. To explore all of these aspects would be over-ambitious: this thesis focuses instead on the discrete area of the role of childcare and its socio-economic consequences faced by carers involved in individual caring relationships in

¹⁷ G. Douglas, 'Marriage, Cohabitation and Parenthood: From Contract to Status?' in S. Katz, J. Eekelaar and M. Maclean (eds) *Cross Currents: Family Law and Policy in the United States and England* (Oxford University Press 2000) 211-233; J. Herring, *Family Law* (Pearson 2011); J. Herring, *Caring and the Law* (Hart Publishing 2013) see Chapter 6.

¹⁸ N. Busby, 'Labour Law, Family Law and Care: A Plea for Convergence' in J. Wallbank, J. Herring, *Vulnerability Care and Family Law* (Routledge 2014) 181-198; G. James, 'Mothers and Fathers as Parents and Workers: Family-Friendly Employment Policies in an Era of Shifting Identities' (2009) 31(3) *Journal of Social Welfare & Family Law* 271-283; J. Williams, *Reshaping the Work-Family Debate* (Harvard University press 2010); E. Caracciolo Di Torella and A. Masselot, 'Work and Family Life Balance in the EU Law and Policy 40 Years On: Still Balancing, Still Struggling' (2013) 2 *European Gender Equality Law Review* 6-14; and E. Caracciolo di Torella and A. Masselot, *Reconciling Work and Family Life in EU Law and Policy* (Palgrave Macmillan 2010).

¹⁹ See, *inter alia*: J. Herring, 'Where are the Carers in Healthcare Law and Ethics?' (2007) 27 *Legal Studies* 51-73; and K. Keywood, 'Gatekeepers, Proxies, Advocates? The Evolving Role of Carers under Mental Health and Mental Incapacity Law Reforms' (2003) 25(4) *Journal of Social Welfare and Family Law* 355-368.

²⁰ A. Den Exter and T. Hervey (eds) *European Union Health Legislation* (Maklu 2012); J. Gronden, E. Szyszczak, U. Neergaard, M. Krajewski (eds), *Health Care and EU law* (Springer 2011).

²¹ T. Hervey and J. McHale, *European Union Health Law: Themes and Implications* (Cambridge University Press 2015); D. Martinsen, 'The Europeanization of Welfare-The Domestic Impact of Intra-European Social Security' (2005) 43(5) *Journal of Common Market Studies* 1027-1054.

²² L. Nistor, *Public Services and the European Union: Healthcare, Health Insurance and Education Services* (Springer 2011).

²³ For example: G. Simon, M. VonKorff, C. Rutter, and E. Wagner, 'Randomised Trial of Monitoring, Feedback, and Management of Care by Telephone to Improve Treatment of Depression in Primary Care' (2000) 320(7234) *BMJ* 550-554; D. Challis, R. von Abendorff, P. Brown, J. Chesterman, and J. Hughes, 'Care Management, Dementia Care and Specialist Mental Health Services: An Evaluation' (2002) 17(4) *International Journal of Geriatric Psychiatry* 315-325; M. Shortell and A. Kaluzny, *Health Care Management: Organization, Design and Behavior* (Delmar Publishers 1994).

²⁴ J. Herring, *Caring and the Law* (Hart Publishing 2013) 242-247.

the specific context of EU employment law.²⁵ It centres on the relationship between women as mothers, workers and carers under EU law. This implies an analysis of different areas of law. For example, the content of employment law is linked and influenced by what happens in the family: family commitments, including unpaid care, will inevitably influence participation in the employment market, in particular women's participation.²⁶

Caring For and Caring About

Even within the narrow context of this thesis, care remains difficult to define: a clear definition is nevertheless crucial in order to make it visible to the legal system. A basic dichotomy can be drawn between *caring about* and *caring for*.²⁷ The former refers to a general attitude of the mind, an acknowledgment that there is a need for care but does not necessarily imply doing something or making sure that somebody's daily needs are met. By contrast, *caring for* implies the taking responsibility for doing something to meet the needs in question.²⁸ Carol Smart looks at this dichotomy within the context of childcare: she draws a distinction between the labour of *caring for* children's everyday needs (which has traditionally been a mother's prerogative) and the more abstract concern embodied in the notion of *caring about*.²⁹ She concludes that the law does not attach particular significance to the distinction thus underplaying the role of care:

“... mothers, when they spoke about the work they did in caring for their children and the sacrifices they made, were hardly acknowledged. These actions were seen as being as normal as breathing and thus worthy of as much acknowledgment as such taken for granted activities usually generate. But when fathers articulated their care about their children, even if they had really never cared for them, their utterances seemed to reverberate the courts with a deafening significance”.³⁰

²⁵ This is, of course, not to say that carers who are not participating altogether in employment are less worthy.

²⁶ N. Busby, 'Labour Law, Family Law and Care: A Plea for Convergence' in J. Wallbank and J. Herring (eds) *Vulnerability Care and Family Law* (Routledge 2014) 181-198.

²⁷ C. Smart, 'The Legal and Moral Ordering of Child Custody' (1991) 18(4) *Journal of Law and Society*, 485-500; J. Tronto, *Moral Boundaries: a Political Argument for an Ethic of Care* (Routledge 1993); J. Herring, *Caring and the Law* (Hart 2013).

²⁸ See also S. Sevenhuijsen, 'The Place of Care: The Relevance of the Feminist Ethic of Care for Social Policy' (2003) 4 *Feminist Theory* 179-197.

²⁹ C. Smart, 'The Legal and Moral Ordering of Child Custody' (1991) 18 *Journal of Law and Society* 485-500.

³⁰ C. Smart, 'Losing the Struggle from Another Voice: The Case for Family Law' (1995) 15 *Dalhousie Law Journal* 173-195.

In the same vein, Lareau³¹ found that the fathers she interviewed did not generally have a detailed knowledge of their children's day-to-day lives because they did not do the intimate work of *caring for* their children that would have enabled them to acquire such knowledge, although they may have *cared about* their children very much. This thesis attaches a difference between the two and is concerned with the practical implications of *caring for* rather than *caring about*.

A Working Definition of Care

Producing a definition of care is not an easy task because this concept is dependent upon contextual considerations.³² Many scholars have provided their definition of the individual aspect of the caring relationship (in terms of *caring for*) which proceed from their various approaches and disciplines. For instance, the definition of care will necessarily vary whether its aim is to understand the psychological impact of care or to set criteria for welfare benefits. The definition of care can be as broad or as narrow depending on the agenda pursued. Policy makers sometimes prefer to define carers rather than care because it allows for a clearer delineation but also a restrictive conception of care. The UK government, for instance, provided this narrow interpretation of the activities of carers:

“A carer spends a significant proportion of their life providing unpaid support to family or potentially friends. This could be caring for a relative, partner or friend who is ill, frail, disabled or has mental health or substance misuse problems”.³³

By contrast, Tronto and Fischer define care in broader terms, which goes beyond family and the domestic sphere:

“a species of activity that includes everything we do to maintain, continue and repair our ‘world’ so that we can live in it as well as possible. That world includes our bodies, ourselves and our environment”.³⁴

³¹ A. Lareau, ‘My Wife Can Tell Me Who I Know: Methodological and Conceptual Problems in Studying Fathers’ (2000) 23(4) *Qualitative Sociology* 407-433, 408; cited by J. Tolmie, V. Eliazbeth and N. Gavey ‘Imposing Gender Neutral Standards in a Gendered World: Parenting Arrangements in Family Law Post Separation’ (2010) 16(2) *Canterbury Law Review* 302-330.

³² J. Herring, *Caring and the Law* (Hart Publishing 2013) 13; J. Finch and D Groves, *A Labour of Love* (Routledge 1983).

³³ Department of Health, *Carers at the Heart of 21st Century Families and Communities: A Caring System on Your Side, a Life of Your Own* (Department of Health Stationary Office 2008) 18.

This definition represents a good example of the ethic of care literature which sees care as “clusters”³⁵ of practice, social process, value, disposition or virtue, in turn or at the same time according to cultural contexts.

Defining care is also a complex task because care takes place in so many different contexts. Three main categories of definitions have surfaced:³⁶ (1) the ethic of care set in contrast to justice;³⁷ (2) an array of work;³⁸ and (3) a form of relationship between individuals.³⁹ However, at a general level these categories are overlapping and interconnecting, revealing “the complexity and diversity of the ethical possibilities of care”.⁴⁰ In this vein, Daly has argued that to care means to look after those who cannot take care of themselves.⁴¹ This involves a broad range of (often unpaid) activities aimed at “meeting the physical and emotional requirements of dependent adults and children”⁴² which are difficult to categorise. Folbre sees care as the “paid or unpaid effort to meet the needs of dependents, including direct care work that involves personal connection and emotional attachment to care recipients”.⁴³ Similarly, Daly and Lewis talk about “the activities and relations involved in meeting the physical and emotional requirements of dependent adults and children, and the normative economic and social frameworks within which these are assigned and carried out”.⁴⁴

This thesis proposes a definition of care - which seeks to help frame the EU legal debate - in order to ultimately propose legal intervention, support and regulation for caring relationships within the context of children in EU law. The proposed definition is based on a number of

³⁴ B. Fisher and J. Tronto, ‘Toward a Feminist Theory of Caring’ in E. Abel and M. Nelson (eds) *Circles of Care: Work and Identity in Women’s Lives* (State University of New York Press 1990) 35-62, 40.

³⁵ V. Held, *The Ethics of Care* (Oxford University Press 2006) 36, 40.

³⁶ S. Ruddick, ‘Care as Labor and Relationship’ in M. Haflon and J. Haber (eds) *Norms and Values: Essays on the Work of Virginia Held* (Rowman & Littlefield 1998) 4.

³⁷ S. Sevenhuijsen, *Citizenship and the Ethics of Care: Feminist Considerations on Justice, Morality, and Politics* (Psychology Press 1998).

³⁸ V. Held, *The Ethics of Care* (Oxford University Press 2006)

³⁹ D. Bubeck, *Care, Gender and Justice* (Clarendon Press 1995); M. Hamington, *Embodied Care: Jane Addams, Maurice Merleau-Ponty and Feminist Ethics* (University of Illinois Press 2004).

⁴⁰ P. Bowden, *Caring: Gender Sensitive Ethics* (Routledge 1997) 183.

⁴¹ M. Daly, ‘Care as a Good for Social Policy’ (2002) 31 *Journal of Social Policy* 251-270.

⁴² M. Daly and J. Lewis (2000) ‘The Concept of Care and the Analysis of Contemporary Welfare States’ 51 *British Journal of Sociology*, 281-298.

⁴³ N. Folbre ‘Reforming Care’, in J. Gornick and M. Meyers (eds) *Gender Equality, Transforming Family Divisions of Labor* (Verso 2009) 111-128.

⁴⁴ See fn 42, at 285.

criteria which scholars have described, over the years, as “markers”.⁴⁵ Instead of adopting a straightforward definition, this thesis proposes to build on and make use of these markers to define a framework around the legal meaning of care. For the purpose of this thesis, it is suggested that in the individual caring relationships there are five main markers. Although this list might not be exhaustive, these selected markers help frame the parameters of the discussion.

The first marker is that care implies *a notion of labour*. In other words, care is work. It is a boundless and endless job “not contained within a specific timescale, but is virtually limitless, characterised by spontaneous, unexpected events or cries which could occur at any time”.⁴⁶ This labour is not considered to require specialisation of skills. Of course, some care professionals are highly specialised and valued: such is the case for doctors and consultants. In a competitive environment, specialisation is considered to be a guarantee of efficient work. However, more basic care giving is often viewed as unskilled “body work” that anyone can do, but nevertheless work that must be done, work that is typically hard, repetitive and often unpleasant.⁴⁷ Indeed, changing nappies, feeding or washing another person does not require high levels of education or specialisation but it is still work even when done with love.⁴⁸ Since care work is considered to be done by anyone, it is also deemed not to deserve reward. Care work often requires direct interaction with another. However, the creation of work does not necessarily require physical or direct interaction between individuals. The labour can also include a wider variety of activities which will fall under this marker. Care work can, for instance, involve doing the grocery shopping for an elderly relative, doing laundry for the family, managing financial issues or planning children’s schedules.⁴⁹ Moreover, Herring points out that under certain circumstances, refraining from entering into direct interaction with another person can constitute work, when for instance one allows the care recipient to

⁴⁵ See J. Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* (Routledge 1993); J. Herring, *Caring and the Law* (Hart 2013). Other authors have identified “values”, see the work of S. Sevenhuijsen.

⁴⁶ S. Pickard and C. Glendinning, ‘Comparing and Contrasting the Role of Family Carers and Nurses in the Domestic Health Care of Frail Older People’ (2002) 10 *Health and Social Care in the Community* 144-150.

⁴⁷ See the work of J. Twigg, *The Body in Health and Social Care* (Palgrave MacMillan, 2006) and J. Twigg, ‘Care Work as a Form of Body Work’ (2000) 20 *Ageing and Society* 389-411.

⁴⁸ A. Mullin, ‘Parents and Children: An Alternative to Selfless and Unconditional Love’ (2006) 21(1) *Hypatia* 181-200.

⁴⁹ M. Nolan, G. Grant and J. Keady, *Understanding Family Care: A Multidimensional Model of Caring and Coping* (Open University Press 1996).

become autonomous by letting them do the work.⁵⁰ This applies to parents who teach their children to become independent as they grow up.

The second marker relevant in the context of this thesis is the *absence of choice*. The obligations and responsibilities inherent in caring activities are non-negotiable: caring is seldom a choice. If and when perceived as a “choice”, this is heavily influenced by cultural, emotional and personal experiences. For example, it has been argued that having children and thus, to care, is the result of life choices.⁵¹ It is submitted, on the contrary, that whilst it might be possible to choose how to care, whether to delegate it, or whether to prioritise it over work,⁵² it is not possible to choose whether to care. As Glucksmann starkly points out, “if babies are not looked after they will die, if food is not prepared people will starve”.⁵³

The third marker refers to the *financial, emotional and physical costs* involved in caring.⁵⁴ Care is typically unpaid. Although unpaid, the care is nevertheless provided and received at a cost. As care takes part in the context of a relationship, both parties participate in an exchange. This transaction has value in itself in the context of the relationship.⁵⁵ Indeed, care is a positive aspect of human interaction. However, care is also costly for both parties financially and emotionally outside of the context of their relationship.⁵⁶ Both caregivers and care receivers experience disadvantages and discrimination in the labour market and in society in general. Care activities are not typically taken into account for macroeconomic statistics, though they are essential to the reproduction of the economy. From the market perspective, care is not valued in traditional accounting methods: it is considered to belong to the private sphere of the family. It follows that caring takes place either in addition to, or instead of, market activities. As a result, carers are less likely to access or hold paid

⁵⁰ J. Herring, *Caring and the Law* (Hart Publishing 2013) 19.

⁵¹ C. Hakim, ‘Lifestyle Preferences as Determinants of Women’s Differentiated Labor Market Careers’ (2002) 29(4) *Work and Occupations* 428-459.

⁵² See further the next section and E. Caracciolo di Torella, ‘Shaping and re-shaping the care discourse in European Law: a catalogue of rights for carers?’ 2016 28(3) *Child and Family Law Quarterly* 261-279.

⁵³ M. Glucksmann, ‘Why “Work”? Gender and The “Total Social Organisation of Labour”’ (1995) 2(2) *Gender, Work and Organisation* 63-75.

⁵⁴ See, for example, Carers UK, *Carers at a Breaking Point* (Carers UK 2014); C. O’Brien, ‘Confronting the Care Penalty: The Cause for Extending Reasonable Adjustment Rights along the Disability/Care Continuum’ (2012) 34 *Journal of Social Welfare and Family Law* 5-30.

⁵⁵ M. Daly and J. Lewis, ‘The Concept of Social Care and the Analysis of Contemporary Welfare States’ (2000) 51(2) *British Journal of Sociology* 281-298.

⁵⁶ M. Hirst, ‘Carer Distress: A Prospective, Population-Based Study’ (2005) 61(3) *Social Science & Medicine* 697- 708.

employment and this leads to financial disadvantage.⁵⁷ From an emotional and physical perspective, caring requires people to give and receive, acknowledging vulnerability in our human condition and our dependence on others. Carers report that both their health and their emotional states are affected by care⁵⁸ as the demands created by care can hinder, for example, their access to health services for themselves or holidays.⁵⁹ Care also impacts on people's relationships and on their social life.

The next marker is linked to connection. More often than not, care involves *personal connection and emotional attachment* between the carer and the person who is cared for.⁶⁰ usually, albeit not always, we care for somebody who is close to us. Therefore, care has been perceived as a "labour of love".⁶¹ If it is clear that care has a detrimental impact on the ability to work, often also after the care duties have ended, it has been suggested that the disadvantages are "counterbalanced by the rewards and satisfaction of being able to provide care for a close relative".⁶² This is disputable yet the emotional link in many cases remains present.

A final marker of care is found in its inherent *vulnerability*, a concept that is steadily gaining momentum in many areas of law and is of particular importance to appreciate the very essence of the caring relationship.⁶³ Vulnerability can be conceptualised in different, almost opposite, ways. At one end of the spectrum it can be a specific feature of certain subjects that make them worthy of special protection and consideration. At the other end, vulnerability is seen in a broader way as "inevitable" and "inherent in the human condition".⁶⁴ Furthermore, being vulnerable is not always an absolute state: sometimes otherwise able adults are in a

⁵⁷ This is especially the case for women: F. Carmichael and S. Charles, 'The Opportunity Costs of Informal Care: Does Gender Matter?' (2003) 22(5) *Journal of Health Economics* 781-803.

⁵⁸ B. Keeley and M. Clarke, *Carers Speak Out Project: Report on Findings and Recommendations* (Princess Royal Trust for Carers 2002).

⁵⁹ Carers Trust, *New Research finds unpaid carers struggle without support* (carers trusts 2012), < <https://www.carers.org/news/new-research-finds-unpaid-carers-struggle-without-support> > accessed on 16 December 2015.

⁶⁰ N. Folbre 'Reforming Care', in J. Gornick and M. Meyers (eds) *Gender Equality, Transforming Family Divisions of Labor* (Verso 2009) 111-128, 111-112.

⁶¹ J. Finch, D. Groves (eds.) *A Labour of Love: Women, Work and Caring* (Routledge 1983) 181-198.

⁶² C. Glendinning, H. Arksey, F. Tjadens, M. Moree, N. Moran and H. Nies, 'Care Provision within Families and its Socio-Economic Impact on Care Providers across the European Union' (2009) Research Works, No. 2009-05, Social Policy Research Unit, 19.

⁶³ J. Wallbank and J. Herring (eds), *Vulnerability Care and Family Law* (Routledge 2014).

⁶⁴ M. Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Conditions' (2008) 20 *Yale Journal of Law and Feminism* 1-23.

position of vulnerability.⁶⁵ Although these approaches have been criticised as “too broad and too narrow”,⁶⁶ they are equally important because “we readily class those who need care from others as vulnerable, without seeing the vulnerability that caring creates for the carers”.⁶⁷ It is submitted that vulnerability should not be seen as a failure to attain autonomy but rather as an inevitable aspect of life.⁶⁸ Thus, this research shares the view of Fineman who argues that our vulnerability derives from “our bodily materiality” and thus “it is both universal and constant. It is apparent at the beginning of life when we are totally dependent on others for survival... [but it also] accompanies us throughout life, as we age, become ill, disable or need care from others and, finally, die”.⁶⁹ In sharp contrast, it is suggested that autonomy should be seen as a way to give people a range of valuable options from which to choose.⁷⁰ Only in this way are “personal integrity and sense of dignity and self-respect...made concrete”.⁷¹

The Question of Choice

It is impossible not to care. As explained above, care is a necessity for all human beings at least when they are babies. It is, at the same time, not possible not to work, except for some rare individuals. For a long time, the division of care and work was done at the level of the family with men doing paid work and women doing unpaid care work. Increasingly, however, the division between care and work is taking place at the individual level and it is framed as an individual choice; sometimes an impossible choice, particularly for women. Women, who have traditionally done most of the care, have entered the paid labour market in huge numbers over the past six decades. As a result, they have had to negotiate care and paid work much more than men whose lives have not changed in the same way (so far at least).⁷²

⁶⁵ See, for example, A. Diduck, ‘Autonomy and Vulnerability in Family Law: The Missing Link’, in J. Wallbank, J. Herring (eds) *Vulnerabilities, Care and Family Law* (Routledge 2013) 95-114.

⁶⁶ S. Hurst, ‘Vulnerability in Research and Health Care: Describing the Elephant in the Room’ (2008) 22 *Bioethics* 191-202, 192.

⁶⁷ B. Hughes, L. McKie, D. Hopkins and N. Watson, ‘Love’s Labour’s Lost? Feminism, the Disabled People’s Movement and the Ethic of Care’ (2005) 39 (2) *Sociology* 259-275, 264.

⁶⁸ See further S. Dodds, ‘Depending on Care: Recognition of Vulnerability and the Social Contribution of Care Provisions’ (2007) 21(9) *Bioethics* 500-510.

⁶⁹ M. Fineman, *The Autonomy Myth* (New Press 2004) and ‘Responsibility, Family and the Limits of Equality: An American Perspective’ in C. Lind, H. Keating and J. Bridgeman (eds.) *Taking Responsibility, Law and The Changing Family* (Ashgate, 2011) 37-49, 46; see also the discussion in J. Herring, *Caring and The Law* (Hart Publishing 2013).

⁷⁰ Case C-303/06 *Coleman v Attridge Law*, Opinion of Advocate General Maduro delivered on 31 January 2008, ECLI:EU:C:2008:61, 9.

⁷¹ J. Raz, *The Morality of Freedom* (Oxford University Press 1986) as quoted in Case C-303/06 *Coleman v Attridge Law*, Opinion of Advocate General Maduro delivered on 31 January 2008, ECLI:EU:C:2008:61, 9.

⁷² J. Rubery and A. Rafferty, ‘Women and Recession Revisited’ (2013) 27(3) *Work, Employment & Society* 414-432; G. Jay, S. Arber, J. Brannen, A. Dale, S. Dex, P. Elias, P. Moss, J. Pahl, C. Roberts and J. Rubery, ‘Feminist Fallacies: A Reply to Hakim on Women’s Employment’ (1996) 47(1) *The British Journal of*

In most post-industrialised countries, caring is not only a gendered activity but it is also perceived to be a personal choice.⁷³ There is a range of individuals who claim that raising children is a life choice, much comparable to choosing to have a pet. However, these views completely ignore the societal benefit of parents heavily investing in the caring and nurturing of their children, helping them to become the next generation of active, responsible and well-adjusted citizens, workers and tax payers. All members of society benefit from the production of such individuals. However, such production is carried largely by parents, and especially by mothers who are not compensated for this work. In addition, caregivers can never withhold the fruit of their labour. Moreover, these caring activities whether paid (taking place in the public sphere) or unpaid (in the private sphere) are undervalued and constructed so that women are considered the natural or primary carer.⁷⁴

It is submitted that care should be valued and cannot be regarded as an undesirable burden.⁷⁵ Indeed, many parents - especially mothers - choose to care for their children and forfeit or put on hold their career regardless of the economic outcome of their decision simply because they value the caring relationship with their children. Choosing to care should be a legitimate option for parents. The choice of parents to care for their children (but also for other dependants) cannot solely be dictated by economic rationality. In particular, the availability of affordable and quality childcare facilities should be an acceptable option for parents to use and not an obligation. Mothers (and parents in general) should be able to use childcare *should they choose to*.

Chapter 2 will argue that caring relationships are essential to human life and represent a central aspect of citizenship. Choices around caring and the extent of that care are influenced by cultural, emotional and personal experiences. The nature of these choices faced by women and men is also dependent on the way law and policies address care and on the place of

Sociology 167-174; A. Hochschild, 'The Time Bind' (1997) 1(2) *WorkingUSA* 21-29; J. Jacobs and K. Gerson, *The Time Divide: Work, Family and Gender Inequalities* (Harvard University Press 2004); J. Nedelsky, 'The Gendered Division of Household Labor: An Issue of Constitutional Rights' in B. Baines, D. Barak-Erez & T. Kahana (eds) *Feminist Constitutionalism: Global Perspectives* (Cambridge University Press 2012) 15-47.

⁷³ P. Morgan and R. Berkowitz King, 'Why Have Children in the 21st Century? Biological Predisposition, Social Coercion, Rational Choice' (2001) 17(1) *European Journal of Population/Revue Européenne de Démographie* 3-20.

⁷⁴ N. Cambien, 'EU Citizenship and ECJ: Why Care about Primary Carers?' (2012) *SSNR Research Paper* 2167890, <SSRN: <http://ssrn.com/abstract=2167890> or <http://dx.doi.org/10.2139/ssrn.2167890>> Accessed on 23 January 2016.

⁷⁵ See Chapter 3.

individuals (especially women) in the labour market.⁷⁶ Women do most of the care work. As a result, the real freedom to choose, at least for women, is necessarily conditioned by the ability of mothers (and fathers or other caregivers) to balance paid work with unpaid care as well as the ability of the market and the state to facilitate the reconciliation of paid work with unpaid care. These conditions represent important limitations to the ability of individuals (especially women) to experience genuine freedom of choice. Indeed, the equal sharing of unpaid care between men and women is tied primarily to men's freedom to choose between paid work and care. Men's freedom of choice necessarily limits women's choices: in other words, men and women's unequal power limits their ability to make free choice with regards to their share of care work. Hence, state intervention, in order to curtail men's freedom through sanction or penalties or through positive incentives such as "daddy leave" provisions,⁷⁷ for instance, can be justified in order to balance choice and equality.

The issue of choice is important, particularly as this thesis seeks support from the capability approach.⁷⁸ The ability to make choices is a freedom which allows individuals to realise their full potential. Within the EU, the question of choice for women has often been subordinated to the principle of gender equality.⁷⁹ However, this principle has seldom been used to address the redistribution of unpaid care work between men and women (except in the very early documents such as the 1992 Childcare Recommendation).⁸⁰ Instead, gender equality has mostly been instrumentalized as a one-dimensional tool by EU policy makers in order to support raising female employment rates, not to open up genuine work and care choices for women.⁸¹

Childcare vs Other Forms of Care

In practice, not all types of individual caring relationships are the same and, equally, there is no such thing as a single type of care. Nevertheless, one can draw a broad distinction

⁷⁶ A. Masselot, 'Gender Implications of the Right to Request Flexible Working Arrangements: Raising Pigs and Children in New Zealand' (2015) 39(3) *New Zealand Journal of Employment Relations* 59-71.

⁷⁷ A. Leira, 'Caring as Social Right: Cash for Child Care and Daddy Leave' (1998) 5(3) *Social Politics: International Studies in Gender, State & Society* 362-378.

⁷⁸ See further Chapter 2.

⁷⁹ J. Lewis and S. Giullari, 'The Adult Worker Model Family, Gender Equality and Care: The Search for New Policy Principles and the Possibilities and Problems of a Capabilities Approach' (2005) 34(1) *Economy and Society* 76-104.

⁸⁰ Council Recommendation 92/241/EEC of 31 March 1992 on child care, OJ [1992] L123/16.

⁸¹ G. Esping Andersen, D. Gallie, A. Hemerijck and J. Myles, *A New Welfare Architecture for Europe. Report submitted to the Belgian Presidency of the European Union* (2001) < http://www.euro.centre.org/data/1182414898_63513.pdf > accessed on 5 November 2015; G. Esping Andersen, *Why We Need a New Welfare State* (Oxford University Press 2002).

between, on the one hand, domestic tasks such as cleaning, cooking, grocery shopping, laundry and DIY, which are considered to be caring tasks and, on the other, caring for individuals, which is about the care relationship. Caring for individuals can be divided into two subgroups: caring for children (feeding, playing, cleaning, educating, for example) and caring for dependent adults (feeding, cleaning, aiding mobility or providing medical help). For many people the care provided to children is considered to be more gratifying than other forms of care.⁸² Most people value the time they spend with their children. This is not always the case for other domestic tasks or even when caring for dependant adults (and these two issues are often conflated into a single category).⁸³ In line with this, EU legislation and policy makers as well as Member States have, commonly, addressed the issue of care using two categories: (1) care for children; and (2) care for the elderly, dependant and disabled people.

The care involved in looking after healthy, young children is perceived to be easier to understand and thus, to regulate, perhaps because it is seen as a normal feature of life. In EU policy, childcare has been argued to represent an investment for future generations.⁸⁴ Accordingly, childcare has been presented as a “special case”⁸⁵ because children are often considered “public goods”,⁸⁶ they are seen as an investment for the future, which will benefit society.⁸⁷ Moreover, caring for young children has sometimes been compared to being economically productive as this enhances society’s future human capital and ensures a workforce within the next generation.⁸⁸ Care for young children is therefore more easily “seen” because it is increasingly considered to be part of the market. In addition, formal, outsourced childcare has been identified as the main way of helping women enter and remain in paid employment.⁸⁹ A quarter of women with young children who do not work or work

⁸² M. Dominguez Folgueras, ‘L’inégale Partage des Responsabilités Familiales et Domestiques est Toujours d’Actualité’ (2014) 2(15) *Regards Croisés sur l’Economie* 183-196.

⁸³ Ibid.

⁸⁴ European Commission Recommendation 2013/112/EU of 20 February 2013, Investing in children: breaking the cycle of disadvantage, OJ [2013] L59/5.

⁸⁵ J. Gornick and M. Meyers, ‘Institutions that Support Gender Equality in Parenthood and Employment’ in J. Gornick and M. Meyers (eds) *Gender Equality, Transforming Family Divisions of Labor* (Verso 2010) 3-64.

⁸⁶ See for example, N. Folbre, ‘Reforming Care’, in J. Gornick and M. Meyers (eds) *Gender Equality, Transforming Family Divisions of Labor* (Verso 2009) 111-128, 120.

⁸⁷ However, see I. Moebius and E. Szyzszczack, ‘Of Raising Pigs and Children’ (1998) 18 *Yearbook of European Law* 125-156.

⁸⁸ OECD, *Starting Strong: Childhood Education and Carer* (OECD 2001) and more recently European Commission Recommendation 2013/112/EU of 20 February 2013, Investing in children: breaking the cycle of disadvantage, OJ [2013] L59/5.

⁸⁹ M. Daly, ‘A Fine Balance Women’s Labour Market Participation in International Comparison’ in F. W. Scharpf and V. E. Schmidt (eds) *Welfare and Work in the Open Economy, Vol II Diverse Responses to Common Challenges* (Oxford University Press 2000) 467-510.

part-time in the EU claim that their lack of employment results from the fact that suitable childcare services are not available or affordable.⁹⁰ This might explain why childcare is often considered to be a priority in EU policy and legislative intervention and why it is funded over care for other types of individuals.⁹¹ This thesis accepts that there is value in investing in the care of future generations but it is also important to point out that people are more than just a means of economic investment and that care does not end with children. Other forms of care for dependant people due to old age, illness and/or disability are not generally considered to be an investment or to be part of the market. Nevertheless, whether caring for children or caring for dependents adults, the social and economic impacts on carers are similar.

The Diversity of Childcare Arrangements in the EU Member States

Childcare is relatively easy to define: it is the act of looking after children.⁹² However, the difficulty resides in identifying the contour of childcare provisions at both EU and domestic levels. On a practical point, there is no common standard for collecting data and statistics on childcare in the EU. Each country has its own unique constellation of childcare arrangements, consisting of various services and facilities such as leave provisions, day-care centres, kindergartens, informal family care arrangements, childminders at home or out of home, and/or (pre)school education systems.⁹³ On a more abstract level, the task still remains difficult because of the blurring lines between various types of arrangements.

Childcare is an area that encompasses elements of welfare and early education policy. Indeed, while some countries draw a clear distinction between the care organization of young children and the education system of older children, others consider that childcare is integrated in the education system but remains excluded from education outside school hours. Depending on how these two categories are framed, childcare initiatives will receive policy support and funding accordingly.

⁹⁰ M. Mills, P. Praeg, F. Tsang, K. Begall, J. Derbyshire, L. Kohle, C. Miani and S. Hoorens, *Use of Childcare Services in the EU Member States and Progress Towards the Barcelona Targets (Short Statistical Report 1)* (European Union 2014) 17.

⁹¹ Communication from the Commission of 20 February 2013, Towards social investment for growth and cohesion including implementing the European Social Fund 2014-2020, COM(2013) 83.

⁹² The definition in the dictionary states that childcare is “care and supervision of children whose parents are working, provided by a childminder or local authority” (Collins English Dictionary, *Complete and Unabridged 2012 Digital Edition*).

⁹³ J. Plantenga and C. Remery, *The Provision of Childcare Services: A Comparative Review of 30 European Countries* (Office for Official Publications of the European Communities 2009) 29.

In addition, childcare arrangements are structured along a continuum of formal and/or informal criteria that are closely interconnected. Formal childcare is a service provided out of home by non-family members and organised and/or controlled by a public or private structure. Such services typically include elements of education at preschool or it can be part of the formal schooling process. Formal childcare involves nurseries, preschools and registered childminders, while informal childcare includes grandparents, other relatives or friends, unregistered nannies and childminders.⁹⁴ It can also cover the care of children before and after school hours and childcare at day care centres.⁹⁵ In contrast, the characteristics of informal childcare often exclude state control over quality, child protection and taxation.⁹⁶ The use of formal and/or informal childcare varies across the EU Member States according to a wide range of criteria including cultural aspects, social norms relating to the role of women, education and socio-economic backgrounds of the parents as well as the age of the child.⁹⁷ Childcare law and policy also influences the choice of arrangements made by parents. In particular, affordability, availability of services and adequate flexibility represents important criteria in the choice of formal or informal childcare but also contributes to the ability of women to work or not or to work part-time.⁹⁸ Nevertheless, the dividing line between formal and informal childcare arrangements can be fluid and varies between countries. Often, informal childcare is used by parents to supplement formal childcare or as emergency cover or back up when regular childcare arrangements breakdown or are insufficient.⁹⁹ Informal childcare is also used as a supplement to school hours and holiday time for school-aged children. Moreover, it represents the main type of childcare for many families of very young children and babies in many EU countries (especially in the Netherlands, Greece, Portugal, Romania and Cyprus).¹⁰⁰ Arguably, informal childcare is commonly used by parents on a

⁹⁴ K. Glaser, D. Price, G. Di Gessa, E. Ribe, R. Stuchbury and A. Tinker, *Grandparenting in Europe: Family Policy and Grandparents' Role in Providing Childcare* (Grandparents Plus 2013) available at < <http://www.grandparentsplus.org.uk/wp-content/uploads/2013/08/Grandparenting-in-Europe-0613-Electronic.pdf> > accessed on 29 December 2015; M. Jappens, and J. Van Bavel, 'Regional Family Norms and Child Care by Grandparents in Europe' (2012) 27(4) *Demographic Research* 85-120. See also L. Spitz, 'Grandparents: their Role in the 21st Century Families' (2012) 42(10) *Family Law* 1254-1257.

⁹⁵ M. Mills, P. Praeg, F. Tsang, K. Begall, J. Derbyshire, L. Kohle, C. Miani and S. Hoorens, *Use of Childcare Services in the EU Member States and Progress Towards the Barcelona Targets (Short Statistical Report 1)* (European Union 2014).

⁹⁶ J. Rutter and B. Evans, *Informal Childcare: Choice or Chance? A Literature Review* (Daycare Trust 2011).

⁹⁷ B. Janta, *Caring for Children in Europe* (European Union 2014) < <http://europa.eu/epic/studies-reports/docs/rr-554-dg-employment-childcare-brief-v-0-16-final.pdf> > accessed on 29 December 2015.

⁹⁸ See fn95 and J. Plantenga and C. Remery, *The Provision of Childcare Services: A Comparative Review of 30 European Countries* (Office for Official Publications of the European Communities 2009).

⁹⁹ M. Mills, P. Praeg, F. Tsang, K. Begall, J. Derbyshire, L. Kohle, C. Miani and S. Hoorens, *Use of Childcare Services in the EU Member States and Progress towards the Barcelona Targets (Short Statistical Report 1)* (European Union 2014).

¹⁰⁰ *Ibid.*

part-time basis and therefore it is unlikely to sufficiently support women's full-time employment in the labour market.¹⁰¹ Informal childcare arrangements do impact on the policy development of formal childcare provisions. Thus, the two forms of childcare remain intricately linked to one another. Although informal childcare plays an unquestionably crucial role in the overall organization of childcare in many EU Member States,¹⁰² this thesis focuses mainly on the EU engagement with law and policy addressing formal childcare. Notwithstanding, it is acknowledged that the lack of clear boundaries between formal and informal childcare means that EU action here impacts both forms and the existence of informal childcare and that this is relevant to the policy development of formal childcare. A further difficulty resides in the fact that the division between public and private childcare arrangements is not always straightforward. Childcare is not exclusively provided by the public sector. The actions of the public and the private sectors are also intermingled (like tax measures designed to support childcare across the private market, for example). Moreover, private employers use a range of programmes which rely and complement the public sector's provisions.

Finally, the provisions relating to childcare are often conflated with more general provisions dealing with the reconciliation of work with family life. Some scholars and policy makers argue that childcare provisions are made from a combination of law and policies which address leave, time and services alike.¹⁰³ However, there is a distinction between provisions which support parents who have childcare obligations in to paid work and measures which facilitate the care of children of parents who work in the paid labour market.¹⁰⁴ The former is made of two types of measures which grant parents time off in connection with the birth of the child¹⁰⁵ and offer the possibility of re-arranging working hours so that parents can fulfil

¹⁰¹ Ibid.

¹⁰² Ibid, 27.

¹⁰³ For instance, see: B. Janta, *Caring for Children in Europe* (European Union 2014) < <http://europa.eu/epic/studies-reports/docs/tr-554-dg-employment-childcare-brief-v-0-16-final.pdf> > accessed on 29 December 2015.

¹⁰⁴ J. Lewis, 'Childcare Policies and the Politics of Choice' (2008) 79(4) *The Political Quarterly* 499–507; E. Caracciolo di Torella and A. Masselot, *Reconciling Work and Family Life in EU Law and Policy* (Palgrave Macmillan 2010).

¹⁰⁵ 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] L348/1; Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC (Text with EEA relevance), OJ [2010] L68/13. To some extent the following measure also belong to this category: Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for

their family responsibilities.¹⁰⁶ Under EU law at least, these provisions are legally binding and are part of employment law. By contrast, childcare measures ensure that individuals (mostly women) with unpaid care responsibilities can participate and remain sustainably in the employment market. In other words, whilst leave and working arrangements give individuals *time to care*, a right to care would provide individuals with *time to work*.¹⁰⁷ Childcare provisions are typically located in the realm of social welfare. Under EU law, such provisions have so far never been legally binding and includes, instead, a number of soft measures which aim to encourage Member States to develop accessible, affordable and quality childcare facilities as well as other forms of financial assistance towards childcare. For the purpose of this thesis, childcare provisions will consist of EU law and policies which facilitate the care of children of parents who work in the paid labour market.

Who Cares? Women

In the same way as there is no single type of caring relationship, there is no single type of caregiver. Caregivers are a heterogeneous cohort: they come from any background and there is no age limit. As they can have different features, caregivers might experience different disadvantages specific to their personal circumstances, raising issues of intersectional discrimination.¹⁰⁸ However, caregivers often share a common characteristic: namely their gender. There is a wealth of evidence that, in the main, care remains a gendered activity at both domestic¹⁰⁹ and EU level.¹¹⁰

men and women as regards access to employment, vocational training and promotion, and working conditions, OJ [2002] L269/15.

¹⁰⁶ Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC - Annex: Framework agreement on part-time work, OJ [1998] L 14/9; Council Directive 99/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, OJ [1999] L175/43, corrigendum at OJ [1999] L244/64 and Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, OJ [2003] L 299/9.

¹⁰⁷ J. Lewis, 'Childcare Policies and the Politics of Choice' (2008) 79(4) *The Political Quarterly* 499-507.

¹⁰⁸ J. Bullock and A. Masselot, 'Multiple Discrimination and Intersectional Disadvantages Challenges and Opportunities in the EU Legal Framework' (2013) 19(1) *Columbia Journal of European Law* 55-80; A. Masselot and J. Bullock, 'Intersectional Aspirations in the EU Anti-Discrimination Legal Framework' 2012(2) - 2013(1) *Australian and New Zealand Journal of European Studies* 3-16; D. Schiek and V. Chege, *European Union Non-Discrimination Law. Comparative Perspectives on Multidimensional Equality Law* (Routledge Cavendish 2009); D. Schiek and A. Lawson (eds) *European Union Non-Discrimination Law and Intersectionality: Investigating the Triangle of Racial, Gender and Disability Discrimination* (Ashgate Publishing 2013).

¹⁰⁹ B. Hobson (ed), *Making Men into Fathers?* (Cambridge University Press 2002); R. Collier, 'Fathers Masculinities and Personal Life' in M. Fineman, M. Thomson (ed) *Exploring Masculinities: Feminist Legal Theory Reflections* (Ashgate 2013) 251-266; R. Crompton and C. Lyonette, 'Who does the Housework? The Division of Labour within the House' in A. Park, J. Curtice, K. Thomson, M. Philipps, M. Johnson and E. Clery (eds) *British Social Attitudes: The 24th Report* (Sage 2008) 53-81; J. Wallbank, J. Herring, 'Introduction: Vulnerabilities, Care and Family Law' in J. Wallbank, J. Herring (eds) *Vulnerability Care and Family Law*

Time surveys have evolved over the past century and, for the last 50 years or so, it has been possible to report accurately on the proportion of time individuals spend caring according to their gender.¹¹¹ Broadly speaking, the fact that women have massively entered the labour market over the past six decades has only minimally impacted on the sharing of tasks and care at domestic level between men and women. While women have reduced the time spent providing care,¹¹² men have only increased the time they spend on caring moderately.¹¹³ Recent studies reveal that, on average, women spend longer hours than men in caring (26.4 weekly hours compared with 8.8).¹¹⁴ Although there are variations across countries, generations and the civil status of individuals,¹¹⁵ by and large care and domestic tasks in general remains a female activity. Particularly, it should be noted, the arrival of children in a family reinforces the inequalities between the sexes.¹¹⁶ In general, women are more likely to

(Routledge 2014) 1-21, 12-13; M. Brewer and L. Wren-Lewis, *Why Did Britain's Households Get Richer? Decomposing UK Household Income Growth Between 1968 and 2008-09* (Institute for Fiscal Studies 2011); F. Deutsch, *Halving it All: How Equally Shared Parenting Works* (Harvard University Press 1999); T. Greenstein, 'Economic Dependence, Gender and the Division of Labour in the Home: A Replication and Extension' (2000) 62(2) *Journal of Marriage and Family* 322-335.

¹¹⁰ L. Waddington, 'Carers, Gender and Employment Discrimination: What does EU Law Offer Europe's Carers' in M.-A. Moreau (ed), *Before and After the Economic Crisis: What Implications for the 'European Social Model'?* (Edward Elgar 2011); F. Carmichael and S. Charles, 'The Opportunity Costs of Informal Care: Does Gender Matter?' (2003) 22(5) *Journal of Health Economics* 781-803. See also R. Rodrigues, M. Huber and G. Lamura (eds), *Facts and Figures on Healthy Ageing and Long-term Care* (European Centre for Social Welfare Policy and Research 2012) discussed in the Commission Staff Working Document of 20 February 2013, *Long Term Care in Ageing Societies – Challenges and Policy Options*, SWD(2013) 41 final.

¹¹¹ M. Dominguez Folgueras, 'L'inégale Partage des Responsabilités Familiales et Domestiques est Toujours d'actualité' (2014) 2(15) *Regards Croisés sur l'Economie* 183-196.

¹¹² This is understood as a general term including caring for children and domestic tasks.

¹¹³ V. Miranda, 'Cooking, Caring and Volunteering: Unpaid Work Around the World', *OECD Social, Employment and Migration Working Papers*, n. 116 (OECD Publishing 2011); M. Dominguez Folgueras, 'L'inégale Partage des Responsabilités Familiales et Domestiques est Toujours d'actualité' (2014) 2(15) *Regards Croisés sur l'Economie* 183-196. In addition, convergence appears to be slowing down: F. Blau and L. Kahn, 'The Gender Pay Gap: Have Women Gone as Far as They Can?' (2007) 21(1) *The Academy of Management Perspectives* 7-23.

¹¹⁴ Eurofound, *Women, Men and Working Conditions in Europe* (Publications Office of the European Union 2013). See also M. Veerle, *Unpaid Work of Older Adults in OECD Countries*, *Social Situation Observatory*, 29 November 2011; M. Veerle, 'Cooking, Caring and Volunteering: Unpaid Work around the World' (2011) *OECD Social, Employment and Migration Working Papers* N°. 116, DELSA/ELSA/WD/SEM(2011)1; OECD, *Balancing Paid Work, Unpaid Work and Leisure* (OECD 2014) <<http://www.oecd.org/gender/data/balancingpaidworkunpaidworkandleisure.htm>> accessed on 19 September 2015. See also European Commission of 5 March 2002, *Annual Report on Equal Opportunities for Women and Men in the European Union 2002*, COM(2003) 98 final.

¹¹⁵ S. Coltrane, 'Research on Household Labour: Modelling and Measuring the Social Embeddedness of Routine Family Work' (2000) 62 (4) *Journal of Marriage and family* 1208-1233.

¹¹⁶ A. Régnier-Loilier and C. Hiron, 'Évolution de la Répartition des Tâches Domestiques après l'arrivée d'un Enfant' (2010) 99(1) *Politiques Sociales et Familiales* 5-25.

provide physical, emotional and long term care.¹¹⁷ Conversely men, unless caring for spouses or partners, care for fewer hours per week and undertake less demanding tasks.¹¹⁸

The gender dimension of care is particularly evident in relation to the struggle of combining employment with child rearing. The care provided to young children is done disproportionately by women who, on average, reduce time spent in paid employment in order to meet their family obligations (whilst men increase their paid work commitment).¹¹⁹ In the UK alone in 2013, the rate of women engaged in paid employment with dependent children increased by 5% from 1996 (to a total 72% in 2013) and that of single mothers increased by 17% (to 60% of all women).¹²⁰ Across Europe, in 2010, 80% of the parents who felt they had to reduce their working time because of childcare responsibilities were women.¹²¹ 25% of women with a child under the age of three and 26% of women with a child between the age of three and the mandatory school age, who are not working or are working part-time in the EU-27, report that they cannot take up full-time employment because childcare services are either unavailable or unaffordable.¹²² Quality of childcare services also plays a role in the reasons for not working full-time (albeit to a lesser extent).¹²³

As women continue to do most of the informal and unpaid care, it is women who are in the vast majority overwhelmed by the dual burden of care and work and their resulting conflicts.¹²⁴ Addressing the equal participation of care work is key to the achievement of gender equality. Women are less likely to participate in paid employment because of their

¹¹⁷ L. Waddington, 'Carers, Gender and Employment Discrimination: What does EU Law offer Europe's Carers' in M.-A. Moreau (ed) *Before and After the Economic Crisis: What Implications for the 'European Social Model'?* (Edward Elgar 2011); F. Carmichael and S. Charles, 'The Opportunity Costs of Informal Care: Does Gender Matter?' (2003) 22(5) *Journal of Health Economics* 781-803.

¹¹⁸ In 2006, women represented 76% of those caring for older persons; see J. Triantafyllou and E. Mestheneos, *Summary of Main Findings from Eurofamcare* (Institute for Medical Sociology, University of Hamburg 2006).

¹¹⁹ M. Dominguez Folgueras, 'L'inégale Partage des Responsabilités Familiales et Domestiques est Toujours d'actualité' (2014) 2(15) *Regards Croisés sur l'Economie* 183-196; D. Hofäcker and S. König, 'Flexibility and Work-Life Conflict in Time of Crisis: A Gender Perspective' (2013) 33(9) *International Journal of Sociology and Social Policy* 613-635.

¹²⁰ Office for National Statistics, *Women and the Labour Market* (Office of National Statistics 2013) < http://www.ons.gov.uk/ons/dcp171776_328352.pdf > accessed on 29 October 2015.

¹²¹ European Commission, *2013 Report on the Application of the EU Charter of Fundamental Rights*, (Publications Office of the European Union, 2014), COM(2014) 224 final, < http://ec.europa.eu/justice/fundamental-rights/files/com_2014_224_en.pdf > accessed on 29 October 2015.

¹²² M. Mills, P. Praeg, F. Tsang, K. Begall, J. Derbyshire, L. Kohle, C. Miani and S. Hoorens, *Use of Childcare Services in the EU Member States and Progress towards the Barcelona Targets (Short Statistical Report 1)* (European Union 2014) 17, 19.

¹²³ *Ibid*, 18.

¹²⁴ T. Hervey and J. Shaw, 'Women, Work and Care: Women's Dual Role and Double Burden in EC Sex Equality Law' (1998) 8 *Journal of European Social Policy* 43-63; A. Hochschild and A. Machung, *The Second Shift: Working Parents and the Revolution at Home* (Viking Penguin 1989).

care responsibilities compared to men and, in turn, are more prone to end up living in poverty.¹²⁵ However, women who work continue to provide most of the care or alternatively rely on outsourcing some of that care. The ‘second shift’,¹²⁶ and sometimes the ‘third shift’,¹²⁷ is unsustainable on many levels. It is therefore not surprising that care giving has been identified as the main obstacle to achieving gender equality.¹²⁸ The increase in female employment rates encouraged, some would even argue driven,¹²⁹ by EU policy has somewhat exacerbated this situation and has led to what some have called “the care-crunch”.¹³⁰

As women have massively entered the paid labour market, and the resulting increase of dual working couples, one would have expected that care would be shared more equally. However, care remains predominantly feminised. Much has been written to explain the reasons as to why care is gendered particularly by economists and sociologists. On the one hand, some economists consider that families act rationally based on cost-benefit analyses. In his seminal book, *A Treatise on the Family*,¹³¹ Gary Becker provides the broad line explaining this approach. He submits that to survive, families need consumer goods such as food, clothes, furniture and services such as childcare, medical care, or transport. Families can decide to produce everything themselves but in contemporary society, most families decide to produce only part of these and to buy a large part of the rest. At least one member of the family needs to work in order to be able to pay for the necessary goods and services. Families need therefore to decide who does what: who works more in the labour market and who will produce more of the domestic tasks and care. A number of combinations are possible, for example: one member works full-time while the other stays home; the two partners work full-time and outsource most of their care and domestic tasks; or both partners work part-time and share the domestic work and care. However, from an economic point of view, Becker shows

¹²⁵ The Commission estimate that “12 million more women than men in the EU are living in poverty”. See Communication from the Commission of 20 February 2013, Towards social investment for growth and cohesion – including implementing the European Social Fund 2014-2020, COM(2013) 83, 7-8.

¹²⁶ A. Hochschild and A. Machung, *The Second Shift: Working Parents and the Revolution at Home* (Viking Penguin 1989).

¹²⁷ The expression ‘third shift’ sometime refers to care-giving outside the home either informally to relatives and friends or more formally to neighbours and strangers within volunteer organisations. See N. Gerstel, ‘The Third Shift: Gender and Care Work Outside the Home’ (2000) 23(4) *Qualitative Sociology* 467-483.

¹²⁸ S. Burri, ‘Reconciliation of Work and Private Life in EU Law: State of Affairs’ (2010) 11(1) *ERA Forum* 111-127; T. Hervey and J. Shaw, ‘Women, Work and Care: Women’s Dual Role and Double Burden in EC Sex Equality Law’ (1998) 8 *Journal of European Social Policy* 43-63.

¹²⁹ M. Stratigaki, ‘The Co-optation of Gender Concepts in EU policies: The Case of Reconciliation of Work and Family’ (2004) 11(1) *Social Politics* 30-56.

¹³⁰ S. Shellenbarger, *Work and Family* (Ballantine Books 1999); L. Hancock, ‘The Care Crunch: Changing Work, Families and Welfare in Australia’ (2002) 22(2) *Critical Social Policy* 119-140.

¹³¹ G. Becker, *A Treatise on the Family* (Harvard University Press 1991).

that in most families, the most rational behaviour is that each partner specialises in an area: paid work or domestic/care work. Becker submits, in particular, that women face a less favourable situation in the labour market because of the gender pay gap and professional segregation. In addition, he claims that they have a “comparative advantage” with regards to childcare in particular (based on their gendered educational upbringing and their reproductive ability). Therefore Becker argues that in most heterosexual families it would be more efficient if the male partner specialised in the labour market while the female partner specialised in domestic and care work. His conclusions therefore provide a justification for the traditional gendered division of work.¹³²

On the other hand, gender studies provide an explanation of the unequal share of care and domestic tasks not based on rationality but based on internalised social norms and gender bias.¹³³ Girls and boys are raised differently and are exposed to different gender norms which they interiorise to reproduce stereotyped gendered behaviour. In this perspective, care-giving is expected of women by societal norms and so women are more likely to provide care than men. It is commonplace to portray women as those who can naturally nurture as if this was a natural extension to women’s reproductive ability. In addition, care giving is often linked to female emotions and sensibilities.¹³⁴ It has therefore been easy to argue that women naturally choose this “labour of love”¹³⁵ in either the private or public arena. Any penalties associated with care giving are considered to be the result of the (illusion) of life choices.¹³⁶ The dichotomy between choice and essentialism remains often unquestioned and this perception has been reinforced by policy and legislation. Yet it is legitimate to investigate the compatibility of the concept of care with that of equality.

¹³² It should be noted, however, that the economist theory explanation regarding the share of care and domestic work is based on gender neutral concepts. If the market conditions were different and the gender pay gap was in favour of women, specialisation would still apply but in this case, men would focus on care and domestic work. Becker’s ideas help us understand some of the characteristics of care work. For instance when heterosexual partners are both engaged in the labour market, especially when women have a more favourable job compared to their male partners, they are better able to negotiate an equal share of care and domestic tasks (M. Dominguez Folgueras, ‘L’inégale Partage des Responsabilités Familiales et Domestiques est Toujours d’actualité’ (2014) 2(15) *Regards Croisés sur l’Economie* 183-196, 194). However, care and domestic work remains often unequal in many heterosexual relationships even though the economic theory would dictate that equal sharing is the more rational choice. Therefore, the economic theory cannot provide a satisfactory explanation for the gender repartition of care.

¹³³ C. West and D. Zimmerman, ‘Doing Gender’ (1987) 1(2) *Gender & Society* 125-151.

¹³⁴ E. Fedder Kittay, *Love’s Labour Essays on Women, Equality and Dependency* (Routledge 1999).

¹³⁵ J. Finch and D. Groves, *A Labour of Love* (Routledge 1983).

¹³⁶ C. Hakim, ‘Lifestyle Preferences as Determinants of Women’s Differentiated Labor Market Careers’ (2002) 29(4) *Work and Occupations* 428-459; C. Hakim, *Work-Lifestyles Choices in the 21st Century: Preference Theory* (Oxford University Press 2000).

Care is at the threshold of the dichotomous concepts of the public and the private spheres. The classification of society's activities into the public and private sphere is full of paradoxes. The private sphere "denote[s] civil society, the values of family, intimacy, the personal life, home, women's domain or behaviour unregulated by law".¹³⁷ It is epitomised by the family (even though the family is highly regulated by the State).¹³⁸ In contrast, the public sphere refers to "the values of the marketplace, work, the male domain or that sphere of activity which is regulated by law".¹³⁹ The State represents the quintessential public sphere (even though the State shapes and regulates the way private life works). The market itself is a swindler: it can be construed as public when set in opposition to the family. In this case, the market is said to be under competitive norms. Alternatively, when compared to the State, it can be considered to be private and therefore not susceptible to public regulation. Depending on the perspective adopted, the market benefits from being placed in either sphere.¹⁴⁰ Care too can be construed as private or public. However, by contrast to the market, it appears to not benefit from its chameleon's characteristic. Care can be perceived to be a private matter that belongs to the private sphere. Care work is not normally viewed as a genuine economic activity¹⁴¹ and as such it is considered to be outside the traditional market-based and commodifiable EU notion of work. Childcare is moreover considered to be a cultural construct which, being private, must remain within the competence of the Member States. At the same time, care work is part of the necessary activities of any society. Care impacts directly on the ability of the people to function in the public sphere. Yet care production, the so-called "social reproduction",¹⁴² is not accounted for in traditional economics and accounting. The gendered nature of care has furthermore been used as an argument to undervalue its production. The interdependence and the relationship between the two spheres is at the heart of the consideration of care. The way the public and private spheres are articulated have significant political implications,¹⁴³ in particular in raising issues of distributions of resources, power and gender equality concerns. Formal outsourced care,

¹³⁷ K. O'Donovan, *Sexual Divisions in Law* (Weidenfeld & Nicolson 1984) 3.

¹³⁸ M. Fineman, 'Our Sacred Institution: The Ideal of the Family in American Law and Society' (1993) *Utah Law Review* 387-406.

¹³⁹ *Ibid.*

¹⁴⁰ M. Fineman, 'Feminist Legal Theory' (2005) 13(1) *Journal of Gender, Social Policy and the Law* 13-23.

¹⁴¹ Case 53/81 *D.M. Levin v Staatssecretaris van Justitie* [1982] ECR 1035; Case C-413/01 *Franca Nimmi-Orasche v Bundesminister für Wissenschaft, Verkehr und Kunst* [2003] ECR I-13187; Case C-14/09 *Hava Genc v Land Berlin* [2010] ECR I-931.

¹⁴² A. Picchio, *Social Reproduction: The Political Economy of the Labour Market* (Zed Books 1992).

¹⁴³ M. Fineman, 'What Place for Family Privacy?' (1999) 67 *George Washington Law Review* 1206-1224.

however, has been identified as the main way of helping women enter and remain in paid employment.¹⁴⁴

Although women do most of the care - thus cementing the link between gender (in)equality and care¹⁴⁵ - we must remain aware that this is not always the case. Societal changes such as increasingly fluid family constructions and the decline of the male breadwinner model, have impacted on traditional arrangements of care. Furthermore, elevated divorce rates mean that a growing number of fathers are increasingly in the position of having to combine childcare and work responsibilities. In general, an enthusiastic and vocal minority of fathers are complaining about the lack of time they have with their family.¹⁴⁶ The law should do more to acknowledge and encourage men's role as carers. They need to be adequately recognised in order to avoid the marginalisation of their care activities.¹⁴⁷ While the gender divide among those who care for adults is less marked than remains the case in relation to childcare, caring is still a task predominantly carried out by women.¹⁴⁸ More evolution is likely to take place as new forms of families - including same sex couples and the development of assisted methods of fertilisation - are bound to impact and shape gender roles associated with care.

¹⁴⁴ M. Daly, 'A Fine Balance Women's Labour Market Participation in International Comparison' in F. W. Scharpf and V. E. Schmidt (eds) *Welfare and Work in the Open Economy, Vol II Diverse Responses to Common Challenges* (Oxford University Press 2000) 467-510.

¹⁴⁵ M. do Rosário Palma Ramalho, 'Reconciling Family and Professional Life and the Gender Equality Principle in Employment' (2009) 2 *European Gender Equality Law Review* 9-15; S. Koukoulis-Spiliotopoulos 'What Future for Fundamental Rights in the European Union? A Few Thoughts', in S. Koukoulis-Spiliotopoulos (ed) *Problèmes d'Interprétation à la Mémoire de Constantin N. Kakouris* (Sakkoulas/Bruylant 2003) 223-258; A. Masselot, 'La Conciliation de la Vie Familiale et de la Vie Professionnelle en Europe : Le Contexte Juridique' in AFEM (ed) *Concilier Vie Familiale et Vie Professionnelle Pour les Femmes et les Hommes : Du Droit A la Pratique* (Sakkoulas/Bruylant 2005) 5-17.

¹⁴⁶ R. Collier and S. Sheldon (eds), *Fathers' Rights Activism and Law Reform in Comparative Perspective* (Hart Publishing 2006); E. Caracciolo di Torella, 'Brave New Fathers for a Brave New World? Fathers as Caregivers in an Evolving European Union' (2014) 20(1) *European Law Journal* 88-106.

¹⁴⁷ K. Slack and M. Fraser, *Husband, Partner, Dad, Son, Carer? - A survey of the experiences and needs of male carers* (Carers Trust 2014) < http://www.carers.org/sites/default/files/male_carers_research.pdf > accessed 24 April 2016.

¹⁴⁸ K. Haberkern, T. Schmid and M. Szydlik, 'Gender Differences in Intergenerational Care in European Welfare States' (2015) 35 *Ageing and Society* 298-320; F. Bettio and A. Verashchagina, *Long Term Care for the Elderly: Provisions and Providers in 33 Countries* (Publications Office of the European Union 2012). Care for dependant relatives is also gendered (see M. Veerle, 'Unpaid Work of Older Adults in OECD Countries', *Social Situation Observatory*, 29 November 2011). However, spousal care has been reported to sometimes be more gender neutral than other forms of care (L. Ackers, A. Balch, S. Scott, S. Currie and D. Millard, *The Gender Dimension of Geographic Labour Mobility in the European Union*, Report prepared for Directorate C Citizens' Rights and Constitutional Affairs (European Parliament), January 2009). Research funded by the European Commission to explore gender equality and female employment perspectives on long term care for the elderly within the EU also found that men take part in informal long-term care much more than in (informal) childcare and their contribution may be on the rise.

The Globalisation of Care Work

Care work is an activity which has predominantly been done by “slaves, servants and women”.¹⁴⁹ It has always been undervalued and has consistently been unaccounted for in classical economic analysis.¹⁵⁰ In the process of unpacking the concept of care, this thesis highlights the gendered aspect of care. However, care work also creates and reinforces ethnic inequality and class division. Care work is increasingly being done by migrants and individuals from lower socio-economic backgrounds.¹⁵¹ There is therefore an intersectional aspect to care work which needs to be noted.

In the wealthy West, work-life conflict is often explained as resulting from the combined effect of longer life expectancy, the massive female entry into paid employment and the change in the organisation of work. The resulting care crisis has led to the importation of care workers from lower-income countries.¹⁵² An increasing range of women from the rich West have progressively been able to access paid employment or professions which have provided them with financial autonomy and, with it, access to ways to outsource some of the care to others care providers. The global migration of women from developing countries such as the Philippines or Indonesia into richer countries for domestic work illustrates both race and class concerns.¹⁵³ These migrations highlight that care can transcend gender boundaries.¹⁵⁴ The care crisis is often framed as a new crisis which affects middle class families. However, the care crisis is neither new nor exclusively affecting the middle class: in reality, working class families and/or families from ethnic minority backgrounds have always faced this care crisis. Working class women have always worked and at the same time cared for their children and other dependants. On the one hand, professional (typically white) women can afford to pay for outsourcing some of the care work. On the other hand, women from poorer backgrounds

¹⁴⁹ J. Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* (Routledge 1993) 21.

¹⁵⁰ C. Hoskyns, ‘Linking Gender and International Trade Policy: Is Interaction Possible?’ (2007) *CSGR Working Paper* 217/07, February 2007; M. Waring, *Counting for Nothing: What Men Value and What Women are Worth* (Allen and Unwin 1988).

¹⁵¹ L. Isaksen, S. Devi, and A. Hochschild, ‘Global Care Crisis A Problem of Capital, Care Chain, or Commons?’ (2008) 52(3) *American Behavioral Scientist* 405-425.

¹⁵² I. Shutes, *Social Care for Older People and Demand for Migrant Workers*, The Migration Observatory, Oxford March 2011 < <http://migrationobservatory.ox.ac.uk/policy-primers/social-care-older-people-and-demand-migrant-workers> > accessed 18 November 2015; L. Gordolan and M. Lalani, *Care and Immigration: Migrant Care Workers in Private Households* (Kalayaan 2009).

¹⁵³ E. Nakano Glenn, ‘From Servitude to Service Work: Historical Continuities in the Racial Division of Paid Reproductive Labor’ (1992) *Signs* 1-43; S. Sevenhuijsen, *Citizenship and the Ethics of Care: Feminist Considerations on Justice, Morality and Politics* (Psychology Press 1998).

¹⁵⁴ M. Doyle and V. Timonen, ‘The Different Faces of Care Work: Understanding the Experiences of the Multi-Cultural Care Workforce’ (2009) 29(3) *Ageing and Society* 337-350.

and/or migrants have little choice but to take work in the care sector often under precarious contracts which are seldom covered by employment law.¹⁵⁵

Care is fast becoming global merchandise.¹⁵⁶ The care crunch is not an exclusive problem for richer countries in demand of care providers but, also, for poorer countries which experience a drain of these same care providers.¹⁵⁷ Policy makers are increasingly making assumptions that all individuals should be self-sufficient, independent and autonomous. In order to help with this vision, care is also increasingly commodified with jobs often precarious, low paid and undervalued. In addition, care work is generally argued to be a national issue, which should be addressed within the internal borders as a matter of domestic and cultural identity. This argument reinforces the globalisation and the commodification of care and contributes to a worsening of the so-called care crisis. In turn, a number of low-income countries are experiencing their own care crisis as they lose their carers who are migrating to take up jobs in the West.¹⁵⁸ Moreover it has been claimed that the care drain experienced by poorer countries was largely produced by the immigrating countries who are encouraging care/healthcare work migration through various laws and policies.¹⁵⁹ It results in not only a care deficit but also creates an accelerated brain drain in these low-income countries. The movement of health-care workers from African countries is a good example of this mixed care and brain drain from this continent. In addition, emigrating countries tend to respond favourably to the demand of care workers as skilled and unskilled care workers also represent a significant form of revenue for lower-income countries.¹⁶⁰

As wealthier countries get older and more women in those countries continue to participate in the paid labour market, the demand for care is increasing proportionately. This means that the demand for carers from other (poorer) regions of the world is growing. The care shortage is

¹⁵⁵ See fn153.

¹⁵⁶ J. Tronto, 'Care Démocratique et Démocratie du *Care*' in P. Molinier, S. Laugier and P. Paperman (eds) *Qu'est-ce que le Care? Souci des Autres, Sensibilité, Responsabilité* (Payot et Rivages 2009) 44.

¹⁵⁷ M. Zimmerman, J. Litt and C. Bose, *Global Dimensions of Gender and Carework* (Stanford University Press 2006); B. Ehrenreich and A. Hochschild (eds), *Global Woman: Nannies, Maids and Sex Workers in the New Economy* (Macmillan 2003).

¹⁵⁸ Or in some cases in richer parts of their own country, as in China for instance (see International Labour Organization, *Situational Analysis of Domestic Work in China* (International Labour Organization 2009), < www.ilo.org/asia/whatwedo/publications/WCMS_114261/lang--en/index.htm > accessed on 03 June 2016; E. Ramos-Carbone, *Decent Work for Domestic Workers in Asia and the Pacific* (ILO 2012).

¹⁵⁹ L. Kaelin, 'Care Drain: The Political Making of Health Worker Migration' (2011) 32(4) *Journal of Public Health Policy* 489-498.

¹⁶⁰ P. Paperman, 'D'une voix Discordante : Désentimentaliser le *Care*, Démoraliser l'éthique' in P. Molinier, S. Laugier, P. Paperman (eds) *Qu'est-ce que le Care? Souci des Autres, Sensibilité, Responsabilité* (Petite Bibliothèque Payot 2009) 89-110.

not limited to health-carers but extends to all forms of care.¹⁶¹ The recipient countries in the wealthy West not only facilitate care drain within low-income countries but also entrenches care workers into precarious work patterns. Indeed, the status of these “servants of globalisation”¹⁶² is limited and this makes them legally, economically and socially vulnerable.

The consequences of the care crisis are therefore far from limited to professional wealthy women and their ability to reconcile work and family obligations. The impacts of the care crisis extend to women who migrate far away from their own family, leaving their children and other dependants without adequate care for long periods of time. The impact of the care crisis on these migrating families changes their local structure of care and these challenges are not always recognised in terms of care.¹⁶³ It is nevertheless a global crisis which impacts and cuts across gender, class and race relations. Arguably, the EU would be best placed to lead a care strategy which could impact positively on migrant and poorer care workers. At the same time, the EU recognises fundamental values such as gender, race and class equality and this could provide a guide to the development of such a global strategy.

Section 2: Why Should the EU Care about Childcare?

Childcare has traditionally been a domain reserved for the Member States themselves.¹⁶⁴ The EU has neither directed nor expressed competence in the area. Under such circumstances, why should the EU be concerned with childcare? This thesis explores this question and argues that the intervention of the EU legislator would be desirable for several reasons. There are a number of compelling arguments to support EU engagement with childcare. The economic argument is well developed by the EU itself and cannot be dismissed easily. Perhaps more importantly, the moral argument based on fundamental human rights and

¹⁶¹ H. Lutz, ‘At Your Service Madam! The Globalization of Domestic Service’ (2002) 70(1) *Feminist Review* 89-104.

¹⁶² R. Parreñas, *Servants of Globalization: Women, Migration and Domestic Work* (Stanford University Press 2001).

¹⁶³ R. Parreñas, ‘The Care Crisis in the Philippines: Children and Transnational Families in the New Global Economy’ in B. Ehrenreich and A. Hochschild (eds) *Global Woman: Nannies, Maids and Sex Workers in the New Economy* (Macmillan 2003) 39-54.

¹⁶⁴ A. Masselot, ‘EU Childcare Strategy in Austerity Time’, (2015) 37(3) *Journal of Social Welfare & Family Law* 345-355; E. Radulova, ‘The Construction of EU’s Childcare Policy through the Open Method of Coordination’ in S. Kröger (ed) *What We Have Learnt: Advances, Pitfalls and Remaining Questions in OMC Research - European Integration Online Papers (EIoP)*, Special Issue 1, Vol. 13, Art. 13. (2009) < <http://eiop.or.at/eiop/texte/2009-013a.htm> > accessed on 19 September 2015.

gender equality appears to be urgent. Childcare, far from being unrelated to EU law, is at the core of its dual concern to balance economic imperatives with social rights.

The necessity for the EU to address childcare is born from a contextual configuration. However difficult and controversial it might be to define the concept of care and to fit it into a normative framework, childcare responsibilities and their socio-economic impacts are becoming too widespread to remain ignored. Childcare has become a major item on the agenda of most post-industrialised countries because of the pressing socio-economic context which includes the ageing population, the decrease in fertility rates, the increase and durability of women's high employment rate, and the management of an increasingly diverse workforce in a 24/7 global economy. In this context, the realisation of EU integration is directly concerned with economic growth and the boosting of employment rates. At the same time, the EU is also concerned with "side line" issues such as the fight against child poverty and the increasing quality of the population's education. Moreover, the EU is committed to upholding human rights and a set of democratic and social values as expressed in particular (but not exclusively) in Articles 2, 3 and 6 of the Treaty on the European Union (hereafter TEU). Human rights' concerns represent powerful arguments, whether they are linked to the rights of the child, gender equality and non-discrimination or the dignity of those who provide and receive care. These EU values can and should contribute to the construction of an EU childcare strategy.

There are at least four reasons which can be put forward in support of the EU's involvement in developing or leading the advancement of a childcare strategy. First, from the economic perspective, there is a clear link between childcare and the realisation of the objectives of the internal market. Simply put, childcare contributes to underpinning the functioning of the economy (internal market). Regulations designed to support the development of a childcare strategy are instrumental to the achievement of the important EU policies on employment, in particular, the targets of 75% employment rate in the Europe 2020 strategy.¹⁶⁵ Women's participation in paid work represents a structural change which is encouraged by the EU. Indeed, as soon as the adoption of the 1997 European Employment Strategy (EES) and

¹⁶⁵ Communication from the Commission: Europe 2020: A Strategy for Smart, Sustainable and Inclusive Growth, COM(2010) 2020 final.

further renewed by the Lisbon Agenda 2000¹⁶⁶ and later by the Europe 2020 Strategy,¹⁶⁷ the EU established that employment rates needed to increase to fit in with the EU's growth strategy. Under this policy, women have been targeted as the largest group to be "activated" into the labour market, thus providing the EU with legitimate, albeit indirect, competence in the area of care. It has been demonstrated that people with childcare responsibilities are less likely than people with no childcare responsibilities to be in employment and specifically in full-time paid work.¹⁶⁸ The differential impact of parenthood means that mothers, in particular, tend to work less in paid employment when they have young children. In contrast, men with children and women without children have higher rates of employment.¹⁶⁹ This clearly impacts on the EU goals of full-employment.

In turn, if individuals are unable to work, they not only will face detrimental (personal and/or financial) consequences, but the EU economy as a whole is likely to suffer. The EU does not only benefit from the fact that individuals are actively engaged in paid employment. It also benefits by avoiding the long-term consequences of the so-called "old social risks"¹⁷⁰ such as unemployment and long-term poverty,¹⁷¹ as well as the "new social risks",¹⁷² most notably inadequate social security coverage.¹⁷³ By the same token, individuals who do not participate in paid work are unlikely to be able to contribute to occupational pension funds that are

¹⁶⁶ European Council, Presidency Conclusions. Lisbon European Council, 23-24 March 2000, < http://www.europarl.europa.eu/summits/lis1_en.htm > accessed on 22 October 2015.

¹⁶⁷ Above fn165.

¹⁶⁸ B. Janta, *Caring for Children in Europe* (European Union 2014) 6 < <http://europa.eu/epic/studies-reports/docs/rr-554-dg-employment-childcare-brief-v-0-16-final.pdf> > accessed on 29 December 2015.

¹⁶⁹ J. Plantenga and C. Remery, *The Provision of Childcare Services: A Comparative Review of 30 European Countries* (Office for Official Publications of the European Communities 2009) 23.

¹⁷⁰ A. Gregory, S. Milner, J. Windebank, 'Work-Life Balance in Times of Economic Crisis and Austerity' (2013) 33 *International Journal of Sociology and Social Policy* 528-541.

¹⁷¹ See the work of N. Busby, 'Only a Matter of Time' (2001) 64(3) *Modern Law Review* 489-499.

¹⁷² G. Bonoli, 'The Politics of the New Social Policies: Providing Coverage against New Social Risks in Mature Welfare States' (2005) 33(3) *Policy and Politics* 431-449, 433 *et seq.*; G. Esping Andersen, 'A Child-Centred Social Investment Strategy', in Esping Andersen (ed) *Why We Need a New Welfare State* (Oxford University Press 2002); P. Taylor-Gooby, 'New Risks and Social Changes' in Taylor-Gooby (ed) *New Risks, New Welfare: The Transformation of the European Welfare State* (Oxford University Press 2004); J. Jenson, 'Social Investment for New Social Risks: Consequences of the LEGO Paradigm for Children', in J. Lewis (ed) *Children in Context: Changing Families and Welfare States* (Edward Elgar Publishing 2006).

¹⁷³ J. Gormick and M. Meyers, *Families that Work: Policy for Reconciling Parenthood and Employment* (Russell Sage Publication 2005); C. Saraceno, 'Childcare Needs and Childcare Policies: A Multidimensional Issue' (2011) *Current Sociology* 78-96.

essential to sustaining an ageing society.¹⁷⁴ Furthermore, the economic value of childcare for individual Member States cannot be underestimated.¹⁷⁵

Seen in this light, the economic rationale is straightforward and shows that the EU needs to urgently develop suitable strategies to allow individuals to care for their children and, at the same time, enable them to participate in paid employment. Against this background, it is somehow paradoxical that childcare has been so far overlooked as opposed to the other rights involved in the reconciliation discourse (namely the right to leave and to rearrange working hours). The business case for the EU to be involved in care is relatively straightforward. In addition, the economic perspective is not necessarily contradictory to some feminist views which value women's economic emancipation through education and work.¹⁷⁶

Second, childcare policy is important from a feminist perspective. Taking into account paid and unpaid care work - such as childcare - is part of the feminist agenda.¹⁷⁷ The establishment of an EU childcare strategy should contribute to women's emancipation by providing them with the opportunity to participate in the labour market and therefore to be economically independent. Such a strategy would directly impact on the efforts to achieve gender equality which is "one of the central missions and activities of the Union".¹⁷⁸

Furthermore, the EU has proven to be an unlikely positive force in terms of fighting discrimination and promoting equality. In this context, the EU constitutes a good starting point for developing a right to protect parents against discrimination based on their childcare commitments. Childcare gives rise to issues of unfair treatment and prohibited discrimination in the labour market. Admittedly, it must be pointed out that discrimination on the grounds of care is not prohibited under EU law. Carers who experience discrimination must be able to place their claim within one of the relevant grounds specified by the Treaty (namely gender under Articles 157 TFEU or sex, racial or ethnic origin, religion or belief, disability, age or

¹⁷⁴ P. Callister and J. Galtry, "“Baby Bonus” or Paid Parental Leave: Which One Is Better?" (2009) 34 *Social Policy Journal of New Zealand*, 1-11.

¹⁷⁵ L. Bukner and S. Yeandle, *Valuing Carers - Calculating the Value of Carers' Support*, CIRCLE (University of Leeds 2011); see also a previous study L. Bukner and S. Yeandle, *Valuing Carers – Calculating the Value of Unpaid Care* (Carers UK 2007).

¹⁷⁶ See further Chapter 2.

¹⁷⁷ M. Fineman and N. Thomadsen (eds), *At the Boundaries of Law (RLE Feminist Theory): Feminism and Legal Theory* (Routledge 2013).

¹⁷⁸ M. Bell, 'The Principle of Equal Treatment: Widening and Deepening' in P. Craig and G. de Búrca (eds) *The Evolution of EU Law* (Oxford University Press 2012) 611-939.

sexual orientation under Article 19 TFEU). These prohibited grounds can be helpful as they can be part of the protection against discrimination on the grounds of care: women, for instance, provide most of the care so it might be possible for them to be able to claim that care-related discrimination is also sex or gender discrimination. In addition, the debate surrounding care has developed around the concept of citizenship rights and welfare-state obligations.¹⁷⁹ Indeed, there are examples where care transcends domestic boundaries and involves EU law. This is exemplified in situations when third country nationals come into the EU as spouses (see cases *Baumbast*¹⁸⁰ and *Carpenter*,¹⁸¹ where care becomes the only link they have with the EU). The EU experience in setting some guidelines with regards to combating discrimination and promoting equality can be regarded as more efficient than many Member States and therefore the EU has the potential to guarantee fundamental values in leading the construction of a decent and fair childcare strategy.

However, a word of caution needs to be inserted here. The recent neo-liberal position adopted by the EU is not incontrovertibly compatible with gender equality. In particular, the push towards privatisation and the marketisation of social policy must be approached with caution.¹⁸² In this context, it is questionable as to whether the EU can be trusted with caring for mother/carers. The EU's record can of course be criticised.¹⁸³ Nevertheless, at the same time, over the years the EU has had some positive impact in fighting gender discrimination and promoting equality.¹⁸⁴ This thesis does not claim that the EU should have an exclusive competence in designing and implementing an EU childcare legal framework. Harmonisation is not the argument developed here. Instead, it is submitted that the EU should take the lead in developing a childcare strategy which should be designed around the EU's respect for gender equality and, at the same time, contribute positively to market integration.

¹⁷⁹ T. Knijn and M. Kremer, 'Gender and the Caring Dimension of Welfare State: Towards Inclusive Citizenship' (1997) 4(3) *Social Politics* 328-362.

¹⁸⁰ Case C-413/99 *Baumbast and R. v Secretary of State for the Home Department* [2002] ECR I-791.

¹⁸¹ Case C-60/00 *Mary Carpenter v Secretary of State for the Home Department* [2002] ECR I-6279.

¹⁸² M. Fineman, 'What Place for Family Privacy?' (1999) 67 *George Washington Law Review* 1206-1224, 1211.

¹⁸³ For example, see: I. Moebius and E. Szyszczack, 'Of Raising Pigs and Children' (1998) 18 *Yearbook of European Law* 125-156; T. Hervey and J. Shaw, 'Women, Work and Care: Women's Dual Role and Double Burden in EC Sex Equality Law' (1998) 8 *Journal of European Social Policy* 43-63; M. Stratigaki, 'The Co-optation of Gender Concepts in EU Policies: The Case of Reconciliation of Work and Family' (2004) 11(1) *Social Politics* 30-56.

¹⁸⁴ See S. Prechal, 'Equality of Treatment, Non-Discrimination and Social Policy: Achievements in Three Themes' (2004) 41(2) *Common Market Law Review* 533-551.

There is an even broader argument to support the development of an EU childcare strategy which is based on human rights. Quality, affordable and available care is based on the principle of human dignity as valued under the EU Treaty.¹⁸⁵ The concept of human dignity can be easily used to highlight and protect the needs of vulnerable people, be those cared for and/or those who care.¹⁸⁶ Advocate General Maduro indicated that dignity entails “the recognition of equal worth of every individual”.¹⁸⁷ This reasoning must be extended to caring relationships and must be adopted regardless of the economic contribution that an individual can make. The Treaty values equality and the dignity of people whether they are economically productive or not. These values are grounded in the fundamental principles and the historical development of the EU, which was created as a tool for peace and European integration.¹⁸⁸

The very value of childcare, moreover, goes beyond its economic currency. To emphasise the characteristics of the productivity yielded through childcare may risk losing its value: “care is the development of a relationship, not the production of a product that is separable from the person delivering it”.¹⁸⁹ The economic argument cannot be “decoupled” from a moral claim that values carers for what they are actually doing, for their contribution to society rather than focusing on their reduced potential in the employment market.¹⁹⁰ This moral argument is, in turn, based on the ethic of care that uses as a starting point the fact that we are all in mutually interdependent relationships and, as individuals, we can only exist because of these very caring relationships.¹⁹¹ The question should not be “what right do I have” but how can EU law support caring relationships. Care is important because it is the foundation of society. It is a most basic human need:¹⁹² young children and frailer adults cannot survive without care.¹⁹³ It is therefore essential to the welfare of society as well as that of individuals. As

¹⁸⁵ Article 2 TEU; Article 1 of the Charter for Fundamental Rights of the EU.

¹⁸⁶ See also G. Moon and R. Allen, ‘Dignity Discourse in Discrimination Law: A Better Route to Equality?’ (2006) 6 *European Human Rights Law Review* 610-649.

¹⁸⁷ Case C-303/06 *Coleman v Attridge Law*, Opinion of Advocate General Maduro delivered on 31 January 2008, ECLI:EU:C:2008:61, para. 9.

¹⁸⁸ Articles 2 and 3 TEU.

¹⁸⁹ S. Himmelweit, *Can We Afford (Not) To Care: Prospects and Policy* (London School of Economics Gender Institute 2005).

¹⁹⁰ G. James, ‘Mothers and Fathers as Parents and Workers: Family-Friendly Employment Policies in an Era of Shifting Identities’ (2009) 31(3) *Journal of Social Welfare & Family Law* 271-283.

¹⁹¹ The leading work in this area is C. Gilligan, *In a Different Voice* (Harvard University Press 1982).

¹⁹² K. Lynch, ‘Affective Equality: Who Cares?’ (2009) 52(3) *Development* 410-415.

¹⁹³ E. Feder Kittay, *Love’s Labour: Essay on Women, Equality and Dependency* (Routledge 1999).

Daly claims, it is a form of social capital¹⁹⁴ that should be embedded in a variety of social fields¹⁹⁵ and arguably care should be constructed as an obligation to provide for people who cannot support themselves. If caring for children can be seen as an investment, it is simply not acceptable to view people in need of care as “economic resources” or “potential investments”: they should be considered as individuals which, at different stages in their life - like all of us - need care. In this context, the development of an EU care strategy would therefore fit well with the objectives of the Union listed in the Treaty of Lisbon, which includes the promotion of, *inter alia*, solidarity between generations, protection of human dignity and protection of the rights of the child.¹⁹⁶

Finally, it is becoming increasingly clear that care cannot be addressed solely within national borders. Care is rapidly changing into services accessible on the global market. This reality means that it is not possible to address care exclusively within national borders because the issue is global.¹⁹⁷ The EU has a legal obligation to promote and uphold its values in its relations with the wider world.¹⁹⁸ At the same time the EU has the capacity to address issues of global migration.

This thesis submits that as a promoter of “the well-being of its peoples”,¹⁹⁹ the EU has an obligation to lead the common development of a childcare strategy which reflects both the values of the Treaty and supports caring relationships. Such support would need to ensure a fair sharing of the disadvantages that care work can bring²⁰⁰ and enable individuals to fulfil their caring responsibilities.²⁰¹

¹⁹⁴ M. Daly, ‘Caring in the Third Way: The Relationship Between Obligation, Responsibility and Care in Third Way Discourse’ (2000) 20 *Critical Social Policy* 5-37.

¹⁹⁵ S. Sevenhuijsen, ‘Care as a Good for Social Policy’ (2002) 31 *Journal of Social Policy* 251-270.

¹⁹⁶ Article 3(3) Treaty of Lisbon. See Busby, *A Right to Care? Unpaid Care Work in European Employment Law* (Oxford University Press 2011).

¹⁹⁷ E. Nakano Glenn, *Forced to Care: Coercion and Caregiving in America* (Harvard University Press 2010).

¹⁹⁸ Article 5(5) TEU: “In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter”.

¹⁹⁹ Article 2 TEU.

²⁰⁰ J. Herring, *Caring and the Law* (Hart Publishing 2013).

²⁰¹ F. Williams, ‘The Presence of Feminism in the Future of Welfare’ (2002) 31 *Economy and Society* 502.

Section 3: Methodology

To explore the emerging EU childcare strategy, this thesis relies on a mixed method: namely doctrinal and socio-legal (feminist and comparative) approaches.²⁰² It considers different areas of law - in particular family and employment law - with a view to assessing whether there are possibilities to situate an EU childcare strategy within these areas of jurisdiction.

Doctrinal Approach

This thesis first adopts a doctrinal legal approach to research. Doctrinal research is concerned with the formulation of legal doctrines through the analysis of legal rules. Hutchinson explains that doctrinal research provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and, perhaps, predicts future development.²⁰³ Doctrinal methodology, thus, is a useful tool to analyse primary sources (legislation, policy documents and case law) and appreciate the potential as well as the limitation of the law. Doctrinal research questions take the form of asking “what is the law?” in particular contexts. For example, a doctrinal research question of the Parental Leave Directive²⁰⁴ will ask what rights are parents entitled to under EU law to take leave from paid work to care for their children following a period of maternity leave? The doctrinal analysis will tell us what types of leave are available following maternity leave. These will include parental leave and leave for urgent reasons. The question will further include an assessment of who is materially concerned with the right to parental leave and it will also indicate who are *de jure* excluded from such leave. A complementary follow-up analysis will contribute to reveal *de facto* implications relating to material, temporal and personal exclusions. For the purpose of this thesis, the use of the doctrinal analysis will help to determine the scope of EU law relevant to childcare. It will also confirm the boundaries of the personal and material scope of the law as well as the nature and extent of the role of carers.

²⁰² D. Watkins, M. Burton, *Research Methods in Law* (Routledge 2011).

²⁰³ T.C. Hutchinson, *Researching and Writing in Law* (Lawbook Co./Thomson Reuters 2010).

²⁰⁴ Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC (Text with EEA relevance), OJ [2010] L68/13.

Legal rules have to be expressed in general terms by necessity. The so-called “open texture of the law”²⁰⁵ means that legal rules can be open to variation in interpretation. The doctrinal research process therefore involves an exercise in reasoning in order to construct an argument which is convincing according to accepted, and instinctive, conventions of discourse within the discipline. The method relies on a variety of techniques which include *inter alia* deductive logic, analogy and inductive reasoning.

Doctrinal methodology has a number of limitations. In particular, it has been argued that the process of legal analysis is probably wrongly described as being dictated by a “methodology”, at least in the sense in which that term is used in the sciences.²⁰⁶ Indeed, the actual process of analysis by which legal doctrines are formulated owes more to the subjective, argument-based methodologies of the humanities than to the more detached, data-based analysis of the natural and social sciences. Moreover, doctrinal research is inward-looking. The normative character of the law means that the validity of doctrinal research must inevitably rest upon developing a consensus within the scholastic legal community, rather than on an appeal to any external reality.²⁰⁷ This, therefore, represents one of the main limitations of the doctrinal method: namely its inability to clarify how the legislation applies and impacts on society. This has led to many criticisms of the doctrinal research method.²⁰⁸ It is true that doctrinal methodology, alone, cannot provide a complete statement of the law in any given situation. This can only be ascertained by applying the relevant legal rules to the particular facts of the situation under consideration. In practice, doctrinal analysis typically makes at least some reference to other external factors as well as seeking answers that are consistent with the existing body of rules. In so doing, the nature of the research changes from that of *internal enquiry into the meaning of the law* to that of *external enquiry into the law as a social entity*. This is the case for the research method used in this thesis. Indeed, in addition to ascertaining the law relating to childcare within the EU, this thesis will aim to articulate recommendations designed to facilitate future change in the law and in the manner of its administration. As such, this research can be referred to as “law reform research”. The terms “law in context” and, increasingly, “socio-legal research” are also often used to

²⁰⁵ H. Hart, *The Concept of Law* (Clarendon Press 1961).

²⁰⁶ P. Chynoweth, ‘Legal Research’ in A. Knight and L. Ruddock (eds) *Advanced Methods in the Built Environment* (Wiley-Blackwell 2008) 28-38, 34.

²⁰⁷ *Ibid.*

²⁰⁸ See for instance: B. Bix, *Jurisprudence: Theory and Context* (Sweet & Maxwell 2003); W. Murphy and S. Roberts, ‘Introduction (to the Special Issue on Legal Scholarship)’ (1987) 50(6) *Modern Law Review* 677–687.

describe this category of research.²⁰⁹ Moreover, the thesis will not be limited to a question of the operation of law, but will also consider, where relevant, its underlying philosophical, moral, economic and political assumptions. This research can therefore also be referred to as critical legal study.

Feminist Perspectives and Socio-Legal Approaches

As this research intends to explore the law in action as opposed to the law in books,²¹⁰ it needs to be complemented with a socio-legal approach.²¹¹ The socio-legal approach encompasses a range of methodological and disciplinary fields: as childcare is overwhelmingly a gendered activity, this thesis frames the debate within a feminist perspective. However, a detailed analysis of feminism goes beyond the scope of this thesis. Suffice to say that feminism is not a comprehensive term but there are several strands to it, including variations in approaches, emphasis and/or objectives. It is therefore difficult to make blanket generalisations. Nevertheless, within the diversity of feminist legal theory, commonalities can be unearthed. In particular, feminism has been credited with inserting the “woman question” into the assertions and assumptions of gender neutrality and objectivity received in disciplinary knowledge.²¹² It questions the societal inequalities resulting from these assertions and assumptions and presents a theory of gender which is relevant to almost all human activities.²¹³ Feminism is an “analysis of women’s subordination for the purpose of figuring out how to change it.”²¹⁴ In other words, feminism aims to reveal and explain how women have been and are exploited within society as well as seeking to empower women and to transform male-dominated institutions. As a result of this final transformative aspect, law and legal reforms are traditionally favourite subjects for feminist researchers.

Feminism is normally classified in three waves: (1) the first wave focused on women’s political rights and legal equality; (2) the second wave on social equality, sexual rights and

²⁰⁹ H. Arthurs, *Law and Learning: Report to the Social Sciences and Humanities Research Council of Canada by the Consultative Group on Research and Education in Law* (Social Sciences and Humanities Research Council of Canada 1983).

²¹⁰ R Pound, ‘Law in Books and Law in Action’ (1910) 44 *American Law Review* 12-36, discussed by D. Nelken, ‘Law in Action or Living Law? Back to the Beginning in Sociology of Law’ (1984) 4 *Legal Studies* 157-174, 162.

²¹¹ R. Banakar and M. Travers (eds) *Theory and Method in Socio-Legal Research* (Hart Publishing 2005), in particular see the Introduction.

²¹² M. Evans, *The Woman Question* (Sage Publications 1994).

²¹³ M. Fineman and N. Thomadsen (eds), *At the Boundaries of Law (RLE Feminist Theory): Feminism and Legal Theory* (Routledge 2013).

²¹⁴ L. Gordon, ‘The Struggle of Reproductive Freedom: Three Stages of Feminism’ in Z. Eisenstein (ed) *Capitalist, Patriarchy and the Case for Social Feminism* (Monthly Review Press 1979) 107-136.

cultural inequalities; and (3) the third wave is more global and multicultural and includes the perspective of others. Within the context of this thesis, it is highlighted that the law often does not attach particular legal significance to the fact of “being a woman”.²¹⁵ The law is also claimed to be male²¹⁶ in the sense that because masculinity has been embedded in the legislation, this has created a set of values that are now perceived as universal.²¹⁷ In reality, however, men and women lead different kinds of lives with different expectations, needs and opportunities and therefore legal rules necessarily affect them in different ways. For example, in the context of the workplace, women face pre-existing structural barriers, such as the societal expectations that they should provide most of the housework and care for children and the elderly within the home, while businesses in contrast require long working hours with managerial positions demanding round-the clock availability.²¹⁸ Thus, gender-neutral assumptions underpinning formal equality typically applied in the law, which considers that men and women are essentially alike and therefore should be treated equally,²¹⁹ fails to take into account the different contexts of men and women. The *raison d’être* of a feminist perspective, by contrast, is to analyse the impact that the law has on women and how it responds to their constructed reality. This thesis makes references to feminist legal theory as a method of analysis:²²⁰ its main contribution lies in the fact that it provides a new, critical method of interpretation of the relevant legal provisions.²²¹ It is, however, acknowledged that a tension exists between feminism as a method of analysis and the aspiration towards gender equality. Women live and experience a gendered life, which can hardly be reconciled with the concept of equality:

“Feminist legal theory can demonstrate that what is not neutral. What is as ‘biased’ as that which challenges it [...] and there can be no refuge in the status quo. Law has developed over time in the context of theories and institutions which are controlled by men and reflect their concerns. Historically, law has been a ‘public’ arena and its focus

²¹⁵ T. Dahl Stang, *Women’s Law: An Introduction to Feminist Jurisprudence* (Norwegian University Press 1987); see also R. Hunter, ‘An Account of Feminist Judging’ in R. Hunter, C. McGlynn and E. Rackley (eds) *Feminist Judgments: From Theory to Practice* (Hart Publishing 2010) 30-43.

²¹⁶ C. Smart, *Law Crime and Sexuality: Essays in Feminism* (Sage Publications 1995) 189; C. Gilligan, *In a Different Voice: Psychological Theory and Women’s Development* (Harvard University Press 1982) 6.

²¹⁷ C. Smart, *Law Crime and Sexuality: Essays in Feminism* (Sage Publications 1995).

²¹⁸ J. Hoobler, G. Lemmon, and S. Wayne, ‘Women’s Underrepresentation in Upper Management: New Insights on a Persistent Problem’ (2011) 40(3) *Organizational Dynamics* 151-156.

²¹⁹ J.A. Sohrab, ‘Avoiding the “Exquisite Trap”: A Critical Look at the Equal Treatment/Special Treatment Debate in Law’ (1993) 1(2) *Feminist Legal Studies* 141-162, 145.

²²⁰ T. Stang Dahl, ‘Fra Kvinneres rett til Kvinnerett’, (1987) 37 *Retfærd Juridisk Tidsskrift* 67.

²²¹ T. Eckhoff, ‘Kan vi laere noe av Kvinneretten?’ (Can We Learn Something from Women’s Law?) (1989) 7(38) *Offentlig Retts Skrifteserie* (Methodology of Women’s Law) 305-332.

has been on public concerns. Traditionally, women belong to the ‘private’ recesses of society, in families, in relationships controlled and defined by men, in silence”.²²²

Thus, feminist legal theory has had to engage in a substantive critique of the concept of equality. This critique is especially relevant when considering childcare policy and legislation.²²³

While feminism presents many strands, women come with varied experiences. When discussing the impact of a specific area of law on women, it must not be forgotten that a single category of women does not exist: women’s individual positions differ depending on several elements such as their social and cultural background or their financial situation.²²⁴ Childcare policies impact differently on women depending on their position in society and their experiences.²²⁵ For example, the very construction of the “good mother” linked exclusively to the private domain has been a class concept, which differentiated the bourgeois or higher-class mothers from working-class mothers who always worked in addition to raising their children and taking care of the household. Furthermore, specific childcare policies can be perceived and used differently by different groups of women. The single mother, who cannot afford to work full-time because of the prohibitive cost of childcare, differs from the middle-class mother who relies on her husband’s income and chooses to work part-time to spend more time with her children. Feminist theory is, thus, used as a critical tool to analyse the gender equality principle and it forms the basis of a legal framework in the area of childcare law and policy.

²²² M. Fineman and N. Thomadsen (eds), *At the Boundaries of Law (RLE Feminist Theory): Feminism and Legal Theory* (Routledge 2013) xiii.

²²³ See for example: J. Lewis, ‘Childcare Policies and the Politics of Choice’ (2008) 79(4) *The Political Quarterly* 499-507; M. Meyers, J. Gornick and K. Ross, ‘Public Childcare, Parental Leave and Employment’ in D. Sainsbury (ed) *Gender and Welfare State Regimes* (Oxford University Press 1999) 117-147; J. Plantenga, ‘Investing in Childcare: the Barcelona Targets and the European Social Model’, key note speech presented at the conference *Child Care in a Changing World*, October 2004, Groningen, 21-23; B. Fisher and J. Tronto, ‘Toward a feminist theory of caring’ in E. Abel and M. Nelson (eds) *Circles of Care: Work and Identity in Women’s Lives* (State University of New York Press 1990) 35-62.

²²⁴ *Inter alia*, C. Smart, ‘The Woman of Legal Discourse’ (1992) 1(29) *Social and Legal Studies* 29-44. See also S. Walby, *Gender Transformation* (Routledge 1997); P. Smith, ‘On Law and Legal Theory’ in P. Smith (ed) *Feminist Jurisprudence* (Oxford University Press 1993) 483-492.

²²⁵ R. Crompton, *Employment and the Family: The Reconfiguration of Work and Family Life in Contemporary Societies* (Cambridge University Press 2006).

Comparative Legal Approach

A discussion on childcare in Europe will finally benefit from a (loosely speaking) comparative legal approach. As this thesis analyses how childcare has been approached in the EU, at times it has been necessary to refer to the relevant domestic provisions of the individual Member States to further our understanding of this area. EU law in fact reflects the Member States' positions and, at the same time, it is able to influence their individual approaches. Comparative law compares different legal systems with the purpose of ascertaining their similarities and differences. It aims to explain the origin of these similarities and differences, evaluate the solutions utilized in the different legal systems and search for the common core of the legal system.²²⁶ There is no doubt that comparative legal studies can offer a major insight into legal education and research.²²⁷ For example, they can explain the genesis of a specific piece of legislation, help us to group different legal orders into the same family and explain why and how they have evolved similarly or differently. Using comparative law also facilitates an appreciation of how a specific problem has been tackled and solved in a legal system with a view to seeking the best solution elsewhere: ultimately they can lead to "legal transplant".²²⁸ More simply, comparative studies can provoke critical thinking and promote policy learning and innovation.

Comparative law also provides tools to explore why binding EU law has proven to be more successful for some measures (parental leave, for example) but is unlikely to be achieved with the same level of success for others (childcare). However, it is acknowledged that this approach has inherent difficulties which can ultimately render the comparison ineffective or misleading. Although the EU Member States might have broadly similar standards of employment legislation and protection, it is simply not possible to compare like with like. This has been recognised in a number of reports addressing the EU childcare strategy.²²⁹

²²⁶ M. Bogdan, *Comparative Law* (Kluwer Nortstedts Juridik Tano 1994) 18 (emphasis added).

²²⁷ P. Legrand, 'Comparative Legal Studies and Commitment to Theory' (1995) 58(2) *The Modern Law Review* 262-273; P. Legrand and R. Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (Cambridge University Press 2003).

²²⁸ *Inter alia*, H. Collins, 'Methods and Aims of Comparative Contract Law', (1991) 11(3) *Oxford Journal of Legal Studies* 396-406; O. Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37(1) *The Modern Law Review* 1-27.

²²⁹ See for instance B. Janta, *Caring for Children in Europe* (European Union 2014) <<http://europa.eu/epic/studies-reports/docs/rr-554-dg-employment-childcare-brief-v-0-16-final.pdf>> accessed on 29 December 2015; M. Mills, P. Praeg, F. Tsang, K. Begall, J. Derbyshire, L. Kohle, C. Miani and S. Hoorens, *Use of Childcare Services in the EU Member States and Progress towards the Barcelona Targets (Short Statistical Report 1)* (European Union 2014); J. Plantenga and C. Remery, *The Provision of Childcare Services: A Comparative Review of 30 European Countries* (Office for Official Publications of the European Communities 2009); J. Plantenga, C. Remery, M. Siegel, and L. Sementini, 'Childcare Services in 25 European

Member States differ in their welfare structures, which often imply that they have access to different resources. More importantly, they differ in their cultural and traditional values which underpin the development of the relevant policies and strategies.

Both feminist and comparative approaches have limitations, which are accepted in this research. Firstly, it might be limiting to approach childcare from a feminist perspective as care is neither an issue exclusively involving women nor should it be. However, historically, women have been responsible for care and continue to dominate the provision of care. Second, the use of a comparative approach cannot forget that childcare is a very difficult area of law to compare because it is not a closed field of law but rather proceeds from various legal backgrounds such as the law regulating *inter alia* employment relationships, the welfare state, education, the family and human rights. Each country has its own set of rules and interactions between the rules. For instance, some countries consider childcare to be part of the education system, while others do not. Moreover, childcare law and policy is heavily informed and influenced by political and cultural views. As a result, a comparative approach alone might not be able to appreciate all these nuances.²³⁰

Structure of the Thesis

In order to explore the development of the childcare discourse in EU law, this thesis is organised into five chapters. *Chapter 2* explores the conceptual underpinning of care. It argues that the legal framework as it stands is ill equipped to address childcare, as the language of rights cannot capture the very essence of the caring relationship. Nevertheless rights and the law are important to give it standing. An alternative is to interpret relevant rights with the lens of the ethic of care and capabilities approach. Against this background, *Chapter 3* addresses the EU policy development on childcare. *Chapter 4* considers the EU position of the caregivers under EU law. Both the EU legislator and the CJEU have provided a number of indirect yet effective tools to alleviate the burden of carers. *Chapter 5* suggests a set of rights for carers and presents some firm conclusions for this thesis.

Union Member States: The Barcelona Targets Revisited' in A. Leira and C. Saraceno (eds) *Childhood: Changing Contexts* (Emerald Group 2008) 27-53.

²³⁰ F. Bettio and J. Plantenga, 'Comparing Care Regimes in Europe' (2004) 10(1) *Feminist Economics* 85-113.

Chapter 2

Conceptualising Care

“No one would die or suffer unbearably if accountants, journalists or professors stopped working for a few weeks. However, they would if carers stopped caring”.¹

Introduction

Care is an inevitable part of life² that is essential to the development and upkeep of society. As such, it should trigger a set of specific rights as these exist “in a moral theory or legal system...whenever the protection or advancement of some interest...is recognised...as a reason for imposing duties or obligations on others”.³ At the time of writing, however, for several reasons further explored in the course of this thesis, the law of the EU still fails to address care and caring responsibilities in terms of free standing rights. In particular, EU law provides very few considerations for employees who also have care responsibilities.⁴ The few rights which do exist are unevenly distributed to favour the protection of parents who care for children rather than those who care for other dependents.⁵ In addition, these rights are never formulated in relation to care relationships or care work. The very notion of rights itself goes a long way to explaining the absence of a right to care under EU law: rights are traditionally structured around individualistic notions of rationality, personal autonomy⁶ and the free market where “what is most essential...is the individual’s capacity to choose his or her own roles and identities, and to rethink those choices”.⁷ Thus, in this context, what is relevant is

¹ J. Herring, *Caring and the Law* (Hart Publishing 2013) 8, discussing the Department of Health’s Report on *Commission on Funding of Care and Support* (Department of Health 2011).

² M. Daly, ‘Care as Good for Social Policy’ (2002) 21 *Journal of Social Policy* 251.

³ J. Waldron, *Theories of Rights* (Oxford University Press 1984) 10.

⁴ S. Himmelweit and H. Land, ‘Reducing Gender Inequalities to Create a Sustainable Care System’ (2011) 4 *Kurswechsel* 49-63.

⁵ P. Smith, ‘Parental-Status Employment Discrimination: A Wrong in Need of a Right’ (2001) 35 *University of Michigan Journal of Law Reform* 569-620.

⁶ J. Raz, *The Morality of Freedom* (Oxford University Press 1986).

⁷ H. Reece, *Divorcing Responsibilities* (Hart 2003) 13.

the “well dressed businessman with his right to autonomy”⁸ and freedom to choose to enter a contract. By contrast, the “exhausted mother...with little autonomy [or] freedom”⁹ remains outside the law. Thus, a system based purely on rights fails to accommodate today’s social reality where a combination of paid work and unpaid care are a prominent feature of many people’s lives, whether they are exhausted mothers or well-dressed businessmen. In other words, whilst a rights-based approach would offer a concrete way to make care-related issues more visible and protect carers from discrimination, rights are not structured in such a way to easily address issues related to care.

This chapter seeks to explore the theoretical underpinning of care work and to tease out an apt legal framework that has relevance for the EU. This chapter is organised in three main sections. *Section 1* starts by looking at how care has been (or can be) addressed within the traditional framework of EU rights. In particular, this section assesses the reasons behind the complex relationship between care and rights that in turn will explain the limited engagement of EU law with care. As care is a gendered activity, the relevant rights are analysed from a feminist perspective. This entails a discussion of the enduring feminist paradox regarding gender equality within the general context of work-life reconciliation and specifically in relation to care work. Against this background, the remaining sections highlight some complementary approaches. Drawing on Gilligan’s work on the ethic of care¹⁰ and Fineman’s theory of the “inevitable dependency”,¹¹ *Section 2* moves on to explore the role that the ethic of care can play in this area, looking particularly at the issue of the visibility of care work and its accountability. *Section 3* considers the potential of addressing care through the social justice and ethical analysis lenses of the capabilities approach.¹²

⁸ J. Herring, *Caring and the Law* (Hart Publishing 2013) 1.

⁹ Ibid.

¹⁰ C. Gilligan, *In a Different Voice* (Harvard University Press 1992).

¹¹ M. Fineman, *The Autonomy Myth* (New Press 2004).

¹² A. Sen, ‘Equality of What?’ in S. MacMurrin (ed) *The Tanner Lectures on Human Values* 4 (2nd ed), (Cambridge University Press 2010) 195–220; see also M. Nussbaum, *Women and Human Development: The Capabilities Approach* Vol. 3. (Cambridge University Press 2001).

Section 1: Rights and Care

It is commonplace to say that the law speaks “the language of rights”.¹³ The starting point will thus be to define what rights are:

“Rights are important because they recognise the respect their bearers are entitled to. To accord rights is to respect dignity: to deny rights is to cast doubt on humanity and integrity. Rights are an affirmation of the Kantian basic principle that we are ends in ourselves, and not means to the ends of others.”¹⁴

In essence, rights confer a specific claim onto somebody: they have the power to transform issues that would normally be addressed within the context of welfare and justice into precise entitlements.¹⁵ Furthermore, rights can impose duties that the law can enforce. They can be specific - namely when they are linked to one person - or general, when they are addressed to any persons, such as, for example, the right to life.¹⁶ Seen in this light, the benefits of rights cannot be underestimated. Their ability “to provide protection to the individual against state intervention has been illustrated repeatedly in liberal legal theory and can barely be disputed”.¹⁷ Rights can also be legal and/or moral: whilst a legal right is a right protected by the legal system, by contrast a moral right is not always protected by that same system. Choudry and Herring make the example of a child that has a moral right to be loved by his parents but this right cannot be protected and enforced by legislation.¹⁸ Thus, rights might be inadequate to address the caring relationship. A further problem with the traditional understanding of rights is that they imply a form of choice where the recipient is able and free to exercise them or not.¹⁹ This does not sit easily with caring relationships and responsibilities where often there is little choice element.

¹³ R. Dworkin, *Taking Rights Seriously* (Harvard University Press 1978), J. Waldron, *Theories of Rights* (Oxford University Press 1984), H. Hart, *Legal Rights* (Oxford University Press 1982).

¹⁴ M. Freeman, ‘The Human Rights of Children’ (2010) 63(1) *Current Legal Problems* 1-44.

¹⁵ S. Choudhry, J. Herring, J. Wallbank, ‘Welfare, Rights, Care and Gender in Family Law’ in J. Wallbank, S. Choudhry, J. Herring (eds) *Rights, Gender and Family Law* (Routledge 2010) 1-25.

¹⁶ H.L. A. Hart, ‘Bentham on Legal Rights’ in A. Simpson (ed) *Oxford Essays in Jurisprudence* (Oxford University Press 1973).

¹⁷ V. Munro, *Law and Politics and the Perimeter: Re-Evaluating Key Debates in Feminist Theory* (Hart 2007) 74.

¹⁸ S. Choudhry and J. Herring, *European Human Rights and Family Law* (Hart Publishing 2010) 99.

¹⁹ H.L. A. Hart, ‘Bentham on Legal Rights’ in A. Simpson (ed) *Oxford Essays in Jurisprudence* (Oxford University Press 1973).

This section will consider care within three different contexts. First, it will consider the extent to which care relationships are incompatible with EU law. It will assess and discuss the difficulties of integrating such a concept within the EU legal framework. Second, it will examine feminist perspectives on care which have been articulated along two broad arms: equality-as-sameness and equality-as-difference. Third, the discussion will endeavour to go beyond the equality/difference debate to consider the dual earner/carer model.

Care and the EU: Two Uneasy Bedfellows?

If the very nature of care and the caring relationship cannot be easily addressed within a traditional rights framework, it becomes even more complex when looking at the EU context. From a conceptual standpoint, there are several reasons that can explain the limited engagement of EU law with caring relationships. First, as noted above, the very nature of care and the caring relationship makes it difficult to address within a traditional rights framework. Caring is often informal and takes place within ordinary family relationships and as such is traditionally perceived to be part of the private sphere which “denote[s] civil society, the values of family, intimacy, the personal life, home, women’s domain or behaviour unregulated by law”²⁰ as opposed to issues related to the public sphere that refer to “the values of the marketplace, work, the male domain or that sphere of activity which is regulated by law.”²¹ Informal care work is not normally viewed as a “genuine economic activity.”²² It is often invisible, unpaid and not all of it is considered productive²³ and thus it exists outside the traditional, market-based commodifiable EU notion of work.²⁴ This remains the reality in

²⁰ K. O’Donovan, *Sexual Division in Law* (Weidenfield and Nicholson 1984) 3.

²¹ *Ibid.*

²² Case 53/81 *D.M. Levin v Staatssecretaris van Justitie* [1982] ECR 1035; Case 344/87 *I. Bettray v Staatssecretaris van Justitie* [1989] ECR 1621.

²³ J. Tronto, ‘The Value of Care’ *Boston Review*, 6 February 2002, < <http://bostonreview.net/BR27.1/tronto.html> > accessed on 07 August 2013.

²⁴ Although the Court of Justice of the EU has not provided a definition of work, it has clearly set the boundaries of the concept of worker in Case 53/81 *D.M. Levin v Staatssecretaris van Justitie* [1982] ECR 1035, which imperatively includes an economic activity. As confirmed by the CJEU in Case 44/88 *Achterberg-te Riele and others v Sociale Verzekeringsbank* [1989] ECR 1963; Case C-31/90 *Johnson v Chief Adjudication Officer* [1991] ECR I-3723; Case C-325/09 *Secretary of State for Work and Pensions v Dias* [2010] ECR I-498. For a comment see example E. Vigerust, *Arbeid, barn og likestilling* (Tano Ashehoug 1998), I. Moebius and E. Szyszczack, ‘Of Raising Pigs and Children’ (1998) 18 *Yearbook of European Law* 125-156; N. Busby, ‘Unpaid Care-Giving and Paid Work within a Right Framework’ in N. Busby, G. James (eds) *Families, Care-Giving and Paid Work* (Edward Elgar 2011); C. Hoskyns, ‘Linking Gender and International Trade Policy: Is Interaction Possible?’ CSGR Working Paper 217/07, February 2007.

some Member States, especially the southern ones, where the care of both children and adults is still provided mainly by family and friends.²⁵

It would be tempting, yet simplistic, to conclude that care work is low status and unregulated simply because it belongs to the private sphere. In fact, care highlights the irrelevance of the private/public sphere dichotomy for two main reasons. First, it is perceived as an extension of the private sphere: it continues to be regarded as a form of badly paid and low status employment. Informal care, which is not counted in normal economic or accounting models, is a source of time crunch²⁶ and stress for carers who must combine paid work with their caring obligations. At the same time, care professions are characterised by striking similarities including low remuneration, long hours and time crunch causing a lack of time for leisure and education, health-related issues such as back problems and stress and low prospects for professional progression.²⁷ Often carers are engaged in both informal and formal care, combining such hardships.²⁸ Secondly, how we manage our caring responsibilities (for example, who looks after our children whilst we go to paid work) is not a single sphere activity but one that requires a sensitive negotiation of the two spheres in which an individual operates. This makes it difficult to see where the private sphere ends and the public begins: the two cannot be seen as separate.

Secondly, the *sui generis*²⁹ nature of EU law is not best suited to addressing the care relationship. The EU is less than a State, but more than an international organisation. The Member States have conferred competences on the EU with the aim of creating “an ever closer union among the peoples of Europe”.³⁰ However, the integration of the EU has been strongly underscored by economic goals: the establishment of an internal market, the economic and monetary Union.³¹ Most of the EU exclusive competences are economically driven: the customs union; competition rules; the monetary policy; and the common

²⁵ Communication from the European Commission, Promoting Solidarity between the Generations, COM(2007) 244 final. See also AFEM (ed), *Concilier Vie Familiale et Vie Professionnelle Pour les Femmes et les Hommes: Du Droit à la Pratique* (Sakkoulas/Bruylant 2005).

²⁶ K. Fox and S. Nickols, ‘The Time Crunch Wife’s Employment and Family Work’ (1983) 4(1) *Journal of Family Issues* 61-82; R. Beaujot and R. Andersen, ‘Time-Crunch: Impact of Time Spent in Paid and Unpaid Work and its Division in Families’ (2007) *The Canadian Journal of Sociology/Cahiers canadiens de sociologie* 295-315.

²⁷ A. Soares, *Les (in)visibles de la santé* (Université du Québec à Montréal 2010).

²⁸ C. O’Brien, ‘Confronting the Care Penalty: The Cause for Extending Reasonable Adjustment Rights along the Disability/Care Continuum’ (2012) 34 *Journal of Social Welfare and Family Law* 5-30.

²⁹ Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

³⁰ Article 1 TEU.

³¹ Article 3 TEU.

commercial policy.³² Competences between the EU and the Member States are not always clearly delineated. Even when they are, the economically-inclined nature of EU law means that they are problematic for addressing care-related issues. The Member States remain in charge of legislating in the area of social welfare. The EU does not have any explicit competence in regulating care or caring relationships but it does have shared power to act in social areas such as gender equality, employment policy and social progress.³³ Within its competences, the EU is also bound by common values set within the Treaty on European Union (TEU),³⁴ the Treaty on the Functioning of the EU (TFEU)³⁵ and the Charter of Fundamental Rights of the European Union (the Charter).³⁶ These common values represent a mixture of civil, social, political and economic rights, of which the most relevant in connection to developing a care strategy is likely to be the promotion of gender equality.³⁷

³² Article 3 TFEU.

³³ Articles 3 TEU and 4(2) TFEU.

³⁴ Article 2 TEU: “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 Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”

Article 3 TEU: “1. The Union’s aim is to promote peace, its values and the well-being of its peoples.

[...] 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.”

³⁵ Article 8 TFEU: “In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women.”

Article 9: “In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.”

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.”

³⁶ The Charter of Fundamental Rights of the EU brings together in a single document the fundamental rights protected in the EU. It contains rights and freedoms under six titles: Dignity, Freedoms, Equality, Solidarity, Citizens' Rights, and Justice.

³⁷ Article 19 TFEU: “Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”

Article 157 TFEU: “1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied. [...] 3. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, and after consulting the Economic and Social Committee, shall 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, including the principle of equal pay for equal work or work of equal value. 4. With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.” See discussion in Chapter 5.

The tension between social rights and economic imperatives has impacted many EU laws.³⁸ As we will see in the course of this thesis, this tension becomes particularly apparent in relation to developing a care strategy.³⁹ This tension is not a new phenomenon but has been an on-going preoccupation of most economists and liberal market thinkers.⁴⁰ For example, in certain instances, some rights (namely economic rights) might be regarded as more relevant than others (these being social rights, such as those aimed at promoting the well-being of people).

This tension was acknowledged in the seminal series of *Defrenne* cases. The then Treaty of Rome, under Article 119 of the European Economic Community (EEC) (now Article 157 TFEU), required Member States to implement the principle of equal pay for equal work between men and women. Although direct discrimination in basic payment had been abolished, a Belgian airline (Sabena - Société Anonyme Belge d'Exploitation de la Navigation Aérienne) company's conditions of employment led to pay disparities by requiring female flight attendants to retire at the age of 40 as opposed to their male counterparts who could retire at the age of 55. Not only had these terms implied that women over 40 were no longer attractive enough to serve (male) air travellers, it also meant that these women lost hard pay. Indeed, they were losing their job and their earnings and having to seek new work at a more vulnerable age. Sabena's retirement policy further meant that they could never qualify for the full payment of pension. Gabrielle Defrenne, an air hostess at Sabena who was forced to retire at the age of 40, put forward a test case with the help of her lawyer Eliane Vogel-Polsky. The so-called *Defrenne* litigation saga lasted a decade.⁴¹ In *Defrenne* (no 3),⁴² the Court of Justice stressed that Article 119 EEC had a double aim: to avoid "competitive disadvantage in intra Community competition" for such undertakings that

³⁸ See for instance C. Hoskyns, *Integrating Gender. Women, Law and Politics in the European Union* (Verso 1996); J. Bain and A. Masselot, 'Gender Equality Law and Identity Building for Europe' (2013) 18 *Canterbury Law Review* 99-120; I. Moebius and E. Szyszczack, 'Of Raising Pigs and Children' (1998) 18 *Yearbook of European Law* 125-156.

³⁹ J. Julén Votinous, 'Parenthood Meets Market-Functionalism: Parental Rights in the Labour Market and the Importance of Gender Dimension' in A. Numhausen-Henning and M. Rönmmar (eds) *Normative Patterns and Legal Developments in the Social Dimension of the EU* (Hart 2013) 185-208.

⁴⁰ See for instance, J. Alsasua, J. Bilbao-Ubillos and J. Olaskoaga, 'The EU Integration Process and the Convergence of Social Protection Benefits at National Level' (2007) 16(4) *International Journal of Social Welfare* 297-306; G. Ross, *Jacques Delors and European Integration* (Polity Press 1995).

⁴¹ The earliest chain of key-cases on equal pay (Case 80/70 *Defrenne v Société Anonyme Belge de Navigation Aérienne Sabena* (*Defrenne* no 1) [1971] ECR 445 and Case 43/75 *Defrenne v Société Anonyme Belge de Navigation Aérienne Sabena* (*Defrenne* no 2) [1976] ECR 455) provided for the direct horizontal effect of Article 119 EEC as well as its fundamental rights quality.

⁴² Case 149/77 *Defrenne v Société Anonyme Belge de Navigation Aérienne Sabena* (*Defrenne* no. 3) [1978] ECR 1365.

applied the equal pay principle (an economic aim) and the improvement of living and working conditions (a social aim). The Court went further in *Deutsche Post v Sievers*⁴³ where it considered the application of Article 157 TFEU on equal pay. Although the Court recognised the economic function of Article 157 TFEU,⁴⁴ it held in *Deutsche Post v Sievers* that the “economic aims pursued by [this] Article, namely the elimination of the distortion of competition between undertakings in different Member States, is secondary to the social aim pursued by the same provision, which constitutes the expression of a fundamental right”.⁴⁵ The Court moreover confirmed this articulation between social aims and economic imperatives in *Viking*⁴⁶ and was encapsulated by the reference to a “highly competitive social market economy” in Article 3(3) TEU.⁴⁷ Such struggle between social aims and economic obligation becomes even more apparent when it comes to addressing the caring relationship and this might explain why this area remains largely unregulated at the EU level. The economic/social posture of the EU is particularly acute at times when many governments across Europe are adopting stringent austerity measures that deeply affect welfare policies.⁴⁸ Services in general, and in particular those aimed at supporting working parents and carers, have been cut back, postponed or abandoned on account of the economic downturn.⁴⁹

Finally, the way children and frailer members of society are looked after and who should provide care is still very much perceived as the domain of domestic policies, rather than a matter for the EU. These are influenced and shaped by different perspectives and priorities, be those dictated by culture (expectations of the role of the family, for example), working

⁴³ Joint Cases C-270/97 and C-271 *Deutsche Post v Elisabeth Sievers and Brunhilde Schrage* [2000] ECR I-929.

⁴⁴ In particular, in Case 43/75 *Defrenne v Société Anonyme Belge de Navigation Aérienne Sabena (Defrenne no 2)* [1976] ECR 455.

⁴⁵ Joint Cases C-270/97 and C-271 *Deutsche Post v Elisabeth Sievers and Brunhilde Schrage* [2000] ECR I-929, para 57.

⁴⁶ Case 438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti (Viking)* [2007] ECR I-10779, para 79: “Since the [Union] has thus not only an economic but also a social purpose, the rights under the provisions of the Treaty on the free movement of goods, persons, services and capital must be balanced against the objective of pursued by social policy.”

⁴⁷ C. Joerges and F. Rödl, “Social Market Economy” as Europe’s Social Model? (2004) SSRN 635362 < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=635362 > accessed on 30 June 2016.

⁴⁸ M. Karamessini and J. Rubery (ed), *Women and Austerity: The Economic Crisis and the Future for Gender Equality* (Routledge 2014); European Women’s Lobby, *The Price of Austerity: The Impact of Gender Equality in Europe* (Brussels 2012). See also R. Guerrina, ‘Socio Economic Challenges to Work Life Balance at Times of Crisis’ (2015) 37(3) *Journal of Social Welfare & Family Law* 368-377.

⁴⁹ A. Gregory, S. Milner, J. Windebank, ‘Guest Editorial: Work-Life Balance in Times of Economic Crisis and Austerity’ (2013) 33 *International Journal of Sociology and Social Policy* 528-541; F. Bettio, M. Corsi, C. d’Ippoliti, L. Antigone, M. Samke Lodovici and A. Verashchagina, *The Impact of the Economic Crisis on the Situation of Women and Men and on Gender Equality Policies* (European Commission DG Justice 2012); M. Karamessini and J. Rubery, ‘The Challenge of Austerity For Equality. A Consideration of Eight European Countries in the Crisis’ (2014) 2(133) *Revue de l’OFCE* 15-39.

patterns (in particular amongst women), and societal attitudes to care, religion and resources available.⁵⁰ Accordingly, national governments have allocated budgets that vary considerably⁵¹ and which affect the very structure of care: some governments have taken the policy decision to support carers of young children mainly through cash benefits,⁵² while others, such as France⁵³ and Sweden,⁵⁴ invest in formal public care arrangements. In the UK, childcare provisions are very much market-oriented and the decision to expand the public sector in this sense has been described as “a Brave New World scenario” with “rows of mothers at work and rows of tiny children in uniform state-run nurseries - a real nanny state”.⁵⁵ The situation is no better for adult care. In a recent report prepared jointly by the Social Protection Committee and the European Commission, it was acknowledged that “there are more pronounced differences between Member States in the way long-term care is provided than in any other aspect of social protection”.⁵⁶ The lack of uniformity in the treatment of care across Europe reflects, and at the same time determines, the lack of a cohesive EU position. As already highlighted, there is no clear legal base for the EU to support the development of specific rights in this area. Thus, to date, the EU only acts as a facilitator that provides “policy support” and “information sharing” and encourages exchange of good practices, rather than as a direct player and a strong leader.⁵⁷ Its role is limited to overview, at best to coordinate, policies mainly with soft law (in particular, the Open Method of Coordination (OMC)).

⁵⁰ C. Glendinning, H. Arksey, F. Tjadens, M. Moree, N. Moran and H. Nies, *Care Provision within Families and its Socio-Economic Impact on Care Providers across the European Union*, Research Works, No. 2009-05 (Social Policy Research Unit 2009). See also, T. Rostgaard, ‘Caring for Children and Older People in Europe – A Comparison of European Policies and Practice’ (2002) 32(1) *Policy Studies* 51-68. Furthermore, the differences are emphasised by the fact that comparative information is currently patchy and does not provide a clear picture of the situation, see Social Protection Committee and the European Commission, *Adequate Social Protection for Long-Term Care Needs in an Aging Society*, 18 June 2014, 10406/14 ADD 1; SOC 403 ECOFIN 525.

⁵¹ A study from 2007 shows that national governments have allocated different budgets for families and children, which vary from 0.7% to 3.9% of GDP (see Communication from the Commission, Promoting Solidarity Between the Generations, COM(2007) 244 final; see also F. Bettio and J. Plantenga, ‘Comparing Care Regimes in Europe’ (2004) 10(1) *Feminist Economics* 85-113).

⁵² M. Naldini and C. Saraceno, *Conciliare Famiglia e Lavoro* (Il Mulino 2011).

⁵³ M.-T. Letablier and M.-T. Lanquetin, *Concilier Travail et Famille en France: Approches Socio-Juridiques* (Centre d'études de l'emploi 2005).

⁵⁴ U. Bjoernberg, ‘Ideology and Choice Between Work and Care: Swedish Family Policy for Working Parents’ (2002) 22 *Critical Social Policy* 33–52.

⁵⁵ G. Osborne, *Speech* ‘Women at Work and Childcare’ 27 February 2006 <<http://toryspeeches.files.wordpress.com/2013/11/osborne-women-at-work-and-childcare.pdf>> accessed on 10 October 2014, quoted in ‘Tories Reach Out to Young Mothers’ *Guardian* 27 February 2006 <<http://www.theguardian.com/politics/2006/feb/27/conservatives.gender>> accessed on 10 October 2014.

⁵⁶ Social Protection Committee and the European Commission, *Adequate Social Protection for Long-Term Care Needs in an Aging Society*, 18 June 2014, 10406/14 ADD 1, SOC 403 ECOFIN 525, 8.

⁵⁷ A. Masselot, ‘EU Childcare Strategy in Austerity Time’ (2015) 37(3) *Journal of Social Welfare & Family Law* 345-355.

As a consequence of the above points, the EU's engagement with care and the caring relationship is limited at best. This is regrettable as the EU might be best placed to lead legal development for a comprehensive and coherent strategy on childcare in Europe. As we will see in Chapters 3 and 4, the EU does take some leadership in this area but the actions remain limited and because of their limited coherence, they often contribute to confusion.

Care, Rights and Gender Equality: A Feminist Critique

To address the caring relationship within a purely traditional right-based framework has had two interlinked implications: firstly, the caring relationship remains outside the public sphere; and secondly, it is mainly regarded as a “woman's issue”. There is a perception that care is a peripheral activity that people do in their own time. This has been challenged on numerous occasions by feminist scholars that have argued that what happens in the private sphere, far from being akin to a “leisure activity”, supports, and is the precondition of, what takes place in the public sphere.⁵⁸ Simply put, “without the contribution of unpaid care, markets would not grow, economies would not prosper and capitalism would not be possible.”⁵⁹

Feminist scholars have also questioned the fact that care is seen as a feminine task: it “is ‘given’ to women: it becomes the defining characteristics of their self-identity and their life work. At the same time, caring is taken away from men: not caring becomes a defining characteristic of manhood.”⁶⁰ Both these implications raise issues of gender equality. Gender equality is a key element in unlocking the difficulties surrounding care activities but at the same time it encapsulates the enduring feminist paradox regarding the way to achieve greater balance between men and women. In light of this, a feminist perspective is likely to be helpful in this thesis' attempt at critically understanding the concept of care in the context of a social organisation such as the EU. However, we must remain aware that women are a diffused constituency.⁶¹ Indeed, not all women and not all feminists agree on an identical

⁵⁸ S. Fredman, *Women and the Law* (Oxford University Press 1998); see also S. Moller-Okin, *Justice, Gender and the Family* (Basic Books 1998) and F. Olsen, ‘The Family and the Market: A Study on Ideology and Market Reform’ (1993) 96 *Harvard Law Review* 1497-1578.

⁵⁹ N. Busby, ‘Unpaid Care-Giving and Paid Work within a Right Framework’ in N. Busby, G. James (eds) *Families, Care-Giving and Paid Work* (Edward Elgar 2011) 189-203, 203.

⁶⁰ S. Harper, *Families in Ageing Societies* (Oxford University Press 2004), in particular Ch. 6.

⁶¹ C. Hoskyns, ‘Linking Gender and International Trade Policy: Is Interaction Possible?’ (2007) *CSGR Working Paper* 217/07, February 2007, 6.

vision of the world. Some women want to keep the world as is it, with the traditional divide between public male-dominated and domestic female-led spheres, but with guarantees regarding their status.⁶² Others would prefer to participate fully in public life on an equal footing with men and therefore ask for the establishment of a level playing field and the removal of discriminatory practices.⁶³ Some women would like to see more profound structural transformations.⁶⁴ At the same time, the diversity of these voices is also affected by social class, ethnicity and geography, implying further intersectional considerations.⁶⁵

While it can be argued that gender equality is a key element in unlocking the difficulties surrounding care activities, at the same time, the concept of care encapsulates the enduring feminist paradox regarding the way to achieve this so-called gender equality. The welfare state is at the heart of the normative debate on work-life balance⁶⁶ and this debate is conceptualised around two opposing frameworks: (1) equality-as-sameness or (2) equality-as-difference.⁶⁷ Ultimately the choice of a framework leads to the question of whether law should be instrumental towards the search of equality or whether, on the contrary, it should recognise differences.

⁶² H. Petersen, 'Perspectives on Women on Work and Law' (189) 17 *International Journal of the Sociology of Law* 327-346.

⁶³ C. MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* (No. 19) (Yale University Press 1979).

⁶⁴ B. Hooks, *Teaching to Transgress* (Routledge 2014); M. Fineman and N. Thomadsen (eds), *At the Boundaries of Law (RLE Feminist Theory): Feminism and Legal Theory* (Routledge 2013); S. Hesse-Biber and D. Leckenby, 'How Feminists Practice Social Research' in S. Hesse-Biber and L. Yaiser (eds) *Feminist Perspectives on Social Research* (Oxford University Press 2004) 209–226.

⁶⁵ A. Reilly, 'Intersections and Inequality at the Work Family Nexus: How Law Fails Some Mothers More than Others', Paper presented at the *Inaugural Labour Law Research Network Conference*, Pompeu Fabra University, Barcelona 13-15 June 2013; J. Bullock and A. Masselot, 'Multiple Discrimination and Intersectional Disadvantages Challenges and Opportunities in the EU Legal Framework' (2013) 19(1) *Columbia Journal of European Law* 55-80; E. Lombardo and M. Verloo, 'Institutionalizing Intersectionality in the European Union? Policy Developments and Contestations' (2009) 11(4) *International Feminist Journal of Politics* 478-495.

⁶⁶ S. Hadj-Ayed and A. Masselot, 'Reconciliation between Work and Family Life in the EU: Reshaping Gendered Structures?' (2004) 26(3) *Journal of Social Welfare and Family Law* 325-338.

⁶⁷ J.A. Sohrab, 'Avoiding the "Exquisite Trap": A Critical Look at the Equal Treatment/Special Treatment Debate in Law' (1993) 1(2) *Feminist Legal Studies* 141-162; R. Lister, *Citizenship: Feminist Perspectives* (New York University Press 1997); E. Caracciolo di Torella and A. Masselot, 'The ECJ Case Law on Issues Related to Pregnancy, Maternity and the Organisation of Family Life: An Attempt at Classification' (2001) 26 *European Law Review* 239-260.

Equality-as-Sameness

Those who work from an equality-as-sameness position⁶⁸ see women as equally capable as men to participate in the labour market⁶⁹ and therefore concentrate their efforts on abolishing the barriers that prevent women's full participation in the labour market. It is a position that supports paid work opportunity through the removal of discriminating structures in access to and participation in the labour market as a way towards women's emancipation. Under this model, female involvement in the labour market provides women with financial, social and intellectual independence. If there is agreement on this general goal, the main debate within this school of thought has been on the best method for achieving gender equality by using formal and/or substantive equality.⁷⁰ While formal equality addresses access to basic rights for all, substantive equality promotes changes in the socio-economic and historical structural inequalities through, in particular, the dismantlement of the public/private divide⁷¹ and the implementation of positive (and sometimes affirmative) actions.⁷² Here, specific legal provisions relating to pregnancy and maternity are part and parcel of substantive equality.⁷³ This approach, however, fails to consider who will watch the children and who will provide the general care which women have been providing for free (but at a cost) for so long. Critics of this approach also highlight the fact that women are required to comply with the ideal of male norms of work, which include high levels of flexibility and availability, long hours at work and a primary commitment to the job above all else.⁷⁴ Worse yet, under the pressure of globalisation, the male ideal as embodied in the 'male breadwinner' is fast being replaced by

⁶⁸ Sometimes referred to as liberal feminists (see N. Busby, *A Right to Care? Unpaid Care Work in European Employment Law* (Oxford University Press 2011)).

⁶⁹ J. Evans, *Feminist Theory Today: An Introduction to Second-Wave Feminism* (Sage 1995); V. Munro, *Law and Politics and the Perimeter: Re-Evaluating Key Debates in Feminist Theory* (Hart 2007); V. Schultz, 'Life's Work' (2000) 100(7) *Columbia Law Review* 1881-1964; R. Ray, J. Gornick and J. Schmitt, 'Who Cares? Assessing Generosity and Gender Equality in Parental Leave Policy Designs in 21 Countries' (2010) 20(3) *Journal of European Social Policy* 196-212, 197.

⁷⁰ J.A. Sohrab, 'Avoiding the "Exquisite Trap": A Critical Look at the Equal Treatment/Special Treatment Debate in Law' (1993) 1(2) *Feminist Legal Studies* 141-162.

⁷¹ S. Boyd (ed.), *Challenging the Public/Private Divide: Feminism, Law and Public Policy* (Toronto University Press 1997); M. Thornton (ed.), *Public and Private: Feminists Legal Debates* (Oxford University Press 1995).

⁷² H. Fenwick, 'From Formal to Substantive Equality: The Place of Affirmative Action in European Union Sex Equality Law' (1998) 4(4) *European Public Law* 507-516; see also A. Masselot and A. Maymont, 'Gendering Economic and Financial Governance through Positive Action Measures: Compatibility of the French Real Equality Measure under the European Union Framework' (2015) 22(1) *Maastricht Journal of European and Comparative Law* 57-80.

⁷³ Case C-136/95 *Caisse nationale d'assurance vieillesse des travailleurs salariés (CNAVTS) v Evelyne Thibault* [1998] ECR 2011, para. 26.

⁷⁴ J. Williams, *Unbending Gender: Why Family and Work Conflict and What to Do About It* (Oxford University Press 2000), 1-6; R. Guerrina, 'Equality, Difference and Motherhood: The Case for a Feminist Analysis of Equal Rights and Maternity Legislation' (2001) 10(1) *Journal of Gender Studies* 33-42.

the (fictitious)⁷⁵ model of the “unencumbered worker”:⁷⁶ an abstract procedural and judicial model that has been criticised for lacking solidarity and depth of identity.⁷⁷ Under this model, workers must be fully available for work 24/7, there is a blurring of the workplace with the home and constant electronic access.⁷⁸ More importantly, unencumbered workers are considered to have no care-giving responsibilities, or if they do they are able to rely upon others, often women increasingly from poorer backgrounds or from the “Global South”,⁷⁹ to facilitate their unencumbered status. Under these conditions, women are caught between conforming to the workplace expectation and their unpaid care commitment, especially when they cannot rely on others to do that care.⁸⁰ It has therefore been argued that the removal of discrimination structures must include measures designed towards not only the equal sharing of paid employment but also, and very importantly, measures aiming to correct the unequal sharing of unpaid (domestic) work between men and women.⁸¹ These measures would seek to increase the work done by men (as fathers in relation to parenting or as sons or spouses in other caregiving situations) within the home and the use of outsourcing of some of that care (the use of institutional care, for example).⁸² To this it must necessarily be pointed out that there is an increasing need to look at the division of paid and unpaid labour between women of various classes and origins. Indeed any improvement for women in this area has been to the advantage of the wealthier only. As explained by Tronto, the issue of care distribution is an exercise of power:

⁷⁵ In agreement with Joan Tronto, it is argued that all individuals are interdependent. J. Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* (Routledge 1993).

⁷⁶ G. James, *The Legal Regulation of Pregnancy and Maternity in the Labour Market* (Routledge-Cavendish 2008), 17-18.

⁷⁷ M. Sandler, ‘The Procedural Republic and the Unencumbered Self’ (1984) 12(1) *Political Theory* 81-96.

⁷⁸ BBC News magazine, 2 August 2013, < <http://www.bbc.co.uk/news/magazine-23533038> > accessed on 07 August 2013. See also M. Thornton, ‘Work/Life or Work/Work? Corporate Legal Practice in the 21st Century’ (2016) 23(1) *International Journal of the Legal Profession* 13-39; R. McManus, ‘Work-Life Balance: A Case of Technical Disempowerment?’ (2009) 16(1) *Social Politics: International Studies in Gender, State and Society* 111–131.

⁷⁹ E. Kofman and P. Raghuram, ‘Women, Migration and Care: Explorations of Diversity and Dynamism in the Global South’ (2012) 19(3) *Social Politics: International Studies in Gender, State & Society* 408-432; H. Lutz (ed), *Migration and Domestic Work: A European Perspective on a Global Theme* (Ashgate Publishing 2012); E. Nakano Glenn, ‘Caring and Inequality’ in S. Harley (ed) *Women's Labour in the Global Economy: Speaking in Multiple Voices* (Rutgers University Press 2007).

⁸⁰ A. Reilly, ‘Intersections and Inequality at the Work Family Nexus: How Law Fails Some Mothers More than Others’, Paper presented at the *Inaugural Labour Law Research Network Conference*, Pompeu Fabra University, Barcelona 13-15 June 2013; see also T. Hervey and J. Shaw, ‘Women, Work and Care: Women’s Dual Role and Double Burden in EC Sex Equality Law’ (1998) 8 *Journal of European Social Policy* 43-63.

⁸¹ N. Frazer, *Justice Interruptus: Critical Reflection on the ‘Post-Socialist’ Condition* (Routledge 1997); J. Gornick and M. Meyers, ‘Institutions that Support Gender Equality in Parenthood and Employment’ in J. Gornick and M. Meyers (eds) *Gender Equality, Transforming Family Divisions of Labor* (Verso 2010) 3-64.

⁸² S. Fredman, ‘Reversing Roles: Bringing Men into the Frame’ (2014) 10(4) *International Journal of the Law in Context* 442-458.

“Relatively more powerful people in society have a lot at stake in seeing that their caring needs are met under conditions that are beneficial to them, even if this means that the caring needs of those who provide them with services are neglected. More powerful people can fob caregiving work onto others: men to women, upper to lower class, free men to slaves”.⁸³

Equality-as-Difference

Supporters of equality-as-difference put emphasis on the differences between men and women, especially when women are considered in their role as mothers and carers. It is therefore advocated that the legal regime should accommodate gender-specific differences in order to achieve equality in practice.⁸⁴ The law should consequently give more value to care. Under this approach, women’s specific attributes and unique characteristics should be valued and celebrated.⁸⁵ The principle of equality, which is criticised as being based on male norms, is therefore considered to undervalue actual (childbearing) or perceived/constructed (childrearing) unique female attributes. Instead, caring work (especially for young children) is a uniquely female feature⁸⁶ which has long been undervalued⁸⁷ and deserves compensation and (re-)evaluation. The State, in this context, would have an obligation to facilitate, remunerate and value⁸⁸ the distinctly female characteristic of care-giving.⁸⁹

Feminists in this school have gone further than simply arguing for the celebration of natural or essential differences (like child bearing, for example). Indeed, care-giving is arguably an essentially gendered activity. The overlap of - and arguably the confusion between - child bearing (a biological difference between the sexes) and child rearing (a socially constructed

⁸³ J. Tronto, ‘The Value of Care’ *Boston Review*, 6 February 2002, < <http://bostonreview.net/BR27.1/tronto.html> > accessed on 07 August 2013.

⁸⁴ This explains the introduction of specific employment law provisions protecting women against discrimination based on pregnancy and maternity. See S. Deakin and G. Morris, *Labour Law* (Hart publishing 2010); W. Chan, ‘Mothers, Equality and Labour Market Opportunities’ (2013) 42(3) *Industrial Law Journal* 224-228.

⁸⁵ L. Finley, ‘Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate?’ (1986) 86 *Columbia Law Review* 1118-1182; R. West, ‘Jurisprudence and Gender’ (1988) 55 *University of Chicago Law Review* 1-72.

⁸⁶ M. Kilkey and J. Bradshaw, ‘Lone Mothers, Economic Well-Being and Policies’ in D. Sainsbury (ed) *Gender and Welfare State Regimes* (Oxford University Press 1999).

⁸⁷ J. Tolmie, V. Elizabeth and N. Gavey ‘Imposing Gender Neutral Standards in a Gendered World: Parenting Arrangements in Family Law Post Separation’ (2010) 16(2) *Canterbury Law Review* 302-330; M. Waring, *Counting for Nothing: What Men Value and What Women are Worth* (Allen and Unwin 1988).

⁸⁸ N. Frazer, ‘After the Family Wage: Gender Equity and the Welfare State’ (1994) 22(4) *Political Theory* 591-618.

⁸⁹ A. Leira, *Welfare State and Working Mothers: the Scandinavian Experience* (Cambridge University Press 1992).

reality) creates the conditions for the introduction of the gender dimension of care. Under this approach, the argument is that as women predominantly provide the unpaid care necessary for child rearing and for other dependants, as well as the majority of unpaid domestic work, it must be part of the special female features. The argument is given further weight when we see evidence of women's overrepresentation in paid work involving care.⁹⁰ Moreover, it is argued that the quantity of women doing care work is matched also by the quality of their care: that is, not only that lots of women *do* care, but that they do it *better* than men because they are women.

The question of whether men and women are equal or different in nature or whether the differences are socially constructed has always occupied thinkers across philosophical, psychological, sociological and legal fields. Reproductive biological differences between men and women provide the perfect basis to argue for the difference between the sexes and therefore it has been used as a justification for treating some women - in particular when they become mothers - differently. Child bearing and breastfeeding, for example, have for a long time been a source of tension between equal and differentiated treatments in the workplace. In the legal setting, this is illustrated in pregnancy anti-discrimination provisions.⁹¹ This conflict, although not completely resolved,⁹² has been toned down in law at least following the adoption of EU pregnancy and maternity discrimination legislation and the uncompromising case law of the Court of Justice that has made it clear that as pregnancy is a unique feature of women, discrimination on the grounds of pregnancy is direct sex

⁹⁰ F. Bettio and A. Verashchagina, *Gender Segregation in the Labour Market Root Causes, Implications and Policy Responses in the EU* (Publications Office of the European Union 2009); D. Perrons, *Gender Divisions and Working Time in the New Economy: Changing Patterns of Work, Care and Public Policy in Europe and North America* (Edward Elgar Publishing 2007).

⁹¹ In the UK, it was agreed for a long time that there could be no sex discrimination against a pregnant woman on the grounds of her pregnancy because there could be no comparison with other workers, as men could not become pregnant. The case *Turley v. Allders Department Stores* [1980] IRLR 4 changed this perspective by allowing pregnant workers to be compared to ill workers. This was confirmed in *Hayes v. Malleable Working Men's Club and Institute* [1985] IRLR 367, whereby it was accepted that pregnant women can be compared to similarly situated men who are temporarily sick. This was reiterated by Glidewell L.J. in the Court of Appeal decision of *Webb v. EMO Cargo (UK) Ltd.* [1992] *Common Market Law Review* 793. For discussion regarding the comparative approach to sex discrimination in relation to pregnancy and prior to Case 177/88, *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus* [1990] ECR I-3941, see N. Lacey, 'Legislation Against Sex Discrimination: Questions from a Feminist Perspective' (1987) 14 *Journal of Law and Society* 411-421 and for a US perspective on the same issue see C. MacKinnon, 'Difference and Dominance: On Sex Discrimination', in A. Phillips (ed) *Feminisms and Politics* (Oxford University Press 1998) 295-313.

⁹² See, for instance, the difficult EU case law on pregnancy related illness discussed in E. Caracciolo di Torella and A. Masselot, 'The ECJ Case Law on Issues Related to Pregnancy, Maternity and the Organisation of Family Life: An Attempt at Classification' (2001) 26 *European Law Review* 239-260; C. Boch, 'Où s'arrête le principe d'égalité ou de l'importance d'être bien-portante: à propos de l'arrêt Larsson de la Cour de Justice' (1998) *Cahiers de Droit Européen* 177-190.

discrimination prohibited under EU law from the beginning of pregnancy until the worker returns from maternity leave.⁹³ Beyond pregnancy, which represents an agreed essential difference, there is no agreement of what are women's essential differences. Whether the law should further accommodate gender specific differences - such as care work - depends on the kind of equality sought (equality of outcomes or equality of opportunities) as well as the nature and significance of the essential differences.⁹⁴ In this context, Jane Lewis observes the difficulty of legislative strategy:

“The central problem in all this is an old one: should law be made to treat the social reality, hence recognizing the different contributions of men and women to the family, or should it treat men and women the same? If it does the former, then it risks perpetuating particular gender roles; if it does the latter then it risks ignoring the reality of women's needs”.⁹⁵

It might not be the best strategy for feminists to link care with an essential feminine characteristic because this proposition risks drawing serious and harmful consequences for women. Indeed, as the male norm is both still prevalent and pervasive, any assertion of gender difference in a social context implies automatically the inferior status of the female.⁹⁶ In turn, this risks presenting women as vulnerable and predisposed to domestic/care work. Exposing women as vulnerable creatures is unlikely to lead to emancipation. If the State is to pay for women to provide care, are we not risking entrenching women into caring roles?⁹⁷ The *balance* between valuing women's paid employment and care is a perilous one.⁹⁸

Moreover, the claim that women do better care work because it is in their nature, leads to the automatic exclusion of men from this area of life. In turn, this denies men the opportunities to explore their nurturing identity. Ultimately this also limits the ability to think further about

⁹³ Article 10 of Directive 92/85/EEC; Article 2(2)(c) of Directive 2006/54/EC; Case 177/88, *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus* [1990] ECR I-3941; Case 179/88 *Hertz* [1990] ECR I-3979.

⁹⁴ W. Chan, 'Mothers, Equality and Labour Market Opportunities' (2013) 42(3) *Industrial Law Journal* 224-228.

⁹⁵ J. Lewis, *Should We Worry About Family Change?* (University of Toronto Press 2003) 90.

⁹⁶ J. Tronto, 'Beyond Gender Difference to a Theory of Care' (1987) 12(3) *Signs: Journal of Women in Culture and Society* 644-663.

⁹⁷ C. McGlynn, 'Ideologies of Motherhood in European Community Sex Discrimination' (2000) 6 *European Law Journal* 29-44.

⁹⁸ E. Kahu and M. Morgan, 'A Critical Discourse Analysis of New Zealand Government Policy: Women as Mothers and Workers' (2007) 30 *Women's Studies International Forum* 134-146.

the organisation of family life, the relationship between work and family and the ability to break the public/private divide. In other words, linking care to women in such an essential way limits our ability to change and challenge the organisation of society.

Beyond the Equality/Difference Debate

The equality/difference debate has been criticised for being counterproductive as to the best way to achieve equality⁹⁹ and divisive between feminists.¹⁰⁰ Although the debate is in itself valuable on an intellectual level, it has detracted from the actual pressing social issues such as the position of mothers and the role of carers in society. Moreover, the equality/difference debate has not contributed to challenging the existing male norms considered to be normal work structures and against which women and carers continue to be positioned.¹⁰¹ Equally it has failed to address the relationship between the public and the private spheres which contributes to the invisibility of care as it is not considered to be ‘work’.¹⁰²

Recent legal and policy developments in the field of work-life balance (especially in Europe¹⁰³ but also, although to a lesser extent, in the United States)¹⁰⁴ have provided an opportunity to disentangle the debate between these two strands of feminist theory. The emergence of the so-called “dual earner/carer model”¹⁰⁵ calls on the State to strengthen females’ link to the labour market while at the same time encouraging men to develop their care-giving ties. The difficulty with this emerging model is that it does not take sufficiently into account contemporary societal evolutions (such as the process of demographic transition, the feminisation of the workplace, the increasingly fluid model of families, or the weight of

⁹⁹ G. James, ‘Mothers and Fathers as Parents and Workers: Family-Friendly Employment Policies in an Era of Shifting Identities’ (2009) 31(3) *Journal of Social Welfare & Family Law* 271-283.

¹⁰⁰ J. Evans, *Feminist Theory Today: An Introduction to Second-Wave Feminism* (Sage 1995).

¹⁰¹ V. Schultz, ‘Life’s Work’ (2000) 100(7) *Columbia Law Review* 1881-1964 and more recently see C. O’Brien, ‘Confronting the Care Penalty: The Cause for Extending Reasonable Adjustment Rights along the Disability/Care Continuum’ (2012) 34(1) *Journal of Social Welfare and Family Law* 5-30.

¹⁰² I. Moebius and E. Szyszczack, ‘Of Raising Pigs and Children’ (1998) 18 *Yearbook of European Law* 125-156.

¹⁰³ Inter alia see R. Crompton, *Employment and the Family: the Reconfiguration of Work and Family Life in Contemporary Societies* (Cambridge University Press 2006).

¹⁰⁴ J. Gormick and M. Meyers, *Families that Work: Policy for Reconciling Parenthood and Employment* (Russell Sage Publication 2003).

¹⁰⁵ E. Pfau-Effinger, ‘Socio Historical Paths of The Male Breadwinner Model: An Explanation of Cross National Differences’ (2004) 55(4) *British Journal of Sociology* 377-400; R. Crompton, S. Lewis, C. Lyolette, ‘Introduction: The Unravelling of the Male Breadwinner Model and Some of its Consequences’ in R. Crompton, S. Lewis, C. Lyolette (eds) *Women, Men, Work and Family in Europe* (Palgrave MacMillian 2007) 1-16.

cultural traditions).¹⁰⁶ For example, single mothers' behaviour towards paid work and care differs drastically from that of mothers with a partner;¹⁰⁷ or the fact that the link between care and women is stronger in Mediterranean rather than Scandinavian societies.¹⁰⁸ Moreover the "dual earner/carer model", especially under EU law and the European Employment Strategy (EES), does not take fully into account the fact that many jobs filled by women are precarious, low-quality and badly paid.¹⁰⁹

While under this new model women and family are given more agency with regard to the organisation of care, this remains a "weighted" autonomy.¹¹⁰ Care work continues to play a central role in the organisation for the family and the ability of women to access paid work. Thus a rights-based model could benefit from being complemented by other approaches.

Section 2: An Alternative Approach - The Ethic of Care

It follows from the above discussion that an approach that relies on rights and an ethic of justice is not entirely suitable to supporting caring relationships. Care is centred on the understanding of responsibility and relationships and as such it is a social responsibility, an obligation that reflects our ties to one another as a human community. It has often been argued that the caring relationship - and our attempts to support the varied ways we "do" care - might indeed sit more easily within the moral theory of the ethic of care:¹¹¹

"An ethic of justice focuses on questions of fairness, equality, individual rights, abstract principles, and the consistent application of them. An ethic of care focuses on attentiveness, trust, responsiveness to need, narrative nuance, and cultivating

¹⁰⁶ A. Orloff, 'Should Feminists Aim for Gender Symmetry? Why the Dual-earner/Dual Care Model May Not Be Every Feminist's Utopia', in J. Gormick, M. Meyers and E. Olin Wright (eds) *Earning and Caring: Creating the Conditions for Gender-Equalitarian Families* (Verso 2009) 129-157.

¹⁰⁷ Department of Work and Pensions (DWP), *Ready for Work: Full Employment in our Generation* (DWP 2007); S. Duncan and R. Edwards, *Lone Mothers, Paid Work and Gendered Moral Rationalities* (Macmillan 1999).

¹⁰⁸ AFEM (ed), *Concilier Vie Familiale et Vie Professionnelle Pour les Femmes et les Hommes : Du Droit A la Pratique* (Sakkoulas/Bruylant 2005).

¹⁰⁹ C. Hoskyns, 'Mainstreaming Gender in the Macroeconomic Policies of the EU: Institutional and Conceptual Issues' Paper presented at the *ECPR Conference*, Bologna June 2004, < <http://www.jhubc.it/ecpr-bologna/docs/179.pdf> > accessed on 20 September 2015.

¹¹⁰ M. Daly, 'What Adult Worker Model? A Critical Look at Recent Social Policy Reform in Europe From a Gender and Family Perspective' (2011) 18(1) *Social Politics: International Studies in Gender, State & Society* 1-23, 17.

¹¹¹ The leading work in this area is C. Gilligan, *In a Different Voice* (Harvard University Press 1982).

caring relations. Whereas an ethic of justice seeks a fair solution between competing individual interests and rights, an ethic of care sees the interest of carers and cared for as importantly intertwined rather than as simply competing¹¹².

The Heinz Dilemma

The ethic of care is not a novel argument¹¹³ but its contemporary interpretation originates from developmental psychologist Gilligan's seminal work in the 1980s on care and morality.¹¹⁴ Her work challenged traditional gendered assumptions about moral development and reasoning in young boys and girls. Gilligan developed her moral theory in contrast to that of Lawrence Kohlberg, whose model had established that boys were found to be more morally mature than girls.¹¹⁵

Cognitive and moral development psychology at the time was testing the *Heinz* dilemma. Heinz lives abroad with his wife who is sick. The chemist has a medicine that can save her, otherwise she will die. Heinz cannot pay for the medicine and the chemist will not gift it to him. Should Heinz steal the medicine? In considering the answers provided by young boys and girls, Lawrence Kohlberg had established that on average men and women had different levels of morality. Boys would see the necessity of stealing the medicine to save a life, even if there were a risk to be caught, in which case, Heinz could plead for a reduced sentence given the circumstances. Girls, by contrast, would approach the problem from a different angle, pointing out that if Heinz was sent to prison his wife would surely die and therefore they would try to find other solutions such as talking together about the problems, persuading the chemist to give it freely or finding alternative funding for the medicine somehow. Boys could perceive abstract principle within the dilemma: the logical priority of life over property. Girls, however, were more concerned with the preservation of ongoing relationships and balancing conflicting responsibilities. The children understood the necessity to reach a solution but boys did it through impersonal methods and the abstract logic of the law, while girls used personal relationships and communication between the self and others. The

¹¹² V. Held, *The Ethic of Care* (Oxford University Press 2006) 15.

¹¹³ The origin of the ethic of care can be traced back to the work of Augustine: L. Mortari, *Filosofia della Cura* (Raffaello Cortina 2015); M. Mayeroff, *On Caring* (HarperCollins Publishers 1972).

¹¹⁴ See fn111.

¹¹⁵ L. Kohlberg, *The Philosophy of Moral Development, Moral Stages and the Idea of Justice* (Harper and Row 1981).

difference in the responses of boys and girls was interpreted by Kolbergh as hierarchical: boys on average reach a higher level of moral development than girls.

In Kolbergh's system, girls' thinking is less moral than that of boys. Carole Gilligan challenged that assumption. Moral maturity does not necessarily require the use of universal abstract principles. She argued that women's approach based on relationships and the dependency with other persons is not less mature but different. Gilligan's theory offered the alternative perspective that men and women have tendencies to view morality in different terms.¹¹⁶ She asserted that traditional moral approaches were male biased, and that the "voice of care" was a legitimate alternative to the "justice perspective" of liberal human rights theory. Her theory claimed women tended to emphasize empathy and compassion over the notions of deontological/Kantian morality privileged in Kohlberg's scale. She conceded that such moral developments were "different" but argued that this did not necessarily lead to the conclusion that females were less efficient than males: rather, men and women were speaking with "different voices".

Gilligan's work has contributed to a questioning about the universal standards and impartiality of morality. The ethic of care underscores the importance of response by operating a shift in moral perspective: the question is not anymore "what is just" but "how to respond". A morality of care rests on the understanding of relationships as a response to another in their terms.

Questioning the Essential Feminine Characteristic of Care

The significance of Gilligan's work has less to do with the difference between men's and women's thinking and more to do with women's empowerment through a new approach of ethical analysis. Nevertheless, Gilligan's work has been widely cited in support of the idea that women are different from men and that there is a "nature of women's morality".¹¹⁷

¹¹⁶ C. Gilligan, *In a Different Voice* (Harvard University Press 1992).

¹¹⁷ See L. Kerber, 'Some Cautionary Words for Historians' (1986) 11(2) *Sign* 304-310, 309; C. Greeno and E. Maccoby, 'How Different Is the "Different Voice"?' (1986) 11(2) *Signs* 310-316, 315; Z. Luria, 'A Methodological Critique' (1986) 11(2) *Signs* 316-321, 318; and C. Stack, 'The Culture of Gender: Women and Men of Color' (1986) 11(2) *Signs* 321-24, 324. All of the above are cited by J. Tronto, 'Beyond Gender Difference to a Theory of Care' (1987) 12(3) *Signs: Journal of Women in Culture and Society* 644-663. It is important, however, to clarify - as Tronto does - that Gilligan did not consider the ethic of care as a category of gender difference. While she argues that justice and care should be included in our understanding of morality, she also explains that in the context of her studies, "the focus on care ... is characteristically a female

Is care really an essential female feature? Are women naturally good at caring and doing care work? Many feminists have been sceptical about women's natural attribute to care.¹¹⁸ It is not the purpose of this thesis to determine whether care is indeed a natural feminine characteristic. A legal thesis is not best equipped to make such judgment in any event. However, it might still be the place to discuss this issue in order to frame the discussion on the relationship between (unpaid) childcare and EU law. To start, the sexual difference between men and women is not exclusively an anatomical fact but also results from interpretation and social construct. Sex and gender cannot systematically be set in opposition because the fact that men and women are different has also been socially constructed. Thus, we can concede that there is a blurring of the boundaries between the strictly biological and the socially constructed. In addition, the argument put forward by Gilligan might not be as persuasive as some might have claimed. Indeed, Seyla Benhabib notes that Gilligan's experiment contributed to the "development of a non-formalist, contextually sensitive, and post-conventional understanding of ethical life".¹¹⁹ In other words, her experiments were highly contextual and set within the perimeters of her time and research field. She certainly did not make a claim for the dismantling of the universality of morality.¹²⁰ In addition, Gilligan herself explained in reflections on her work that she had deliberately entitled her book "In a Different Voice" and not a "woman's voice".¹²¹ Gilligan was not concerned with identifying "sex difference" in "moral reasoning" but rather wanted to show that the exclusion of women from "normal" mainstream developmental theory in psychology meant that existing models were neither "universal" nor "neutral".¹²²

phenomenon". C. Gilligan, "Reply" in "On In a Different Voice: An Interdisciplinary Forum" (1986) 11(2) *Signs* 324-333, 330.

¹¹⁸ J.B. Elshtain and D.E. Decosse, 'Public Man, Private Woman: Women in Social and Political Thought' (2006) 34(2) *Journal of Religious Ethics* 339-369; F. Olsen, 'The Family and The Market: A Study of Ideology and Legal Reform' (1983) *Harvard Law Review* 1497-1578.

¹¹⁹ S. Benhabib, 'The Debate over Women and Moral Theory Revisited' in J. Meehan (ed) *Feminists read Habermas: Gendering the Subject of Discourse* (Routledge 1995) 181-203, 183.

¹²⁰ *Ibid.*

¹²¹ E. Dubois, M. Dunlop, C. Gilligan and C. MacKinnon, C. Menkel-Meadow, 'Feminist Discourse, Moral Values and the Law: A Conversation - The 1984 James McCormick Mitchell Lecture' (1985) 34(1) *Buffalo Law Review* 11-88.

¹²² S. Benhabib, 'The Debate over Women and Moral Theory Revisited' in J. Meehan (ed) *Feminists Read Habermas: Gendering the Subject of Discourse* (Routledge 1995) 181-203, 193.

Since its inception, Gilligan's work has been further developed¹²³ through different perspectives such as political science¹²⁴ and philosophy.¹²⁵ It has also been criticised. In particular, its valorisation of a "female voice" has been portrayed as problematic.¹²⁶ Not all females are innately caring, self-sacrificing and nurturing (or any more capable of these traits than men).¹²⁷ Nevertheless more women do care work than men. Why do women do more care work than men and why is it considered that women do care work better than men? Might it be that as women have always been "forced" to do the care work and, with experience, they have learned to do it well? Arguably care work is passed on from one (female) generation to another without being questioned. Some children - more often the girls - are being better groomed to do care activities, whereas other (male) children are more used to relying on others.¹²⁸ Pascale Molinier shows in the field of psychodynamics that the experience of work transforms the subject¹²⁹ so "one is not born carer but rather one becomes one."¹³⁰ In other words, the ability to do care work well often results from the experience sometimes forced upon an individual of having to care for someone.¹³¹

The Ethics of Care

The theory on the ethics of care is vast and "there is no complete agreement over what...[it] means."¹³² Nevertheless, it is widely acknowledged that it is based on the idea that life is a series of mutual and interdependent relationships without which we would not exist.¹³³ These

¹²³ See for instance: J. Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* (Routledge 1993); V. Held, *The Ethic of Care* (Oxford University Press 2006).

¹²⁴ J. Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* (Routledge 1993); S. Sevenhuijsen, *Citizenship and the Ethics of Care: Feminist Considerations on Justice, Morality and Politics* (Psychology Press 1998).

¹²⁵ V. Held, *The Ethics of Care* (Oxford University Press 2006); E. Fedder Kittay, *Love's Labour Essays on Women, Equality and Dependency* (Routledge 1999); S. Ruddick, 'Maternal Thinking' (1980) 6(2) *Feminist Studies* 342-67.

¹²⁶ See discussion in V. Munro, *Law and Politics and the Perimeter: Re-Evaluating Key Debates in Feminist Theory* (Hart 2007) 23-33.

¹²⁷ Indeed, there is ample evidence that the voices of gender are far less different than Gilligan suggests, see D. Rhode, *Justice and Gender* (Harvard University Press 1991) 309.

¹²⁸ P. Molinier, 'Quel est le bon témoin du care?', in P. Molinier, S. Laugier, P. Paperman (eds) *Qu'est-ce que le Care? Souci des autres, Sensibilité, Responsabilité* (Petite Bibliothèque Payot 2009) 233-251.

¹²⁹ P. Molinier, *L'Enigme de la Femme Active* (Payot 2003).

¹³⁰ In line with Beauvoir's saying "On ne naît pas femme : on le devient" (One is not born, but rather becomes, a woman), S. de Beauvoir, *Le deuxième sexe I* (Gallimard 1949) 285-286.

¹³¹ P. Molinier, S. Laugier and P. Paperman, 'Introduction: Qu'est-ce que le Care?' in P. Molinier, S. Laugier and P. Paperman (eds) *Qu'est-ce que le Care? Souci des autres, sensibilité, responsabilité* (Payot et Rivages 2009) 7-31, 15.

¹³² J. Herring, *Caring and the Law* (Hart Publishing 2013) 49.

¹³³ C. Meyers, 'Cruel Choices: Autonomy and Critical Care Decision-Making' (2004) 18(2) *Bioethics* 104-119.

relationships carry responsibilities¹³⁴ and should be used as a starting point to reevaluate legal norms. The ethics of care implies that there is moral significance in the fundamental elements of relationships and dependencies in human life. Accordingly, the law should promote and support care as well as enabling caring relationships.¹³⁵ In normative terms, care ethics should support relationships by contextualizing and promoting the well-being of caregivers and care receivers in a network of social relations. The primary focus should be “what is my proper obligation within the context of this relationship” rather than “is it my right to do X?”¹³⁶ Seen in this light, the ethics of care framework is likely to offer an important contribution to the discourse on care and the law.

It is argued in this thesis that a greater promotion of an ethic of care could radically transform institutions and legal rights and the values that underpin them in this context. If we are willing to accept that caregiving is a changing concept and one that is slowly becoming less gendered - an argument that is increasingly valid in our context as male and female identities as carers and workers are shifting¹³⁷ - then an ethic of care provides a useful means of critiquing individualistic approaches to law and policy. For the purpose of this thesis, an injection of an ethic of care would mean that the necessity of care-giving and inevitability of interdependence between all individuals across our life course be reflected more prominently within the relevant legal framework.¹³⁸ The historical and ongoing failure to include the ethic of care when drafting social policy that impinges upon the lives of working parents means that whilst we have created a superficially attractive cake, it lacks the quality, texture and shelf-life that might have been achieved had it been baked with an ethic that “has at its core a central mandate to care for the relationships that sustain life”.¹³⁹ Instead, we have created a framework that reflects a dominant neo-liberal approach and continues to promote, prioritise and reward autonomy, individualism and market-making above informal (unpaid) care-giving

¹³⁴ C. Gilligan, *In a Different Voice* (Harvard University Press 1982).

¹³⁵ See also C. Ungerson, ‘Cash in Care’ in M. Herrington Meyer (ed) *Care Work: Gender, Class and the Welfare State* (Routledge 2000) 69-88.

¹³⁶ V. Held, *The Ethic of Care* (Oxford University Press 2006).

¹³⁷ See G. James, ‘Mothers and Fathers as Parents and Workers: Family-Friendly Employment Policies in an Era of Shifting Identities’ (2009) 31(3) *Journal of Social Welfare & Family Law* 271-283 and see S. Sevenhuijsen, ‘The Place of Care: The Relevance of the Feminist Ethic of Care for Social Policy’ (2003) 4 *Feminist Theory* 179-197, 181, who argues that care is being ‘relocated from women to men’.

¹³⁸ For a recent critique of an important piece of legislation in the United Kingdom - the Mental Capacity Act 2005 - using the ethic of care see B. Clough, ‘What About Us? A Case for Legal Recognition of Interdependence in Informal Care Relationships’ (2014) 36(2) *Journal of Social Welfare and Family Law* 129-148. See also, more generally, J. Herring, *Caring and the Law* (Hart Publishing 2013).

¹³⁹ R. West, *Caring for Justice* (New York University Press 1997) 8.

or, at least, it reinforces the “public” pretence of these traits,¹⁴⁰ which continue to be at odds with reality for many working parents. Placing care at the centre allows us to think about the role of law and the nature of rights in different ways. The ethic of care can help address the normative difficulties surrounding the nature of care. In particular, it can contribute to making care visible to policy makers.

Making Care Visible

“It is only with the heart that one can see rightly; what is essential is invisible to the eye.”¹⁴¹

If we are not convinced of the argument that Gilligan’s work defines an essential female morality, we can recognise however that she has nevertheless powerfully showed the weakness of using the concept of justice as the exclusive basis for morality.¹⁴² The historical division of labour has placed care into the domestic sphere where it has been undervalued as a private female emotion. As such, care is excluded from the political and the moral domain in the public sphere. Gilligan’s work has opened the way to reinstate a care perspective into the political arena. Joan Tronto, in particular, has moved the application of the ethic of care beyond caring relationships to the political and social field. In doing so, care ethics is about making visible these invisible realities which we are not seeing and which we are not articulating into theory (or, more precisely, which have been excluded from theory). The aim of the theory of care is almost an anthropological project designed not to discover what is invisible but rather to reveal visible realities, which we do not see because they are too close and ordinary.¹⁴³ Addressing issues related to care requires a focus on the ordinary life of human beings. According to Foucault, it is about making visible what we see but do not perceive:

¹⁴⁰ As Bridgeman put it, ‘the work of caring for dependents and emotional interdependency with our children, spouses, partners and families must remain concealed lest we appear not to be independent souls suited for the public world’: J. Bridgeman, ‘Accountability, Support or Relationship? Conceptions of Parental Responsibility’ (2007) 58 *Northern Ireland Legal Quarterly* 307-324, 308, discussed in B. Clough, ‘What About Us? A Case for Legal Recognition of Interdependence in Informal Care Relationships’ (2014) 36(2) *Journal of Social Welfare and Family Law* 129-148.

¹⁴¹ A. Saint Exupéry, *Le petit Prince* (Gallimard 1946) 92.

¹⁴² S. Laugier, ‘Le sujet du *care*: vulnérabilité et expression ordinaires’ in P. Molinier, S. Laugier and P. Paperman (eds) *Qu’est-ce que le Care? Souci des autres, sensibilité, responsabilité* (Payot et Rivages 2009) 159-200.

¹⁴³ *Ibid*, 187; L. Wittgenstein, *Philosophical Investigations* (Blackwell 1953).

“We have long known that the role of philosophy is not to discover what is hidden, but to render visible what precisely is visible, which is to say, to make appear what is so close, so immediate, so intimately tied to ourselves that, as a consequence we do not perceive it” [*The author’s translation*].¹⁴⁴

Care is “ignored and invisible”.¹⁴⁵ The invisibility of care work results from its lack of recognition which, in turn, leads to a devaluation of the work itself, a depreciation of the care-provider’s role and, ultimately, of the care recipient too.¹⁴⁶ Angelo Soares reminds us that the invisibility of care work does not correspond to the non-existence of care providers in the paid employment market or in the domestic sphere, but rather to an absence of social and organisational recognition.¹⁴⁷ Relying on Alex Honneth’s work, Soares links invisibility to a question of recognition: “Dominants express their social superiority by ignoring those that they dominate” [*translation*].¹⁴⁸

This so-called social invisibility is a figure of speech or a metaphor. Individuals are indeed visible to the eye but they are invisible socially because their status or their work is not recognised and therefore not valued. Molinier provides an example from Cocteau’s film, *The Beauty and the Beast*.¹⁴⁹ Here the servants are enchanted and their bodies have disappeared, replaced by the service, a candle holder or a water pitcher without faces. The servants are disembodied, identity-less and incapable of making demands. They demand nothing in return for the care they provide. Whilst this is fiction, it does demonstrate both the invisibility of care and the disregard for care-providers.

¹⁴⁴ “Il y a longtemps qu’on sait que le rôle de la philosophie n’est pas de découvrir ce qui est caché, mais de rendre visible ce qui est précisément visible, c’est-à-dire de faire apparaître ce qui est si proche, ce qui est si immédiat, ce qui est si intimement lié à nous-même qu’à cause de cela nous ne le percevons pas. [Alors que le rôle de la science est de faire connaître ce que nous ne voyons pas, le rôle de la philosophie est de faire voir ce que nous voyons.]” M. Foucault, ‘La Philosophie Analytique de la Politique’ (1978) in *Dits et écrits, 1976-1988* (Gallimard 2001) 534-551, 541-542.

¹⁴⁵ M. Henwood, *Ignored and Invisible? Carers’ Experience of the NHS* (Carers National Association 1998).

¹⁴⁶ C. O’Brien, ‘Confronting the Care Penalty: The Cause for Extending Reasonable Adjustment Rights along the Disability/Care Continuum’ (2012) 34(1) *Journal of Social Welfare and Family Law* 5-30.

¹⁴⁷ A. Soares, *Les (in)visibles de la santé* (Université du Québec à Montréal 2010).

¹⁴⁸ “Les dominants expriment leur supériorité sociale en ne percevant pas ceux qu’ils dominent”. A. Honneth, *La Société du Mépris: Vers une Nouvelle Théorie Critique* (la Découverte 2008) 226.

¹⁴⁹ P. Molinier, S. Laugier and P. Paperman, ‘Introduction: Qu’est-ce que le Care?’ in P. Molinier, S. Laugier and P. Paperman (eds) *Qu’est-ce que le Care? Souci des autres, sensibilité, responsabilité* (Payot et Rivages 2009) 7-31, 19.

Recognition is based on the double acknowledgment that one's job is accomplished and useful, and that the work is well done.¹⁵⁰ Therefore the non-recognition of care work implies not only that the work done is devalued but also that the person doing the job is disregarded. This is a form of social disdain. By contrast, the ethic of care places care at the centre of the human being experience. Thus, the ethic of care contributes to the social and legal visibility of care.

Accountability of Care

The characteristics of care work make it very difficult to monitor and to measure under traditional accounting methods. Accounting requires proof that the work has been done and that it is has been done to a high quality. However, care work includes many dimensions that are not easily quantifiable (such as communication, love, trust, loyalty and diplomacy). Arguably such 'tasks' are immeasurable both in terms of quantity (*how many* times you care) but also, importantly, in terms of quality (*how well* you care). Objective judgments of the quality of care are absolutely imperative to the adoption of legal measures.¹⁵¹

Here, again, the ethic of care perspective can help with shifting the emphasis on the value of care work. An analysis that embraces the ethic of care shows that care work goes further than simple considerations of specialisation or skills. Care-giving involves by necessity work done with the heart. Care work includes ethics, love, common sense and attachment. The problem is that there is a semantic deficit when we try to define the caring relations that take place between human beings. Are we talking about the heart, courage, a vital force? The subject of care is linked to the subconscious: care is a form of fragile sublimation. Caring for someone else is an expansion of the self, in which it is impossible not to develop attachment feelings. As such, care work can be placed at the boundary between professional work and love: it requires perilous negotiation and continuous management of feelings and emotions. People who care often also love the person they care for and vice versa.

¹⁵⁰ A. Soares, *Les (in)visibles de la santé* (Université du Québec à Montréal 2010); C. Dejours, 'Intelligence ouvrière et organisation du travail (À propos du modèle japonais de production)' in H. Hirata (ed), *Autour du "modèle" japonais - Automatisation, nouvelles formes d'organisation et de relations de travail* (L'Harmattan 1992) 275-303.

¹⁵¹ Council Recommendation 92/241/EEC of 31 March 1992 on child care, OJ [1992] L123/16.

Paradoxically, experienced and/or professional care-providers are not always able to articulate for themselves and for others the complexity of their activities.¹⁵² The kind of work done around care-giving is mostly repetitive, constant and discrete: it is only when the work is not done or not well done that it becomes visible and that everyone feels free to criticise and comment. For instance, a mother that does not love her children, a cold nurse or an unconcerned educator is shocking, whereas love, attention and availability from these same people are considered as standard or normal.¹⁵³

If the quality (and the quantity) of care is dependent on the personal and emotional relationship between the care-provider and the care-recipient, this emotional attachment also puts the care-provider in a vulnerable position. When care work is not just the subject of an economic exchange (which it rarely is), the emotional attachment makes it difficult, if not impossible, for the care-provider to withdraw or even to threaten to withhold it. In Nancy Folbre's words, caregivers become "prisoners of love".¹⁵⁴ On this basis, caregivers can be taken advantage of because not only are they unable to negotiate for adequate economic compensation but it has been argued that love is a more powerful motivator than money.¹⁵⁵ The historical relationship between gender and care means that these "prisoners of love" are disproportionately female.

The theory of care ethics has provided feminists with tools to unpack the private/public and love/work dichotomies. Whilst traditionally altruism and love has explained who does the care, the theory of care itself takes into account the work done and its unequal reparation.¹⁵⁶ The ethics of care is linked to concrete situations, reflected by the actions of taking care of, and caring for, someone: it is work *in and of itself*. The law does not acknowledge very well this work which is partly relational, partly emotional, even if it is work. Adopting an ethic of

¹⁵² P. Molinier, 'Quel est le bon témoin du *care*?', in P. Molinier, S. Laugier, P. Paperman (eds) *Qu'est-ce que le Care? Souci des Autres, Sensibilité, Responsabilité* (Petite Bibliothèque Payot 2009) 233-251; D. Stone, 'For Love Not Money: The Commodification of Care' in M. Ertman and J. Williams (eds) *Rethinking Commodification: Cases and Readings in Law and Culture* (New York University Press 2005) 271-90.

¹⁵³ N. Benelli and M. Modak, 'Analyser un objet invisible: le travail de care' (2010) 51(1) *Revue Française de Sociologie* 39-60.

¹⁵⁴ N. Folbre 'Reforming Care', in J. Gornick and M. Meyers (eds) *Gender Equality, Transforming Family Divisions of Labor* (Verso 2009) 111-128, 114.

¹⁵⁵ J. Nelson, 'Of Market and Martyrs: Is it OK to Pay Well for Care?' (1999) 5(3) *Feminist Economics* 43-59; A. Heyes, 'The Economics of Vocation of 'Why is a Badly Paid Nurse a Good Nurse?' (2005) 24(3) *Journal of Health Economics* 561-569; J. Nelson and N. Folbre, 'Why a Well-Paid Nurse is a Better Nurse!' (2006) 24(3) *Journal of Nursing Economics* 127-130.

¹⁵⁶ P. Molinier, 'Quel est le bon témoin du *care*?', in P. Molinier, S. Laugier, P. Paperman (eds) *Qu'est-ce que le Care? Souci des Autres, Sensibilité, Responsabilité* (Petite Bibliothèque Payot 2009) 233-251.

care would allow for the reconciliation between emotions and rationality in policy design. It would provide a basis for enabling caring relationships by protecting care-givers and valorising their work.

Section 3: The Caring Relationship and the Capability Approach

“Any real society is a care-giving and care-receiving society, and must therefore discover ways of coping with these facts of human neediness and dependency that are compatible with the self-respect of the recipients and do not exploit the caregivers. This, as I said, is a central issue for gender justice”.¹⁵⁷

It is contended that the capabilities approach has the potential to contribute persuasively to underpinning the development of a legal environment where the diversity and flexibility of care relationships would be both valued and supported. The capabilities approach was originally developed by Amartya Sen¹⁵⁸ as an economic theory which provides new perspectives on welfare economics. It has further been explored by Martha Nussbaum¹⁵⁹ as a means to achieving effective gender equality. The capabilities approach goes beyond traditional economic welfare. It challenges the assumption that human well-being is based on economic success. Instead it is centred on what people can effectively achieve because under a capabilities approach, it “is the things people are capable of doing which is the most useful indication of a successful society”.¹⁶⁰ The core focus of the capabilities approach is on what individuals are able/capable to do and to be. The capability approach to human well-being is a “concentration on freedom to achieve in general and the capabilities to function in

¹⁵⁷ M. Nussbaum, ‘Capabilities as Fundamental Entitlements: Sen and Social Justice’ (2003) 9(2-3) *Feminist Economics* 33-59, 41-42.

¹⁵⁸ A. Sen, *Commodities and Capabilities* (Oxford University Press 1987); A. Sen, *Development as Freedom* (Alfred Knopf 1999); A. Sen, ‘Equality of What?’ in S. MacMurrin (ed) *The Tanner Lectures on Human Values* 4 (2nd ed), (Cambridge University Press 2010) 195–220; A. Sen, *Inequality Reexamined* (Oxford University Press 1992).

¹⁵⁹ M. Nussbaum, *Sex and Social Justice* (Oxford University Press 1999); M. Nussbaum, ‘Human Capabilities, Female Human Beings’ in M. Nussbaum and J. Glover (eds) *Women, Culture and Development: A Study of Human Capabilities* (Oxford University Press 1995) 61-104; M. Nussbaum, *Women and Human Development: The Capabilities Approach* Vol. 3. (Cambridge University Press 2001); M. Nussbaum, ‘Capabilities and Social Justice’ (2002) 4(2) *International Studies Review* 123-135.

¹⁶⁰ J. Herring, *Caring and the Law* (Hart Publishing 2013) 320.

particular” and the central concepts of this approach are “functionings and capabilities”.¹⁶¹ The approach is about the empowerment of people with freedom and the development of an environment suitable for human flourishing.¹⁶² A functioning is an achievement, whereas a capability is the ability to achieve (i.e. the freedom).¹⁶³ Sen claims that a person’s well-being must be evaluated in the light of a form of assessment of the functionings achieved by that person.¹⁶⁴ This capability to achieve functionings reflects the person’s real opportunities or freedom of choice between possible lifestyles.¹⁶⁵ In other words, functionings are what people want to be capable or should be capable to be and/or to do. Thus, the capabilities are the alternative combinations of functionings that are feasible for a person to achieve. The distinction between the capabilities and functionings lies in the difference between what is realised and what is effectively possible. Capabilities are considered to be our freedom, which society has an obligation to guarantee to each citizen so that they can live the life they want and be the person they want to be. There is no prescription about how life should be lived: individuals should be able to choose their path once they have the requisite capabilities.

The capability approach is a suitable theoretical framework to analyse and assess social justice and care relationships. The presumption that we are - or ought to be - autonomous beings ignores the reality of the variable levels of dependency over our lifecycle, as well as the risk inherent to our condition as human beings (illness, accident and old age, for example). Care is central to human life and development. As “all societies contain people in need of care,”¹⁶⁶ it is becoming necessary to contest the idea that “those who are dependent and ‘unproductive’ are not full participants”.¹⁶⁷ Real social justice must necessarily include the need to respond to the urgency and unpredictability of care and the effects of dependency on the distribution of resources.¹⁶⁸ The capabilities approach goes beyond measuring well-

¹⁶¹ A. Sen, ‘Gender Inequality and Theories of Justice’ in M. Nussbaum and J. Glover (eds) *Women, Culture and Development: A Study of Human Capabilities: A Study of Human Capabilities* (Oxford University Press 1995) 259-273, 266.

¹⁶² M. Walker, ‘Amartya Sen's Capability Approach and Education’ (2005) 13(1) *Educational Action Research* 103-110, 103.

¹⁶³ A. Sen and G. Hawthorn, *The Standard of Living* (Cambridge University Press 1988), 36.

¹⁶⁴ A. Sen, *Inequality Reexamined* (Oxford University Press 1992), 31.

¹⁶⁵ A. Sen, *Capability and Well-Being* in D. M. Hausman (ed) *The Philosophy of Economics* (Cambridge University Press 1993) 30-53.

¹⁶⁶ M. Nussbaum, ‘Care, Dependency and Social Justice: A Challenge to Conventional Ideas of the Social Contract’ in P. Lloyd-Sherlock (ed) *Living Longer: Ageing, Development and Social Protection* (Zed Books 2004) 275-299, 275.

¹⁶⁷ *Ibid*, 293.

¹⁶⁸ M. Nussbaum, *Sex and Social Justice* (Oxford University Press 1999), 190.

being according to income and wealth:¹⁶⁹ it considers the ability of individuals to engage effectively in a wide range of human activities, of which care is an essential component.¹⁷⁰ Social justice cannot have any meaning without the recognition that care and dependency are significant parts of the human experience. For instance, the systematic omission of the contribution of women in their role as caregivers fails to account for social justice for all citizens. In order to frame the basic principles of capabilities into real opportunities for individuals, Nussbaum proposes a list of ten central capabilities which should enable individuals to “deal better with people’s need for various types of love and care.”¹⁷¹ This underscores the centrality of care in the production of capabilities. People’s basic needs must be met in order for them to have the capabilities to live the life they wish. Similarly, care-givers must be supported and valued to also have capabilities.

The capabilities approach goes beyond the conflict between paid work and unpaid care. It recognises that care obligations at home are not necessarily linked to income and wealth. Some people who are well-off in terms of income might at the same time experience life struggle because of their care responsibilities at home.¹⁷² By contrast, others might only be able to secure low income because they cannot function well in the paid work environment due to their care obligations. Nevertheless, these individuals might at the same time be well-off because of the love they received (and give) from their valuable care contribution. Indeed, care-giving is not - and should not be construed as - a burden, but as a valuable activity which benefits society and contributes to the richness and well-being of an individual’s personal life.¹⁷³ Legal rights, in particular, should exist to sustain real options for people. The law should contribute to an institutional environment in which the relevant capabilities support and enable caring relationships. Such a support would both sustain the dignity of human beings¹⁷⁴ in caring relationships while at the same time develop the full potential of carers and those for whom they care for.

¹⁶⁹ The capabilities approach has been detailed by Amartya Sen: A. Sen, ‘Human Rights and Capabilities’ (2005) 6(2) *Journal of Human Development* 151-166; A. Sen, ‘Equality of What?’ in S. MacMurrin (ed) *The Tanner Lectures on Human Values* 4 (2nd ed), (Cambridge University Press 2010) 195–220; A. Sen, *The Idea of Justice* (Harvard University Press 2011); M. Nussbaum, ‘Capabilities as Fundamental Entitlements: Sen and Social Justice’ (2003) 9(2-3) *Feminist Economics* 33-59.

¹⁷⁰ M. Nussbaum, *Sex and Social Justice* (Oxford University Press 1999), 191.

¹⁷¹ Ibid, 192 and M. Nussbaum, *Women and Human Development: The Capabilities Approach* Vol. 3. (Cambridge University Press 2001), Chapter 7.

¹⁷² M. Nussbaum, *Sex and Social Justice* (Oxford University Press 1999), 192.

¹⁷³ J. Herring, *Caring and the Law* (Hart Publishing 2013).

¹⁷⁴ G. Moon and R. Allen, ‘Dignity Discourse in Discrimination Law: A Better Route to Equality?’ (2006) 6 *European Human Rights Law Review* 610-649.

A large part of the solution is to shift the perception of what constitutes ‘work’. Standard work is presently considered to be paid, full-time work. Any other form of paid work - whether flexibilised or shortened compared to what is considered the norm and which is adopted in order to compromise for the necessity (or the choice) of unpaid care work - is treated as atypical and carries penalties,¹⁷⁵ at least in terms of income. Should care work be valued appropriately, the State would be justified to intervene in order to provide equity between the parties in a contract of employment. Essentially, this is one of the aims of the Part-Time Directive:¹⁷⁶ people who engage in unpaid care work and as a result cannot (or choose not to) function adequately as “standard” workers should not be discriminated against by, for instance, being penalised on their income or on their work progression. Should the capabilities approach apply, the next step, of course, requires the State to intervene in order to change the perception of standard/atypical work and to integrate the requirement of unpaid care to be a part of a normal interference in paid work patterns. Such change can be achieved through the allocation of rights to defend against specious prejudices and discrimination based on individual characteristics. However, as Busby cautions,¹⁷⁷ such shifts in understanding labour relations is substantial. It would entail a “fundamental repositioning of the contract with greater emphasis placed on State intervention as we move from public ethic of care to the provision of a legally recognised right to care.”¹⁷⁸ In turn, supporting caring relationships would allow for a shift in understanding what is valued - not just income and wealth - and would support the full development of all an individual’s human capabilities.¹⁷⁹

Conclusions

While care is central to human beings, it follows from the above discussion that a rights framework is not entirely suitable to address care. Care work remains invisible and

¹⁷⁵ C. O’Brien, ‘Confronting the Care Penalty: The Cause for Extending Reasonable Adjustment Rights Along the Disability/Care Continuum’ (2012) 34 *Journal of Social Welfare and Family Law* 5-30.

¹⁷⁶ Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC - Annex: Framework agreement on part-time work, OJ [1998] L 14/9. Of course, the Part-Time Directive does not prohibit discrimination on the ground of the caring relationship.

¹⁷⁷ N. Busby, *A Right to Care? Unpaid Care Work in European Employment Law* (Oxford University Press 2011).

¹⁷⁸ *Ibid*, 36.

¹⁷⁹ M. Nussbaum, *Sex and Social Justice* (Oxford University Press 1999).

unaccounted for in the legal framework of the EU. Although the feminism debate has highlighted the gender gap between care-giving and resources distribution, it has not generated enough traction to create the necessary changes to valorise care work within the law. The ethic of care and the capability approach represent two avenues which could complement a feminist theory on care. Both provide valuable theoretical insights into how EU law may position and apprehend care relationships. The ethic of care renders care relationships visible to the legal system. In doing so, it also accounts for care work. The capabilities approach provides new ways of assessing individuals' well-being. Whilst income and wealth are not central anymore to this assessment, caring relationships are considered central to the ability of people to function in society. A greater account of both the ethic of care and the capabilities approach has the potential to transform institutions and legal rights by shifting the values that underpin them.

Chapter 3

The Development of a Legal Framework for an EU Strategy on Childcare

Introduction

The next two chapters explore the EU's emerging strategy on childcare. For several reasons - amongst which the (perceived) lack of an economic rationale and the (actual) lack of clear competence - issues related to care have not expressly been part of the EU agenda.¹ As a result, the development of childcare policy has been relatively slow, reactive rather than proactive and the relevant measures adopted incoherent and not legally binding. However, it is arguable that the issue of care is very much an integral part of the development of the EU: care is not only central to humanity, it also underpins economic development and the very functioning of the internal market. Furthermore, the lack of a clear strategy in childcare also undermines important EU policy objectives such as economic growth, full employment and gender equality.² In particular it has been found that childcare usage has a positive effect on women's employment rate, above and beyond any other factors, including public spending on paid leave or tax relief measures for the second earner in a family.³ Thus, to address care, and childcare specifically, is not only an aim in itself, it is also an essential pre-requirement to the successful development of other important EU policies.

This chapter focuses on the development of the EU legal contribution in the area of childcare with a view to assessing whether the EU can support an efficient, coherent and sustainable strategy that recognises and values the importance of the caring relationship and, ultimately, the best interest of the child.⁴ This chapter concentrates specifically on childcare because the

¹ See also the discussion in Chapter 1.

² J. Plantenga, C. Remery, M. Siegel, and L. Sementini, 'Childcare Services in 25 European Union Member States: The Barcelona Targets Revisited' in A. Leira and C. Saraceno (eds) *Childhood: Changing Contexts* (Emerald Group 2008) 27-53. N. Busby, 'A Right to Care? Unpaid Care Work in European Employment Law' (Oxford University Press 2011); M. Thomson, 'Social Regimes and Gender Equality: Childcare in the EU' in G. Mayes and M. Thomson (eds) *The Cost of Children* (Edward Elgar 2012).

³ Organisation for Economic Co-Operation and Development (OECD), *Gender Equality in Education and Entrepreneurship: Final Report to the MCM 2012* (OECD 2012).

⁴ Article 24 of the EU Charter of Fundamental Rights, echoes Article 3 of the United Nations Convention on the Rights of the Child 1989. See also G. James, 'Forgotten Children: Work-Family Reconciliation in the EU' (2012) 34(3) *Journal of Social Welfare and Family Law* 363-379.

carers have been generally considered to be easily defined as the parents of a child⁵ and EU policy has started to develop into a wider strategy. It therefore is possible to make an assessment of the legal development of this area at the EU level.

As discussed in Chapter 1, childcare appears to be relatively easy to define as the act of looking after children, but the boundaries of its meaning remain difficult to assess at the EU level, partly because of the broad diversity of the meaning of childcare at a domestic level. This chapter will aim to clarify the boundaries of this concept but suffice to say at this stage that the lack of a clear definition hinders EU action. As childcare at the EU level is considered a welfare measure, the EU has no express competencies in this area. In the main, Member States remain in sole charge of developing their own childcare policies and their level of engagement varies depending on their economic performance and cultural value.⁶ The EU provisions adopted in this area are therefore soft in nature and merely aim to encourage Member States to develop accessible, affordable and quality childcare facilities.⁷

Against this background, this chapter argues that a tentative EU childcare strategy has nevertheless slowly emerged. The development of the childcare strategy can be divided into two broad phases: the first goes from the mid-1980s, when childcare was first put on to the agenda, to 2008, the year of the beginning of the on-going economic recession;⁸ and the second phase starts in the aftermath of the financial crisis to the present day. The Court of Justice of the European Union (CJEU) has contributed along the way to shaping EU childcare strategy. However, at least in the first phase, it has not based its judgments on a clear theoretical framework: instead it has used the principle of *non-discrimination*, rather than that of *equality*, as well as an employment-based idea of the reconciliation between work and

⁵ See also our discussion on defining caregivers in Chapter 5.

⁶ European Commission Recommendation of 20 February 2013, Investing in children: breaking the cycle of disadvantage, COM(2013) 778; Social Protection Committee, *Social Europe: Aiming for Inclusive Growth - Annual Report of the Social Protection Committee on the Social Situation in the European Union* (2014) (10/03/2015) < <http://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=7744> > accessed 16 September 2015; R. Horton, 'Caring for Adults in the EU: Work-Life Balance and the Challenge for EU Law' (2015) 37(3) *Journal of Social Welfare & Family Law* 356-367.

⁷ The EU has also used a number of financial mechanisms to support and influence access for families to childcare facilities while at the same time getting over its low level competence in matters related to childcare. The Structural Funds have, in particular, been utilised to provide co-financing for the construction of childcare facilities, training of personnel and the provision of childcare services for parents seeking employment.

⁸ For the purpose of this thesis, the terms financial/economic crisis and recession will be used interchangeably. The thesis does not aim to define the crisis or its transformations. For further discussion on the meaning of the various terms see S. Walby, *Crisis* (Polity 2015).

family life.⁹ These legal instruments are arguably ill-adapted to address this complex issue. As a result, the CJEU's decisions in this area are not always consistent or comprehensive.¹⁰

This chapter is organised into two main sections. The first section identifies the different rationales that underpin and drive the development of the emerging EU childcare strategy. The next section proposes an analysis of the development of the EU's strategic directions against these rationales. It starts by considering EU childcare policy development from the 1980s through to the 2008 financial crisis, then turns to assess how the 2008 economic downturn has impacted on the continuing development of EU actions in relation to childcare. Finally, it considers the gender impact of the new model of governance used in order to build the EU childcare strategy.

Section 1: The Rationales Underpinning Childcare

The conceptualisation of the EU childcare strategy falls under an evolving legal framework which, over the years, has been influenced by various and sometimes opposing rationales. The early years' concern with gender equality has gradually left space for the imperative of sustainable economic growth. Despite the growing awareness that a formal childcare strategy is an essential pre-requirement to the successful development of other EU policies,¹¹ the development of this area has been relatively slow, reactive rather than pro-active, incoherent and not legally binding. The EU response to issues related to childcare has mainly been a response to, or a "by-product"¹² of, a number of interconnected challenges raised in the context of broader EU policies. Thus, childcare has been conceptualised and shaped not as an aim in itself but as a way of responding to problems raised in other areas. Childcare services are generally considered to provide remedies to at least five problems, namely: (1) gender inequalities; (2) the European slow-down in global competitiveness and economic growth;

⁹ A. Masselot, 'EU Childcare Strategy in Austerity Time', (2015) 37(3) *Journal of Social Welfare & Family Law* 345-355.

¹⁰ The Court's contribution to the development of EU rights connected to childcare will be examined in Chapter 4.

¹¹ N. Busby, *A Right to Care? Unpaid Care Work in European Employment Law* (Oxford University Press 2011); M. Thomson, 'Social Regimes and Gender Equality: Childcare in the EU' in G. Mayes and M. Thomson (eds) *The Cost of Children* (Edward Elgar 2012).

¹² E. Rubio, 'A Policy in its Infancy: The Case for Strengthening and Rethinking EU Action on Childhood' (2007) 30 *Notre Europe Policy Paper* 2 < <http://www.institutdelors.eu/media/policypaper30-erubio-policyenfancy-en.pdf?pdf=ok> > accessed 17 September 2015.

(3) the demographic crisis and low fertility rates; (4) the fight against child poverty and social exclusion; as well as (5) early education.¹³ These rationales will be analysed in turn. The pace of development of the EU childcare strategy has coincided with the relevance and perceived importance or urgency of each of these rationales at any point in time. Nevertheless, economic considerations have constantly been prevalent in the decision to advance the policy on EU childcare. The EU activities in the social domain have always been linked to market integration and labour policy. For example, there is a clear link between childcare and the achievement of the Lisbon Strategic goals which expect increases in female employment and the achievement of gender equality in the labour market. It is not surprising that the EU adopted the 2002 Barcelona targets on the expansion of childcare services shortly after the adoption of the Lisbon Strategy where the Council established a strong commitment to raising women's employment rates.

Gender Equality

Firstly, from its very inception, childcare has been an almost instinctive, albeit arguably limited, response to gender inequality. Traditionally the care of young children has been - and still is - largely an activity done by women.¹⁴ It is common for mothers to experience difficulties in reconciling domestic unpaid care work with paid work in the labour market.¹⁵ Gender equality has been acknowledged as one of the EU's central missions.¹⁶ On this basis alone, the EU should have legitimacy to lead the development of a childcare strategy embedded in the concept of gender equality.

¹³ E. Radulova, 'The Construction of EU's Childcare Policy through the Open Method of Coordination' in S. Kröger (ed) *What We Have Learnt: Advances, Pitfalls and Remaining Questions in OMC Research*, European Integration Online Papers (EIOP), Special Issue 1, Vol. 13, Art. 13. (2009) < <http://eiop.or.at/eiop/texte/2009-013a.htm> > accessed on 15 October 2015; E. Rubio, 'A Policy in its Infancy: The Case for Strengthening and Rethinking EU Action on Childhood' (2007) 30 *Notre Europe Policy Paper* < <http://www.institutdelors.eu/media/policypaper30-erubio-policyenfancy-en.pdf?pdf=ok> > accessed 17 September 2015; C.L. Bacchi, *Women, Policy and Politics* (SAGE 1999); J. Lewis, 'Work/Family Reconciliation, Equal Opportunities and Social Policies: The Interpretation of Policy Trajectories at the EU Level and the Meaning of Gender Equality' (2006) 13(3) *Journal of Public Policy* 420-437; European Commission Report, Report of 3 October 2008, *Implementation of the Barcelona Objectives Concerning Facilities for Pre-School-Age Children*, COM (2008) 638.

¹⁴ See the discussion in Chapters 1 and 2, but see also the criticisms developed in Chapter 5.

¹⁵ A. Masselot, E. Caracciolo di Torella, and S. Burri, *Thematic Report of the European Network of Legal Experts in the Field of Gender Equality "Fighting Discrimination on the Grounds of Pregnancy, Maternity and Parenthood - The Application of EU and National Law in Practice in 33 European Countries"* (Publication of the European Commission 2012).

¹⁶ M. Bell, 'The Principle of Equal Treatment: Widening and Deepening' in P. Craig and G. de Búrca (eds) *The Evolution of EU Law* 2nd edition (Oxford University Press 2012) 611-939.

Feminists have consistently argued that to be able to participate in the labour market, to have access to financial independence and, ultimately, to achieve gender equality as well as emancipation, women need to be freed from (some of) their caring obligations.¹⁷ Structured, quality, out-of-home childcare facilities can provide women with the option and the time to participate in the employment market.¹⁸ Childcare services can also help to realign the uneven distribution of domestic work between men and women. Moreover, the availability of such services can support the redistribution of paid and unpaid responsibility between individuals, the State and the market. However, the ultimate contribution of childcare services as a way to achieve gender equality depends largely on how policy makers address care as well as the position of women in the labour market.¹⁹

The question of choice and opportunity is central to gender equality. It has been argued elsewhere²⁰ that the ability for parents to make real choice regarding care and paid work can only exist if all the legal provisions relating to reconciliation between work and family life are adequately and equally developed. If, as is the case presently in the EU legal system, provision regarding time and leave are more developed than childcare policy, it restricts parents' choice as to how to care for their children. This ultimately means that the mother is more likely to take up part-time work. Consequently, this hinders gender equality. With that said, out-of-home childcare facilities should be intended as an available option for parents to use and not an obligation. Mothers (and parents in general) should be able use childcare *should they choose to*. This position is supported by the ethic of care,²¹ which reminds us that care should be valued and cannot be regarded as an undesirable burden. Indeed many parents, especially mothers, choose to care for their children and forfeit or put on hold their career regardless of the economic outcome of their decision simply because they value the caring relationship with their children. Choosing to care should not only be valued but it should be a legitimate option for parents. The choice of parents to care for their children cannot solely be dictated by economic rational. As argued in Chapter 2, caring relationships are essential to

¹⁷ See the discussion in Chapter 2.

¹⁸ M. Daly, 'A Fine Balance Women's Labour Market Participation in International Comparison' in F. W. Scharpf and V. E. Schmidt (eds) *Welfare and Work in the Open Economy, Vol II Diverse Responses to Common Challenges* (Oxford University Press 2000) 467–510.

¹⁹ J. Lewis and S. Giullari, 'The Adult Worker Model Family, Gender Equality and Care: The Search for New Policy Principles and the Possibilities and Problems of a Capabilities Approach' (2005) 34(1) *Economy and Society* 76-104.

²⁰ E. Caracciolo di Torella and A. Masselot, *Reconciling Work and Family Life in EU Law and Policy* (Palgrave Macmillan 2010).

²¹ See Chapter 2.

human life and represent a central aspect of citizenship. They are influenced by cultural, emotional and personal experiences. As a promoter of “the well-being of its peoples”,²² the EU has an obligation to lead the common development of a childcare strategy which reflects both gender equality values and supports caring relationships. Such a support would need to ensure a fair sharing of the disadvantages that care work can bring²³ and enable individuals to fulfil their caring responsibilities.²⁴ The issue of choice in relation to care is important, particularly if we refer to the capability approach.²⁵ The ability to make choices is a freedom which allows individuals to realise their full potential. In the EU context, the question of choice for women has often been subordinated to the principle of gender equality.²⁶ However, this principle has seldom been used to address the redistribution of unpaid care work between men and women (except in the very early documents such as the 1992 Childcare Recommendation). Instead, gender equality has mostly been utilised as a unidimensional tool by EU policy makers to support raising female employment rates not to open up choices for women.²⁷

Indeed, the creation of out-of-home childcare services alone is not enough to achieve equality between the sexes. Structural changes - in particular a better sharing and redistribution of domestic tasks between men and women in the private sphere - are also necessary in order to provide better opportunities for both parents.²⁸ If women continue to bear the vast majority of domestic unpaid care work in the home as well as working in the labour market, they will simply accumulate paid and unpaid work and be liable to the “second shift”.²⁹ This, rather than offering a solution to gender inequality, can exacerbate it. Expanding childcare facilities must be complemented by measures designed to equalise the sharing and redistribute

²² Article 2 TEU.

²³ J. Herring, *Caring and the Law* (Hart Publishing 2013).

²⁴ F. Williams, ‘The Presence of Feminism in the Future of Welfare’ (2002) 31 *Economy and Society* 502.

²⁵ See Chapter 1.

²⁶ See fn19.

²⁷ G. Esping Andersen, D. Gallie, A. Hemerijck and J. Myles, *A New Welfare Architecture for Europe: Report Submitted to the Belgian Presidency of the European Union* (2001) < http://www.euro.centre.org/data/1182414898_63513.pdf > accessed on 5 November 2015; G. Esping Andersen, *Why We Need a New Welfare State* (Oxford University Press 2002).

²⁸ S. Fredman, ‘Reversing Roles: Bringing Men into the Frame’ (2014) 10(4) *International Journal of the Law in Context* 442-458.

²⁹ For a discussion of the second shift, see A. Hochschild and A. Machung, *The Second Shift: Working Parents and the Revolution at Home* (Viking Penguin 1989); T. Hervey and J. Shaw, ‘Women, Work and Care: Women’s Dual Role and Double Burden in EC Sex Equality Law’ (1998) 8 *Journal of European Social Policy* 43-63; J. Williams, *Unbending Gender: Why Family and Work Conflict and What to Do About It* (Oxford University Press 2000) and F. Carmichael and S. Charles, ‘The Opportunity Costs of Informal Care: Does Gender Matter?’ (2003) 22(5) *Journal of Health Economics* 781-803.

domestic tasks between partners. If a childcare strategy is not supported by both childcare facilities and measures aimed at redistributing unpaid work, any intervention is likely to remain merely cosmetic.³⁰

The Economic Rationale

Although the link between gender equality and childcare is obvious, it is a link that has always had a distinctly economic flavour. This is clearly illustrated by the Lisbon Strategic goals,³¹ which expect rises in female employment and the achievement of gender equality in the labour market. Thus, not surprisingly, the EU adopted the 2002 Barcelona targets³² on the expansion of childcare services shortly after the adoption of the Lisbon Strategy, where the Council established a strong commitment to raise women's employment rates.³³

Over the years the economic element of childcare³⁴ has gradually become more evident and this leads to the second rationale that sees childcare as a response to the European slow-down in global competitiveness. This rationale has three intertwined aims: (1) to encourage economic growth; (2) to raise employment rates; and (3) to reform welfare systems in the spirit of reducing the culture of dependency.

Economic concerns represent a major challenge for the EU. Economic growth is linked to employment growth. Women who have been traditionally caring in the home represent potential workers in the labour market. The economic reasoning is that childcare will free women's time. Based on that freed time, women can presumably then take up paid jobs. However, out-of-home childcare provision is not enough: good quality and affordable childcare provisions are also necessary if parents/mothers are to consider giving up caring for

³⁰ See further the discussion on the narrow aims of the Barcelona targets in Chapter 5.

³¹ European Council, Presidency Conclusions. Lisbon European Council, 23-24 March 2000, < http://www.europarl.europa.eu/summits/lis1_en.htm > accessed on 22 October 2015; Communication to the Spring European Council from President Barroso in agreement with Vice-President Verheugen, *Working Together for Growth and Jobs: A New Start for the Lisbon Strategy*, COM(2005) 24.

³² European Council, Presidency Conclusions, Barcelona European Council, 15 and 16 March 2002, SN 100/1/02 REV 1 < http://ec.europa.eu/invest-in-research/pdf/download_en/barcelona_european_council.pdf > accessed on 14 October 2015.

³³ See the discussion later in this Chapter.

³⁴ Childcare is indeed a key component of the EU work-family reconciliation legal framework, which is itself an integral part of the EU employment-led social policy, see: E. Caracciolo di Torella and A. Masselot, *Reconciling Work and Family Life in EU Law and Policy* (Palgrave Macmillan 2010) and Communication from the Commission of 21 September 2010, Strategy for Equality between Women and Men 2010-2015, COM(2010) 491 final.

paid employment.³⁵ In order to impact on women's labour market participation, childcare needs to be low cost: if not, a large portion of the mother's salary risks funding childcare and women might be discouraged from participating in the labour market.³⁶ At the same time, quality childcare is also an important factor to convince mothers to relinquish for the other work.³⁷

Childcare is a key component of the EU work-family reconciliation legal framework,³⁸ which is itself an integral part of the EU employment-led social policy.³⁹ The 1997 European Employment Strategy (EES)⁴⁰ firmly established that employment rates needed to increase to fit in with the EU's growth strategy. In line with this, the 2000 Lisbon Council conclusions outlined as an objective to raise female employment rates from 51 to 60 percent by 2010.⁴¹ From then on, women have been targeted as the largest group to be "activated" into the labour market thus providing the EU with legitimate albeit indirect competence in the area of childcare. The importance of women's participation in the labour market has been further reinforced in the Europe 2020 Strategy,⁴² which sets out a (gender neutral) target of 75% overall employment rates for the 20-64 age group. Although, there is no explicit reference, women are recognized as being a crucial resource for achieving the overall employment target rate.

³⁵ See further the discussion in Chapter 5.

³⁶ R. Connelly, 'The Effects of Child Care Costs on Women's Decision-Making' in D. Blau (ed) *The Economics of Child Care* (Russell Sage Foundation 1992); D. Ribar, 'A Structural Model of Child Care and the Labor Supply of Married Women' (1995) 13(3) *Journal of Labor Economics* 558-597; T. Van der Lippe, 'The Effect of Individual and Institutional Constraints on Hours of Paid Work of Women: An International Comparison' in T. Van der Lippe and L. V. Dijk (eds) *Women's Employment in a Comparative Perspective* (Aldine de Gruyter 2001); M. Mills, P. Praeg, F. Tsang, K. Begall, J. Derbyshire, L. Kohle, C. Miani and S. Hoorens, *Use of Childcare Services in the EU Member States and Progress Towards the Barcelona Targets (Short Statistical Report 1)* (European Union 2014).

³⁷ Ibid.

³⁸ E. Caracciolo di Torella and A. Masselot, *Reconciling Work and Family Life in EU Law and Policy* (Palgrave Macmillan 2010).

³⁹ Communication from the Commission of 21 September 2010, Strategy for Equality between Women and Men 2010-2015, COM(2010) 491 final.

⁴⁰ After inclusion of the new title "Employment" in the Treaty on European Union, the Heads of State and Government launched a European Employment Strategy (EES) at the Luxembourg Jobs Summit with a view to coordinating national employment policies. The EES aims to improve employability, entrepreneurship, adaptability and equal opportunities at the level of the European labour market. See J. Mosher and D. Trubek, 'Alternative Approaches to Governance in the EU: EU Social Policy and the European Employment Strategy' (2003) 41(1) *Journal of Common Market Studies* 63-88.

⁴¹ European Council, Presidency Conclusions. Lisbon European Council, 23-24 March 2000, < http://www.europarl.europa.eu/summits/lis1_en.htm > accessed on 22 October 2015.

⁴² Communication from the Commission of 3 March 2010, Europe 2020 Strategy, A strategy for smart, sustainable and inclusive growth, COM(2010) 2020.

Parallel to the aim of economic growth is the expressed need to reform the inefficient welfare regime. The idea is that if women are engaged in paid employment they are less likely to claim social security benefits.⁴³ While employment growth has increasingly been identified as a key social policy, which is considered as a means to support economic competitiveness, the Western welfare systems have, at the same time, undergone deep reforms over the past few decades. Although work and welfare have always been closely related under modern welfare systems, the association between work and welfare has mostly been concerned with men (under the traditional male breadwinner family model).⁴⁴ Under the reformed welfare system, all individuals are meant to be self-sufficient and responsible: individuals who are considered to be able to work are encouraged to take up paid work. Encouraging (if not compelling) employment is considered to promote financial independence, to help with the cost of care, to provide individuals with personal satisfaction and increase self-esteem.⁴⁵ In its Strategy for Equality between Women and Men 2010-2015, the Commission states that “economic independence is a prerequisite for enabling both women and men to exercise control over their lives and to make genuine choices”.⁴⁶ Women’s employment participation is seen to be key to the economic growth of the EU. If possible, all women are encouraged to be involved in the paid work and:

“particular attention needs to be given to the labour market participation of older women, single parents, women with a disability, migrant women and women from ethnic minorities. The employment rates of these groups are still relatively low and remaining gender gaps need to be reduced in both quantitative and qualitative terms”.⁴⁷

The EU’s employment and social policy not only focuses on ensuring the economic productivity of all individuals in society, including women, it has also increasingly been

⁴³ J. Wiggan, ‘Telling Stories of 21st Century Welfare: The UK Coalition Government and the Neo-Liberal Discourse of Worklessness and Dependency’ (2012) 32(3) *Critical Social Policy* 383-405; E. Pavolini, M. León, A.M. Guillén, and U. Ascoli, ‘From Austerity to Permanent Strain? The EU and Welfare State Reform in Italy and Spain’ (2015) 13(1) *Comparative European Politics* 56-76; J. Windebank, A. Whitworth, ‘Social Welfare and the Ethics of Austerity in Europe: Justice, Ideology and equality’ (2014) 22(2) *Journal of Contemporary European Studies* 99-103.

⁴⁴ A. Supiot (ed), *Au-delà de l’emploi* (Flammarion 1999).

⁴⁵ Department of Health (UK), *Caring about Carers: A National Strategy for Carers* (Department of Health 1999).

⁴⁶ Communication from the Commission of 21 September 2010, Strategy for Equality between Women and Men 2010-2015, COM(2010) 491 final, 5.

⁴⁷ *Ibid*, 5., citing the Employment Guideline 7, Council document 10907/10, 9.6.2010.

concerned with the reduction of the “culture of dependency”⁴⁸ and the introduction of means-tested benefit as an incentive to work.⁴⁹ This shift in thinking has been justified on the basis of economic growth policy as well as on the principle of gender equality. In order to maximize both growth in employment and a reduction in welfare benefits, the EU and most of the Member States have adopted a model of the so-called “adult worker”,⁵⁰ which assumes that all adults, whether male or female, with or without children or other dependants, are potentially able to work and therefore should participate in the economy. Under this model, policy makers make the assumption that the traditional male breadwinner family model - where men would take primary responsibility for earning and women for caring - has largely disappeared from society. In reality, this assumption is simply not true: the traditional male breadwinner model has not disappeared⁵¹ and many women remain economically dependent on their partner.⁵² Changes in family formations mean that there has also been an increase in the number of single parents, particularly single mothers. The combination of encouraging female paid employment with the development of childcare services is far from suitable for all families in the EU.⁵³

How care work is to be accommodated under the new adult worker model is of major concern. Policy makers are assuming that traditional unpaid care is going to be transferred to the formal paid sector,⁵⁴ which has already been identified as a potential source of new jobs.⁵⁵ In the context of childcare, this means that the EU is prepared to support initiatives to

⁴⁸ M. Daly, ‘What Adult Worker Model? A Critical Look at Recent Social Policy Reform in Europe from a Gender and Family Perspective’ (2011) 18(1) *Social Politics: International Studies in Gender, State & Society* 1-23.

⁴⁹ See, for instance, European Commission, *Increasing Labour Force Participation and Promoting Active Ageing*, COM(2002) 9 (Publications Office of the European Union 2002).

⁵⁰ J. Lewis and S. Giullari, ‘The Adult Worker Model Family, Gender Equality and Care: The Search for New Policy Principles and the Possibilities and Problems of a Capabilities Approach’ (2005) 34(1) *Economy and Society* 76-104; M. Daly, ‘What Adult Worker Model? A Critical Look at Recent Social Policy Reform in Europe from a Gender and Family Perspective’ (2011) 18(1) *Social Politics: International Studies in Gender, State & Society* 1-23.

⁵¹ A. Masselot, E. Caracciolo di Torella, and S. Burri, *Thematic Report of the European Network of Legal Experts in the Field of Gender Equality “Fighting Discrimination on the Grounds of Pregnancy, Maternity and Parenthood - The Application of EU and National Law in Practice in 33 European Countries”* (Publication of the European Commission 2012).

⁵² See fn48.

⁵³ The Sunday Times reported in April 2016 that “a mother with two children at nursery needs to earn at least £40,000 a year to make any profit from going to work (after deducting the costs of childcare, travel and pension contributions). A salary of £60,000 would leave her with £36 a day after deductions. The average woman in a full-time job earns £24,202.”

⁵⁴ J. Lewis and S. Giullari, ‘The Adult Worker Model Family, Gender Equality and Care: The Search for New Policy Principles and the Possibilities and Problems of a Capabilities Approach’ (2005) 34(1) *Economy and Society* 76-104.

⁵⁵ *Ibid*, 79.

develop out-of-home childcare services and to fund access to these services through the Structural Fund.⁵⁶

Demographic Concerns

Childcare is further seen as a way to address the challenges of Europe's ageing population.⁵⁷ Fertility rates in Europe have declined steeply since the 1960s to a level beneath the replacement level in all the EU Member States.⁵⁸ Women in Europe not only have fewer children, they also have children at a later age. These patterns - combined with an increase in life expectancy - partly explain the slowdown in the EU's population growth and an expected future decline in population size. Traditionally, it was assumed that economic hardship explained postponement in family formation and reduced fertility rates, while economic growth was associated with high fertility.⁵⁹ However, the European demographic transition characterised by industrialisation and economic growth has been accompanied by rapid decline in fertility. These patterns have challenged traditional demographic theories. In recent times, the decline in fertility rates and the postponement in family formation have been attributed to women's emancipation and the increase in female employment rates.⁶⁰ The economic argument put forwards by Becker⁶¹ has become a cornerstone of family

⁵⁶ Article 174 of the TFEU provides that, "in order to strengthen its economic, social and territorial cohesion, the Union is to aim at reducing disparities between the levels of development of the various regions and the backwardness of the least favoured regions or islands, and that particular attention is to be paid to rural areas, areas affected by industrial transition, and regions which suffer from severe and permanent natural or demographic handicaps." The Structural Funds Regulations (Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC), OJ [2013] L347/320) provide that childcare is an investment priority. The European Social Fund (ESF) Regulation, moreover, provides for financial assistance for measures to reconcile work and private life, notably by supporting childcare facilities. Regulation (EU) No 1300/2013 of the European Parliament and of the Council of 17 December 2013 on the Cohesion Fund and repealing Council Regulation (EC) No 1084/2006, OJ [2013] L. 347/281, Preamble 6 further states: "The ESF may be used to enhance access to affordable, sustainable and high quality services of general interest, in particular in the fields of health care, employment and training services, services for the homeless, out of school care, childcare and long-term care service."

⁵⁷ J. Plantenga and C. Remery, *The Provision of Childcare Services: A Comparative Review of 30 European Countries* (Office for Official Publications of the European Communities 2009).

⁵⁸ Eurostat, *Fertility Statistics*, 2015 < http://ec.europa.eu/eurostat/statistics-explained/index.php/Fertility_statistics > accessed on 8 December 2015.

⁵⁹ T. Bengtsson and O. Saito, *Population and The Economy: From Hunger to Modern Economic Growth* (Oxford University Press 2000).

⁶⁰ R. Lesthaeghe, 'The Unfolding Story of the Second Demographic Transition' (2010) 36(2) *Population and Development Review* 211-251; R. Lesthaeghe, 'A Century of Demographic and Cultural Change in Western Europe: An Exploration of Underlying Dimensions' (1983) 9(3) *Population and Development Review* 411-435.

⁶¹ G. Becker, 'An Economic Analysis of Fertility' in G. Becker (ed) *Demographic and Economic Change in Developed Countries* (Columbia University Press 1960) 209-240.

economics.⁶² It posits that parents not only decide the number of children (child quantity) but they also chose how much money and time they will invest in each child (child quality). As the income level rises, the demand for child quality tends to increase to a much greater extent than the demand for child quantity. It follows that income and fertility rates have a negative relationship. Under the child quality/quantity relationship model, the economic approach to fertility assumes that women's increase in education and their involvement in the labour market amplifies the opportunity costs of childrearing and therefore this results in falling fertility rates.⁶³

In the contemporary era, however, these theories have further been challenged by the facts that in some countries, such as France, Sweden and Finland, higher female employment rates feature alongside higher fertility rates.⁶⁴ Conversely, other countries - such as Slovakia, Hungary and Poland - have low female employment participation with dropping fertility rates. It is suggested that traditional economic approaches to fertility are mitigated by the ability of societies to adopt work-family reconciliation law and policies.⁶⁵ As the employment of women in general and mothers in particular have become firmly established in many countries and the dual earner family model becomes more prevalent, law and policies are widely adopted to facilitate work-family reconciliation, reducing the association between economic conditions and fertility.⁶⁶ If having children is seen by women as a hindrance to their ability to access the labour market, they are willing to delay or forfeit all together having children. However, the existence of available, affordable and quality out-of-home childcare facilities has been shown to allow women to reconcile (to an extent) their ambition to work in paid employment while at the same time permitting them to have children.⁶⁷ As such, a

⁶² M. Kreyenfeld, G. Andersson and A. Pailhé, 'Economic Uncertainty and Family Dynamics in Europe: Introduction' (2012) 27(28) *Demographic Research* 835-852.

⁶³ G. Becker, *An Economic Analysis of Fertility: The Economic Approach to Human Behavior* (University of Chicago Press 1993) 140.

⁶⁴ J. Plantenga and C. Remery, *The Provision of Childcare Services: A Comparative Review of 30 European Countries* (Office for Official Publications of the European Communities 2009).

⁶⁵ M. Kreyenfeld, G. Andersson and A. Pailhé, 'Economic Uncertainty and Family Dynamics in Europe: Introduction' (2012) 27(28) *Demographic Research* 835-852; J. Plantenga and C. Remery, *The Provision of Childcare Services: A Comparative Review of 30 European Countries* (Office for Official Publications of the European Communities 2009).

⁶⁶ Organisation for Economic Co-Operation and Development (OECD), *Babies and Bosses - Reconciling Work and Family Life: A Synthesis of Findings for OECD Countries* (OECD 2007) 34.

⁶⁷ J. Ermisch, 'Purchased Child Care, Optimal Family Size and Mother's Employment: Theory and Econometric Analysis' (1989) 2(2) *Journal of Population Economics* 79-102; M. Del Boca, S. Locatelli, C. Pasqua and C. Pronzato, *Analyzing Women's Employment and Fertility Rates in Europe: Differences and Similarities in Northern and Southern Europe* (Centre for Household, Income, Labour and Demographic Economics 2003).

childcare strategy can be an important contribution to raising fertility rates which, in turn, is a crucial element to tackle the overall demographic challenge.⁶⁸

Reducing Child Poverty and Social Exclusion

Although the three rationales discussed above - namely gender inequalities, economic competitiveness and demographic crisis - have held a particularly strong influence on the development of the EU childcare strategy, there are two others that have influenced the development of this area. In recent decades, childcare has been discussed as providing a solution to the problem of child poverty and social exclusion. The issue of child poverty emerged on the EU agenda in 2000, when the Open Method of Coordination (OMC) was extended to the field of social exclusion. The EU action against child poverty was further implemented in the context of a broader EU strategy to fight poverty and social exclusion launched in 2000 as part of the Lisbon agenda⁶⁹ and included in Article 3 of the Treaty on European Union (TEU). Childcare is considered to provide some solutions to help reduce child poverty and social exclusion, by, in particular, representing a potential complement to the family where it fails.

Child poverty has increased in developed countries throughout the 1990s partly as a result of labour market transformation from industrial to service-based economies⁷⁰ and, again, rates of child poverty have risen in the post-2008 economic downturn.⁷¹ The erosion of the traditional family with a parent in paid employment and a parent doing full-time care contributes to degrade children's shelter against poverty. This is illustrated by the fact that more than one out of three lone parent families in the EU is at risk of poverty.⁷² Care and education can no longer be guaranteed by an abundant reserve of full-time housewives whilst, at the same time, employment instability and family formation fluidity mean that children are more vulnerable

⁶⁸ A. D'Addio and M. d'Ercole, *Trends and Determinants of Fertility Rates in OECD Countries: The Role of Policies*, OECD Social Employment and Migration Working Paper No. 27 (OECD 2005); R. Rindfuss, D. Guilkey, S. Morgan, Ø. Kravdal and K. Guzzo, 'Child Care Availability and First-Birth Timing in Norway' (2007) 44(2) *Demography* 345-372.

⁶⁹ European Council, *Presidency Conclusions: Lisbon European Council, 23-24 March 2000*, < http://www.europarl.europa.eu/summits/lis1_en.htm > accessed on 22 October 2015.

⁷⁰ UNICEF, *Child Poverty in Rich Countries*, Innocenti Report Card 6 (Innocenti Research Centre 2005).

⁷¹ UNICEF, *Measuring Child Poverty*, Innocenti Report Card 10 (Innocenti Research Centre 2012); UNICEF, *Children of the Recession: The Impact of the Economic Crisis on Child Well-being in Rich Countries*, Innocenti Report Card 10 (Innocenti Research Centre 2014); UNICEF, *Fairness for Children. A League Table of Inequality in Child Well-being in Rich Countries*, Innocenti Report Card 13, UNICEF, (Innocenti Research Centre 2016).

⁷² EUROCHILD, 'A Child Rights Approach to Child Poverty', *Discussion Paper*, September 2007, < http://old.eurochild.eu/fileadmin/user_upload/files/Eurochild_discussion_paper_child_rights_poverty.pdf > accessed on 18 September 2015.

than ever to poverty and social exclusion. Despite the social changes in family formation, EU law and policy on care has continued to focus on the relationship between parent(s) and child(ren) rather than on other caring relationships. More than that, the typical relationship envisaged by EU law is that of a traditional family with two heterosexual parents, where the main carer is the mother.⁷³ In recent decades, however, disaffection towards marriage, rising divorce rates and increasing numbers of atypical families have created a structure of risks which have not been sufficiently recognised by EU policy makers. Mechanisms to develop protection for children in vulnerable situations have not been sufficiently adopted.

Early Childcare Education

Finally, childcare is also considered an important step towards achieving a more educated society. Whilst the EU has no competence in matters related to education, many Member States have made links between early childcare and excellence in education. Investing in early education is generally regarded as a very effective egalitarian strategy in post-industrial, knowledge-based societies. In developed countries, a relatively high level of education has become a prerequisite for participation in the labour market. Thus, guaranteeing that all children have equal access to education is essential to ensure a basic degree of equality in their adulthood. In addition, early interventions for disadvantaged children has been claimed to reduce school drop-out rates, delinquency and other anti-social behaviour in teenage years.⁷⁴ Moreover, childcare is argued to contribute to children's social capital.⁷⁵ As children are increasingly construed by policy makers as "investments" for future society, investing in childcare is argued to represent an economic venture that, in the long term, will be productive. To provide childcare for young children would enhance society's future human capital and ensure the workforce of the next generation.⁷⁶

⁷³ S. Fredman, *Women and the Law* (Clarendon Press 1997); N. Cambien, 'EU Citizenship and ECJ: Why Care about Primary Carers?' (2012) *SSNR Research Paper 2167890*, < [SSRN: http://ssrn.com/abstract=2167890](http://ssrn.com/abstract=2167890) or <http://dx.doi.org/10.2139/ssrn.2167890> > accessed on 23 January 2016.

⁷⁴ S. Danzinger and J. Walfogel, *Investing in Children: What Do We Know? What Should We Do?* CASE paper 34 (Centre for the Analysis of Social Exclusion, London School of Economics 2000).

⁷⁵ J. Jenson, 'Social Investment for New Social Risks: Consequences of the LEGO Paradigm for Children', in J. Lewis (ed) *Children in Context: Changing Families and Welfare States* (Edward Elgar 2006); R. Lister, 'Children (but not Women) First: New Labour, Child Welfare and Gender' (2006) 26(2) *Critical Social Policy* 315–335.

⁷⁶ OECD, *Starting Strong: Childhood Education and Carer* (OECD 2001) and more recently European Commission Recommendation 2013/112/EU of 20 February 2013, Investing in children: breaking the cycle of disadvantage, OJ [2013] L59/5.

Rationales on Childcare: Some Conclusions

The rationales discussed above have, separately and cumulatively, impacted the shape of the EU childcare strategy. As a result, the policy frame is neither coherent nor comprehensive. This chapter argues that the EU is in a position to lead policy and legislation aimed at promoting a coherent and effective childcare strategy for the Union. The progress of the EU's integration has always required new interventions, especially where national measures have been insufficient or nonexistent. Childcare has been linked to at least five EU policy concerns which are themselves linked to European integration. The EU is only one step away from taking leadership in this area. The usual arguments for rejecting the EU's intervention in the area of childcare are about the necessity to protect national identities or the privacy of people's lives. However, when Member States are unable to produce an adequate response to social needs, it is arguable that the EU can and should take leadership.

Section 2: The EU Childcare Strategy – An Evolving Legal Framework

This section critically assesses the evolution of EU policy on childcare and argues that the EU must (re)take the lead in developing a childcare strategy in order to (re)gender the discourse on childcare. In this section, it is argued that the early conceptualisation of the EU childcare strategy around gender equality concerns has gradually faded away to be replaced by an imperative for sustainable economic growth as well as other rationales. This section is divided into three parts which examine the two main factors that can generally be identified to have contributed to the disconnection between childcare and gender equality. Of primary note, feminist arguments have progressively lost their voice as the evolving childcare strategy has been pushed by rationales unconnected to gender equality concerns. In addition to the various and sometimes competing rationales underpinning the evolving and emerging EU childcare framework as discussed above, the interest of the child⁷⁷ has very recently been put forward as a further justification for the development of the EU childcare strategy. As will be argued, the interest of the child appears to replace, rather than complement, considerations of gender equality. The first two parts will analyse the disappearance of gender equality as a rationale for the childcare strategy across two periods (the early development of the EU childcare strategy from the 1980s until the 2008 economic crisis, and the evolution since

⁷⁷ R. Lister, 'Children (But Not Women) First: New Labour, Child Welfare and Gender' (2006) 26(2) *Critical Social Policy* 315–335.

2008 to date). The third and last part will critically analyse another factor relevant to the gradual disconnection between childcare and gender equality: namely the process of shaping the EU childcare strategy through new forms of governance such as the Open Method of Coordination (OMC).

The Early Developments of the EU Childcare Strategy

The progress of EU integration has always required new interventions, especially where national measures have been insufficient or nonexistent. As childcare appears to be central to some fundamental EU policies, and as the Member States seem unable to produce an adequate response to such social needs, it is unsurprising that the EU has had to take some form of leadership (albeit weakly) in this area.

Between 1980 and 2008, the development of the EU childcare strategy can be said to be firmly framed within the traditional gender equality/market imperative dichotomy. Although the original emphasis is centred on gender equality, the focus has faded gradually to allow space for increasing economic concerns. At this early stage, the EU intervention on childcare had remained limited and confined to non-binding soft law and policy initiatives. The EU had also used a number of financial mechanisms to support and influence access for families to childcare facilities while at the same time getting over its low-level competence in matters related to childcare. The Structural Funds have, in particular, been utilised to provide co-financing for the construction of childcare facilities, training of personnel and the provision of childcare services for parents seeking employment.

Childcare has moreover been addressed as part of the work-family reconciliation strategy: specifically childcare was first timidly put on the EU agenda in the mid-1980s. It was promoted by the European Commission within the context of gender equality in the Second Action Program (1986-1989),⁷⁸ but it was the creation of the European Childcare Network that ran for a decade between 1986 and 1996, that marked the beginning of the EU discourse on childcare.⁷⁹ The Network focused mainly on three areas: (1) services for children; (2)

⁷⁸ Communication from the Commission of 19 December 1985, Equal opportunities for women. Medium-term Community programme (1986-1990), COM(1985) 801 final and final/2. By contrast, the Community First Action Programme (1982-1985) focussed on the sharing domestic tasks but did not include measures on childcare. See: Communication from the Commission of 9 December 1981, A new Community action programme on the promotion of equal opportunity for women, COM(1981) 758.

⁷⁹ M. Stratigaki, 'The European Union and the Equal Opportunities Process' in L. Hantrais (ed) *Gendered Policies in Europe: Reconciling Employment and Family Life* (Macmillan and St. Martin's Press 2000) 27-48.

leave for parents; and (3) men as carers. It argued in favour of a proposal for a directive on childcare, which had emphasised the need for public support and was largely inspired by the egalitarian Scandinavian model of care, including the better sharing of care work within the family and an improvement of work-family reconciliation through structural changes in workplace and access to leave.⁸⁰ However, unsurprisingly, the necessary majority could never be achieved and the 1992 Childcare Recommendation⁸¹ was adopted instead. From the start, the Recommendation was a weak instrument: it was not legally binding and thus merely *advised* and *recommended* Member States to *encourage* initiatives in this area, in particular childcare services, which should be affordable, available and of good quality. It was not part of broader policy making and it had the flavour of a one-off action. It therefore yielded very little political traction. Although this was perhaps an important symbolic achievement, it failed to place enough emphasis on the role of the public sector and to generate substantial change in domestic policies.

Conceptually, the Recommendation was framed within a gender equality agenda. In particular, it promoted the adoption of flexibility in the form of special leave,⁸² the adaptation of the working environment and structures to reflect the needs of workers with children⁸³ and encouraged a more equal sharing of parental responsibilities.⁸⁴ However, it was also clearly underpinned by economic concerns: its main preoccupation was to guarantee women's access to the market rather than raising men's opportunities to care.

For over a decade following the adoption of the Childcare Recommendation, the EU remained silent on this issue: childcare was simply not seen as a priority. However, with renewed commitment on gender equality and employment, the Treaty of Amsterdam brought new impetus to the issue of reconciliation between work and family life and with it the concept of childcare. At the same time, the introduction of the new Employment Title in the Treaty,⁸⁵ gave the EU responsibility to coordinate employment policies and, with them, the

⁸⁰ B. Cohen and N. Frazer, *Childcare in a Modern Welfare System* (Institute of Public Policy Research 1991).

⁸¹ Council Recommendation 92/241/EEC of 31 March 1992 on child care, OJ [1992] L123/16.

⁸² Article 4 of Recommendation 92/241/EEC.

⁸³ Article 5 of Recommendation 92/241/EEC.

⁸⁴ Article 6 of Recommendation 92/241/EEC provides: 'As regards responsibilities arising from the care and upbringing of children, it is recommended that Member States should promote and encourage, with due respect for freedom of the individual, increased participation by men, in order to achieve a more equal sharing of parental responsibilities between men and women and to enable women to have a more effective role in the labour market.'

⁸⁵ Title IX of the TFEU includes Articles 145-150 TFEU (formerly Articles 125-130 of the EC Treaty).

employability of men and women. Although the concept of employability was considered to be beneficial to women, concerns with women's limited access to the labour market due to structural constraints were raised.⁸⁶ In particular, care work was seen to hinder women's employment rate and employment policy was to reflect the reality of gender relations inside and outside of work. To that end, the social partners (representatives of management and labour) were provided full recognition in the Treaty of Amsterdam reform in order to contribute to social dialogue as well as to actively design European social policy.⁸⁷

Effectively, the new Employment Title merged the equal opportunity and employment agendas. In practice, this meant that, for the first time, the EU was able to support the development of a childcare strategy with an implementation system under the Council Employment Guidelines and their application through the EES. These provided a momentum for the building of an EU childcare strategy.

At the same time, a shift of focus in relation to employment policy had operated in the European debate from fighting unemployment to raising employment levels through growth and opportunities for skilled workers.⁸⁸ In the 1998 employment guidelines adopted at the Luxembourg European Council, Member States were asked "to strive to raise levels of access to care services where some needs are not met".⁸⁹ The 1999 European Council provided further guidelines on childcare, including the active involvement of not only the Member States but also the social partners:

"In order to strengthen equal opportunities, Member States and the social partners will (...) design, implement and promote family friendly policies, including affordable, accessible and high quality care services for children and other dependants, as well as other leave schemes".⁹⁰

The Council Employment Guidelines and their application through the EES provided a momentum for the building of an EU childcare strategy. However, the EU strategy continues

⁸⁶ J. Rubery and C. Fagan, *Equal Opportunities and Employment in the European Union* (Federal Ministry of Labour, Health and Social Affairs 1998) 99.

⁸⁷ Article 151-156 TFEU.

⁸⁸ M. Ferrera, A. Hemerijck and M. Rhodes, *The Future of Social Europe: Recasting Work and Welfare in the New Economy* (Celta Editora 2000) 77-78.

⁸⁹ Council Resolution of 15 December 1997 *on the 1998 Employment Guidelines*, OJ [1998] C30/1.

⁹⁰ Council Resolution of 22 February 1999 *on the 1999 Employment Guidelines*, OJ [1999] C69/2.

to be limited because it was concerned exclusively with the supply side of childcare: that is, the quality, quantity and affordability of out-of-home formal services. Although the EU strategy provided broad principles such as quality, quantity and affordability, it left to the Member States the practical operational of these principles (including the payment and training of care workers which actually remained a competence of the Member States). Thus the demand side of childcare was a matter for national law.⁹¹ Further, the involvement of the social partners meant the replacement of equal opportunity as a feminist vision (including the equal sharing of care work) by equal opportunity as part of larger economic and strategic concern.⁹² In the process, the conceptual underpinning of gender equality has gradually disappeared to be replaced by the systematic incorporation of childcare into the broader policy framework of employment and economic competitiveness. This process has been reinforced by the adoption of the Lisbon agenda.⁹³

The Lisbon European Council agreed on a new agenda to achieve “the most competitive and dynamic knowledge economy in the world, capable of durable economic growth, of high employment levels and jobs of a better quality and of improved social cohesion”.⁹⁴ The new agenda included various targets to be achieved by 2010 and, in particular, it demanded an increase in female employment rates to 60% (70% for men). In order to further its commitment towards full employment, the European Council adopted a series of objectives aimed at removing the obstacles to women participating in the labour market. Member States were encouraged, along with their competent authorities at national, regional and local levels and their social partners, to ensure access to quality childcare facilities which were affordable for all. In 2002, the Barcelona European Council set specific targets requiring Member States to take into account the demand for childcare facilities and, in line with national patterns of provision, “to provide 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”.⁹⁵ However, in

⁹¹ M. Meyers, J. Gornick and K. Ross, ‘Public Childcare, Parental Leave and Employment’ in D. Sainsbury (ed) *Gender and Welfare State Regimes* (Oxford University Press 1999) 117-147.

⁹² E. Radulova, ‘The Construction of EU’s Childcare Policy Through the Open Method of Coordination’ in S. Kröger (ed) *What We Have Learnt: Advances, Pitfalls and Remaining Questions in OMC Research*, *European Integration online Papers (EIoP)*, Special Issue 1, Vol. 13, Art. 13. (2009) < <http://eiop.or.at/eiop/texte/2009-013a.htm> > accessed 19 September 2015.

⁹³ European Council, Presidency Conclusions. Lisbon European Council, 23-24 March 2000, < http://www.europarl.europa.eu/summits/lis1_en.htm > accessed on 22 October 2015.

⁹⁴ *Ibid.*

⁹⁵ European Council, Presidency Conclusions, Barcelona European Council, 15 and 16 March 2002, SN 100/1/02 REV 1, 13 < http://ec.europa.eu/invest-in-research/pdf/download_en/barcelona_european_council.pdf > accessed on 14 October 2015.

practice, the results of the Barcelona targets have been disappointing. The expected results have not been reached by the Member States in general. The Joint Employment Reports, issued the same year as the Barcelona targets, voiced pessimistic expectations regarding the results of the childcare targets:

“Even though a growing number of Member States have introduced new measures, quantitative targets and deadlines to improve childcare facilities, good and affordable services are still not sufficient to meet the demand or to reach the new Barcelona targets...The issue of improving care for other dependents has, as last year, received very little attention”.⁹⁶

As predicted, reviews of those targets in 2008⁹⁷ and in 2013⁹⁸ showed that they were far from being achieved - in particular for children under the age of three - and in some countries “the situation appears to deteriorate”.⁹⁹ In 2010, only ten Member States (namely Denmark, Sweden, The Netherlands, France, Spain, Portugal, Slovenia, Belgium, Luxembourg and the UK) had achieved the Barcelona targets for children under three while fifteen States were below 25% and only eleven States had achieved the objectives of 90% for children between three years and school age. By 2013, many countries were still far away from reaching the targets. This failure prompted the Commission to emphasise the necessity for the EU to take stronger leadership in this area since childcare directly contributes to the (economic) objectives of the EU.

Moreover, a number of internal and external technical difficulties have made the assessment of the targets particularly challenging. From an external point of view, the Commission explained that “it is difficult to assess the effect of the initiatives because of the lack of appropriate and/or comparable data”.¹⁰⁰ Indeed, Member States were originally not obliged to

⁹⁶ Communication from the Commission of 13 November 2002, Draft Joint Employment Report 2002, COM(2002) 621 final, 54.

⁹⁷ European Commission Report of 3 October 2008, *Implementation of the Barcelona Objectives Concerning Facilities for Pre-School-Age Children*, COM(2008) 638.

⁹⁸ Council of the European Union, Council conclusions of 7 March 2011 on European Pact for Gender Equality (2011-2020), (2011/C 155/02), OJ [2011] C155/10; European Commission, *Barcelona Objectives: The Development of Childcare Facilities for Young Children in Europe with a View to Sustainable and Inclusive Growth: Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions* (Publications Office of the European Union 2013).

⁹⁹ *Ibid.*, 4.

¹⁰⁰ Communication from the Commission of 13 November 2002, Draft Joint Employment Report 2002, COM(2002) 621 final, 54.

disclose their national childcare targets in terms of percentage of children covered in each age group as defined by the EES. Thus, some States limited the information provided to the Commission to their spending and the creation of childcare facilities. Although the information gathered has improved over the years in terms of statistical data on childcare provisions and the gender impact on employment, it remains incomplete to provide adequate comparative data on childcare.¹⁰¹ From an internal perspective, the link between formal childcare usage and employment rates is problematic, particularly when reference is made to the “full-time” concept. In the context of formal childcare, “full-time” is defined by the usage of 30 hours or more per week. However, “full-time” employment generally refers to 40 hours per week (plus commuting time). As the two definitions of “full-time” are not compatible, it means that the link between employment (or full-time employment) and childcare usage is problematic to establish.¹⁰² As a result it might not be enough for a child to be attending full-time childcare for the mother to be able to be employed full-time. Complementary informal childcare might also be needed. Alternatively, the mother might remain in part-time employment. This is extremely problematic because the Barcelona targets were set with the clear understanding that parenthood impacted strongly on female employment rates.¹⁰³

Regardless of the Barcelona targets’ success levels, it is important to underscore that such targets were strongly positioned under the European strategies for growth and jobs and the EES. Thus, they were only linked to social inclusion or gender equality and work-family reconciliation to a very limited degree.¹⁰⁴ There is no reference to the role of men in care work. It fails to acknowledge that provisions relating to adult care as well as other forms of care for school age children are necessary for achieving reconciliation. The concept of gender equality appears to be fading: the equal opportunity debate has been reframed to fit the necessity of the labour market and the economic growth narrative. In turn, this has impacted on the way childcare is construed to fit with parents’ employability rather than with gender equality concerns. In addition, there was a strong emphasis on quantity and a general failure to refer to quality.¹⁰⁵ Under the Barcelona objectives, childcare was conceptualised as a

¹⁰¹ N. Richardt, ‘European Employment Strategy, Childcare, Welfare State Redesign: Germany and the United Kingdom Compared’ *Conference of Europeanists, Chicago* (2004, March) < <http://www.eucenter.wisc.edu/OMC/Papers/EES/richardt.pdf> > accessed on 11 November 2015.

¹⁰² M. Mills, P. Praeg, F. Tsang, K. Begall, J. Derbyshire, L. Kohle, C. Miani and S. Hoorens, *Use of Childcare Services in the EU Member States and Progress towards the Barcelona Targets (Short Statistical Report 1)* (European Union 2014) 12-13.

¹⁰³ *Ibid*, 11.

¹⁰⁴ See fn90.

¹⁰⁵ Council of the European Union, Joint Employment Report 2003/2004, 5 March 2004 (7069/04).

service for adult workers only: it was blind to the needs of children *and* parents. In particular, it did not include any information about the quality of the childcare services and whether those services should serve the educational needs of children and the care relationship between parents (carers) and children. As discussed earlier, quality is essential to the success of the care strategy but quality is seldom considered in EU policy.

Against this policy approach, the Court of Justice of the EU adopted a paternalistic stance regarding childcare which confirmed its dominant ideology of motherhood¹⁰⁶ that sees women primarily as carers and not as workers in their own right. This was confirmed by the Court in the very first (and only) case directly concerning childcare provisions. In *Lommers*, the Court considered the childcare policy of the Dutch Ministry of Agriculture who provided access to childcare facilities primarily to its female employees whilst granting male employees access to nursery placements only in emergencies such as in the case of a single father who was the sole care-giver.¹⁰⁷ The Ministry had justified its position as the only way:

“...to tackle inequalities existing between male and female officials, as regard both the number of women working at the Ministry and their representation across the grades. The creation of subsidised nursery places *is precisely the kind of measure needed to help to eliminate this de facto inequality*”.¹⁰⁸

The Court was satisfied that there was no breach of the Equal Treatment Directive because when men were fulfilling a primary caring role, they were not excluded from the policy. In doing so, however, it omitted to consider the fact that Mr Lommers’ wife might have experienced difficulties in pursuing *her* career as a result of this policy. Ultimately, the Court reiterated the message that *normally* “care work is for women” and men enter the picture only in *exceptional* circumstances.

Childcare in the Aftermath of the 2008 Crisis and the Social Investment Package 2013

The Impact of the Financial Crisis

The 2008 recession did not provide the optimal political and economic context from which to build and develop the nascent childcare strategy into a fully-fledged childcare policy at the

¹⁰⁶ C. McGlynn, ‘Ideologies of Motherhood in European Community Sex Discrimination’ (2000) 6 *European Law Journal* 29-44.

¹⁰⁷ Case C-476/99 *Lommers v Minister van Landbouw, Natuurbeheer en Visserij* [2002] ECR I-2891.

¹⁰⁸ Case C-476/99 *Lommers*, para. 21, emphasis added.

EU level. In the immediate aftermath of the 2008 crisis, the EU, occupied with reforming banking and financial markets, adopted no policy on childcare (or indeed on work-life reconciliation).¹⁰⁹ One of the many consequences of the economic climate following the post 2008 recession was a further weakened EU leadership in the area of childcare specifically, and in the more general area of care. In many Member States, the crisis has deeply affected national welfare policies¹¹⁰ *inter alia* those aimed at supporting working parents which have been cut back, postponed or abandoned in many countries.¹¹¹ By then, gender equality was clearly no longer at the heart of policy development on work-family reconciliation¹¹² and any EU activity was strongly tainted by economic motives. In this new economic context, austerity measures sprouted and fundamental rights, such as gender equality, have either been considered too costly or subordinated to the demand of market necessity. Not surprisingly, the tendency, which was started with the Lisbon Agenda, to use childcare as a tool to support economic competitiveness and employment strategy goals, was staunchly entrenched post-crisis.

¹⁰⁹ The European Commission's proposed Work-Life Package (MEMO/08/603 of 03 October 2008) had been adopted a few weeks before the 2008 crisis engulfed the EU. The Work-Life Package included four documents: a Communication from the European Commission setting the context (Communication from the Commission of 3 October 2008, A Better Work-Life Balance: Stronger Support for Reconciling Professional, Private and Family Life, COM(2008) 635 final); two legislative proposals to revise existing directives, the Pregnant Workers Directive (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 breastfeeding, COM(2008) 637) and the Self Employed Directive (Proposal for a Directive on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Directive 86/613/EEC, COM(2008) 636); finally a report monitoring the national progress towards the childcare targets set by the 2002 Barcelona Council (European Commission Report of 3 October 2008, *Implementation of the Barcelona Objectives Concerning Facilities for Pre-School-Age Children*, COM(2008) 638). At the same time, the Social Partners (ETUC, BUSINESSEUROPE, CEEP and UEAPME) in July 2008 initiated the negotiation procedure provided for Article 138 to 'better achieve the aims of the Parental Leave Directive' (Council Directive 96/34/EC). In addition to the European Commission's Work-Life Package, the Social partners agreed in June 2009 a revised Parental Leave Framework Agreement (BUSINESSEUROPE, UEAPME, CEEP, ETUC, Framework Agreement on Parental Leave (Revised) 18 June 2009, < http://www.etuc.org/IMG/pdf_Framework_agreement_parental_leave_revised_18062009.pdf >), which has now been implemented by a Directive (Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC (Text with EEA relevance), OJ [2010] L68/13).

¹¹⁰ A. Gregory, S. Milner, J. Windebank, 'Work-Life Balance in Times of Economic Crisis and Austerity' (2013) 33 *International Journal of Sociology and Social Policy* 528-541.

¹¹¹ R. Guerrina, 'Socio Economic Challenges to Work Life Balance at Times of Crisis' (2015) 37(3) *Journal of Social Welfare & Family Law* 368-377. See also S. Walby and J. Towers, *Measuring the Impact of Cuts in Public Expenditure on the Provision of Services to Prevent Violence Against Women and Girls* (Lancaster University 2012); S. Walby, 'Enquête on the current financial crisis: the UK' (2012) 14(1) *European Societies* 151-152.

¹¹² A. Gregory, S. Milner, J. Windebank, 'Work-Life Balance in times of Economic Crisis and Austerity' (2013) 33 *International Journal of Sociology and Social Policy* 528-541.

It has been argued that following the 2008 recession, childcare policy and work-family reconciliation in general have slipped off the EU agenda and have been supplanted by neo-liberal arguments. It has been claimed, in particular, that the 2008 recession affected the EU law and policy trajectory on work-family reconciliation in two main ways:¹¹³ (1) gender equality was no longer at the heart of policy development on work-family reconciliation; and (2) the pace of legal development had come to a quasi-halt. These can be illustrated by the two following retrenchments: first, despite a campaign led by the European Confederation of Family Organisation (COFACE) to designate 2014 as the European Year for Reconciling Professional and Private Life, the European Commission refused to make such a designation. Second, the proposed amendments to the Pregnant Workers Directive,¹¹⁴ introduced within the 2008 work-life package, was rejected by the Council in December 2010 and axed by the Commission on 19 June 2014 because it was considered to be “red tape”.¹¹⁵

The crisis has further highlighted deeply ingrained gender stereotypes in Europe.¹¹⁶ Women are still perceived as the main caregivers, and therefore, not primarily as workers in their own right. The male breadwinner model has not disappeared in most Member States¹¹⁷ and the preference for the father as the main economic provider remains a strong cultural force. The persisting gender pay gap of 16.4% (in the average hourly gross wage)¹¹⁸ due in part to women earning lower pay for work of equal value, and in part to job segregation, continues to shape the perception of entitlement and preference in the workplace. This means that work-family reconciliation is viewed as a luxury for women, certainly not a necessity in times of crisis.

¹¹³ Ibid.

¹¹⁴ 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 breastfeeding, COM(2008) 637.

¹¹⁵ P. Foubert and Š. Imamović, ‘The Pregnant Workers Directive: Must Do Better - Lessons to be Learned From Strasbourg?’ (2015) 37(3) *Journal of Social Welfare & Family Law* 309-320.

¹¹⁶ A. Masselot, E. Caracciolo di Torella, and S. Burri, *Thematic Report of the European Network of Legal Experts in the Field of Gender Equality “Fighting Discrimination on the Grounds of Pregnancy, Maternity and Parenthood: The Application of EU and National Law in Practice in 33 European Countries”* (Publication of the European Commission 2012); see also European Commission, *Report on Equality between Women and Men 2014*, (Publications Office of the European Union 2015) < http://ec.europa.eu/justice/gender-equality/files/annual_reports/150304_annual_report_2014_web_en.pdf > accessed on 24 October 2015.

¹¹⁷ ‘Women’s activity rate is still 12.7 percentage points below that of men (64.9 % against 77.6 % for the 15-64 age bracket in 2011), reflecting persistent gender divisions in household and care responsibilities’ - European Commission, *Social Investment Package: Key Facts and Figures* (Publications Office of the European Union 2013); this is further confirmed by European Commission, *Report on Equality between Women and Men 2014*, (Publications Office of the European Union 2015) < http://ec.europa.eu/justice/gender-equality/files/annual_reports/150304_annual_report_2014_web_en.pdf > accessed on 24 October 2015.

¹¹⁸ Eurostat, *Gender Pay Gap Statistics, 2014* < http://ec.europa.eu/eurostat/statistics-explained/index.php/Gender_pay_gap_statistics#cite_note-1 > accessed on 24 October 2015.

The crisis undoubtedly had a gendered impact and contributed to the entrenchment of gender stereotypes. In its *Strategy for Equality between Women and Men*,¹¹⁹ the European Commission suggested that the recession hindered the achievement of gender equality and that the effect of the crisis would be to put increased pressure on women. In reality, the consequences of the recession have been mixed for both men and women (but negative overall). Unemployment levels for both men and women are equalizing, although women generally remain in segregated, under-paid and precarious jobs.¹²⁰ In some countries, unemployment levels are accelerating, especially for women as the public sector is shrinking. Public sector cuts disproportionately affect women both as employees and as service users. Thus, the recession “appears to have exacerbated the earlier gendered and sectoral pattern of work-life conflict”.¹²¹ Nevertheless, despite claims to the contrary,¹²² women’s labour market participation appears to have become a lasting feature of contemporary capitalism.¹²³ Despite the difficulties, the crisis has revealed some durable transformed structures: the majority of women are in paid employment and the crisis has not led them to returning (voluntarily) to traditional unpaid roles.¹²⁴

The Return of Childcare on the EU Agenda Post-2010

Despite the above criticisms, in reality post-crisis the EU has been active in the area of care, and particularly childcare as well as work-life reconciliation. As a response to the impact of the crisis, in particular the increased level of poverty, the EU has devised a plan to counter-

¹¹⁹ Communication from the Commission of 21 September 2010, Strategy for Equality between Women and Men 2010-2015, COM(2010) 491 final.

¹²⁰ Women are not more likely to face unemployment (9.8% compared to 9.7% for men) but they do face a higher risk of poverty and social exclusion (25.2) than men (23%) as stated by European Commission, *Barcelona Objectives: The Development of Childcare Facilities for Young Children in Europe with a View to Sustainable and Inclusive Growth* (Publications Office of the European Union 2013) 5. See also C. Solera and F. Bettio, ‘Women’s Continuous Careers in Italy: The Education and Public Sector Divide’ (2013) 52(1) *Population Review* 129-148; M. Karamessini and J. Rubery, ‘The Challenge of Austerity for Equality: A Consideration of Eight European Countries in the Crisis’ (2014) 2 (133) *Revue de l’OFCE* 15-39; J. Rubery and A. Rafferty, ‘Women and Recession Revisited’ (2013) 27(3) *Work, Employment & Society* 414-432.

¹²¹ A. Gregory, S. Milner, J. Windebank, ‘Work-Life Balance in Times of Economic Crisis and Austerity’ (2013) 33 *International Journal of Sociology and Social Policy* 528-541, 531; see also European Commission, *Report on Equality between Women and Men 2014* (Publications Office of the European Union 2015) < http://ec.europa.eu/justice/gender-equality/files/annual-reports/150304_annual-report_2014_web_en.pdf > accessed on 24 October 2015.

¹²² N. Gilbert, *A Mother’s Work: How Feminism, The Market and Policy Shape Family Life* (Yale University Press 2008) 10.

¹²³ M. Karamessini and J. Rubery, ‘The Challenge of Austerity for Equality: A Consideration of Eight European Countries in the Crisis’ (2014) 2 (133) *Revue de l’OFCE* 15-39.

¹²⁴ See generally: M. Karamessini and J. Rubery, *Women and Austerity: The Economic Crisis and the Future for Gender Equality* (Routledge 2014).

act the Member States' cycle of austerity measures which have been increasingly cutting welfare state and social protection. This response has ultimately contributed to reinforcing, not weakening, childcare strategy building. In addition, the EU childcare strategy has the potential to complement and support the policy response to the recession¹²⁵ in the form of measures designed to limit or avoid job losses and to support undertakings in retaining their workforce. Childcare measures have been identified by the EU to contribute to the creation of new jobs, however, most of these care-related jobs are typically filled by women and are undervalued, heavily segregated and often precarious.

If childcare policy development stopped in the immediate aftermath of the 2008 crisis, the production of measures has, from 2010, increased dramatically and has now surpassed any EU childcare-related activities from the period prior to 2008. All the EU political institutions have been involved in childcare policy development and efforts have been made to connect with actors at national levels through a consultation to reinstate and possibly reinforce European social values.¹²⁶ Through the creation of the European Platform for Investing in Children (EPIC)¹²⁷ in 2013, the European Parliament has been actively helping Member States implement the 2013 Recommendation¹²⁸ and to encourage Member States to inform them with evidence-based practices that have been found to have a positive impact on children and families. In 2011, the Council restated its commitment to the Barcelona childcare targets in its European Pact for Gender Equality (2011-2020).¹²⁹ Moreover, the European Commission has addressed childcare in at least three communications,¹³⁰ including in the Communication Europe 2020 Strategy - A Strategy for Smart, Sustainable and

¹²⁵ A. Crimman, F. Wiener and L. Bellman, 'The German Work-Sharing Scheme: An Instrument for the Crisis' *Conditions of Work and Employment Series No. 25* (International Labour Organisation 2010).

¹²⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Launching a consultation on a European Pillar of Social Rights, COM(2016) 127 final.

¹²⁷ < http://europa.eu/epic/studies-reports/childcare/index_en.htm > accessed on 30 June 2016.

¹²⁸ European Commission Recommendation 2013/112/EU of 20 February 2013, Investing in children: breaking the cycle of disadvantage, OJ [2013] L59/5.

¹²⁹ Council of the European Union, Council conclusions of 7 March 2011 on European Pact for Gender Equality (2011-2020), (2011/C 155/02), OJ [2011] C155/10.

¹³⁰ Communication from the Commission of 21 September 2010, Strategy for Equality between Women and Men 2010-2015, COM(2010) 491 final; Communication from the Commission of 3 March 2010, Europe 2020 Strategy, A strategy for smart, sustainable and inclusive growth, COM(2010) 2020; Communication from the Commission of 17 February 2011, Early Childhood Education and Care: Providing all our children with the best start for the world of tomorrow, COM(2011) 66.

Inclusive Growth,¹³¹ in which the Commission adopted a revised proposed strategy that claimed to be “about jobs and better lives”.¹³²

Despite these positive developments and heightened activity in relation to childcare, EU action remains strongly driven by economic concerns. A closer look at the 2020 Strategy reveals that social issues do not appear to be of primary concern: indeed, it clearly outlines a business framework. Employment rates are to be raised, with special emphasis on the participation of women, the young and the old in the workforce. The increase in women’s work rate was judged to not have progressed fast enough by comparison with the rest of the world (especially in comparison to the USA and Japan): “only 63% of women are in work compared to 76% of men”.¹³³ Thus, the 2020 Strategy requires greater effort to involve women in paid employment, which will be achieved by providing “access and opportunities for all throughout the lifecycle”¹³⁴ and by using “policies to promote gender equality [...] to increase labour force participation thus adding to growth and social cohesion”.¹³⁵ The 2020 Strategy mentions the importance of childcare facilities and of care for other dependants but the Member States remain in charge of the care strategy as this continues to be a national competence. Member States are required under the new strategy to facilitate “the reconciliation of work and family life” as well as to “promote new forms of work-life balance [...] and to increase gender equality”.¹³⁶ Thus, the problems which existed with regards to raising women’s paid employment rate prior to 2010 remain the same if not even more acute following the global economic crisis. Women are encouraged to both have children and hold paid jobs. Despite the existence of EU gender equality legislation, women continue to provide most of the domestic care in Europe. However, policies such as the 2020 Strategy - which encourage increasing women’s employment rates - cannot be successful without policies that aim at a more equitable share of domestic demands and family responsibilities.¹³⁷

¹³¹ Communication from the Commission of 3 March 2010, Europe 2020 Strategy, *A strategy for smart, sustainable and inclusive growth*, COM(2010) 2020.

¹³² José Manuel Barroso, Preface of the European Commission Communication from the Commission of 3 March 2010, Europe 2020 Strategy, *A strategy for smart, sustainable and inclusive growth*, COM(2010) 2020.

¹³³ Communication from the Commission of 3 March 2010, Europe 2020 Strategy, *A strategy for smart, sustainable and inclusive growth*, COM(2010) 2020, 5.

¹³⁴ *Ibid.*, 16.

¹³⁵ *Ibid.*, 16.

¹³⁶ *Ibid.*, 17.

¹³⁷ V. Miranda, ‘Cooking, Caring and Volunteering: Unpaid Work Around the World’ *OECD Social, Employment and Migration Working Papers*, n. 116 (OECD 2011); C. Fagan and H. Norman, ‘Men and Gender Equality: Tackling Gender Segregation in Family Roles and in Social Care Jobs’ in F. Bettio, J. Plantenga and M. Smith (eds) *Gender and the European Labour Market* (Routledge 2013) 199–224; Equality and Human

The adoption by the European Commission of the Social Investment Package (SIP) in 2013 has so far been the most interesting EU initiative in terms of counteracting the consequences of the crisis. In the context of this thesis, the SIP is also particularly significant because it places childcare at the heart of economic recovery. The SIP is made up of a Commission Communication on Growth and Cohesion¹³⁸ together with a Commission Recommendation on *Investing in Children: Breaking the Cycle of Disadvantage*¹³⁹ and a series of staff working documents.¹⁴⁰ Under the SIP, the achievement of the Barcelona objectives is said to be central to European priorities both within the Lisbon Strategy and in the Europe 2020 Strategy.¹⁴¹ The failure of Member States to comply with the Barcelona objectives by 2010, and the further deterioration in some Member States since 2011,¹⁴² prompted the Commission to highlight the necessity for the EU to take strong leadership with regards to childcare facilities which directly contribute to the (economic) objectives of the EU.¹⁴³

Against this background, the Commission reaffirmed its commitment to childcare policy development and the promotion of gender equality in line with the attainment of the Europe 2020 Strategy. Indeed, the 2013 Recommendation calls on EU countries to improve access to affordable early childhood education and care services. By providing guidance for Member States on how to tackle child poverty and social exclusion through measures such as family support and benefits, quality childcare and early-childhood education, the 2013 Recommendation puts forward a long-term social strategy to support children and to help mitigate the effects of the economic crisis. It specifically encourages Member States to step up access to quality childcare services and to support children's participation in extra-curricular activities.

Right Commission (EHRC), *Working Better: Fathers, Family and Work –Contemporary Perspectives* (Equality and Human Right Commission 2009).

¹³⁸ Communication from the Commission of 20 February 2013, *Towards Social Investment for Growth and Cohesion – including implementing the European Social Fund 2014-2020*, COM(2013) 83.

¹³⁹ European Commission Recommendation 2013/112/EU of 20 February 2013, *Investing in children: breaking the cycle of disadvantage*, OJ [2013] L59/5.

¹⁴⁰ For an overlook of the various documents adopted by the EU on the SIP, see: < <http://ec.europa.eu/social/main.jsp?catId=1044&langId=en&newsId=1807&moreDocuments=yes&tableName=news> > accessed on 24 October 2015.

¹⁴¹ European Commission, *Social Investment Package: Key Facts and Figures* (Publications Office of the European Union 2013) 4.

¹⁴² Ibid; European Commission, Annual Report of 5 March 2002 on *Equal Opportunities for Women and Men in the European Union 2002*, COM(2003) 98 final.

¹⁴³ See fn139, 4.

Without doubt the SIP is inextricably linked to the achievement of economic growth and highlights the importance of an economic perspective. The aim of the policy is to entice and support Member States into investing in people's social capital in order to prevent social risks. The SIP aims to reconcile social investment with adequate social protections. In particular, the 2013 Recommendation aims to support parents' access to the labour market and to make sure that work "pays" for them. It also recommends the provision of adequate income support in the form of measures such as child and family benefits, which should be redistributive across income groups. It urges the need to avoid inactivity traps and stigmatisation. Under the Recommendation, childcare becomes an investment in individual capacities during the early years. This economic perspective is important because it provides momentum for policy development around childcare. In other words, the economic underpinning of the policy carries weight and gives traction to the social outcome.

The SIP moreover introduces the perspective of the child, which is *prima facie* a new and welcome development. The Recommendation states that it aims to improve the well-being and the protection of the rights of children.¹⁴⁴ Arguably, the SIP mitigates its economic competitiveness objectives by including more human concerns in the form of the children's interests. This perspective has been called for by scholars¹⁴⁵ who have persuasively argued that the reconciliation discourse has too often neglected addressing children's needs. The SIP introduces for the first time the notion that childcare is important not just for the economy, rising employment rates or the concept of reconciliation between work and family life: but it is relevant *also* to children. Giving children rights in the building of a childcare strategy makes sense as they are directly impacted. In addition, a child perspective is long overdue in EU law as "children are coming to be recognised as political citizens".¹⁴⁶ However, as Daly argues, the tendency to grant children some individual rights can also contribute to increasing the individualisation of family members and creates a distance between the child and the

¹⁴⁴ European Commission Recommendation 2013/112/EU of 20 February 2013, Investing in children: breaking the cycle of disadvantage, OJ [2013] L59/5, preamble s 1.

¹⁴⁵ E. Rubio, 'A Policy in its Infancy: The Case for Strengthening and Rethinking EU Action on Childhood' (2007) *Notre Europe Policy Paper* No. 30, < <http://www.institutdelors.eu/media/policypaper30-erubio-policyenfancy-en.pdf?pdf=ok> > accessed 17 September 2015; L. Ackers and H. Stalford, *A Community for Children? Children, Citizenship and Internal Migration in the EU* (Ashgate 2004); H. Stalford and E. Drywood, 'Coming of Age? Children's Rights in the European Union' (2009) 46(1) *Common Market Law Review* 143-172; G. James, 'Forgotten Children: Work-Family Reconciliation in the EU' (2012) 34(3) *Journal of Social Welfare and Family Law* 363-379.

¹⁴⁶ M. Daly, 'What Adult Worker Model? A Critical Look at Recent Social Policy Reform in Europe from a Gender and Family Perspective' (2011) 18(1) *Social Politics: International Studies in Gender, State & Society* 1-23, 10; R. Lister, 'Children (But Not Women) First: New Labour, Child Welfare and Gender' (2006) 26(2) *Critical Social Policy* 315-35.

family. In addition, social reforms which promote the individualisation of family members have gender implications but often are blind to them.¹⁴⁷ The SIP valorises out-of-home childcare facilities as a social investment designed to build children's social capital, but in doing so it also distances itself from feminist concerns and the principle of gender equality. Additionally, the tendency to individualise rights blanks out the ethic of care insight to focus on relationships rather than on individuals.¹⁴⁸

Gender equality appears to be vanishing from the main aims of the childcare strategy. The SIP does not address the gender imbalance which underlines the childcare debate and there are few mentions of gender equality in either the Communication or the Recommendation. The EU does restate its commitment to the promotion of gender equality in the labour market and in family responsibilities,¹⁴⁹ but gender equality principles have mainly become instrumental to the realisation of both economic perspectives and children's rights. As the EU childcare strategy appears to have shed most of the gender equality principles, there is a risk that women's roles will be further entrenched in the traditional gendered vision of production and reproduction where the former is valued and the latter is not. If the individual rights of the child takes precedence over gender equality, it risks confirming the so-called dominant ideology of motherhood¹⁵⁰ where childcare remains gendered, under or un-valued, unaccounted for and largely unpaid. The danger is that this will entrench women in traditional domestic roles, or worse, legitimise the "second shift".¹⁵¹ Consequently one might question whether the childcare strategy is showing a retrenchment of the core EU values.

¹⁴⁷ M. Daly, 'What Adult Worker Model? A Critical Look at Recent Social Policy Reform in Europe from a Gender and Family Perspective' (2011) 18(1) *Social Politics: International Studies in Gender, State & Society* 1-23, 10; B. Hobson, 'The Individualised Worker, the Gender Participatory and the Gender Equity Models in Sweden' (2004) 3(1) *Social Policy & Society* 75-83; R. Ray, J. Gornick and J. Schmitt, 'Who Cares? Assessing Generosity and Gender Equality in parental Leave Policy Designs in 21 Countries' (2010) 20(3) *Journal of European Social Policy* 196-212.

¹⁴⁸ M. Daly and K. Scheiwe, 'Individualisation and Personal Obligations: Social Policy, Family Policy and Law Reform in Germany and the UK' (2010) 24(2) *International Journal of Law, Policy and the Family* 177-197; G. Therborn, *Between Sex and Power: Family in the World 1900-2000* (Routledge 2004); F. Williams, 'A Good-Enough Life: Developing the Grounds for a Political Ethic of Care' (2005) 30 *Soundings* 17.

¹⁴⁹ Article 2.1 of the European Commission Recommendation 2013/112/EU of 20 February 2013, Investing in children: breaking the cycle of disadvantage, OJ [2013] L59/5.

¹⁵⁰ C. McGlynn, 'Ideologies of Motherhood in European Community Sex Discrimination' (2000) 6 *European Law Journal* 29-44.

¹⁵¹ A. Hochschild and A. Machung, *The Second Shift: Working Parents and the Revolution at Home* (Viking Penguin 1989).

The EU has not yet discarded all core values from its childcare strategy. Indeed, the adoption in 2016 of the proposed European Pillar of Social Rights¹⁵² shows a level of continuing commitment in relation to EU core values. Although gender equality is fading from the main picture, the SIP provides that the EU's commitments to combating "social exclusion" and discrimination are fundamental objectives of the EU Treaty and the Charter of Fundamental Rights.¹⁵³ The SIP also identifies "social exclusion" (but not inequality) as a cost to the economy and as a threat to achieving the economic targets set by the Europe 2020 strategy.¹⁵⁴ The introduction of core values such as social exclusion and social justice are to be welcomed and it is possible that the economic crisis has served to highlight existing structural inequalities. The values embedded in the Treaty - solidarity, human dignity and gender equality - can provide strong guidelines for the development of good quality, affordable and accessible childcare facilities. This could encompass care facilities for all dependants, adults and children alike. Indeed, if developed under appropriate guiding principles, including gender equality, the articulation of childcare policy has the potential to provide a blueprint for the development of all forms of care across the EU.

Against the pernicious gender impact of the crisis, in particular the increased levels of poverty, the EU devised a plan to counteract the Member States' cycle of austerity measures which have been increasingly cutting welfare state protections. The EU's response has ultimately contributed to reinforcing, not weakening, childcare strategy building. In addition, the EU childcare strategy has the potential to complement and support the policy response to the recession¹⁵⁵ in the form of measures designed to limit or avoid job losses and to support undertakings in retaining their workforce. Childcare measures have been identified by the EU to contribute to the creation of new jobs, however, most of these care-related jobs which are typically held by women are undervalued, heavily segregated and often precarious.¹⁵⁶

¹⁵² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Launching a consultation on a European Pillar of Social Rights, COM(2016) 127 final.

¹⁵³ Communication from the Commission of 20 February 2013, Towards Social Investment for Growth and Cohesion – including implementing the European Social Fund 2014-2020, COM(2013) 83, 1.

¹⁵⁴ Communication from the Commission of 3 March 2010, Europe 2020 Strategy, A strategy for smart, sustainable and inclusive growth, COM(2010) 2020; Council of the European Union, Council conclusions of 17 June 2010 - A new European Strategy for jobs and growth, EUCO 13/10 < http://ec.europa.eu/eu2020/pdf/council_conclusion_17_june_en.pdf > accessed 24 October 2015.

¹⁵⁵ A. Crimman, F. Wiener and L. Bellman, 'The German Work-Sharing Scheme: An Instrument for the Crisis' *Conditions of Work and Employment Series No. 25* (International Labour Organisation 2010).

¹⁵⁶ M. Karamessini and J. Rubery, 'The Challenge of Austerity for Equality: A Consideration of Eight European Countries in the Crisis' (2014) 2 (133) *Revue de l'OFCE* 15-39.

The Gendered Impact of Soft Law and the OMC on the Construction of the EU Childcare Strategy

Since its inception, the EU childcare strategy has been addressed with soft law instruments, namely recommendations and opinions or acts such as Commission Communications and Council Resolutions.¹⁵⁷ Soft law is often compared to hard law, which are based on directives that have to be implemented into national law.¹⁵⁸ Soft instruments are considered to present greater flexibility which results in a better fit with the varied national legal systems of the Member States. These soft provisions are important because they show the EU and the Member States' commitment to specific issues (in this case childcare), they can be used as interpretative instruments by national Courts, they can stimulate integration by both legally building upon existing legislation and providing a useful starting point for further discussion. Ultimately, thus, they can influence the conduct of those affected by creating a "strategy". When it comes specifically to childcare, soft law is arguably a better instrument than binding provisions because the regulation of childcare is linked to socio-cultural characteristics of Member States which are difficult for the EU to challenge. In addition, the use of soft law does not incorporate the inevitable compromises which can water down the substantive content of these measures.

The benefits of soft law provisions, however, must be seen against their weak legal status: for example, the 1992 Childcare Recommendation discussed above, by lacking binding character, cannot be much more than a declaration of principles. In addition, soft law measures do not create legally enforceable obligations and are therefore left to the goodwill of the Member States. Moreover, soft law provisions create limited incentives for change when the national priorities do not fit with the EU initiatives.¹⁵⁹

The Lisbon (2000) and Barcelona (2002) Councils formalised a new form of governance - namely the Open Method of Coordination (OMC) - and its application to the EU strategy on

¹⁵⁷ The EU has also used a number of financial mechanisms to support and influence access for families to childcare facilities while at the same time getting over its low level competence in matters related to childcare. The Structural Funds have, in particular, been utilised to provide co-financing for the construction of childcare facilities, training of personnel and the provision of childcare services for parents seeking employment.

¹⁵⁸ J. Mosher and D. Trubek, 'Alternative Approaches to Governance in the EU: EU Social Policy and the European Employment Strategy' (2003) 41(1) *Journal of Common Market Studies* 63-88.

¹⁵⁹ M. Mailand, 'The Uneven Impact of the European Employment Strategy on Member States' Employment Policies: A Comparative Analysis' (2008) 18(4) *Journal of European Social Policy* 353-365.

employment, economic reform and social exclusion. Childcare policy developments at EU level have exclusively taken place under the umbrella of the OMC in the context of the European Employment Strategy (EES). The EES in particular had originally placed gender equality at the centre of the emerging employment policy of the EU.¹⁶⁰ Women were considered key to the EU economic and demographic challenges. As such, they therefore represented a source of labour supply, which, in turn, meant that they achieved a new legitimacy within EU employment policy.¹⁶¹ The EU's commitment to gender equality was reflected in the original EES, which included gender mainstreaming as a horizontal guideline for employment policies from 1999.¹⁶² It also established a set of specific targets for female employment rates (60%) to be reached by 2010.¹⁶³ The EU moreover adopted quantitative targets for childcare provision at the 2002 Barcelona Summit.¹⁶⁴ Although in practice it is difficult to measure the direct impact of the EES, it has been argued that it has made crucial contributions to altering national policy makers' "mental map"¹⁶⁵ by, in particular, raising awareness of female employment and gender equality matters. In addition, to help Member States implement the SIP in 2013, the European Parliament's EPIC¹⁶⁶ serves to feed into the OMC as it is a platform for sharing the best of policy making for children and families and to foster cooperation and mutual learning in the field. In essence all decision-making regarding childcare in the EU is made through the OMC.

In broad terms, the OMC promotes interaction at different levels. It is a widely meshed process that relies on regular monitoring of progress to meet specified agreed targets thus allowing Member States to compare their efforts and learn from the experiences of others. In

¹⁶⁰ P. Villa and M. Smith, 'Policy in the Time of Crisis: Employment Policy and Gender Equality in Europe', in M. Karamessini and J. Rubery (eds) *Women and Austerity: The Economic Crisis and the Future for Gender Equality* (Routledge 2014) 273-294.

¹⁶¹ Ibid.

¹⁶² C. Fagan, J. Rubery, D. Grimshaw, M. Smith, G. Hebson and H. Figueiredo, 'Gender Mainstreaming in the Enlarged European Union: Recent Developments in the European Employment Strategy and Social Inclusion Process' (2005) 36(6) *Industrial Relations Journal* 568-591; J. Rubery, 'Gender Mainstreaming and Gender Equality in the EU: The Impact of the EU Employment Strategy' (2002) 33(5) *Industrial Relations Journal* 500-522.

¹⁶³ Council of the European Union, Council conclusions of 17 June 2010 - A new European Strategy for jobs and growth, EUCO 13/10 < http://ec.europa.eu/eu2020/pdf/council_conclusion_17_june_en.pdf > accessed 24 October 2015.

¹⁶⁴ Communication from the Commission of 21 September 2010, Strategy for Equality between Women and Men 2010-2015, COM(2010) 491 final.

¹⁶⁵ J. Visser, 'Neither Convergence nor Frozen Paths' in M. Heidenreich, and J. Zeitlin (eds) *Changing European Employment and Welfare Regimes: The Influence of the Open Method of Coordination on National Reforms* (Routledge 2009) 37-60.

¹⁶⁶ < http://europa.eu/epic/studies-reports/childcare/index_en.htm > accessed on 12 November 2015.

the words of the European Council, it is “a means of spreading best practice and achieving greater convergence towards the main EU goals”.¹⁶⁷

The OMC can potentially be the most appropriate system to overcome the asymmetry between market forces and social concerns inherent in EU law.¹⁶⁸ For instance, the OMC has been deemed by the EU to be particularly suitable for encouraging the development of care and childcare related issues where a strict approach will not always be successful or desirable due to wide national diversity and variation of policies and where there is no institutional framework.¹⁶⁹ In this case, the EU’s role is limited to that of facilitator, while Member States set their own objectives.

Although the OMC is considered to be “the chief soft law”,¹⁷⁰ being a process, the OMC is not strictly speaking a form of soft law. The two share, however, some important features. Most notably, neither is legally binding under EU law, and there is no set mechanism to ensure enforcement. The main difference remains that, whilst the primary aim of “traditional” soft law is to emphasise general principles and declarations of intention, the OMC is a practice of cross-national policy learning where the objective is not to achieve a common policy in selected issue areas, but rather to institutionalise process for sharing policy experience and the diffusion of best practice.¹⁷¹ Such a process can be criticised as it lacks transparency, essentially leaving this to the Member States. In addition, OMC measures lack full democratic legitimacy as there is no involvement of the European Parliament, the Court of Justice, nor the national parliaments. Despite being directly connected to EU economic growth, the role of the European Commission is limited to promoting the exchange of experiences, ensuring that jobs in this field are highly valued, and making new recommendations to Member States. The absence of these institutions, especially that of the European Parliament, is regrettable as they have often supported and given a favourable input to childcare, in line with the gender equality principle. Interestingly, the Barcelona targets,

¹⁶⁷ European Council, Presidency Conclusions. Lisbon European Council, 23-24 March 2000, < http://www.europarl.europa.eu/summits/lis1_en.htm > accessed on 22 October 2015.

¹⁶⁸ I. Montanari, K. Nelson, and J. Palme, ‘Towards a European Social Model? Trends in Social Insurance Among EU countries 1980–2000’ (2008) 10(5) *European Societies* 787-810.

¹⁶⁹ P. Villa and M. Smith, ‘Policy in the Time of Crisis: Employment Policy and Gender Equality in Europe’, in M. Karamessini and J. Rubery (eds) *Women and Austerity: The Economic Crisis and the Future for Gender Equality* (Routledge 2014) 273-294, 275.

¹⁷⁰ *Ibid*, 275.

¹⁷¹ Communication to the Spring European Council from President Barroso in agreement with Vice-President Verheugen, Working together for growth and jobs. A new start for the Lisbon Strategy, COM(2005) 24.

which take the form of specific targets, appear to be very much like a directive in disguise. This raises the question of the appropriateness of the OMC.¹⁷²

As Member States remain in charge of developing their national childcare policies, their engagement in this area fluctuates according to their economic performance and value.¹⁷³ At the EU level, childcare strategy has developed under weak leadership and the reluctant participation of Member States. Since its inception, the role of the EU has been to support and facilitate information sharing: accordingly in this area, few legal instruments, none of which are legally binding, have been adopted. Under this new model of governance, Member States can and do ignore EU core values such as the obligation to achieve gender equality.

It is submitted that a strong EU leadership is important because it can provide a better opportunity to remind Member States of their fundamental obligations under the Treaty. A stronger EU leadership could bring back core EU values into the debate on childcare. Presently, it does not appear that the EU is gaining any traction in developing strong leadership in the area of childcare. Indeed, the recently adopted SIP continues to be undermined by the Member States' reticence in this area. The core principle embodied in the EU Treaty, such as gender equality, can too easily be overlooked by the recipient actors of these soft laws.

Arguably the method of governance adopted to manage the development of the EU childcare strategy goes a long way to explain the mediocre results in the area. The main problem in relation to the development of childcare through the process of OMC is that the very objectives of the welfare regime are not clearly set. The weak institutional process characterised by the OMC, together with the frail leadership of the EU in terms of ability to implement its values, means that as gender equality loses visibility and priority, so does the EU's ability to steer towards an EU childcare strategy. In turn, without comprehensive direction for the development of childcare within clear objectives for the welfare regime and

¹⁷² J. Plantenga, 'Investing in Childcare: the Barcelona Targets and the European Social Model', Key Note Speech presented at the conference *Child Care in a Changing World*, October 2004, Groningen.

¹⁷³ European Commission Recommendation of 20 February 2013, Investing in children: breaking the cycle of disadvantage, COM(2013) 778; Social Protection Committee, *Social Europe - Aiming for inclusive growth - Annual report of the Social Protection Committee on the social situation in the European Union* (2014) (10/03/2015) < <http://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=7744> > Accessed 16 September 2015; R. Horton, 'Caring for Adults in the EU: Work-Life Balance and Challenge for EU Law' (2015) 37(3) *Journal of Social Welfare & Family Law* 356-367.

without clear leadership from the EU, Member States are left to define weak objectives, unsupported by a gender equality perspective. For example, Member States and social partners have dropped the issue of unfair distribution of care work within the family, adopting instead a narrow vision of childcare linked to employability structures. Similarly, the EES has over the years gradually abandoned the gender equality goals which have been reflected by a parallel decline in gender priorities at national level.¹⁷⁴ It is submitted that the involvement of Member States through the process of the OMC has meant that the focus on the feminist discourse has disappeared.¹⁷⁵ Thus, the use of OMC in the EES is a real set back for the feminist perspective.

Conclusion

This chapter has discussed the emergent EU childcare strategy and, in particular, the impact of the 2008 recession on its development. Despite the chaotic progress with regards to the development of a care strategy for young healthy children, some steps forward have been made albeit slowly and unevenly. Some severe limitations, however, continue to hamper the development of such policy. In particular, the EU has no direct competencies in this area and it is ultimately left to the Member States to address childcare.

Initially the EU's childcare strategy was strongly underpinned by gender equality concerns but arguments relating to economic imperatives and the need to raise women's employment rates have superseded those early gender equality principles. Feminist voices have faded away into the background, while other rationales (particularly economic ones), supported by the new method of governance, have become new drivers for the development of the EU childcare strategy. Gender equality has been reduced to an instrument designed to reinforce the economic goals and support attempts to raise female employment rates. This chapter has

¹⁷⁴ P. Villa and M. Smith, 'Policy in the Time of Crisis: Employment Policy and Gender Equality in Europe', in M. Karamessini and J. Rubery (eds) *Women and Austerity: The Economic Crisis and the Future for Gender Equality* (Routledge 2014) 273-294; M. Smith and P. Villa, 'The Ever-Declining Role of Gender Equality in the European Employment Strategy' (2010) 41(6) *Industrial Relations Journal* 526-543.

¹⁷⁵ E. Radulova, 'The Construction of EU's Childcare Policy through the Open Method of Coordination' in S. Kröger (ed) *What We Have Learnt: Advances, Pitfalls and Remaining Questions in OMC Research*, *European Integration online Papers (EIoP)*, Special Issue 1, Vol. 13, Art. 13. (2009) < <http://eiop.or.at/eiop/texte/2009-013a.htm> > accessed 19 September 2015.

argued that the EU must (re)take the lead in developing a childcare strategy in order to (re)gender the discourse on childcare.

Perhaps paradoxically, following the 2008 financial crisis, EU childcare strategy, while remaining soft in nature, seems to have picked up speed and a more coherent structure has appeared. The adoption of the SIP in 2013 marks significant change in the approach taken by the EU in relation to childcare. First, childcare has become explicitly a concept relevant to the internal market that serves economic growth. Although ever since the EU made reference to childcare it has been connected to the economy, since the adoption of the SIP, it emerges as a condition to economic and employment growth. In the SIP, the necessity of childcare has also been associated with the rights of the child. Gender equality thus is confirmed as a secondary aim of childcare policy. The SIP, which revitalised EU childcare strategy post-crisis, is laddered with economic language and makes little reference to gender equality. The EU 2020 growth strategy, which talked about a “changing world”, in fact entrenched the traditional gendered vision of production and reproduction where the former is valued and the latter is not. As a result, childcare remained gendered, under-valued, unaccounted for and often unpaid. Yet under SIP, childcare is considered to be an “investment” in the future. This market term obscures the fact that the need for care is vastly broader than just *childcare* but it is a start. The looming demographic time bomb is very pertinent here: increased life expectancy coupled with an ageing society means that a far larger proportion of the population is likely to become in need of care in the coming decades. The EU remains mostly silent with regard to other forms of care. However, a coherent childcare strategy may serve as a blueprint for developing strategies for other forms of care. While childcare policy is increasingly linked to the market as a form of investment into the future, the care of dependent adults and disabled children is markedly addressed under fundamental rights such as human dignity or healthcare and remains largely disconnected from the market (although the EU has, in very recent times, made references to the silver economy).¹⁷⁶

¹⁷⁶ European Commission, Directorate - General for Economic and Financial Affairs, *The 2015 Ageing Report - Economic and budgetary projections for the 28 EU Member States (2013-2060)* (Publications Office of the European Union 2015) < http://ec.europa.eu/economy_finance/publications/ > accessed on 13 October 2015; European Summit on Innovation for Active and Healthy Ageing, Brussels, 9-10 March 2015, Final Report, *Innovation for Acting and Healthy Ageing* (European Union 2015) < http://ec.europa.eu/research/innovation-union/pdf/active-healthy-ageing/ageing_summit_report.pdf#view=fit&pagemode=none > accessed on 14 October 2015; European Commission, Background paper: *Growing the European Silver Economy*, 23 February 2015 < <http://ec.europa.eu/research/innovation-union/pdf/active-healthy-ageing/silverereco.pdf#view=fit&pagemode=none> > accessed on 14 October 2015.

Chapter 4

The Emerging Rights for Carers of Children under EU Law

Introduction

Although the EU has not yet developed a cohesive approach to childcare,¹ the strain that childcare responsibilities place on carers has long been acknowledged.² In relation to the labour market, people who take care of children often have to work reduced hours, work in precarious jobs or are even forced out of paid employment altogether in order to meet their care obligations.³ As care is reciprocal,⁴ providing specific legal rights for caregivers ultimately also confers better protection for the children whom they care for.⁵

Some legislation designed to protect parents has been developed at the EU level. It is submitted that these initiatives have emerged as a consequence of the negative impact that informal care has on participation in the labour market. In particular, the increasing involvement of mothers in paid employment has been matched with changes in employment law in order to mitigate some of the informal care which mothers have traditionally been providing for free but at a cost.⁶ Rights have been articulated around leave and forms of flexible working arrangements. A good example is found in the right to emergency leave available to workers “on grounds of *force majeure* for urgent family reasons in cases of

¹ See the discussion in Chapter 1.

² T. Hervey and J. Shaw, ‘Women, Work and Care: Women’s Dual Role and Double Burden in EC Sex Equality Law’ (1998) 8 *Journal of European Social Policy* 43-63; A. Hochschild and A. Machung, *The Second Shift: Working Parents and The Revolution at Home* (Viking Penguin 1989); H. Immervoll and D. Barber, ‘Can Parents Afford to Work? Childcare Costs, Tax-Benefit Policies and Work Incentives’ *OECD Social, Employment and Migration Working Papers* 31 (OECD 2005). For a general assessment of the cost of care in general on carers see C. O’Brien, ‘Confronting the Care Penalty: The Cause for Extending Reasonable Adjustment Rights along the Disability/Care Continuum’ (2012) 34 *Journal of Social Welfare and Family Law* 5-30; J. Herring, *Caring and the Law* (Hart Publishing 2013).

³ D. Hofäcker and S. König, ‘Flexibility and Work-Life Conflict in Time of Crisis: A Gender Perspective’ (2013) 33(9) *International Journal of Sociology and Social Policy* 613-635; L. Fursman and N. Zodgekar, ‘Making It Work: The Impacts of Flexible Working Arrangements on New Zealand Families’ (2009) 35 *Social Policy Journal of New Zealand* 43-54.

⁴ D. Stone, ‘For Love Nor Money: The Commodification of Care’ in M. Ertman and J. Williams (eds) *Rethinking Commodification: Cases and Readings in Law and Culture* (New York University Press 2005) 271-90, 273; J. Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* (Routledge 1993).

⁵ R. Horton, ‘Caring for Adults in the EU: Work-Life Balance and Challenge for EU Law’ (2015) 37(3) *Journal of Social Welfare & Family Law* 356-367.

⁶ See generally E. Caracciolo di Torella, A. Masselot, *Reconciling Work and Family Life in EU Law and Policy* (Palgrave Macmillan 2010).

sickness or accident making the immediate presence of the worker indispensable”.⁷ In addition, some working caregivers might benefit from two further directives⁸ offering protection against discrimination to those engaged in part-time and agency work. The rights available to carers have been complemented by a number of provisions prohibiting discrimination and unfair treatment. For instance, the prohibition of indirect sex discrimination allows, under certain circumstances, claims to be made against the unfavourable treatment of part-time workers. These anti-discrimination rights are, however, constrained in two main ways. First, their material scope is largely limited to the workplace. Despite the adoption of a directive prohibiting discrimination in the access to and the supply of goods and services,⁹ most EU anti-discrimination law applies to situations taking place within the labour market. Overall, rights for parents and carers of children are framed as “workplace rights” and as such they can only represent a small part of the response to the challenges posed by the increasing demand for care for children. A policy and legislative response should be aware of the conceptual, political and practical difficulties. Second, these provisions apply to a specific exhaustive list of grounds of discrimination including sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.¹⁰ As EU law does not include a prohibitive ground of discrimination for carers, the existing legal provisions can benefit only *some* working carers: parents but mostly mothers. Apart from parents, typically mothers, others do care for children with often little or no protection. These might include other women (but men also) who care for the children of their partners following a new family formation, grandparents and other family members but also legal guardians of children and foster parents. In New Zealand the concept is caught by the general term of *Whānau*, which is often translated as family but which, in fact, has a more complex meaning including the physical, emotional and spiritual dimensions of care.¹¹

In the past two decades, the EU further realised that a competitive economy cannot be achieved without the development of a sustainable strategy to allow citizens to care for their

⁷ Article 7, Council Directive 2008/104/EC.

⁸ Council Directive 97/81/EC and Council Directive 2008/104/EC, respectively.

⁹ Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ [2004] L373/37.

¹⁰ Articles 19 and 157 TFEU.

¹¹ T. Walker, ‘An Exploration of the Evolution and Application of the Notion of Whānau’ PhD thesis, Victoria University of Wellington, 2010; T. Walker, *Whānau is Whānau* (Families Commission 2006); R. Reedy, ‘Māori Ways of Knowing and Being’ in T. Walker (ed) *Challenging Science* (Dunmore Press 2004) 111–125.

children and enable them to be employable.¹² Thus, in 2008, the European Commission advocated for the need to explore fully reconciliation measures by adopting the draft Work Life Balance Package.¹³ The Court of Justice of the EU has also played an important role in shaping the legal discourse on childcare and the right of carers: not only, in some cases, has it delivered individual justice¹⁴ and its judgments have contributed to developing relevant policies and legislation, it has also been instrumental in valuing the work done by carers and making both care work and carers visible as well as relevant to the market. For example, in the seminal case of *Martínez Sala*,¹⁵ the Court of Justice acknowledged the importance of carers' contribution to the well-being of society.

If it is difficult for the EU to regulate childcare as such, a robust approach regarding the protection of those who care for children is long overdue. The few attempts made by the EU to regulate childcare or to guarantee the protection of carers of children, have had limited results.¹⁶ Consequently, individuals who care for children continue to be at a disadvantage position in the labour market and in many cases face discrimination.¹⁷ For too long parents - especially mothers but also other carers - have been undervalued, exploited and expected to offer unrealistic standards of care.¹⁸ Nevertheless, in addition to the soft law provisions directly addressing childcare-related matters, the Court of Justice has addressed childcare directly and indirectly in more binding ways and in a manner that deals with the rights of parents and others who care for children. To some extent it can be argued that the EU has already used a variety of instruments to address the concerns of individuals who care for children, whether this is done through the non-discrimination provisions or via employment policies and legislation. As a result, it is submitted that an emerging legal framework which creates rights for parents and those who care for children is developing at the EU level.

¹² European Council, Presidency Conclusions. Lisbon European Council, 23-24 March 2000 < http://www.europarl.europa.eu/summits/lis1_en.htm > accessed on 22 October 2015.

¹³ Communication from the Commission of 3 October 2008, A Better Work-Life Balance: Stronger Support for Reconciling Professional, Private and Family Life, COM(2008) 635 final.

¹⁴ G. James, 'Mothers and Fathers as Parents and Workers: Family-Friendly Employment Policies in an Era of Shifting Identities' (2009) 31(3) *Journal of Social Welfare & Family Law* 271-283.

¹⁵ Case C-85/96 *Martínez Sala v. Freistaat Bayern* [1998] ECR I-2691.

¹⁶ A. Masselot, E. Caracciolo di Torella, and S. Burri, *Thematic Report of the European Network of Legal Experts in the Field of Gender Equality "Fighting Discrimination on the Grounds of Pregnancy, Maternity and Parenthood: The Application of EU and National Law in Practice in 33 European Countries"* (Publication of the European Commission 2012).

¹⁷ *Ibid.*

¹⁸ C. McGlynn, 'Ideologies of Motherhood in European Community Sex Discrimination' (2000) 6 *European Law Journal* 29-44; W. Chan, 'Mothers, Equality and Labour Market Opportunities' (2013) 42(3) *Industrial Law Journal* 224-228; R. Guerrina, 'Equality, Difference and Motherhood: The Case for a Feminist Analysis of Equal Rights and Maternity Legislation' (2001) 10(1) *Journal of Gender Studies* 33-42.

Moreover, it is further contended that the EU already has a solid basis to devise a clear and cohesive legal framework to protect parents and carers of children. The existing EU general principles and values - such as gender equality and dignity - can provide support to the childcare strategy, which should also be guided by the ethics of care and the capability approach.¹⁹

Against this background, this chapter explores how the EU has developed existing legal instruments to address the position of parents and carers of children with a view to propose a way forward for such carers in the EU. The chapter, which explores the increasing scope of the personal and the material rights of parents and carers of children, is organised in three main parts. The first section discusses the development of the non-discriminatory principle and how this has been applied to parents and carers of children. The second section moves on to consider the application of the EU work-life balance legal framework to parents and carers of children. It further considers the legal framework of part-time work and working time in the EU. The final section examines the Court of Justice's decisions on the work done by parents and carers of children. In light of this discussion, some conclusions are drawn to argue for a rethinking of the traditional EU normative framework in the area of childcare with a view to proposing a way forward for parents and carers of children.

Section 1: Parents, Carers of Children and the Non-Discrimination Provisions

The fight against gender inequality has traditionally been acknowledged as one of the EU's central missions.²⁰ Parents and people who have care responsibilities for children are disproportionately represented by women.²¹ These individuals often find themselves in a different and unfavourable position in the labour market compared to people who have no caring obligations. Individuals who have caring responsibilities for children have, on average, a lower employment rate than the rest of the population.²² When they are engaged in

¹⁹ See Chapter 2.

²⁰ M. Bell, 'The Principle of Equal Treatment: Widening and Deepening' in P. Craig and G. de Búrca (eds) *The Evolution of EU Law* (Oxford University Press 2012) 611-939.

²¹ N. Gerstel, 'The Third Shift: Gender and Care Work Outside the Home' (2000) 23(4) *Qualitative Sociology* 467-483; C. Ungerson, 'Thinking about the Production and Consumption of Long-Term Care in Britain: Does Gender Still Matter?' (2000) 29(4) *Journal of Social Policy* 623-643; F. Bettio and J. Plantenga, 'Comparing Care Regimes in Europe' (2004) 10(1) *Feminist Economics* 85-113.

²² S. Cunningham-Burley, K. Backett-Milburn, and D. Kemmer, 'Constructing Health and Sickness in the Context of Motherhood and Paid Work' (2006) 28(6) *Sociology of Health & Illness* 385-409; European

economic activities, parents and carers of children might not be able to work the same hours as someone who is free from care, thus, often they do so on a non-traditional basis. In other words, carers, who have to meet their care responsibilities, are more likely than other individuals without care obligations to enter contracts of employment which are non-standard and therefore frequently precarious.²³ Such work is typically characterised by poor pay, limited legal protection and job insecurity.²⁴ An increasing proportion of workers with care responsibilities end up in such precarious work.²⁵ Legal protections, rooted in industrial modes of production, and based on an outdated male breadwinner/female caregiver social norm,²⁶ are increasingly inadequate²⁷ to guarantee labour rights to such workers. Even when such rights are relevant, they are under-enforced.²⁸ Neo-liberal reform, focused on Gross Domestic Product, de-unionisation and the deregulation of labour standards have moreover contributed to the increase of precarious work.²⁹ Work-family reconciliation measures have largely targeted elite women's needs and not those at the margins of the workforce.³⁰ Thus parents and those who care for children are often not protected by the few rights that do exist.

Commission, *Report on Progress on Equality Between Women and Men in 2010: The Gender Balance in Business Leadership* (Publications Office of the European Union 2011).

²³ D. Hofäcker and S. König, 'Flexibility and Work-Life Conflict in Time of Crisis: A Gender Perspective' (2013) 33(9) *International Journal of Sociology and Social Policy* 613-635; L. Fursman and N. Zodgekar, 'Making It Work: The Impacts of Flexible Working Arrangements on New Zealand Families' (2009) 35 *Social Policy Journal of New Zealand* 43-54; F. Colombo, A. Mercier, and F. Tjadens, *Help Wanted? Providing and Paying for Long-Term Care* (OECD publishing 2011).

²⁴ J. Fudge and R. Owens (eds) *Precarious Work, Women, and the New Economy: The Challenge to Legal Norms* (Hart Publishing 2006); N. Kountouris, 'The Legal Determinants of Precariousness in Personal Work Relations: A European Perspective' (2012) 34 *Comparative Labour Law and Policy Journal* 21-46.

²⁵ M. Lilly, A. Laporte, and P. Coyte, 'Labor Market Work and Home Care's Unpaid Caregivers: A Systematic Review of Labor Force Participation Rates, Predictors of Labor Market Withdrawal and Hours of Work' (2007) 85(4) *Milbank Quarterly* 641-690.

²⁶ S. Bornstein, 'Work, Family, and Discrimination at the Bottom of the Ladder' (2012) 19(1) *Georgetown Journal on Poverty Law and Policy* 1-42; R. Crompton, *Employment and the Family: The Reconfiguration of Work and Family Life in Contemporary Societies* (Cambridge University Press 2006).

²⁷ L. Vosko, *Managing the Margins* (Oxford University Press 2010); M. Forstater, 'Working for a Better World: Cataloguing Arguments for the Right to Employment' (2015) 41(1) *Philosophy and Social Criticism* 61-67; E. Caracciolo Di Torella and A. Masselot, 'Work and Family Life Balance in the EU Law and Policy 40 Years On: Still Balancing, Still Struggling' (2013) 2 *European Gender Equality Law Review* 6-14; A. Masselot, 'The Rights and Realities of Balancing Work and Family Life in New Zealand' in N. Busby and G. James (eds) *Families, Care-Giving and Paid Work: Challenging Labour Law in the 21st Century* (Edward Elgar 2010).

²⁸ L. Vosko, M. MacDonald and I. Campbell (eds), *Gender and the Contours of Precarious Employment* (Routledge 2010); A. Kalleberg, 'Nonstandard Employment Relations: Part-Time, Temporary and Contract Work' (2000) 26 *Annual Review of Sociology* 341-365; A. Kalleberg, 'Precarious Work, Insecure Workers: Employment Relations in Transition' (2009) 74(1) *American Sociological Review* 1-22.

²⁹ M. Quinlan, 'The 'Pre-Invention' of Precarious Employment: The Changing World of Work in Context' (2012) 23(4) *The Economic and Labour Relations Review* 3-24.

³⁰ E. Caracciolo di Torella and A. Masselot, *Reconciling Work and Family Life in EU Law and Policy* (Palgrave Macmillan 2010); J. Williams and H. Boushey, *The Three Faces of Work-Family Conflict: The Poor, The Professionals and The Missing Middle* (Center for American Progress and Work Life Law) < <https://cdn.americanprogress.org/wp-content/uploads/issues/2010/01/pdf/threefaces.pdf> > accessed on 19 February 2016.

Individuals with caring responsibilities for children are also more likely to face discrimination and unfair treatment within the labour market. They might, for instance, be denied access to a job because of their care commitments. The European Commission notes that “women’s activity rate is still 16.4% below that of men, reflecting persistent gender divisions in household responsibilities”.³¹ Employers generally value reliable, timely and consistent workers: the so-called “unencumbered worker”.³² Employers have been known to refuse employment as result of pregnancy,³³ of childcare related obligations³⁴ or even on the basis of the perception that a candidate might potentially in the future have care responsibilities.³⁵ Indeed, statistical discrimination, the economic theory of racial or gender inequalities based on stereotypes, is well documented.³⁶ It is not rare for young women to be refused employment (especially, but not exclusively, in the private sector)³⁷ for instance, based on the assumption that they are likely to become mothers and that with new caring responsibilities, they will leave their job or be less committed to their professional career.³⁸ In other words, there is a perception that young women need less investment in their careers than young men because childbearing is likely to take them out of the labour force. Maternity leave and parental leave breaks also impact negatively on women who find it difficult to build up a career profile³⁹ as their skills are depreciated.⁴⁰ In other words, individuals with

³¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Towards Social Investment for Growth and Cohesion – including implementing the European Social Fund 2014-2020, 20 February 2013, COM(2013) 83, 7.

³² G. James, *The Legal Regulation of Pregnancy and Maternity in the Labour Market* (Routledge-Cavendish 2008), 17-18; G. James, ‘Law’s Response to Pregnancy/Workplace Conflicts: A Critique’ (2007) 15(2) *Feminist Legal Studies* 167-188; M. Daly, ‘What Adult Worker Model? A Critical Look at Recent Social Policy Reform in Europe from a Gender and Family Perspective’ (2011) 18(1) *Social Politics: International Studies in Gender, State & Society* 1-23.

³³ Case C-32/93 *Carole Louise Webb v EMO Air Cargo (UK) Ltd.* [1994] ECR I-3567.

³⁴ Case C-303/06 *Coleman v Attridge Law* [2008] ECR I-5603.

³⁵ E. Caracciolo Di Torella and A. Masselot, ‘Work and Family Life Balance in the EU Law and Policy 40 Years On: Still Balancing, Still Struggling’ (2013) 2 *European Gender Equality Law Review* 6-14.

³⁶ W. Bielby and J. Baron, ‘Men and Women at Work: Sex Segregation and Statistical Discrimination’ (1986) 91(4) *American Journal of Sociology* 759-799; B. G. Dahlby, *Adverse Selection and Statistical Discrimination* (Springer 1992); A. Masselot, E. Caracciolo di Torella, and S. Burri, *Thematic Report of the European Network of Legal Experts in the Field of Gender Equality “Fighting Discrimination on the Grounds of Pregnancy, Maternity and Parenthood: The Application of EU and National Law in Practice in 33 European Countries”* (Publication of the European Commission 2012); W. Chan, ‘Mothers, Equality and Labour Market Opportunities’ (2013) 42(3) *Industrial Law Journal* 224-228.

³⁷ H. Mandel and M. Semyonov, ‘A Welfare State Paradox: State Interventions and Women’s Employment Opportunities in 22 Countries’ (2006) 111(6) *American Journal of Sociology* 1910-1949.

³⁸ A. Masselot, E. Caracciolo di Torella, and S. Burri, *Thematic Report of the European Network of Legal Experts in the Field of Gender Equality “Fighting Discrimination on the Grounds of Pregnancy, Maternity and Parenthood: The Application of EU and National Law in Practice in 33 European Countries”* (Publication of the European Commission 2012).

³⁹ K. Morgan and K. Zippel, ‘Paid to Care: The Origins and Effects of Care Leave Policies in Western Europe’ (2003) 10(1) *Social Politics: International Studies in Gender, State & Society* 49-85.

childcare responsibilities are, directly or indirectly, very likely to face discrimination in the labour market on the grounds of their childcare obligation or to be treated unfavourably because of that commitment (or the perception of it). In contrast, it is submitted here that:

“carers should have the same life chances as anyone else. The mere fact that they are providing care should not disentitle them to opportunities available to people who do not have caring responsibilities. To argue otherwise would be to suggest that it is legitimate to discriminate against carers in a way that would not be acceptable for any other group”.⁴¹

Whilst it has been suggested that government investment in childcare noticeably erodes the aforementioned disadvantages,⁴² the adoption of anti-discrimination and equality legal provisions guaranteeing the rights of those who care for children is important. The EU has, over the years, developed such a legal arsenal.⁴³ EU law prohibits discrimination on a number of exclusive restricted grounds (namely nationality, sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation).⁴⁴ However, EU law does not provide a protection ground for people discriminated on the basis of their childcare responsibility. Therefore, individuals who experience discrimination on such grounds can only be protected if they can establish a link between childcare and at least one protected ground under EU law.⁴⁵ For instance, as childcare is gendered it might be possible to claim that the contested issue is about gender discrimination.

⁴⁰ P. Edin and M. Gustavsson, ‘Time Out of Work and Skill Depreciation’ (2008) 61(2) *Industrial & Labor Relations Review* 163-180.

⁴¹ L. Clements, *Carers and the Law* (Carers UK 2008) 4.58.

⁴² This is particularly noticeable in the Scandinavian countries. P. Lindert, *Growing Public: Social Spending and Economic Growth Since the Eighteenth Century* Vol. 1 (Cambridge University Press 2004) 256.

⁴³ S. Prechal, ‘Equality of Treatment, Non-Discrimination and Social Policy: Achievements in Three Themes’ (2004) 41(2) *Common Market Law Review* 533-551; M. Bell, ‘The Principle of Equal Treatment: Widening and Deepening’ in P. Craig and G. de Búrca (eds) *The Evolution of EU Law* (Oxford University Press 2012) 611-939.

⁴⁴ Article 19 TFEU. Note that under the Article 14 of the European Convention of Human Rights, there are no restricted grounds of discrimination.

⁴⁵ Under EU law it is not possible to claim intersectional discrimination. See J. Bullock and A. Masselot, ‘Multiple Discrimination and Intersectional Disadvantages Challenges and Opportunities in the EU Legal Framework’ (2013) 19(1) *Columbia Journal of European Law* 55-80.

The Existing Prohibited Grounds of Discrimination under EU Law

The fight against discrimination has traditionally been part of the constitutional make-up of the EU Treaty.⁴⁶ In particular, combating sex discrimination and the promotion of gender equality are “the central missions and activities of the Union”.⁴⁷ Indeed, Article 2 of the Treaty on European Union (TEU) proclaims that equality is one of the values on which the Union is founded and has been confirmed as a constitutional fundamental right legally guaranteed by Article 23 of the EU Charter of Fundamental Rights.⁴⁸ Moreover, Articles 2 TEU and 157 TFEU place an emphasis on promoting equality rather than just prohibiting discrimination. This means that EU law supports equality of outcome which is a broader and more expansive concept than the more limiting formal equality. It is partially based on a redistributive justice model which suggests that measures have to be taken to rectify past discrimination, because to fail to do so would leave people and groups at different starting points. This is reinforced by Article 3 TEU which provides that the EU “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”.

EU law prohibits an exhaustive number of grounds of discrimination. The principle of gender equality and the prohibition of sex discrimination is one of the oldest and most sophisticated prohibited grounds of discrimination under EU law.⁴⁹ The prohibition of discrimination between women and men (in matters of paid employment) was originally introduced in Article 119 of the Treaty of the European Economic Community (EEC) with a view to correcting competition distortions between the Member States.⁵⁰ However, this Treaty provision was soon flooded with concerns for equality as a fundamental right.⁵¹ The concepts

⁴⁶ G. More, ‘The Principle of Equal Treatment: From Market Unifier to Fundamental Rights?’ in P. Craig and G. de Búrca (eds) *The Evolution of EC Law* (Oxford University Press 1999) 517-553.

⁴⁷ M. Bell, ‘The Principle of Equal Treatment: Widening and Deepening’ in P. Craig, G. de Búrca (eds) *The Evolution of EU Law* (Oxford University Press 2012) 611-939, 629.

⁴⁸ S. Koukoulis-Spiliotopoulos, ‘The Lisbon Treaty and the Charter of Fundamental Rights: Maintaining and Developing the *Aquis* in Gender Equality’ (2008) 1 *European Gender Equality Law Review* 15-24.

⁴⁹ C. Hoskyns, *Integrating Gender. Women, Law and Politics in the European Union* (Verso 1996).

⁵⁰ B. Ohlin, ‘Social Aspects of European Economic Co-operation: Report by a Group of Expert’ (1956) *International Labour Review* 102, 99; C. Barnard, ‘The Economic Objectives of Article 119’ in T. Hervey and D. O’Keeffe (eds) *Sex Equality in the European Union* (Wiley 1996) 321-334; R. Nielsen and E. Szyzcsak, *The Social Dimension of the European Union* (Handelshøjskolens Forlag 1997); W. Streeck, ‘From Market Making to State Building? Reflections on the Political Economy of the European Social Policy’ in S. Liebfried and P. Pierson (eds) *European Social Policy: Between Fragmentation and Integration* (Brookings 1995) 389-430; however, C. Hoskyns, *Integrating Gender. Women, Law and Politics in the European Union* (Verso 1996) suggests that non-economic factors also contributed to the inclusion of Article 119.

⁵¹ See fn48.

of gender equality and non-discrimination on the grounds of sex were considerably strengthened by the Treaty of Amsterdam in 1999⁵² and, a decade later, subsequently by the Treaty of Lisbon.⁵³ Today's Article 157 TFEU includes a wide understanding of gender equality, including specific reference to positive action. Article 157(4) TFEU allows Member States to maintain or adopt measures "providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers". Such provision could potentially be used to accommodate female workers with childcare responsibilities, for example, by providing subsidised places in a nursery⁵⁴ or by excusing women with childcare responsibilities from working unsociable hours. In addition, gender equality is pervasive. The so-called obligation of "gender mainstreaming"⁵⁵ - introduced in Article 8 TFEU - provides that "in all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women".⁵⁶

Further, a comprehensive set of secondary legislation on gender equality was adopted and has expanded the scope of gender equality⁵⁷ from the realm of pay to the areas of equal treatment

⁵² S. Langrish, 'The Treaty of Amsterdam: Selected Highlights' (1998) 23 *European Law Review* 3-19; J. Lewis, 'Work/Family Reconciliation, Equal Opportunities and Social Policies: The Interpretation of Policy Trajectories at the EU Level and the Meaning of Gender Equality' (2006) 13(3) *Journal of Public Policy* 420-437; E. Defeis, 'Treaty of Amsterdam: The Next Step towards Gender Equality' (1999) 23 *The Boston College International and Comparative Law Review* 1-34.

⁵³ E. Ellis, 'The Impact of the Lisbon Treaty on Gender Equality' (2010) 1 *European Gender Equality Law Review* 7-13.

⁵⁴ See for example Case C-476/99 *Lommers v Minister van Landbouw Natuurbeheer en Visserij* [2002] ECR-2891.

⁵⁵ M. Pollack and E. Hafner-Burton, 'Mainstreaming Gender in the European Union' (2000) 7(3) *Journal of European Public Policy* 432-456.

⁵⁶ See M. Stratigaki, 'Gender Mainstreaming vs Positive Action: An Ongoing Conflict in EU Gender Equality Policy' (2005) 12(2) *European Journal of Women's Studies* 165-186; J. Rubery, 'Gender Mainstreaming and Gender Equality in the EU: The Impact of the EU Employment Strategy' (2002) 33(5) *Industrial Relations Journal* 500-522; M. Garcia and A. Masselot, 'The Value of Gender Equality in the EU-Asian Trade Policy: An Assessment of the EU's Ability to Implement its Own Legal Obligations' in A. Björkdahl, N. Chaban, J. Leslie and A. Masselot (eds) *Importing EU Norms? Conceptual Framework and Empirical Findings* (Springer 2015) 191-209.

⁵⁷ The Recast Directive (Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ [2006] L204/23) incorporates and updates several existing Directives: the Equal Pay Directive 75/117/EEC (Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, OJ [1975] L45/19), the Equal Treatment Directive 76/207/EEC (Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ [1976] L39/40) as amended by Directive 2002/73/EC (Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ [2002] L269/15), the Occupational Social Security Directive 86/378/EEC (Directive 86/613/EEC of 11

in work conditions and in social security as well as to the protection of pregnant workers.⁵⁸ The EU gender equality principle has also served to inform and support policies on reconciliation between work and family life,⁵⁹ positive actions⁶⁰ and gender mainstreaming.⁶¹

The contribution of European Court of Justice has moreover been pivotal to the development of sex discrimination and gender equality.⁶² In particular, the Court has introduced the crucial distinction between direct and indirect discrimination.⁶³ Direct discrimination is a straightforward concept: it occurs when two individuals are treated differently because of their sex. In contrast, indirect discrimination - which has been described as “the greatest achievement of the [Court of Justice] in its corpus of sex equality... jurisprudence”⁶⁴ - is a more complex concept. Article 2 of the Recast Directive 2006/54/EC defines indirect discrimination as:

December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood, OJ [1986] L359/56) as amended by Directive 96/97/EC (Council Directive 96/97/EC of 20 December 1996 amending Directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes, OJ [1997] L46/20) and the Burden of Proof Directive 97/80/EC (Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex, OJ [1998] L14/6). See also: N. Burrows and M. Robison, ‘An Assessment of the Recast of Community Equality Laws’ (2007) 13(2) *European Law Review* 186-203; A. Masselot, ‘The New Equal Treatment Directive: Plus Ça Change...’ (2004) 12(1) *Feminist Legal Studies* 93-104; A. Masselot, ‘The State of Gender Equality Law in the European Union’ (2007) 13(2) *European Law Journal* 152-168; C. Barnard, ‘The Economic Objectives of Article 119’ in T. Hervey and D. O’Keeffe (eds) *Sex Equality in the European Union* (Wiley 1996) 321-334.

⁵⁸ 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] L348/1. See: E. Caracciolo di Torella and A. Masselot, ‘The ECJ Case Law on Issues Related to Pregnancy, Maternity and the Organisation of Family Life: An Attempt at Classification’ (2001) 26 *European Law Review* 239-260.

⁵⁹ AFEM (ed), *Concilier Vie Familiale et Vie Professionnelle Pour les Femmes et les Hommes : Du Droit A la Pratique* (Sakkoulas/Bruylant 2005); S. Burri, ‘Reconciliation of Work and Private Life in EU Law: State of Affaire’ (2010) 11(1) *ERA Forum* 111-127; E. Caracciolo di Torella and A. Masselot, *Reconciling Work and Family Life in EU Law and Policy* (Palgrave Macmillan 2010).

⁶⁰ M. Stratigaki, ‘Gender Mainstreaming vs Positive Action: An Ongoing Conflict in EU Gender Equality Policy’ (2005) 12(2) *European Journal of Women’s Studies* 165-186. See also A. Masselot and A. Maymont, ‘Gendering Economic and Financial Governance Through Positive Action Measures: Compatibility of the French Real Equality Measure under the European Union Framework’ (2015) 22(1) *Maastricht Journal of European and Comparative Law* 57-80.

⁶¹ M. Pollack and E. Hafner-Burton, ‘Mainstreaming Gender in the European Union’ (2000) 7(3) *Journal of European Public Policy* 432-456; J. Rubery, ‘Reflections on Gender Mainstreaming: An Example of Feminist Economics in Action?’ (2005) 11(3) *Feminist Economics* 1-26.

⁶² S. Krebber, ‘The Social Rights Approach of the European Court of Justice to Enforce European Employment Law’ (2006) 27 *Comparative Labor Law and Policy Journal* 377-403.

⁶³ See Case 43/75 *Defrenne v Société Anonyme Belge de Navigation Aérienne Sabena (Defrenne no 2)* [1976] ECR 455, in particular at paragraph 10. For a more recent analysis of the difference between direct and indirect discrimination see Case C-73/08 *Bressol v Gouvernement de la Communauté Française*, Opinion of A.G. Sharpston delivered on 25 June 2009 ECLI:EU:C:2009:396 paragraphs 43–57.

⁶⁴ C. Kilpatrick, ‘Community or Communities of Courts in European Integration? Sex Equality Dialogues Between UK Courts and the ECJ’ (1998) 4(2) *European Law Journal* 121–147, 141.

“... an apparently neutral provision, criterion or practice [that] 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”.

Whilst justification for direct discrimination “is conceivable only in limited circumstances and has to be carefully reasoned,”⁶⁵ indirect discrimination can be justified if it is objectively warranted by a legitimate aim. The means for achieving such an aim must be appropriate and necessary.⁶⁶ The concept of indirect sex discrimination is particularly useful for people who have childcare obligations. It contains elements of substantive equality as it recognises the existence of social and material structural differences between people. In doing so, it seeks to promote equality *de facto* as opposed to equality in form.

Furthermore the Court has also made it clear in several instances - though most notably in its decision in *Hill*⁶⁷ - that the principle of reconciliation between work and family life is a corollary of the principle of equality. Linking the principle of gender equality to reconciliation goes some way to incorporating care into that principle.⁶⁸

Thus, the principle of gender equality can prove a useful starting point: women are more likely than men to be spending time caring for children, therefore are more likely to be discriminated against because of their childcare commitments. An employer might, for instance, refuse employment to a woman who might not be available on a traditional 9-5 basis because she needs to pick up children from school at 3pm. This could arguably constitute a form of sex discrimination which although not *prima facie* directly discriminatory (the refusal to employ such individual is not based on sex), could be indirect

⁶⁵ Case C-236/09 *Test-Achats*, Opinion of AG Kokott delivered on 30 September 2010 ECLI:EU:C:2010:564.

⁶⁶ Case 170/84 *Bilka Kaufhaus GmbH v Heber von Hartz* [1989] ECR 1607.

⁶⁷ Case C-243/95 *Kathleen Hill and Ann Stapleton v the Revenue Commission and the Department of Finance* [1998] ECR I-3739 para. 42: the Court held that “Community policy in this area is to encourage and, if possible, adapt working conditions to family responsibilities. Protection of women within family life and in the course of their professional activities is, in the same way as for men, a principle which is widely regarded in the legal systems of the Member States as being the natural corollary of the equality between men and women, and which is recognised by Community law.” See also Case C-1/95 *Hellen Gerster v Freistaat Bayern* [1997] ECR I-5253.

⁶⁸ It has already been outlined that childcare is one of the main components of reconciliation between work and family life. See also E. Caracciolo di Torella and A. Masselot, *Reconciling Work and Family Life in EU Law and Policy* (Palgrave Macmillan 2010).

discrimination on the grounds of sex.⁶⁹ Many women might be able to argue that such behaviour is indirect sex discrimination because a neutral criterion (the school timetable in this instance) is likely to have a harsher impact on their gender since they are more likely to care for children. Yet to rely exclusively on the discrimination on grounds of sex overlooks the fact that childcare is not (or should not be) an inherent risk for either sex: people who care for children are not always women. Men with childcare obligations would find little protection if relying exclusively on the EU gender equality principle. In addition, to provide protection only to women with childcare responsibilities is not only wrong as it ignores the disadvantages that men might endure, it also perpetuates the stereotype that childcare is a woman's job.⁷⁰

The EU anti-discrimination legal framework was completed by the insertion of Article 13 EC (now Article 19 TFEU) into the Amsterdam Treaty in 1997. This provision grants the legislator the power to address a variety of forms of discrimination, albeit exhaustive, beyond the strict confines of the workplace:

“...without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation”.

The Treaty provision was also completed with the adoption of secondary legislation. The Race Directive⁷¹ and the Framework Directive⁷² are likely to become useful in the context of childcare discrimination. People are likely to need care and/or provide childcare because of their age (often because they are very young) or in connection with a disability. The

⁶⁹ The employer might have an objective justification for that job to be set during specific hours. See for instance *London Underground Limited v Edwards* [1998] EWCA Civ 876.

⁷⁰ Case C-366/99 *Joseph Griesmar v Ministre de l'Économie, des Finances et de l'Industrie, Ministre de la Fonction publique, de la Réforme de l'État et de la Décentralisation* [2001] ECR I-9383; and more recently case C-173/13 *Maurice Leone, Blandine Leone v Garde des Sceaux, Ministre de la Justice, and Caisse nationale de retraites des agents des collectivités locales*, Nyp ECLI:EU:C:2014:2090.

⁷¹ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ [2000] L180/22.

⁷² Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ [2000] L 303/16.

provisions under these two directives could therefore offer a potential avenue for people who care for children to fight discrimination.

Although Article 19 TFEU considerably extends the grounds for discrimination, it does not address discrimination on grounds of care. Unfortunately, the Court of Justice has confirmed that the list of prohibited grounds under Article 19 TFEU is exhaustive.⁷³ Thus, apart from the grounds expressly mentioned, “there is no clear, logical scheme to identify those grounds that are for discrimination that are morally reprehensible to be categorised as unlawful”.⁷⁴

Discrimination by Association

Despite this setback, the Court has also made a valuable contribution in attempting to broaden the scope of application of the existing grounds of discrimination by introducing the concept of discrimination by association. In Case C-303/06 *Coleman v Attridge Law*,⁷⁵ the Court considered whether anti-discrimination law could cover more than people who are disabled (or have a particular sex, race, religion, belief and age) and include individuals who suffer discrimination because they are related or connected to or care for disabled people. In the case, Mrs Coleman, a legal secretary, was the primary carer of her disabled son who needed specialised care. She was forced to resign after being harassed by her employer and being refused flexible working arrangements, which were offered to her colleagues who did not have disabled children. Early in 2008, Advocate General Maduro had delivered an opinion in this case in which he supported an inclusive approach to disability discrimination under the Framework Directive.⁷⁶ Citing Dworkin,⁷⁷ Raz⁷⁸ and Gardner,⁷⁹ he argued that discrimination law should combat all forms of discrimination, including those connected to protected groups of people, and that discrimination by association:

⁷³ Case C-13/05 *Chacón Navas v Eurest Colectividades SA* [2006] ECR I-6467.

⁷⁴ C. O'Brien, 'Confronting the Care Penalty: The Cause for Extending Reasonable Adjustment Rights along the Disability/Care Continuum' (2012) 34 *Journal of Social Welfare and Family Law* 5-30, 9.

⁷⁵ Case C-303/06 *Coleman v Attridge Law* [2008] ECR I-5603.

⁷⁶ Case C-303/06 *Coleman v Attridge Law*, Opinion of Advocate general Maduro delivered on 31 January 2008, ECLI:EU:C:2008:61, as noted by T. Connor, 'Discrimination by Association: A Step in the Right Direction' (2010) 32(1) *Journal of Social Welfare and Family Law* 59-69. See also S. Honeyball, 'Discrimination by Association', (2007) 4 *Web Journal of Current Legal Issues*, < <https://ore.exeter.ac.uk/repository/bitstream/handle/10036/15933/honeyball4.pdf?sequence=2&isAllowed=y> > accessed on 03 June 2016; J. Herring, *Caring and the Law* (Hart Publishing 2013) 240.

⁷⁷ R. Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate* (Princeton University Press 2006) Chapter 1.

⁷⁸ J. Raz, *The Morality of Freedom* (Oxford University Press 1986).

⁷⁹ J. Gardner, 'Discrimination as Injustice' (1996) 16 *Oxford Journal of Legal Studies* 353-368, 355.

“...undermines the ability of persons who have a suspect characteristic to exercise their autonomy....People belonging to certain groups are often more vulnerable than the average person, so they have come to rely on individuals with whom they are closely associated for help in their effort to lead a life according to the fundamental choices they have made. When the discriminator deprives an individual of valuable options in areas which are of fundamental importance to our lives because that individual is associated with a person having a suspect characteristic then it also deprives that person of valuable options and prevents him from exercising this autonomy”.⁸⁰

The Court followed the Advocate General’s opinion and recognised that, in order to be effective, the protections against discrimination must extend not only to those having “suspect characteristics” themselves, but also to those who are associated with them and this may include their carers.⁸¹ This is a significant judgment which could help care givers combat unfavourable treatment and discrimination because of their caring commitment.⁸² Even though the decision does not address directly the issue of discrimination on grounds of caring, it provides guidance as to the treatment of carers. There is a clear connection between the need for care and the specific characteristics encapsulated in Article 19 TFEU (such as their age (they are either very young or old) or because of a disability). However, in order to unveil its full potential, the principle of discrimination by association requires further development.

An opportunity for such development arose in 2012 when the case of *Kulikauskas* was referred to the Court of Justice of the EU.⁸³ The case raised the interesting question of whether a man can bring a sex discrimination claim on the basis that he has been discriminated against on the grounds of his association with a pregnant woman. Mr Kulikauskas and his partner Alisa Mihailova were employed in a fish factory in the UK. A

⁸⁰ Case C-303/06 *Coleman v Attridge Law*, Opinion of Advocate General Maduro delivered on 31 January 2008, ECLI:EU:C:2008:61, para. 14.

⁸¹ Case C-303/06, *Coleman v Attridge Law and Steve Law*, para. 38. See more recently, *Truman v Bibby Distribution Ltd* ET/2404176/2014 where an employee with caring responsibilities who was performing satisfactorily was suddenly dismissed.

⁸² Hervey T., M. Reeves, H. Rodgers, B. Riding and T. Robert, Case C-303/06 *Coleman v. Attridge Law and Steve Law Judgment of the ECJ 17 July 2008* (2009) 31(3) *Journal of Social Welfare and Family Law* 309-319; see also M. Pilgerstorfer and S. Forshaw, ‘Transferred Discrimination in European Law’ (2008) 37 *Industrial Law Journal* 384-393.

⁸³ C-44/12 *Kulikauskas*, application: OJ [2012] C109/6.

supervisor noticed that Mr Kulikauskas was doing Ms Mihailova's heavy lifting. Mr Kulikauskas informed the supervisor that his partner was pregnant. On the same day, both workers received letters of dismissal for poor performance. Both brought unfair dismissal and sex discrimination claims. Mr Kulikauskas argued that following *Coleman*,⁸⁴ the Recast Directive⁸⁵ should be interpreted in a way as to provide protection for fathers and others associated with pregnant women. The Employment Tribunal rejected this argument because it stated that protection against discrimination on grounds of pregnancy under EU law is based on health and safety concerns for the "biological condition" of the pregnant women and her foetus. Thus it stated that there were no wider policy reasons to extend this protection to those associated with pregnant women. Accordingly, pregnancy and maternity are not covered by "associative discrimination" and the Employment Tribunal refused to accept Mr Kulikauskas' claim. The refusal was appealed to the Employment Appeal Tribunal (EAT) which upheld the Tribunal's decision.⁸⁶ The case was appealed further to the Court of Session who decided that a reference would be made to the CJEU on the question of whether the Recast Directive renders it unlawful to directly discriminate against a person on grounds of another person's pregnancy. Unfortunately, before the Court of Justice could consider the question, the case was withdrawn from the registry.⁸⁷

Another opportunity was raised in a different British case: *Hainsworth v Ministry of Defence*.⁸⁸ The claimant alleged associative discrimination on the grounds of her daughter's disability and a failure to make reasonable adjustments. The claimant's daughter had Down's Syndrome and further education could not appropriately be provided in Germany where the claimant worked and would have been facilitated had the claimant been permitted to move her place of work. The Tribunal rejected the argument that Article 5 of Directive 2000/78 extended to persons who were not in a relationship with the employer. Moreover it argued that Article 5 was insufficiently clear and precise in its language.⁸⁹ On appeal, the domestic court reiterated that EU law does not require employers to provide reasonable accommodation for employees who are not themselves disabled but who care for a disabled

⁸⁴ Case C-303/06 *Coleman v Attridge Law* [2008] ECR I-5603.

⁸⁵ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ [2006] L204/23.

⁸⁶ *Kulikauskas v Macduff Shellfish* [2011] ICR 48.

⁸⁷ C-44/12 *Kulikauskas*, removal from the register: OJ [2013] C108/18.

⁸⁸ *Hainsworth v Ministry of Defence* UKEATPA/0227/13/GE.

⁸⁹ *Ibid.*

person.⁹⁰ The domestic court made a strict interpretation of the *Coleman* case and confirmed that employees cannot take a claim against their employers for a failure to make reasonable adjustments in relation to a person for whom the employee has caring responsibilities. *Hainsworth v Ministry of Defence* can be distinguished from *Coleman* in the sense that the claimant was not claiming discrimination but only that his employer failed in making reasonable adjustment. It is worth noting, however, that an employee with caring responsibilities would still be entitled to make an application for flexible working arrangements. The employer would be obliged to carefully consider the request yet would have no obligation to grant it.

The disappointing development surrounding the concept of discrimination by association at the national level does not, however, reflect the lack of interest for this concept at the EU level. Since *Coleman*, the CJEU has had little chance to expand and/or explain this concept any further because few questions on this issue have been referred by national Courts. In reality, when given the opportunity, the CJEU has further explored the concept of discrimination by association. In the case of *CHEZ Razpredelenie Bulgaria*,⁹¹ the CJEU suggested that the concept of discrimination by association can apply not only to direct discrimination, as in *Coleman*, but also to indirect discrimination. The importance of this judgment cannot be underestimated.⁹² In *CHEZ Razpredelenie Bulgaria*, the claimant ran a shop in a particular district of Bulgaria, most of whose inhabitants (although not the claimant) were of Roma origin. In this district, and in other areas populated by Roma, the electricity supplier had decided to install meters six metres higher from the ground than it did in other areas, to prevent tampering. This made it difficult for those, like the claimant, who lived or ran businesses in the district, to monitor their electricity usage and check that they were not being overcharged. The claimant brought a claim alleging that the electricity supplier's actions were direct or indirect race discrimination. The case showed strong grounds for asserting that the electricity supplier's action in fact amounted to *direct* discrimination. In particular, the company had only applied its six-metre policy in this and other "Roma districts". This was the principal factor in applying the policy and it was clear that the company thought it was mainly Roma people who were making unlawful connections. At the same time, it had failed to produce evidence of the alleged damage and tampering and had

⁹⁰ *Hainsworth v Ministry of Defence* [2014] EWCA Civ 763.

⁹¹ C-83/14 *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia* [2015] ECR I-480.

⁹² R. Grozev, 'A Landmark Judgment of the Court of Justice of the EU: New Conceptual Contributions to the Legal Combat Against Ethnic Discrimination' (2015) 15 *The Equal Rights Review* 168-187.

apparently carried out no objective analysis of the extent of the problem in the various districts to which it supplied electricity. Accordingly, there were quite strong indications that the company's approach was tainted by racial stereotyping, which would normally indicate direct discrimination. Therefore unsurprisingly, the CJEU ruled that the claimant could complain of direct race discrimination even though the less favourable treatment did not come about because of his/her own ethnic origins. In addition, the CJEU also stated that had this been a case of indirect discrimination, the claimant could have brought a valid complaint, notwithstanding the fact that she did not share the same ethnic origins of those who were particularly disadvantaged by the practice. This part of the CJEU's decision suggests that once discrimination is established on a protected ground, anyone who suffers that same disadvantage can bring a claim of indirect discrimination regardless of whether or they share the same protected characteristic of the disadvantaged group.

The Court ruled that Directive 2000/43/EC extends to persons who, although not themselves a member of the racial or ethnic group concerned, nevertheless suffer "less favourable treatment" (direct discrimination) or a "particular disadvantage" (indirect discrimination) on the grounds of that race or ethnic origin. The CJEU observed that the wording of the directive permits this wide interpretation as it defines indirect discrimination as occurring where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons (unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary). There is nothing in this wording stating that a victim of indirect discrimination must share the race or ethnic origin of the protected group.

While *CHEZ Razpredelenie Bulgaria* was concerned with Directive 2000/43/EC, a very similar definition of indirect discrimination is used in the other EU equality directives. As such, it is very likely that the CJEU's judgment can apply in relation to other protected characteristics. This broad approach has the potential to extend the reach of indirect discrimination law in areas covered by EU law. For instance, the unfavourable treatment of part-time work could lead to claims of indirect discrimination from female employees on the basis that such a practice disadvantages women in particular because they are more likely to have primary caring responsibilities that make it more difficult to work full-time. The reasoning in *CHEZ Razpredelenie Bulgaria* suggests that male employees with caring responsibilities could also bring claims of indirect discrimination without needing to show

that men, as a group, are put at a particular disadvantage. It is therefore likely that the CJEU is far from finished in addressing the issue of discrimination by association. This represents a real potential legal instrument that can be used by people who face discrimination based on their childcare obligation.

Section 2: Childcare and the Work-Family Reconciliation Strategy

The rights of parents and those who care for children have further been enhanced by measures designed to reconcile work and family life. These measures are employment law based and are typically available to working parents who fulfil certain conditions in terms of employment status or length of service.⁹³ The EU has, over recent years, developed a broad strategy on work-family reconciliation where the relevant provisions have been articulated around two main employment areas relating to leave and time.⁹⁴ This strategy has gained further momentum upon the adoption of the Charter of Fundamental Rights, which has elevated reconciliation of work and family life to a fully fledged fundamental right.⁹⁵ This section considers in turn the leave and the time provisions under EU law with a view to assessing their ability to enhance rights for parents and those who care for children.

The Leave Provisions

The Leave provisions⁹⁶ allow parents to take time off in connection with the birth or the adoption of a child. These legal provisions include the Pregnant Workers⁹⁷ and the Parental

⁹³ See *inter alia*, R. Crompton, S. Lewis and C. Lyonette (eds), *Women, Men, Work and Family in Europe* (Palgrave Macmillan 2007); J. Lewis, *Work-Family Balance, Gender and Policy* (Edward Elgar 2009).

⁹⁴ E. Caracciolo di Torella and A. Masselot, *Reconciling Work and Family Life in EU Law and Policy* (Palgrave Macmillan 2010).

⁹⁵ Article 33(2) of the Charter of Fundamental Rights of the EU states that “[t]o 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” (emphasis added). See further C. Costello, ‘Family and Professional Life’ in S. Peers, T. Hervey, J. Kenner and A. Ward (eds) *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014) 891-925; M. Barbera, ‘The Unsolved Conflict: Reshaping Family Work and Market Work in the EU Legal Order’ in T. Hervey and J. Kenner (eds) *Economic and Social Rights under the EU Charter of Fundamental Rights: A Legal Perspective* (Hart Publishing 2003) 139-160.

⁹⁶ For a full assessment of the leave provisions in the context of work-life reconciliation, see E. Caracciolo di Torella and A. Masselot, *Reconciling Work and Family Life in EU Law and Policy* (Palgrave Macmillan 2010) Chapter 2.

⁹⁷ 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] L348/1.

Leave⁹⁸ Directives, which grant time off to mothers (in the case of the Pregnant Workers Directive) and to both parents (in the case of the Parental Leave Directive) in order to care for newborns and young children. Article 8 of Directive 92/85/EEC provide for a minimum of 14 weeks maternity leave and Clause 2 of the Framework Agreement attached to Directive 2010/18/EU entitles men and women workers to an individual right of a minimum period of four months 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. The Parental Leave Directive goes further by providing the right to take time off in case of *force majeure* which can apply to any family members and/or dependents. This right is available to workers “on grounds of force majeure for urgent family reasons in cases of sickness or accident making the immediate presence of the worker indispensable”.⁹⁹ However while this may be of valuable assistance in emergencies, it is clearly not a useful right in relation to meeting on-going needs of childcare.

These rights to periods of leave, as set out in these two directives, are deeply gendered¹⁰⁰ and fail to provide adequate or genuine choices for parents and those who care for children.¹⁰¹ The right to pregnancy and maternity leave is addressed exclusively to women on the basis of health and safety and the right for the mother to bond with her newborn.¹⁰² When leave is offered to both parents in the case of parental rights, the leave is unpaid. This means that because of the gender pay gap and general gender bias,¹⁰³ mostly women take parental leave.¹⁰⁴ Paternity leave is not protected *per se* under EU law as fathers are not entitled to leave under EU law. Article 16 of the Recast Directive only provides that fathers taking paternity leave can be protected under the same circumstances as mothers taking maternity leave if the leave for fathers exists under domestic law.

⁹⁸ Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC (Text with EEA relevance) OJ [2010] L68/13.

⁹⁹ Clause 7 of the Framework Agreement attached to Directive 2010/18/EU.

¹⁰⁰ S. Hadj-Ayed and A. Masselot, ‘Reconciliation between Work and Family Life in the EU: Reshaping Gendered Structures?’ (2004) 26(3) *Journal of Social Welfare and Family Law* 325-338; L. Haas, ‘Parental Leave and Gender Equality: Lessons from the European Union’ (2003) 20(1) *Review of Policy Research* 89-114.

¹⁰¹ See further, E. Caracciolo di Torella, ‘New Labour, New Dads: The Impact of Family Friendly Legislation on Fathers’ (2007) 36 *Industrial Law Journal* 339-350.

¹⁰² Case 184/83 *Ulrich Hofman v Barmer Ersatzkasse* [1984] ECR 3047.

¹⁰³ A. Masselot, E. Caracciolo di Torella, and S. Burri, *Thematic Report of the European Network of Legal Experts in the Field of Gender Equality “Fighting Discrimination on the Grounds of Pregnancy, Maternity and Parenthood: The Application of EU and National Law in Practice in 33 European Countries”* (Publication of the European Commission 2012).

¹⁰⁴ L. Haas, ‘Parental Leave and Gender Equality: Lessons from the European Union’ (2003) 20(1) *Review of Policy Research* 89-114; S. Hardy and N. Adnett, ‘The Parental Leave Directive: Towards a Family-Friendly Social Europe?’ (2002) 8(2) *European Journal of Industrial Relations* 157-172.

The Time Provisions and Flexible Work

The time provisions enable individuals to adjust their working hours flexibly so that workers can fulfil their family-related responsibilities and care commitments whilst also taking part in paid employment. Four directives are particularly relevant in this context and will be considered in turn with a view to assessing their contribution to building a framework of rights for parents and those who care for children: (1) the Part-Time Directive;¹⁰⁵ (2) the Fixed-Term Directive;¹⁰⁶ (3) the Working-Time Directive;¹⁰⁷ and (4) the Agency Work Directive.¹⁰⁸

The Part-Time Directive

Parents and people who have responsibilities for children might not be able to take a job or they might give up their employment because of their caring commitments.¹⁰⁹ Care work has been linked to economic, emotional and/or physical disadvantages,¹¹⁰ which makes involvement in paid employment difficult. When they access paid employment, parents and people who care for children often do so on a flexible working arrangement,¹¹¹ and in particular, often on a part-time basis.¹¹² In 2004, 19.6% of the EU-28 workforce reported that their main job was part-time.¹¹³ Part-time work is notably popular with women who use this form of flexible work arrangement to be able to meet their unpaid childcare obligations.¹¹⁴ In

¹⁰⁵ Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC - Annex: Framework agreement on part-time work, OJ [1998] L 14/9.

¹⁰⁶ Council Directive 99/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, OJ [1999] L175/43, corrigendum at OJ [1999] L244/64.

¹⁰⁷ Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, OJ [2003] L 299/9.

¹⁰⁸ Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work, OJ [2008] L327/9.

¹⁰⁹ F. Carmichael and S. Charles, 'The Opportunity Costs of Informal Care: Does Gender Matter?' (2003) 22(5) *Journal of Health Economics* 781-803.

¹¹⁰ M. Hirst, 'Carer Distress: A Prospective, Population-Based Study' (2005) 61(3) *Social Science & Medicine* 697-708; F. Hoffmann and R. Rodrigues, *Informal Carers: Who Takes Care of Them?* European Centre for Social Welfare Policy and Research, Policy Brief (2010) < http://www.euro.centre.org/data/1274190382_99603.pdf > accessed on 18 November 2015.

¹¹¹ F. Carmichael and S. Charles, 'The Opportunity Costs of Informal Care: Does Gender Matter?' (2003) 22(5) *Journal of Health Economics* 781-803. See also the discussion in Chapter 1.

¹¹² D. Hofäcker and S. König, 'Flexibility and Work-Life Conflict in Time of Crisis: A Gender Perspective' (2013) 33(9) *International Journal of Sociology and Social Policy* 613-635.

¹¹³ Eurostat, *Employment Statistics Explained*, 2016 < http://ec.europa.eu/eurostat/statistics-explained/extensions/EurostatPDFGenerator/getfile.php?file=132.181.202.24_1458154314_0.pdf > accessed on 17 March 2016.

¹¹⁴ J. Jacobs and K. Gerson, *The Time Divide: Work, Family and Gender Inequalities* (Harvard University Press 2004); D. Hofäcker and S. König, 'Flexibility and Work-Life Conflict in Time of Crisis: A Gender Perspective' (2013) 33(9) *International Journal of Sociology and Social Policy* 613-635; European Commission, *Report on*

the EU, just under one third (32.2 %) of all employed women worked on a part-time basis in 2014, which represents a much higher proportion than the corresponding share for men (8.8%).¹¹⁵ Although a popular form of employment, part-time work often comes at a price “leading to 17% lower average weekly hours worked by women”.¹¹⁶ This represents 33.7 hours in paid employment for women as against 40.6 hours for men in 2011. Care work also affects (women’s) careers perspective.¹¹⁷ The difficulties that women face as carers has been acknowledged by the Court of Justice of the EU in 1997 in the case of *Marshall*:

“Even where male and female candidates are equally qualified, male candidates tend to be promoted in preference to female candidates particularly because of prejudices and stereotypes concerning the role and the capacities of women in working life and the fear, for example, that women will interrupt their careers more frequently, that owing to household and family duties they will be less flexible in their working hours, or that they will be absent from work more frequently because of pregnancy, childbirth and breastfeeding”.¹¹⁸

As a result, perhaps the most important provision of the EU work-family strategy is the Part-Time Directive,¹¹⁹ which prohibits discrimination against such workers. It aims to ensure that employees who work part-time are nevertheless guaranteed a minimum level of equal

Equality between Women and Men 2014, (Publications Office of the European Union, 2015) < http://ec.europa.eu/justice/gender-equality/files/annual_reports/150304_annual_report_2014_web_en.pdf > accessed on 24 October 2015.

¹¹⁵ Eurostat, *Employment Statistics Explained*, 2016 < http://ec.europa.eu/eurostat/statistics-explained/extensions/EurostatPDFGenerator/getfile.php?file=132.181.202.24_1458154314_0.pdf > accessed on 17 March 2016. The proportion of part-time workers varies across the EU. The highest rate of part-time employment among the EU Member States is found in the Netherlands, where more than three quarters (76.7 %) of all women employed worked on a part-time basis in 2014.

¹¹⁶ Communication from the Commission of 20 February 2013, *Towards Social Investment for Growth and Cohesion – including implementing the European Social Fund 2014-2020*, COM(2013) 83, 7.

¹¹⁷ V. Miranda, ‘Cooking, Caring and Volunteering: Unpaid Work Around the World’ *OECD Social, Employment and Migration Working Papers*, n. 116 (OECD Publishing 2011); M. Lilly, A. Laporte, and P. Coyte, ‘Labor Market Work and Home Care’s Unpaid Caregivers: A Systematic Review of Labor Force Participation Rates, Predictors of Labor Market Withdrawal and Hours of Work’ (2007) 85(4) *Milbank Quarterly* 641-690; A. Masselot, E. Caracciolo di Torella, and S. Burri, *Thematic Report of the European Network of Legal Experts in the Field of Gender Equality “Fighting Discrimination on the Grounds of Pregnancy, Maternity and Parenthood : The Application of EU and National Law in Practice in 33 European Countries”* (Publication of the European Commission 2012).

¹¹⁸ Case C-409/95 *Hellmut Marschall v Land Nordrhein-Westfalen* [1997] ECR I-6363, para. 29.

¹¹⁹ Directive 97/81/EC OJ [1998] L14/9. For a critical analysis with reference to reconciliation between work and family life see: E. Caracciolo di Torella and A. Masselot, *Reconciling Work and Family Life in EU Law and Policy* (Palgrave Macmillan 2010) 106-110.

treatment compared to full-time, permanent staff.¹²⁰ Reliance on part-time work is a very popular option for those seeking to reconcile work and family life.¹²¹ The Part-Time Directive is relevant to childcare because parents and those who care for children are more likely to work part-time than other workers in order to meet their childcare obligations. The introduction of the Part-Time Directive has provided a gender neutral base for carers. Fathers and men who are carers can rely on the Part-Time Directive to claim unfavourable treatment. Prior to the introduction of the Part-Time Directive, only women working part-time were able, under some conditions, to rely on the principle of indirect sex discrimination,¹²² but men who have childcare responsibilities had no specific provision to address potential discrimination and unfavourable treatment.

These positive developments are over-shadowed, however, by a series of restrictions relating to the application of the personal and material scope of the Part-Time Directive, which seriously undermines the anti-discrimination rights. Most striking is the possibility for employers to justify alleged unfavourable treatment of part-time workers on objective grounds.¹²³ If workers no longer have to rely on the complex concept of indirect sex discrimination in order to claim equal treatment, the justification for the differential treatment has been made easier for employers who can now justify it on the basis of considerations such as seniority, qualification or skills.¹²⁴

The negative obligation not to discriminate against part-time workers is reinforced by a positive obligation for Member States to “identify and review obstacles to part-time work”.¹²⁵ Indeed, the Part-Time Directive also aims to improve the quality of part-time work, to promote the development of part-time work on a voluntary basis,¹²⁶ and “to contribute to the flexible organisation of working time in a manner which takes into account the needs of

¹²⁰ Clause 4(1) of the Framework Agreement attached to the Part-Time Work Directive 97/81/EC OJ [1998] L 14/9 provides that “in respect of employment conditions, part-time workers shall not be treated in a less favourable manner than comparable full-time workers solely because they work part-time unless different treatment is justified on objective grounds.”

¹²¹ European Foundation for the Improvement of Living and Working Conditions, *Part-Time Work in Europe* (The European Foundation for the Improvement of Living and Working Conditions 2007); H. Blossfeld and C. Hakim, *Between Equalization and Marginalization: Women Working Part-Time in Europe and in the United States of America* (Oxford University Press 1997).

¹²² Case 170/84 *Bilka - Kaufhaus GmbH v Karin Weber von Hartz* [1989] ECR 1607.

¹²³ Clause 4(1) of the Framework Agreement attached to the Part-Time Directive 97/81/EC OJ [1998] L14/9.

¹²⁴ Clause 4(4) of the Framework Agreement attached to the Part-Time Directive 97/81/EC.

¹²⁵ Clause 5 of the Framework Agreement attached to the Part-Time Directive 97/81/EC.

¹²⁶ Clause 1(a) of the Framework Agreement attached to the Part-Time Directive 97/81/EC.

employers and workers”.¹²⁷ Under Clause 5 of the Framework Agreement attached to the Part-Time Directive, employers are obliged as far as possible to consider the worker’s request to transfer from full-time to part-time and vice-versa. This gender neutral provision holds considerable potential. However, a closer look reveals that it is not above criticism. Whilst it implies a right for employees to request flexible working arrangements, it does not guarantee an automatic right to obtain such a request. Furthermore, once obtained, the contract of employment is modified and the right cannot be easily reversed or altered and this denies the very nature of childcare and its demands. In practice, this means that workers have limited control over the possibility of changing their working arrangements. The CJEU has provided positive reinforcement of this right, however, in the case of *Hill*, where it held that to place job sharers who returned to full-time work on a lower paid level than they would have been if they had been working full-time is indirect discrimination.¹²⁸

The Part-Time Directive has contributed to the flexibilisation of the labour market but it has done little to advance the rights of carers. The Part-Time Directive aims to encourage “the development of part-time work on a voluntary basis and to contribute to the flexible organisation of working time in a manner which takes into accounts the needs of employers and workers”.¹²⁹ As such, the Part-Time Directive aims to encourage business adaptability to the (global) market economy and to modernise the work organisation, framed within the EU’s agenda on flexibility.¹³⁰ By contrast, the Part-Time Directive provides relatively limited resources to address work-family conflicts and lacks adequate guarantees to people with childcare responsibilities. While the Part-Time Directive prohibits discrimination on grounds of unfavourable treatment, it introduces dangerous justifications of such unfavourable treatment under certain circumstances. Whilst it promotes part-time work, it does not provide employees with any real control over their choices. It guarantees the same hourly wages for both part-timers and full-timers but cannot guarantee enough income to live on. It aims to improve the quality of part-time work but part-time is generally not associated with real

¹²⁷ Clause 1(b) of the Framework Agreement attached to the Part-Time Directive 97/81/EC.

¹²⁸ Case C-243/95 *Kathleen Hill and Ann Stapleton v the Revenue Commission and the Department of Finance* [1998] ECR I-3739. It is noteworthy that this case was decided on the basis of Article 141 EC (now Article 157 TFEU). Nevertheless, this indicates that the Court is willing to take seriously the principle of non-discrimination for part-time workers.

¹²⁹ Paragraph 2 of the Preamble of the Framework Agreement attached to the Part-Time Directive 97/81/EC OJ [1998] L14/9.

¹³⁰ C. Barnard, *EC Employment Law* (Oxford University Press 2006) 475. See also Point 5 of the Preamble of the Part-Time Directive 97/81/EC OJ [1998] L14/9.

quality jobs. Despite the anti-discrimination legislation, part-time work it is still gendered, under-paid compared to full-time work and associated with low quality jobs.¹³¹

Working Time Directive

The Working Time Directive¹³² represents one of the main instruments for improving the conditions of work of workers with childcare obligations. This Directive lays down minimum health and safety requirements for the organisation of working time. Accordingly, it requires minimum periods of daily rests, weekly and annual leave, and regulates breaks and limits the weekly maximum working time as well as certain aspects of night work, shift work and patterns of work. Although it is addressed to all workers and does not specifically cater for atypical workers, it is in practice a very important instrument for workers with childcare responsibilities. Working time varies significantly across the life course and remains gendered. During the parenting phase, in particular, employed women spend twice as many hours on childcare and household activities compared with employed men. Correspondingly, women reduce their paid work by four hours a week but increase their unpaid work by 25 hours when they become mothers compared to an increase of 12 hours for men's unpaid work.¹³³

The Fixed-Term Directive

Fixed-term contracts of employment are not as common as part-time contracts but they remain significant for a minority of workers. In 2014, the proportion of employees in the EU-28 with a fixed-term contract of employment was 14%.¹³⁴ Around half of the workers are reported to be on fixed-term jobs involuntarily.¹³⁵

¹³¹ A. Manning and B. Petrongolo, 'The Part-Time Pay Penalty for Women in Britain' (2008) 118(526) *The Economic Journal* F28-F51; M. Jeffery, 'Not Really Going to Work? On the Directive on Part-Time Work, "Atypical Work" and Attempts to Regulate It' (1998) 27(3) *Industrial Law Journal* 193-213; J. Herring, *Caring and the Law* (Hart Publishing 2013); T. Sparreboom, 'Gender Equality, Part-Time Work and Segregation in Europe' (2014) 153(2) *International Labour Review* 245-268.

¹³² Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, OJ [2003] L299/9 is a health and safety measure adopted on the basis of Article 118a EC (now Article 153 TFEU). This Directive consolidates and replaces two previous Directives namely: Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time, OJ [1993] L307/18 and Directive 2000/34/EC of the European Parliament and of the Council of 22 June 2000 amending Council Directive 93/104/EC concerning certain aspects of the organisation of working time to cover sectors and activities excluded from that Directive, OJ [2000] L195/41.

¹³³ D. Anxo, C. Franz and A. Kümmerling, *Working Time and Work-Life Balance in a Life Course Perspective: A Report Based on the Fifth European Working Conditions Survey* (Eurofound 2012).

¹³⁴ Eurostat, *Employment Statistics Explained*, 2016 < http://ec.europa.eu/eurostat/statistics-explained/extensions/EurostatPDFGenerator/getfile.php?file=132.181.202.24_1458154314_0.pdf > accessed on 17 March 2016.

¹³⁵ EUROSTAT, *The Life of Women and Men in Europe: A Statistical Portrait* (European Commission 2008).

The Fixed-Term Directive¹³⁶ was adopted with the aim to “improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination [and to] establish a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships”.¹³⁷ The intention was to restrict the abusive use of fixed-term contracts in certain sectors to regulate the use of such contracts within the Member States. The Fixed-Term Directive provides: rights of information regarding opportunities of employment in the establishment;¹³⁸ access to training opportunities to enhance skills, career development and occupational mobility;¹³⁹ and adequate representation.¹⁴⁰ These rights aim to balance the need for the employer’s flexibility with a certain level of employment security for employees.¹⁴¹ The Court of Justice of the EU has interpreted the Fixed-Term Directive in a way which further reinforced “the benefit of stable employment”¹⁴² for parents. In the context of pregnancy and maternity, in particular, the Court of Justice of the EU has clearly established that regardless of the type of contract of employment (fixed-term or indefinite) the employee was subjected to the same level of pregnancy rights and protection.¹⁴³

Nevertheless, the right to non-discrimination for workers on fixed-term contracts is relatively weak. It is subject to various conditions and differential treatment can be objectively justified by employers. In addition, the personal scope of the Fixed-Term Directive is limited to workers who have a fixed-term contract of employment or employment relationships as defined in the law, collective agreements or practice in the Member States.¹⁴⁴ This means that self-employed and temporary¹⁴⁵ workers are not covered by the Fixed-Term Directive. Furthermore, to claim unfavourable treatment, workers must find comparators employed in

¹³⁶ Council Directive 99/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, OJ [1999] L175/43, corrigendum at OJ [1999] L244/64.

¹³⁷ Clause 1, reiterated in Clauses 4 and 5 of the Framework Agreement attached to the Fixed-Term Directive 99/70/EC.

¹³⁸ Clause 6(1) of the Framework Agreement attached to the Fixed-Term Directive 99/70/EC.

¹³⁹ Clause 6(2) of the Framework Agreement attached to the Fixed-Term Directive 99/70/EC.

¹⁴⁰ Clause 7(1) of the Framework Agreement attached to the Fixed-Term Directive 99/70/EC.

¹⁴¹ L. Zappala, ‘Abuse of Fixed-Term Employment Contracts and Sanctions in the Recent ECJ’s Jurisprudence’ (2006) 35(4) *Industrial Law Journal* 439-444.

¹⁴² *Ibid.*, 441.

¹⁴³ A. Masselot, ‘The ECJ Links Pregnancy and Maternity Protection to Fixed-Term Contract of Employment’ (2002) 9(1) *Maastricht Journal of European and Comparative Law* 57-66. See specifically Case C-32/93 *Carole Louise Webb v EMO Air Cargo (UK) Ltd.* [1994] ECR I-3567; Case C-207/98 *Silke-Karin Mahlburg v Land Mecklenburg-Vorpommern* [2000] ECR I-549; Case C-109/00 *Tele Danmark A/S v Handels- og Kontorfunktionærernes Forbund i Danmark (HK)* [2001] ECR I-6993.

¹⁴⁴ Clause 2(1) of the Framework Agreement attached to the Fixed-Term Directive 99/70/EC.

¹⁴⁵ See further discussion in the next section for the definition of temporary agency workers.

the same establishment or under the same applicable collective agreement or the same national legislation, collective agreement or practice. However, in an increasing flexible working environment, not all employment relationships can be traced so easily to a unique source.¹⁴⁶

The Temporary Agency Work Directive

Employment in temporary agency work in the EU is significant and has increased rapidly during the last decade,¹⁴⁷ especially in the aftermath of the global financial crisis.¹⁴⁸ According to the International Confederation of Temporary Agency Work Businesses, temporary work agencies in the EU currently employ over seven million workers or 1.9% of the EU working population and there were an average of 2.8 million workers working through employment agencies on any given day in 2001.¹⁴⁹ Manpower and Adecco reported achieving over €35 billion in 2012 with over 1.4 million people on assignment each day across the world.¹⁵⁰ However, an accurate and detailed profile of temporary agency work in the EU is made difficult by the inconsistent and often limited statistics that are collected in Member States.¹⁵¹ The European Trade Union Confederation points out that a higher “proportion of temporary agency workers are unhappy with their jobs and conditions than permanent staff. Many do not choose this way of working, but would prefer secure employment”.¹⁵²

The employment relationship for temporary workers is based on a triangular structure. Temporary agency workers, also known as temps or agency workers, are typically employed by a temping agency, which offers their services to a user undertaking such employment. In

¹⁴⁶ See Case C-320/00 *A. G. Lawrence and Others v Regent Office Care Ltd, Commercial Catering Group and Mitie Secure Services Ltd*. [2002] ECR I-1275 and case C-256/01 *Debra Allonby v Accrington & Rossendale College, Education Lecturing Services, trading as Protocol Professional and Secretary of State for Education and Employment* [2004] ECR I-8349.

¹⁴⁷ J. Arrowsmith, *Temporary Agency Work and Collective Bargaining in the EU* (European Foundation for the Improvement of Living and Working Conditions 2008).

¹⁴⁸ M. Karamessini and J. Rubery, *Women and Austerity: The Economic Crisis and the Future for Gender Equality* (Routledge 2014).

¹⁴⁹ CIETT (International Confederation of Temporary Agency Work Businesses), *Annual Report of Activities 2002* (CIETT 2002) 21.

¹⁵⁰ H. Fu, ‘Introduction: Temporary Agency Work and Globalisation’ in H. Fu (ed) *Temporary Agency Work and Globalisation: Beyond Flexibility and Inequality* (Ashgate Publishing 2015) 1-14.

¹⁵¹ F. Michon, ‘Temporary Agency Work in Europe’ in S. Gleason (ed) *The Shadow Workforce: Perspectives on Contingent Work in the United States, Japan and Europe* (2006) 271-309.

¹⁵² See ETUC, *Temporary Agency Workers in the European Union* < <http://www.etuc.org/a/501> > accessed on 3 June 2016.

this context, the Temporary Agency Work Directive¹⁵³ endorses the principle of equal treatment between temporary agency workers and permanent workers in the user undertakings, subject to certain limitations and exemptions in areas such as pay, maternity leave¹⁵⁴ and leave entitlements. Moreover, the preamble of the Temporary Agency Work Directive explains that its aims are to meet the “undertakings needs for flexibility but also the needs for employees to reconcile their working and private lives”.¹⁵⁵ Significantly, the Temporary Agency Work Directive further provides that temporary agency workers are entitled to benefit from equal access to collective facilities including childcare facilities.¹⁵⁶ This right is further reinforced by the inclusion of a right to improved access to training and childcare facilities in periods between assignments in order to increase the employability of the worker.¹⁵⁷

Leave and Time Components: Some Conclusions

The leave and time components of the reconciliation policy are certainly reasonably developed at the EU level and they are often reaffirmed and taken further at the domestic level. Nevertheless it is noteworthy that they present common shortcomings. In particular, it appears that these provisions can (indirectly) contribute to a reinforcing of traditional gender roles. Although the provisions on leave and time are drafted in gender neutral terms (except for the Pregnant Workers Directive, which is addressed exclusively to women), in fact they denote deeply gendered structures because they fail to recognise that men and women enter the labour market under different terms. Women continue and are expected to carry the bulk of childcare work (as well as other unpaid domestic and care work). This means, for instance, that women can disproportionately afford to take the unpaid parental leave or the atypical works such as part-time employment. In addition, even though the Part-Time Directive has opened ways for fathers and men who care for children to be able to contest unfavourable treatment on the ground of part-time work, the time and leave provisions provide little incentives to challenge the traditional organisation of family life. Moreover, despite the laying out of minimum standards and the prohibition of discrimination for workers in a

¹⁵³ Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work OJ [2008] L327/9.

¹⁵⁴ Article 1(a) of Directive 2008/104/EC provides for a wide right to equal treatment in relation to maternity rights including ‘the protection of pregnant women and nursing mothers and protections of children and young people’.

¹⁵⁵ Point 11 of the preamble of the Temporary Agency Work Directive 2008/104/EC.

¹⁵⁶ Article 6(4) of the Temporary Agency Work Directive 2008/104/EC.

¹⁵⁷ Article 6(5)(a) of the Temporary Agency Work Directive 2008/104/EC.

number of atypical contracts of employment, broad restrictions apply to the personal and material scope of the Directive. This means that a limited range of workers are protected and even where the workers can claim protection, the employers are able to justify a broad range of grounds of unfavourable treatment. These directives represent tools to increase flexibility of the workplace for the benefit of employers, not for the benefit of workers with childcare responsibilities in mind. Atypical work is often still (but not always) associated with low quality work and therefore is lowly paid and has low status. These jobs are also gender segregated. In addition, employees have little autonomy with regards to their workplace arrangements and when they do, their autonomy in choosing flexible work contributes to reinforce traditional gender structures as men tend to choose to work flexibly to work more and women choose to work less in order to meet their childcare and other unpaid domestic tasks.¹⁵⁸ The EU time and leave provisions are unequivocally relevant to parents and individuals who care for children, however, they address superficially the issue of childcare.

Section 3: The Role of the Court of Justice in Valuing the Work of Parents and Carers of Children

In order to fully unveil their potential, the non-discrimination provisions need to be supported by a strategy which values childcare and the work of people who care for children. Valuing work done around informal childcare appears to be gradually emerging in the case law of the Court of Justice. Generally speaking, litigation is very important as it delivers individual justice¹⁵⁹ and helps shape relevant policies and legislation. The CJEU has typically been committed to a substantive equality approach¹⁶⁰ which places it in a good position to deal with childcare.¹⁶¹ Specifically, in a series of cases, the Court of Justice has acknowledged the importance of the role of parents, and particularly mothers, for the well-being of society and

¹⁵⁸ D. Hofäcker and S. König, 'Flexibility and Work-Life Conflict in Time of Crisis: A Gender Perspective' (2013) 33(9) *International Journal of Sociology and Social Policy* 613-635; A. Masselot, 'Gender Implications of the Right to Request Flexible Working Arrangements: Raising Pigs and Children in New Zealand' (2015) 39(3) *New Zealand Journal of Employment Relations* 59-71.

¹⁵⁹ G. James, *The Legal Regulation of Pregnancy and Maternity in the Labour Market* (Routledge-Cavendish 2008).

¹⁶⁰ See for example Case C-136/95 *Caisse nationale d'assurance vieillesse des travailleurs salariés (CNAVTS) v Evelyne Thibault* [1998] ECR I-2011.

¹⁶¹ S. Millns, 'Gender Equality, Citizenship, and the EU's Constitutional Future' (2007) 13(2) *European Law Journal* 218-237.

their economic significance. This section aims to analyse these cases and their significance for people who care for children.

The Treaties have not considered “care” as a concept for EU law and, as previously asserted, “care” is not a prohibited ground of discrimination under EU law. In fact, care, at least in the sense of “taking care of a child”, is only mentioned once in the Treaty.¹⁶² Article 24(1) of the Charter of Fundamental Rights of the EU states that children have the right to be protected and to receive care necessary for their well-being. As previously mentioned, secondary legislation has, to some extent, addressed the rights of parents and those who care for children through employment law¹⁶³ but childcare itself remains in the domain of soft law.¹⁶⁴ Over recent years, the Court of Justice of the EU has offered an important contribution to the development of the concept of care in particular in the context of the EU citizenship.¹⁶⁵

In early cases, unpaid childcare had to be linked to an economic context, or at the least to an employment connection.¹⁶⁶ The first time that the Court removed care from a strictly economic framework, thus addressing the *value* of work associated with informal childcare, was in the case of *Martínez Sala*.¹⁶⁷ In this case, the applicant, a Spanish national resident in Germany applied for a child raising allowance, although at the time of the application, she was not working. This was originally refused on the basis that Mrs Martínez Sala was not a German national. The Court, however, found that she was entitled to the benefit “as a national of a Member State lawfully residing in the territory of another Member State, the appellant in the main proceeding comes within the scope *ratione personæ* of the provisions of the Treaty on European Citizenship”.¹⁶⁸ Recognising the importance of work associated with childcare, anti-discrimination on the grounds of nationality can therefore be claimed as part of the status of EU citizenship. There is no need for the individual to be economically active in order to qualify for the right. In this case, unpaid childcare is accepted as an element of EU

¹⁶² Health care is referred to in Article 168(7) TFEU on the responsibility of Member States in relation to medical care and in Article 35 of the EU Charter of Fundamental Rights on the right of access to preventive health care. In addition, Protocol 7 TFEU on the privilege and immunities of the EU addresses the relationship between tax and care in Article 13.

¹⁶³ See Chapter 4 on caregivers’ rights.

¹⁶⁴ See Chapter 3 on the EU’s childcare strategy.

¹⁶⁵ N. Busby, *A Right to Care? Unpaid Care Work in European Employment Law* (Oxford University Press 2011), Chapter 6.

¹⁶⁶ J. Shaw, ‘Citizenship of the Union: Towards Post-National Membership’ in *Academy of European Law* (ed) *Collected Course of the Academy of European Law* vol. VI Book I (Kluwer International Law 1998) 237-387.

¹⁶⁷ Case C-85/96 *Martínez Sala v. Freistaat Bayern* [1998] ECR-I 2691. S. Fries and J. Shaw, ‘Citizenship of the Union: First Steps of the European Court of Justice’ (1998) 4 *European Public Law* 533-559.

¹⁶⁸ Case C-85/96 *Martínez Sala v. Freistaat Bayern* [1998] ECR I-2691, para. 61.

citizenship and is thus valued. Although this is an important decision, the emphasis was more on the link between the individual as citizen and the benefit in question rather than specifically on the concept of childcare.

The Court has addressed the right of parents and those who care for children in further cases, especially in the context of family breakdown, to confirm the link between informal unpaid childcare work and citizenship. In a number of recent cases, the Court underscores the importance of the contribution made by parents and individuals who care for children. In *Carpenter*,¹⁶⁹ the Court of Justice considered the right of residence of a non-EU citizen who was also the primary carer of young children who were EU citizens. Mary Carpenter, a third country national, was married to a UK national, who had children from a previous marriage. Faced with a deportation order against her, she appealed arguing that she was entitled to reside in the UK under EU law as the spouse of an EU citizen. Her situation did not fall within the scope of EU law on the free movement of workers because she invoked a wholly internal situation, namely the right to reside with a UK national in the UK, rather than in another Member State. The Court, nevertheless, held that the refusal of a right of residence to Mrs Carpenter would deter Mr Carpenter from exercising his right to work in another Member State. In addition and, significantly, the Court points out that if Mrs Carpenter was not entitled to reside in the UK, she would not be able to care for Mr Carpenter's children. Consequently, it would become more difficult for Mr Carpenter to work in another Member State.¹⁷⁰ Thus, the right of residence is linked to the care that Mrs Carpenter provided to Mr Carpenter's children. Without it, the freedom of Mr Carpenter to provide services in the EU could be compromised. The CJEU moreover referred to Article 8 of the European Convention of Human Rights (ECHR)¹⁷¹ and held that the deportation of Mrs Carpenter would constitute an unjustified breach of the right to respect for his family life.

In *Baumbast*,¹⁷² the Court considered the situation of two female applicants (US citizens) married to EU nationals who were residing in the UK together with their school-age children.

¹⁶⁹ Case C-60/00 *Mary Carpenter v Secretary of State for the Home Department* [2002] ECR I-6279. H. Toner, 'Comments on *Mary Carpenter v. Secretary of State*, 11 July 2002 (Case C-60/00)' (2003) 5 *European Journal of Migration and Law* 163-172.

¹⁷⁰ Case C-60/00 *Mary Carpenter v Secretary of State for the Home Department* [2002] ECR I-6279, para. 44.

¹⁷¹ *Ibid.*, para. 64-68.

¹⁷² Case C-413/99 *Baumbast and R. v Secretary of State for the Home Department* [2002] ECR I-791. A. P. van der Mei, 'Residence and the Evolving Notion of European Union Citizenship, Comments on *Baumbast and R v. Secretary of State for Home Department*, 17 September 2002 (Case C-413/99)' (2003) 5(3) *European Journal of Migration and Law* 419-433; T. Storey, 'Freedom of Movement for Persons - *Baumbast & (and) R v. Secretary*

They were denied the right to continue to reside in the UK because, following a divorce, they had lost the status of spouse of a migrant worker. In both cases, the mothers remained the primary carer of the children after the divorce. In one case, the ex-husband lost his job and therefore his worker status. The question related to the position of the mothers and the children with regard to their right of residence in the UK. In both cases, the Court found that the children had a right to residence as they were in education in the UK. It made no difference whether their parents were divorced and whether one of them had lost his status as a worker. Taking into account the interest of the children, the main point of the Court judgment was that a move would risk disrupting the children's education. Accordingly, the children were allowed to stay and finish school.¹⁷³ In addition, the Court held that the mothers should be granted a right of residence in the UK, on account of the fact that they were the primary carers of children with an independent right to pursue studies in the host Member State. Since the children could not be expected to reside in the host Member State independently of their parent-primary carer, they would not otherwise be able to usefully exercise their right to continue their education in the UK. As a result, the women were awarded a right to reside *for the very reason* that they were the primary carers.¹⁷⁴ Although the issue is about the right of residence of the mother, the CJEU's reasoning, as in *Carpenter*, centres on the impact of the parent's right of residence on the child. Thus, the consideration is on the interest of the child even if the Court does not spell this out explicitly. The Court states that the requirement of the respect for family life, as laid down in Article 8 of the ECHR, is a fundamental right recognised by EU law.¹⁷⁵ Hence, the Court concluded that "to refuse to grant permission to remain to a parent who is the primary carer of the child exercising his right to pursue his studies in the host Member State infringes that right".¹⁷⁶

of State for the Home Department (Case C-413/99), *Carpenter v. Secretary of the State for the Home Department* (Case C-60/00) - Court of Justice of the European Communities - EU Citizenship; Rights of Residence under EU Law for Third Country Family Members; Right to Respect for Family Life as a Fundamental Right in EU Law Case Analysis' (2002) 7(3) *Journal of Civil Liberties* 152-162. See also the interesting contributions in M. Maduro and L. Azoulai (eds) *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Bloomsbury Publishing 2010).

¹⁷³ In Case C-413/99 *Baumbast and R. v Secretary of State for the Home Department* [2002] ECR I-79, para. 63 the Court held that: "children of a citizen of the European Union who have installed themselves in a Member State during the exercise by their parent of rights of residence as a migrant worker in that Member State are entitled to reside there in order to attend general educational courses there, pursuant to Article 12 of Regulation No 1612/68. The fact that the parents of the children concerned have meanwhile divorced, the fact that only one parent is a citizen of the Union and that parent has ceased to be a migrant worker in the host Member State and the fact that the children are not themselves citizens of the Union are irrelevant in this regard."

¹⁷⁴ N. Reich and S. Harbacevica, 'Citizenship and Family on Trial: A Fairly Optimistic Overview of Recent Court Practice with Regard to Free Movement of Persons' (2003) 40(3) *Common Market Law Review* 615-638.

¹⁷⁵ Case C-413/99 *Baumbast and R. v Secretary of State for the Home Department* [2002] ECR I-791, para. 72.

¹⁷⁶ *Ibid.*, para. 73.

The CJEU confirmed this finding in *Ibrahim*¹⁷⁷ and *Teixeira*,¹⁷⁸ where it again considered whether mothers of school-age children with the nationality of a Member State could invoke a right of residence in the host country, despite not satisfying the conditions regarding the right to residence and in particular the obligation of financial self-sufficiency.¹⁷⁹ The Court held that the applicants could invoke a right of residence in their capacity as the primary carer of school-age children of a former migrant worker. The children's right to reside and to go to school in the host Member State cannot realistically be exercised without the right to residence for their primary carer. In addition, the Court held that these rights could not be made subject to a condition of age. Therefore, the primary carer of a school-age child is entitled to residence in the host Member State even when that child reaches his or her majority, for as long as the child continues to need the primary carer's presence and care in order to be able to pursue and complete education.¹⁸⁰

In *Chen*,¹⁸¹ the Court went even further as it held that the Chinese mother of a child born in the territory of one of the Member States and, therefore an EU citizen, had the right to move freely within the EU and that her primary carer (here her mother) would have the same right of movement and residence as an EU citizen. The Court considered that to refuse a right of residence to the parent who is the primary carer of a child entitled to reside in the host Member State would deprive the child's right to free movement and residence in the EU.¹⁸² In doing so, the Court recognises the essential role of the carer as linked to the exercise of the rights of the EU citizen.

¹⁷⁷ Case C-310/08 *Ibrahim and Secretary of State for the Home Department* [2010] ECR I-80.

¹⁷⁸ Case C-480/08 *Maria Teixeira v London Borough of Lambeth and Secretary of State for the Home Department* [2010] ECR I-83. See C. O'Brien, 'Case C-310/08 *Ibrahim*, Case C-480/08 *Teixiera*' (2011) 48(1) *Common Market Law Review* 203-225.

¹⁷⁹ Article 7(1) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ [2004] L158/77; Corrigendum OJ [2004] L229/35.

¹⁸⁰ Case C-480/08 *Maria Teixeira v London Borough of Lambeth and Secretary of State for the Home Department* [2010] ECR I-83, para. 86. See also Case C-529/11 *Olaitan Ajoke Alarape and Olukayode Azeez Tijani v Secretary of State for the Home Department* [2013] ECR I-290. However, in Joined Cases C-147/11 and C-148/11 *Secretary of State for Work and Pensions v Lucja Czop and Margita Punakova* ECLI:EU:C:2012:538, the Court restricted this right to the children of (former) migrant workers and not, by contrast, to children of (former) self-employed persons.

¹⁸¹ Case C-200/02 *Kunqian Catherine Zhu, Man Lavette Chen v Secretary of State for the Home Department* [2004] ECR I-9925.

¹⁸² *Ibid.*, para. 45-46.

Finally, in a similar case, *Ruiz Zambrano*,¹⁸³ the CJEU held that a Colombian national could invoke the right to residence in Belgium based on the fact that his two children had Belgian nationality.¹⁸⁴ Although the Court did not explicitly refer to the term “primary carer”, it explained that the children of Mr Ruiz Zambrano could not reside in Belgium independently from their carer. Consequently, the refusal of a right of residence to their father would require them to leave the country and thereby deprive them of their EU rights as Union citizens. Accordingly, the primary carer derives his or her right of residence from the fact that otherwise the child concerned could not usefully exercise his or her right of residence, which, in turn, might enable this child to exercise his or her right to access education in the host Member State.

Together these cases have built a body of rights for parents who care for their children. The Court has recognised the value of informal care and the link that caring builds between individuals. In tying care work to the rights of EU citizenship, it is arguable that the Court has thereby made its first step into applying the ethics of care. The Court’s recognition of childcare only applies to that of the “primary carer”.¹⁸⁵ The CJEU has made it clear that it is care provided to children which can trigger the right to residence. In *McCarthy*,¹⁸⁶ the Court was asked to consider an attempt by an EU citizen to rely on EU law to obtain residence for a third country national family member against her home Member State. In this case, the CJEU suggests that the spousal relationship by its nature will fail where the dependency relationship of a parent and child, such as *Ruiz Zambrano*, will succeed. The right of residence rights for family members of citizens appears therefore to be limited to situations where a care relationship exists between parent and child. While in *Zambrano*, the right of residence in the territory of the Union was considered essential for parents to be able to care for children, in *McCarthy* the same logic did not apply to a spouse.¹⁸⁷

¹⁸³ Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l’emploi (ONEm)* [2011] ECR I-1177.

¹⁸⁴ For a detailed analysis of the case, see J. Guth and E. Mowlam, ‘The Evolution of European Union Citizenship: Where Does Zambrano Take Us?’ (2012) 46(1) *The Law Teacher* 75-82.

¹⁸⁵ Primary carer is a well-known concept in a number of common law legal systems, such as the UK, Australia and the United States, but is a new and under explored concept for the EU. See N. Cambien, ‘EU Citizenship and ECJ: Why Care about Primary Carers?’ (2012) *SSNR Research Paper 2167890* < [SSRN: http://ssrn.com/abstract=2167890](http://ssrn.com/abstract=2167890) or <http://dx.doi.org/10.2139/ssrn.2167890> > accessed on 23 January 2016; N. Reich and S. Harbacevica, ‘Citizenship and Family on Trial: A Fairly Optimistic Overview of Recent Court Practice with Regard to Free Movement of Persons’ (2003) 40(3) *Common Market Law Review* 615-638.

¹⁸⁶ Case C-434/09 *Shirley McCarthy v Secretary of State for the Home Department* [2011] ECR I-3375.

¹⁸⁷ For a gendered perspective on the two cases, see J. Guth, ‘Law and the Object and Agent of Integration: Gendering the Court of Justice of the European Union, its Decisions and their Impacts’ in G. Abels and H. MacRae (eds) *Gendering European Integration Theory Engaging New Dialogues* (Budrich 2016) 175-195.

It must be pointed out that the late developments of the case law in the area of migration and free movement have been disappointing with regards to the development of the concept of care. In more recent cases, the Court has moved away from the concept of “primary carer” and there is a noted absence of the concept of care or childcare. In the joint cases of *Dereci*,¹⁸⁸ for example, the Court does not appear to distinguish between categories of familial relationship in applying the free movement provisions. The circumstances of this case were somewhat different from those in *Zambrano*. *Dereci* involved five separate applications which were linked in the referral. All applicants were third-country nationals and had their applications for residence permits in Austria refused despite being, in one way or another, “family members” of Austrian nationals. The facts of Mr Dereci’s case are the most relevant: Mr Dereci, a Turkish national, entered Austria illegally and married an Austrian national with whom he had three Austrian nationals’ children who were still minors. Mr Dereci lived with his family. His applications for a residence permit had been rejected and he was subject to expulsion orders and individual removal orders from Austria. The CJEU considered that the Austrian nationals, with whom the litigants were family members, would not be deprived of their means of subsistence¹⁸⁹ and would not need to leave the EU if the rights of residence of the father were not recognised. This is a crucial difference to *Zambrano*. In *Dereci* there was no care dependence, therefore a husband could be refused a right to reside with his EU spouse. The Court was, however, careful to point out that it was not making any ruling as to the applicability either of Article 8 of the European Convention on Human Rights or of Article 7 of the Charter of Fundamental Rights of the European Union. Hence, the right of residence could be granted on the basis of other criteria, and notably by virtue of the right to the protection of family life, but this aspect was left to the national court to decide.

Moreover, in a following case, *Iida*,¹⁹⁰ the Court held that the issue of whether or not residence rights need to be granted to the primary carer of an EU child may not depend solely on whether or not that child would otherwise have to leave the EU. Mr Iida, a Japanese national, was married to a German national with whom he had a daughter born in America. The daughter, Mia, had German, Japanese and American nationality. The family moved to Germany from the USA and Mr Iida obtained a residence permit as spouse of a Union

¹⁸⁸ Case C-256/11 *Murat Dereci and Others v Bundesministerium für Inneres* [2011] ECR I-11315.

¹⁸⁹ *Ibid*, para. 32.

¹⁹⁰ Case C-40/11 *Yoshikazu Iida v Stadt Ulm* ECLI:EU:C:2012:691.

citizen. He worked full-time on an unlimited contract. Mr Iida and his wife separated but did not divorce. The mother and daughter moved to Austria where the mother worked full-time. Mr Iida kept a good relationship with his daughter and both parents enjoyed joint custody. After separation, however, Germany revoked Mr Iida's spousal residence permit. His application became the subject of the appeal proceedings from which the following question was referred to the CJEU for a preliminary ruling: "Does European Union law give a parent who has parental responsibility and is a third-country national, for the purpose of maintaining regular personal relations and direct parental contact, a right to remain in the Member State of origin of his child who is a Union citizen, to be documented by a "residence card of a family member of a Union citizen", if the child moves from there to another Member State in exercise of the right of freedom of movement?"¹⁹¹ The Court decided that the case was internal and not EU law relevant. Thus, it rejected the application because the daughter was not considered to be materially reliant on her father, in contrast to cases such as *Chen*. The Court considered that not only did Mr Iida already have residency as a worker, but also it was therefore less imperative for him to "remain" with his daughter as she was not materially "dependent" on him. The CJEU disregarded the fact that care between a father and daughter goes beyond material aspects.¹⁹²

Who then is protected under EU law for being a carer? In most of the cases discussed above, the Court makes reference to the primary carer. As mentioned previously, care is only referred to once in the Treaty but there is no reference to the concept of primary carer either in the Treaty or in the secondary legislation. The concept of primary carer is in fact a Common Law concept,¹⁹³ which the Court of Justice of the EU has picked up from questions referred by Common Law courts (in particular in *Baumbast*¹⁹⁴ and *Chen*¹⁹⁵) when addressing the dependant relationship of children towards a parent. The Court of Justice has also used the term "primary carer" with reference to persons taking care of disabled persons or persons

¹⁹¹ Ibid, para. 33.

¹⁹² A. Tryfonidou, '(Further) Signs of a Turn to the Tide in the CJEU's Citizenship Jurisprudence, Case C-40/11 "Iida", Judgment of 8 November 2012, not yet reported' (2013) 20(2) *Maastricht Journal of European and Comparative Law* 302-320.

¹⁹³ W. Weyrauch, S. Katz and E. Olsen, *Cases and Materials on Family Law: Legal Concepts and Changing Human Relationships* (West Publishing 1994) 438-444.

¹⁹⁴ See the second question referred to the CJEU in Case C-413/99 *Baumbast and R. v Secretary of State for the Home Department* [2002] ECR I-791, para. 28.

¹⁹⁵ See the second question referred to the CJEU in Case C-200/02 *Kunqian Catherine Zhu, Man Lavette Chen v Secretary of State for the Home Department* [2004] ECR I-9925, para. 15.

with medical needs in *Coleman*.¹⁹⁶ Despite these references, the Court has not clearly defined the term and this leaves many questions unanswered. Indeed, what does the concept of “primary carers” refer to? Does the primary carer systematically need to be a parent? Can the concept be construed in a broader sense to include other family members, such as siblings or spouses? Does the concept of primary carer always involve a family link, or can it include non-family members such as the guardian of a child or the carer of a disabled person?¹⁹⁷ Although in *Coleman*,¹⁹⁸ the Court refers to a person taking care of a disabled person, Mrs Coleman was the parent of the disabled child. In *Carpenter*, the Court considers that the wife of a worker can be the primary carer for his children. However, in *Dereci*, the Court appears to refute this option as the husband was refused a right to reside with his spouse.

Could the primary care giver refer to both parents at the same time? Indeed, the notion of primary carer suggests that there might be a secondary carer, who might be less deserving of EU rights.¹⁹⁹ In *Carpenter*, for instance, the father was not considered to be a primary carer of the children. The Court has systematically considered the question of one carer. In *Ruiz Zambrano*, the CJEU only addressed the issue of the father but in fact both parents were in need of a residence permit in the domestic case. It is difficult to imagine why only one parent could derive a right of residence from the need to preserve the interests of a child and not the other parent. However, this is exactly what the Court implies in *Iida*. In addition, the nature of the “care” provided remains questionable. The CJEU held that the daughter was not materially “dependent” on her father in *Iida* but in *Carpenter*, the Court considered the importance of care as a relationship rather than as a material support.

Furthermore, in many cases examined by the CJEU, the primary carer is the mother, but in *Ruiz Zambrano*, the father was considered primary carer of the children. In line with other cases,²⁰⁰ the Court takes the view that either parent can take care of children. Moreover, the Court does not only refer to the primary carer in relation to the parent of a child, but also

¹⁹⁶ Case C-303/06 *Coleman v Attridge Law* [2008] ECR I-5603, paras. 20 and 22, as noted by T. Connor, ‘Discrimination by Association: A Step in the Right Direction’ (2010) 32(1) *Journal of Social Welfare and Family Law* 59-69. For a previous analysis of this case see earlier in this chapter.

¹⁹⁷ P. Starup and M. Elsmore, ‘Taking a Logical or Giant Step Forward? Comment on *Ibrahim and Teixeira*’ (2010) 35(4) *European Law Review* 583-584; K. Vanvoorden, ‘Case C-200/02, *Zhu and Chen v. Secretary of State for the Home Department*’ (2005) 12(1) *The Columbia Journal of European Law* 305-321.

¹⁹⁸ Case C-303/06 *Coleman v Attridge Law* [2008] ECR I-5603.

¹⁹⁹ P. Starup and M. Elsmore, ‘Taking a Logical or Giant Step Forward? Comment on *Ibrahim and Teixeira*’ (2010) 35(4) *European Law Review* 583-584.

²⁰⁰ See in particular, Case C-104/09 *Roca Álvarez v Sesa Start España ETT SA* [2010] ECR I- 8661.

more broadly to the person who is the primary carer. This seems to point to a broader concept of carer. Even if in more recent cases the Court has seemingly taken steps back in relation to the rights of carers - as in both the *Dereci* and *Iida* cases²⁰¹ - the CJEU, nevertheless, pointed out that children derive rights from Articles 7 and 24 of the Charter²⁰² as well as Article 8 of the ECHR, which entitled them to protection of private and family life, including the right to maintain a regular and personal contact with both parents. The Court's reasoning appears therefore to remain, even if loosely, concerned with the interests of the child. Moreover, the Court has acknowledged the importance of the rights of carers who look after children has contributed to enhancing women's rights. It remains questionable, however, whether the consideration of care by the Court is contributing to gender equality.

Conclusions

This section has argued that, although not fully articulated, issues related to childcare and the caring relationship between children and their carers have always been an integral part of the EU. The legal discourse on care is recent but incremental, especially when referring to childcare. Care as such is not an EU legal concept, however, it has become an element which, in some circumstances, can be taken into account in order to give effect to EU legal provisions and to give respect to the right to family life. Equally, to some extent, the EU has always had at its disposition a number of instruments which could be used to address the concerns of carers (be this through the non-discrimination provisions, employment policies and legislation, or provisions aimed at establishing services). The Charter of Fundamental Rights has further offered the potential to give these issues a legal standing. The contribution of the Court of Justice has been central to the process of valuing the work done by those who care for children and to have sought to trace how the "care element" has been incorporated into the EU discourse. However, being responsive to questions has not been the best way to create comprehensive policy. The legal provisions together with the Court's judgments have

²⁰¹ For a critical analysis of the gendered perspective of these cases see J. Guth, 'Law and the Object and Agent of Integration: Gendering the Court of Justice of the European Union, its Decisions and their Impacts' in G. Abels and H. MacRae (eds) *Gendering European Integration Theory: Engaging New Dialogues* (Budrich 2016) 175-195.

²⁰² Article 24(3) EUCFR states that children have the right to maintain on a regular basis a personal relationship and direct contact with both parents. The Court has had the opportunity to consider the meaning of Article 24 EUCFR in only a limited number of cases. See for instance, Case C-403/09 *Jasna Detiček v Maurizio Sgueglia* [2009] ECR I-12193, para. 54; Case C-211/10 *Doris Povse v Mauro Alpage* [2010] ECR I-6673, para. 64.

only offered an *ad hoc* answer to the quest of those who care for children. The non-discrimination provisions, for instance, lack a clear provision against discrimination on the grounds of caring responsibilities. Although the principle of gender equality, in particular, and the non-discrimination EU legislation as a whole has become increasingly sophisticated, it is still ill-equipped to deal with discrimination on the grounds of childcare responsibilities.²⁰³ The lack of specific ground prohibiting care discrimination and the absence of a positive right to protect carers means that individuals must rely on existing inadequate grounds. The Court has opened some potential opportunities with the case *Coleman* by developing the principle of discrimination by association. However, in practice, the *dicta* in *Coleman* shows that discrimination by association remains limited in its ability to improve the lives of working carers. The recent case of *CHEZ Razpredelenie Bulgaria* has opened the possibility of using indirect discrimination in such cases but more clarification will be needed.²⁰⁴ Without a clear care strategy, the rights of parents and those who care for children have been addressed as part of other policies such as gender equality, disability and age.²⁰⁵ Therefore in order to be effective for carers, there is the need to link the discrimination faced by the carer to another protected ground.

The main limitation of employment policies is that they are typically geared towards young children. The contribution of the Court of Justice, although welcomed, is limited in that it can only answer specific questions that are referred to it. Furthermore, care has mainly been construed as a woman's issue. Finally, it highlights the fact that the tension between fundamental rights and economic rights is still very much alive and it has meant that there is a distinction between childcare and other (often invisible) forms of care. In particular, it is also clear that it has always been easier to address the care of healthy young children, rather than the more challenging care of older people or children with disabilities. The challenge is to unpack these elements in order to form a coherent policy at the EU level.

²⁰³ E. Caracciolo di Torella and A. Masselot, *Reconciling Work and Family Life in EU Law and Policy* (Palgrave Macmillan 2010).

²⁰⁴ Case C-83/14 *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia*, decided on 16 July 2015 Nyp ECLI:EU:C:2015:480.

²⁰⁵ L. Waddington, 'Carers, Gender and Employment Discrimination: What Does EU Law Offer Europe's Carers' in M.-A. Moreau (ed) *Before and After the Economic Crisis: What Implications for the 'European Social Model'?* (Edward Elgar 2011).

Chapter 5

Ways Forward for an EU Childcare Strategy

Introduction

This thesis set out to consider the emergent, but nevertheless increasing, enduring and essential EU engagement with childcare law and policies. In particular, it has assessed the extent to which the EU has adopted a childcare strategy which responds to the need of caregivers, the requirement of gender equality and the well-being of children, while at the same time supports the EU's economic aims.

Chapter 1 provided an outline of the concept of care. It specifically identified childcare as the focus for this research and has set it in contrast to other types of care such as long-term elderly or disabled care since childcare is the most advanced normative aspect of care at EU law level. In addition, since the adoption of the Lisbon Strategy, childcare has been integrated into aspects of EU economic policy,¹ therefore making it a full part of the objectives of the Treaties and providing a unique vantage point from which to observe the underlying principles on which the EU childcare strategy is based. Finally, the chapter has also considered the role of gender in childcare and its implications for EU policy development.

Chapter 2 explored the theoretical underpinning of care work to tease out an appropriate legal framework relevant to the EU. It argued that childcare measures should be supported by an ethic of care, the capability approach and the principle of gender equality. It has been contended that reliance on these three theoretical perspectives is appropriate and compatible with the EU regulatory frameworks.² Furthermore, this thesis has submitted that these theoretical perspectives are already embedded within the EU legal framework. Drawing on these theoretical perspectives, it advanced three broad arguments: (1) there is a strong case to support EU intervention in the area of childcare, which is not only based on economic

¹ European Council, Presidency Conclusions. Lisbon European Council, 23-24 March 2000, <http://www.europarl.europa.eu/summits/lis1_en.htm > accessed on 22 October 2015

² N. Busby, *A Right to Care? Unpaid Care Work in European Employment Law* (Oxford University Press 2011).

rationales, but also on feminist claims to gender equality; (2) the EU should adopt a catalogue of rights applicable to people who care for children in order to give citizens the necessary freedoms under the capability approach; and (3) since care is central and essential to all human activity, as well as being a good part of life, it needs to be valued according to the ethic of care. This implies that the EU legal instruments, which are presently based on an individual rights model, must be radically reshaped to support caring relationships. The ethic of care, which is compatible with the concept of justice,³ is relevant to help shifting the political commitment in order to value childcare not just as an investment, but as a good for society. Consequently, as care becomes valued, the work done by caregivers should be appreciated and not contribute to their disadvantage. To reflect this change in value, gender equality and the language of rights can help support the reshaping of the institutions.⁴

The institutions of childcare in EU law were considered in the next two chapters which looked at childcare from two broad perspectives. Chapters 3 and 4 have analysed respectively the provisions relating to childcare services and the rights of caregivers. Although these two aspects of childcare law and policy are interrelated and complementary, the thesis has justified their separate consideration based on their different legal bases.

Chapter 3 addressed the EU legal contribution to a childcare strategy. It has assessed that although the building of an EU childcare strategy designed to set minimum common standards around childcare services appears to be relevant to employment and economic growth, the EU has made little progress in relation to the adoption of such a coordinated strategy. It has acknowledged that regulating childcare services is a difficult exercise for the EU for multiple and compounded reasons. The lack of clear EU competence in this area means that the regulation with a view to harmonise or at least to adopt minimum standards on care for both childcare and adult care at EU level is a difficult (although not an impossible) task. Moreover, childcare policies are charged with socio-cultural influences and Member States have traditionally been responsible for the organisation of childcare. Thus, it is possible that a stronger involvement by the EU on the issue of childcare could lead to resistance from the Member States.⁵ The desirability for EU action in this area is also

³ See Chapter 2. M. Slote, *The Ethics of Care and Empathy* (Routledge 2007) 2-3.

⁴ J. Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* (Routledge 1993).

⁵ See, for instance, the Member States' resistance to the adoption of a childcare directive in the 1980s. See C. Hoskyns, *Integrating Gender: Women, Law and Politics in the European Union* (Verso 1996) 147; B. Cohen

questionable given the retreat to liberalist perspectives on social issues, particularly since the global financial crisis.⁶ In addition, childcare arrangements are structured along a continuum of formal and/or informal criteria that are closely interconnected and involve elements of welfare and early education policy, making their regulation problematic for the EU that must rely on specific attributed competences. The thesis has furthermore pointed to the broad diversity of the meaning and the forms of childcare at domestic level. Since the treatment and the policy of care at a national level continues to be disparate, if not divergent, this does not contribute to creating a fertile ground for developing a common position within the EU. Indeed, the lack of a common position on care within the EU Member States has been shown to have an amplified effect at the EU level and this has resulted in the EU consistently failing to develop a coherent and comprehensive legal strategy on childcare more specifically. As the EU does not have clear competences to regulate the structure, the funding and the organisation of care, its role is necessarily constrained. Despite these difficulties, Chapter 3 showed that the EU has had to intervene because childcare is central to many of the EU's economic aims. The EU has provided some leadership, albeit weakly, to encourage Member States to make childcare facilities available with the aim of increasing women's full-time employment rates. The chapter discussed how the adoption of the Barcelona targets⁷ started this process and how this has been reinforced by the 2013 Social Investment Package.⁸ It discussed the extent of the role of the EU, which is mainly limited to encouraging Member States to adopt (preferably publicly subsidised) provisions on childcare. Under the guise of the Open Method of Cooperation, the EU encourages Member States to adopt available, affordable and quality out-of-home childcare services as well as to provide a forum for information sharing. Thus, the EU's ability to influence the regulation of care has been

and N. Fraser, *Childcare in a Modern Welfare System* (Institute of Public Policy Research 1991) 52. See also discussion in Chapter 3.

⁶ C. Crouch, 'Entrenching Neo-Liberalism: The Current Agenda of the European Social Policy' in N. Countouris and M. Freedland (eds) *Resocialising Europe in a Time of Crisis* (Cambridge University Press 2013) 36-60; P. Villa and M. Smith, 'Policy in the Time of Crisis: Employment Policy and Gender Equality in Europe', in M. Karamessini and J. Rubery (eds) *Women and Austerity: The Economic Crisis and the Future for Gender Equality* (Routledge 2014) 273-294; M. Smith and P. Villa, 'The Ever-Declining Role of Gender Equality in the European Employment Strategy' (2010) 41(6) *Industrial Relations Journal* 526-543; A. Masselot, 'EU Childcare Strategy in Austerity Time' (2015) 37(3) *Journal of Social Welfare & Family Law* 345-355; D. Perrons and A. Plomien, 'Gender Inequality and the Crisis: Towards More Equitable Development' in M. Karamessini and J. Rubery (eds) *Women and Austerity: The Economic Crisis and the Future for Gender Equality* (Routledge 2014) 293-313; J. Jenson, 'Lost in Translation: The Social Investment Perspective and Gender Equality' (2009) *Social Politics: International Studies in Gender, State & Society* 1-38.

⁷ European Council, Presidency Conclusions, Barcelona European Council, 15 and 16 March 2002, SN 100/1/02 REV 1 < http://ec.europa.eu/invest-in-research/pdf/download_en/barcelona_european_council.pdf > accessed on 14 October 2015.

⁸ Communication from the Commission of 20 February 2013, Towards Social Investment for Growth and Cohesion – including implementing the European Social Fund 2014-2020, COM(2013) 83.

limited to principle setting (and, oddly, the EU has not always implemented the principles it has set itself).

In contrast to the provisions on childcare services, *Chapter 4* showed that the EU has been actively involved in addressing the rights of some caregivers, principally mothers. Here the EU law maker has been able to act because it has clearer competence and, consequently, the Court of Justice has also been frequently solicited to clarify EU law in the area. The chapter analysed how the EU has addressed, albeit partially, these rights in two broad areas: (1) work-life reconciliation and EU labour law rights have mainly contributed to supporting the employment of women in the labour market;⁹ and (2) the Court of Justice of the EU has also broadened the concept of citizenship based on care in the context of the free movement of persons and immigration. The chapter showed that through the development of the rights of parents (principally mothers), the EU has been contributing to supporting childcare and the work of caregivers.

Sections 1: Keys Findings of the Thesis

The EU Childcare Strategy and Gender Equality

This thesis confirms that women are key to the EU childcare policy and gender equality is a relevant principle to contribute to the legal framework on childcare. However, the EU childcare strategy has only marginally contributed to gender equality with a view to expanding women's rights and opportunities. This thesis has submitted that both the EU policy on childcare services and the rights of caregivers have been developed as a "by-product" of interconnected challenges raised in the context of broader EU policies. It is granted that although these rationales include the achievement of gender equality, the latter only feature on a small scale, too often as a rhetoric rather than as a legal obligation, and with the purpose of raising women's employment rate not to heighten women's choices or opportunities. The EU has moreover often used childcare policy as a way to respond to a

⁹ Council Directive 2010/41/EU of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC OJ [2010] L180/1 also guarantees a maternity allowance of at least 14 weeks to enable self-employed women to interrupt their professional activities. This Directive further provides social protection for assisting spouses and life partners. In addition, Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ [2004] L373/37 also prohibits discrimination on the ground of pregnancy in the access to goods and services which is outside the realm of workplace.

range of rationales external to gender equality including, for example: the European slow-down in global competitiveness and economic growth; the demographic crisis and low fertility rates; the fight against child poverty and social exclusion; as well as early the need for enhanced education.

Notwithstanding, women have been primarily concerned with childcare policy development because, in practice, it is they who have been and are still providing the vast majority of care. Women continue to provide most of the unpaid, invisible yet essential care which supports the entire economy, doing the “second” and then the “third shift”.¹⁰ Women should therefore logically be the first beneficiaries of childcare law and policy, if these policies were aimed at achieving gender equality. However, they often are not and when they are, EU childcare policies do not liberate women but entrench them into traditional gendered roles while at the same time enticing them to take up paid work.

As discussed in Chapter 3, the development of childcare law and policy was aimed primarily at helping women manage paid and unpaid care rather than achieving genuine gender equality. It has been submitted that facilitating access for women to paid employment while they continue doing unpaid care, does not challenge adequately gender inequalities. In turn, this has meant that other individuals, who might be considered more autonomous, have also benefitted from childcare law and policies in the sense that they have not had to increase their participation in unpaid care work. Such childcare policies foster an environment of unfair competition between those who are free of unpaid care (or individuals who can afford to outsource the care) and those who have no choice but to meet their care responsibilities. The EU childcare strategy has almost exclusively been concerned with raising women’s employment rate and to facilitate women’s efforts to reconcile work and family life, too often resulting in women mimicking the male standard of work or, worst yet, the “unencumbered worker”.¹¹ However, very little has been done to address men’s relationship to care. Indeed,

¹⁰ A. Hochschild and A. Machung, *The Second Shift: Working Parents and the Revolution at Home* (Viking Penguin 1989). Many women take on an additional “third shift” involving managing the emotions that getting through your first and second shift inspired – the intense feelings of guilt and resentment that women began to feel as they realised that “having it all” often just meant “doing everything”. A. Hochschild, ‘The Time Bind’ (1997) 1(2) *WorkingUSA* 21-29.

¹¹ G. James, *The Legal Regulation of Pregnancy and Maternity in the Labour Market* (Routledge-Cavendish 2008), 17-18; G. James, Law’s Response to Pregnancy/Workplace Conflicts: A Critique (2007) 15(2) *Feminist Legal Studies* 167-188; M. Daly, ‘What Adult Worker Model? A Critical Look at Recent Social Policy Reform in Europe From a Gender and Family Perspective’ (2011) 18(1) *Social Politics: International Studies in Gender, State & Society* 1-23.

men are largely absent from any provisions relating to the EU law on pregnancy and maternity and they are quasi-inexistent in law and policies on work-family reconciliation.¹²

The focus on women and mothers in particular has had further perverse implications resulting in the glorification of mothers. “All that I am, or hope to be, I owe to my angel mother.”¹³ This comment, attributed to Abraham Lincoln, encapsulates the glorification of mothers and, with it, the risks that this encompasses.¹⁴ Indeed, mothers are assumed to not only provide the care for children, they are also asked to perform such care at the very highest standard and any less than that is deemed a failure.¹⁵ It is assumed that childcare will be provided by mothers. This means that when others, who do not fit the traditional model of motherhood or family life, have provided childcare their work has been overlooked.¹⁶ It also means that not much has been done to entice fathers and men to take a stronger role in childcare. Stereotypes run deep¹⁷ and the EU has had limited impact in challenging traditional gender roles. The EU childcare law and policies have in particular failed to incentivise men to participate into unpaid care activities, and to encourage better sharing of unpaid care between men and women. In turn, women’s freedom to choose between paid work and care has been limited by men’s ability to choose not to care.¹⁸ In this context, it has been submitted that reliance on the capability approach would contribute to better policy design. In particular, there should be certain fundamental values on which individuals should be able to rely on regardless of the economic circumstances or the political climate.¹⁹ Such fundamental values are already set in the EU Treaties.

¹² E. Caracciolo di Torella, ‘Brave New Fathers for a Brave New World? Fathers as Caregivers in an Evolving European Union’ (2014) 20(1) *European Law Journal* 88-106; G. James, ‘Mothers and Fathers as Parents and Workers: Family-Friendly Employment Policies in an Era of Shifting Identities’ (2009) 31(3) *Journal of Social Welfare & Family Law* 271-283.

¹³ Attributed to Abraham Lincoln cited by J. G. Holland, *The Life of Abraham Lincoln* (Springfield 1866) 23.

¹⁴ J. Herring, *Caring and the Law* (Hart Publishing 2013) 7.

¹⁵ F. Ferudi, *Paranoid Parenting: Why Ignoring the Experts May be Best for your Child* (Chicago Review Press 2002); S. Hays, *The Cultural Contradictions of Motherhood* (Yale University Press 1996).

¹⁶ J. Manthorpe, ‘Nearest and Dearest? The Neglect of Lesbians in Caring Relationships’ (2003) 33(6) *British Journal of Social Work* 753-768; E. Caracciolo di Torella and P. Foubert, ‘Surrogacy, Pregnancy and Maternity Rights: A Missed Opportunity for a More Coherent Regime of Parental Rights in the EU?’ (2015) 40(1) *European Law Review* 52-69.

¹⁷ A. Masselot, E. Caracciolo di Torella, and S. Burri, *Thematic Report of the European Network of Legal Experts in the Field of Gender Equality “Fighting Discrimination on the Grounds of Pregnancy, Maternity and Parenthood - The Application of EU and National Law in Practice in 33 European Countries”* (Publication of the European Commission 2012).

¹⁸ A. Leira, ‘Caring as Social Right: Cash for Child Care and Daddy Leave’ (1998) 5(3) *Social Politics: International Studies in Gender, State & Society* 362-378.

¹⁹ M. Nussbaum, *Women and Human Development: The Capabilities Approach* Vol. 3. (Cambridge University Press 2001); M. Nussbaum, ‘Capabilities as Fundamental Entitlements: Sen and Social Justice’ (2003) 9(2-3) *Feminist Economics* 33-59.

The EU Childcare Strategy and the Care Relationship

The thesis discusses at length the inadequate EU legal engagement with childcare and the resulting socio-economic and legal impacts on people who care for children.²⁰ Despite the fact that childcare is acknowledged as a pressing issue,²¹ so far EU intervention in relation to developing a legal childcare strategy has been disappointingly scarce. Although the EU has developed a rhetorical link to childcare and has published a number of reports on this topic,²² no binding law has been adopted with regards to childcare services. Chapter 3, in particular, provided a critical analysis of the evolution of the EU engagement in the regulation of formal out-of-home childcare services. The few attempts made by the EU to regulate childcare²³ or to guarantee the protection of people who care for children²⁴ have not led to any credible results.²⁵ In addition, there is no clearly articulated legal strategy on childcare apart from the main guiding principles which are enunciated in the Barcelona targets. The EU does not have provisions that regulate how childcare should be managed: its role is mainly limited to encouraging Member States to adopt, preferably publicly subsidised, provisions on childcare services and facilities which are available, affordable and acceptable as well as to provide a forum for information sharing. Thus, the EU role with regards to childcare remains limited to that of a facilitator, a provider of policy support, information sharing and a promoter of cooperation between Member States.

²⁰ See Chapters 3 and 4.

²¹ European Commission Report of 3 October 2008, *Implementation of the Barcelona Objectives Concerning Facilities for Pre-School-Age Children*, COM(2008) 638; Communication from the Commission of 21 September 2010, Strategy for Equality between Women and Men 2010-2015, COM(2010) 491 final; Communication from the Commission of 17 February 2011, Early Childhood Education and Care: Providing all our children with the best start for the world of tomorrow, COM(2011) 66.

²² See for examples: B. Janta, *Caring for children in Europe* (European Union 2014) < <http://europa.eu/epic/studies-reports/docs/rr-554-dg-employment-childcare-brief-v-0-16-final.pdf> > accessed on 29 December 2015; M. Mills, P. Praeg, F. Tsang, K. Begall, J. Derbyshire, L. Kohle, C. Miani and S. Hoorens, *Use of Childcare Services in the EU Member States and Progress towards the Barcelona Targets (Short Statistical Report 1)* (European Union 2014); J. Plantenga and C. Remery, *The Provision of Childcare Services – A Comparative Review of 30 European Countries* (Office for Official Publications of the European Communities 2009).

²³ Council Recommendation 92/241/EEC of 31 March 1992 on child care, OJ [1992] L123/16; European Council, Presidency Conclusions, Barcelona European Council, 15 and 16 March 2002, SN 100/1/02 REV 1 < http://ec.europa.eu/invest-in-research/pdf/download_en/barcelona_european_council.pdf > accessed on 14 October 2015.

²⁴ European Commission Recommendation 2013/112/EU of 20 February 2013, Investing in children: breaking the cycle of disadvantage, OJ [2013] L59/5.

²⁵ See, for instance, the following on the Barcelona targets: European Commission, *Barcelona Objectives: The Development of Childcare Facilities for Young Children in Europe with a View to Sustainable and Inclusive Growth* (Publications Office of the European Union 2013); M. Mills, P. Praeg, F. Tsang, K. Begall, J. Derbyshire, L. Kohle, C. Miani and S. Hoorens, *Use of Childcare Services in the EU Member States and Progress Towards the Barcelona Targets (Short Statistical Report 1)* (European Union 2014).

The fragmentation of childcare policy across the Member States and poor EU leadership means that female access to the labour market, the mitigation of work-family conflicts and the realisation of gender equality objectives as a whole remain variable across the Member States depending on the availability of care services and the level of rights afforded to carers. On a broader perspective yet, the different national approaches to care contribute to different impacts on social justice as a whole and an inconsistent ability of Member States to tackle poverty and social exclusion. The EU must engage on the topic of care with Member States in a way that reflects the EU Charter of Fundamental Rights and other EU values and principles, in particular, gender equality, human dignity and solidarity.

The EU's concern with childcare services, which are reflected in the Barcelona targets, have been too narrow and too focussed on economic outcomes. The values which underpin the Treaties have largely been ignored. As a result, EU intervention has largely failed to achieve the immediate goal of the policy, namely to raise female full-time employment rates. Moreover, the goal set by the EU in addressing childcare - again, that of raising female employment rates - has been too narrow and has largely missed the opportunity to contribute to achieve broader EU aims and values. When addressing childcare services, the EU should have been more concerned with broader social aims, proclaimed as fundamental in the Treaties, which are compatible with the ethic of care and the value of care relationships. The Barcelona targets and the following policies have failed to contribute effectively to gender equality, the best interest of the child, the eradication of poverty, or the solidarity between the generations.

The Protection of Caregivers Remains Patchy and Incoherent

It has been recognised that although the EU has already adopted a solid framework in relation to work-life reconciliation,²⁶ carers, including those who care for children, continue to be at a disadvantageous position in the labour market and, in many cases, face discrimination.²⁷ The legal development in relation to work-life reconciliation remains partial and incomplete, leaving some caregivers without protection. Those who are not covered by the existing limited rights, are excluded either because they are the wrong gender or their situation falls

²⁶ E. Caracciolo di Torella and A. Masselot, *Reconciling Work and Family Life in EU Law and Policy* (Palgrave Macmillan 2010).

²⁷ A. Masselot, E. Caracciolo di Torella, and S. Burri, *Thematic Report of the European Network of Legal Experts in the Field of Gender Equality "Fighting Discrimination on the Grounds of Pregnancy, Maternity and Parenthood - The Application of EU and National Law in Practice in 33 European Countries"* (Publication of the European Commission 2012).

outside the narrow areas which are protected. Moreover, much legal uncertainty surrounds the protection of care givers in the area of free movement and immigration:²⁸ the existing rights do not reflect the ethics of care, where caring relationships should be valued but, instead, they echo the market's values (labour, free movement and education). A childcare strategy must go beyond and incorporate social and human rights' values. These are supported by the existing EU General Principles and Treaty values such as gender equality and dignity which have been set as a priority by EU policy makers.²⁹ These principles should be guided by the ethics of care and the capability approach in devising rights for parents and those who care for children. At present however, caring for children often means reduced working hours or leads to an exit from the workforce, which translates into costs in the form of loss of earnings. Wider economic losses must also be taken into account as a result of lower productivity, lower tax revenues and lower household consumption.³⁰ In turn, caregivers' and specifically women's ability to access the labour market, to mitigate work-family conflicts and to realise gender equality objectives as a whole vary across the Member States. Equally, this further impacts on the ability of Member States to tackle poverty and social exclusion and, ultimately, it compromises social justice across the whole of the EU.

The difficulties with regards to the rights of carers are twofold and relate to the personal and the material scopes of the rights of carers. With regards to the personal scope, these rights are addressed generally to parents but more specifically to mothers, especially when referring to leave provisions. For instance, fathers do not feature at all in the Pregnant Workers Directive;³¹ they are mentioned but derive no right from the Recast Directive;³² and they can

²⁸ See Chapter 4.

²⁹ Council of the European Union, Council conclusions of 7 March 2011 on European Pact for Gender Equality (2011-2020), (2011/C 155/02), OJ [2011] C155/10; Communication from the Commission of 20 February 2013, Towards Social Investment for Growth and Cohesion – including implementing the European Social Fund 2014-2020, COM(2013) 83; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Launching a consultation on a European Pillar of Social Rights, COM(2016) 127 final.

³⁰ M. Lilly, A. Laporte, and P. Coyte, 'Labour Market Work and Home Care's Unpaid Caregivers: A Systematic Review of Labour Force Participation Rates, Predictors of Labour Market Withdrawal and Hours of Work' (2007) 85(4) *Milbank Quarterly* 641-690.

³¹ 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] L348/1.

³² Article 16 of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ [2006] L204/23.

only benefit from unpaid parental leave guaranteed in the Parental Leave Directive³³ with the implication that in practice they do not use the leave.³⁴ Other caregivers are completely forgotten in any of these legal provisions. In contrast, the provisions on time are typically drafted in gender neutral terms. Nevertheless, their effects often have either gendered impacts³⁵ or they benefit the employers rather than the employees.³⁶ In any case, the existing EU law on leave and time fails to fully address the need of many caregivers by focussing mostly on mothers. The consequences are similar to that of the policy on childcare services: women are perceived to primarily be carers and not employees in their full rights justifying harmful gender stereotypes.³⁷ Far from challenging the *status quo*, the leave and time provisions - which do not take into account that caring is a universal basic need inherent to our humanity and central to our flourishing³⁸ - lead to entrenching women in traditional gendered roles and, in turn, limit women's ability to access the labour market on a full-time basis. By contrast, this thesis has submitted that, in accordance with the ethics of care, the personal scope of the right to care for children needs to be expanded to include a broader definition of people who care for children in accordance with the five markers of care suggested in Chapter 1 (which include a notion of labour; the absence of choice; financial, emotional and physical cost; personal and emotional attachment; and an element of vulnerability). These markers are suggested to form a basis on which a clear definition of a caregiver could be built by the EU policy makers in the Court of Justice in the same way it has constructed the concept of workers.

³³ Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC (Text with EEA relevance) OJ [2010] L68/13.

³⁴ E. Caracciolo di Torella, 'Brave New Fathers for a Brave New World? Fathers as Caregivers in an Evolving European Union' (2014) 20(1) *European Law Journal* 88-106; L. Haas, 'Parental Leave and Gender Equality: Lessons from the European Union' (2003) 20(1) *Review of Policy Research* 89-114; G. James, 'Mothers and Fathers as Parents and Workers: Family-Friendly Employment Policies in an Era of Shifting Identities' (2009) 31(3) *Journal of Social Welfare & Family Law* 271-283.

³⁵ D. Hofäcker and S. König, 'Flexibility and Work-Life Conflict in Times of Crisis: A Gender Perspective' (2013) 33(9) *International Journal of Sociology and Social Policy* 613-635; A. Masselot, 'Gender Implications of the Right to Request Flexible Working Arrangements: Raising Pigs and Children in New Zealand' (2015) 39(3) *New Zealand Journal of Employment Relations* 59-71.

³⁶ M. Stratigaki, 'The Co-optation of Gender Concepts in EU Policies: The Case of Reconciliation of Work and Family' (2004) 11(1) *Social Politics* 30-56

³⁷ A. Masselot, 'EU Childcare Strategy in Austerity Time' (2015) 37(3) *Journal of Social Welfare & Family Law* 345-355; A. Masselot, E. Caracciolo di Torella and S. Burri, *Thematic Report of the European Network of Legal Experts in the Field of Gender Equality "Fighting Discrimination on the Grounds of Pregnancy, Maternity and Parenthood - The Application of EU and National Law in Practice in 33 European Countries"* (Publication of the European Commission 2012).

³⁸ E. Feder Kittay, *Love's Labour: Essay on Women, Equality and Dependency* (Routledge 1999).

With regards to the material scope of the right to care for children, it has been noted that the EU has been supporting the rights of parents and those who care for children. The Court of Justice has made the best of the existing legal instruments to support caregivers despite the fact that principles (such as non-discrimination on the grounds of gender) can be ill-equipped to address discrimination on the grounds of care. The existing EU law and policy, moreover, is too narrow, considering almost exclusively the caring relationship in the context of the workplace. In contrast, caring relationships in the broader context of citizenship are seldom considered, except in the area of migration and free movement. In addition, the existing provisions, relating in particular to work-family reconciliation, are incomplete and therefore incoherent in places leading to legal uncertainties and inequities.

Section 2: Recommendations for an EU Childcare Strategy

It has been argued that the EU is the right actor to recognise, facilitate and value childcare as well as to support those who care for children. This thesis is based on the idea that a realistic shift in norms can be achieved because they are already supported by existing fundamental EU values and a wide range of legal provisions. The EU not only has the necessary theoretical support to intervene in the area of childcare but also it has a strong foundation to adopt effective rights for the protection and the support of caregivers. It is strongly argued that the traditional EU normative framework relating to childcare must shift significantly to put the EU's fundamental values at the heart of policy and law making. This thesis contends that adequate measures to support childcare and those who care for children are likely to result in substantially reducing gender norm stereotypes around care and work. This thesis advocates for a realistic step by step progression guided by existing values in contrast to a "grand" vision for deeper, systemic reforms.³⁹

This section will articulate two main practical recommendations. First, it will argue that ideally a clear legal basis in the EU Treaty needs to support the EU's action in this area but that to some extent a number of principles already exist which, when taken together, provide

³⁹ J. Nedelsky, 'The Gendered Division of Household Labour: An Issue of Constitutional Rights' in B. Baines, D. Barak-Erez & T. Kahana (eds) *Feminist Constitutionalism: Global Perspectives* (Cambridge University Press 2012) 15-47; J. Nedelsky, 'Part-time for All: Creating New Norms of Work and Care' *Natural Law Colloquium Fall 2014 Lecture*. New York: Fordham University (2014) < http://calendars.fordham.edu/EventList.aspx?view=EventDetails&eventidn=3923&information_id=9826&syndicate=syndicate > accessed on 25 May 2016.

the EU with implied competences in the area of childcare. Second, it will outline recommendations in order to devise a clear agenda for the development of a coherent EU legal framework on childcare which incorporates feminist viewpoints, an ethic of care and the capability approach with regards to the EU childcare services and the rights of individuals who care.

Building a Clear Legal Base for Childcare in the EU

Under EU law, every right needs to be supported by a legal base.⁴⁰ As childcare was not contemplated by the EU founding fathers, technically, there is not a specific legal base that could clearly underpin parents' or carers' rights in the EU Treaty. Similarly, there is no specific right for the EU to legislate expressly on any aspect of childcare services or any childcare organisation in the Member States.

Since there is no clearly established legal base for the EU to act in this area, this thesis calls for the adoption of a new treaty article which would provide the EU legislator with specific competencies in the area of childcare. Moreover, this thesis joins other scholars⁴¹ who have called for the adoption of a general right to care and argues that at the least a specific right for individuals who care for children should be devised. The drafting of the new Treaty Article should be inspired by the existing Articles 45, 157 and 19 TFEU. As such, it would include the prohibition of anti-discrimination, the promotion of equality and the protection of free movement. Articles 2 and 3 TEU would underpin the new treaty article on childcare which would also be backed up by the provisions of the EU Charter of Fundamental Rights and the General Principles of EU law. The adoption of such a legal basis on childcare into the Treaty on the Functioning of the European Union would strongly signal that the EU is committed to social values and particularly to childcare. More than that, it would make the undeniable statement that the EU's economy is based on the combination of both production and reproduction. It would change the way work is understood in the EU by including paid and unpaid work. This new treaty article would truly be paradigm changing and a world first.

Having made this statement, this thesis recognises that the introduction of a new treaty article on childcare - especially one that would change the way the market economy is accounted for

⁴⁰ Articles 4 and 5 TEU.

⁴¹ N. Busby, *A Right to Care? Unpaid Care Work in European Employment Law* (Oxford University Press 2011); E. Caracciolo di Torella, 'Shaping and re-shaping the care discourse in European Law: a catalogue of rights for carers?' 2016 28(3) *Child and Family Law Quarterly* 261-279.

- is unlikely to be adopted in the near future.⁴² The next best option is to call for the amendment of Article 19 TFEU in order to include a new ground of prohibited discrimination to the existing list. Accordingly, the amendment of Article 19 TFEU would give the EU competence to adopt secondary legislation in order to prohibit discrimination based on childcare.⁴³ The breadth of such an amendment would be narrower than the previous option. The inclusion of childcare into the existing list of Article 19 TFEU would neither cover the promotion of equality nor would it include the free movement principle. Nevertheless, the inclusion of childcare in Article 19 TFEU would be challenging well-established EU discrimination law. However, the hope that Article 19 TFEU be amended in the near future is also pretty unrealistic. Therefore, the last best strategy is to work creatively with the existing EU Treaty provisions.

Drawing on Existing Treaty Provisions and Principles to Reveal EU Implied Competence in Childcare

Although care is not specifically considered in the law of the EU, it is arguable there are already a number of existing principles that can underpin the development of a specific legal strategy on childcare as well as care in general.⁴⁴ The provisions which support the advancement of a childcare strategy can be found in the EU Treaty, the EU Charter of Fundamental Rights and the General Principles of EU law⁴⁵ developed over the years by the judgements delivered by the Courts of Justice of the European Union, as well as by the European Convention of Human Rights. Taken individually, these provisions are not enough to develop a comprehensive childcare strategy. This thesis has illustrated how traditional provisions taken in isolation - such as Article 157 TFEU on the principle of gender equality and Article 19 TFEU on a broader non-discrimination principle - have proven to have pitfalls with regards to childcare.⁴⁶ This is perhaps because a catalogue of rights cannot be devised within a traditional normative framework that values personal autonomy and free choice. Instead, such a childcare strategy would need to be grounded within feminist theory and

⁴² L. Rossi and F. Casolari (eds), *The EU After Lisbon: Amending or Coping with the Existing Treaties?* (Springer 2014).

⁴³ Article 19 TFEU does not contain a direct prohibition of discrimination on the grounds which it lists (unlike Article 21 of the EU Charter of Fundamental Rights) and it does not have direct effect (unlike Article 157 TFEU). It only provides competence to the EU to adopt measures to combat discrimination on the grounds listed within the scope of the policies and powers granted in the Treaties.

⁴⁴ N. Busby, *A Right to Care? Unpaid Care Work in European Employment Law* (Oxford University Press 2011).

⁴⁵ T. Tridimas, *The General Principles of EU Law* (Oxford University Press 2006); P. Craig, *EU Administrative Law* (Oxford University Press 2012).

⁴⁶ See discussion in Chapter 4.

based on the ethics of care where the interdependence of individuals is acknowledged and valued as well as on the capability approach which can accommodate human diversity. These theories and principles can and should support specific rights on childcare. Taken together, however, EU principles and values (such as equality, dignity and solidarity) are not only compatible with the EU legal order but they can also represent a powerful support to the theoretical framework adopted by this thesis, including a feminist perspective, the ethic of care and the capability approach, which is necessary to develop an adequate childcare strategy. Failing the adoption of a new treaty article on childcare, the existing legal provisions to the Treaty taken together with the principles and values of the EU and supported with the appropriate theoretical framework should provide enough to argue that an implied legal basis for childcare already exists. This could make a difference in practice and reinforce EU leadership in this area.

The Values Setting of the EU Treaties

This thesis has discussed how the principles of gender equality and anti-discrimination on the grounds of sex are central to building a childcare strategy.⁴⁷ It has also previously highlighted that equality between women and men is a fundamental principle of EU law⁴⁸ which has been integrated at all levels of the Treaty (the Treaty on the EU, the Treaty on the Functioning of the European Union and the Charter). However, the Treaty goes further than addressing gender inequality. It has established a list of values which are relevant to childcare and reconciliation between work and family life beyond gender equality. The principles and values of human dignity, solidarity between generations, social inclusion and the recognition of the rights of children represent the basis upon which the EU can build a childcare strategy.⁴⁹

In addition, prior to its integration in the Treaty, the Court of Justice of the EU had incorporated human dignity as a general principle of European law, deriving from the constitutional traditions common to the Member States.⁵⁰ Post-Lisbon, the respect for human

⁴⁷ See Chapter 4.

⁴⁸ See Chapters 1 and 4.

⁴⁹ Article 2 TEU: “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 Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail”.

⁵⁰ In 1993, Advocate General Jacobs stated that “the constitutional traditions of the Member States in general allow for the conclusion that there exists a principle according to which the State must respect not only the individual’s physical well-being, but also his dignity, moral integrity and sense of personal identity.” Case C-

dignity is one of the values on which the Union is based, and which is common to all Member States as well as in the Charter of Fundamental Rights of the EU.⁵¹ Respect for human dignity is not a new concept within EU law, but it is a difficult concept to apprehend. Far from providing a set of universalistic, principled bases for judicial decision-making, the concept of dignity is incredibly flexible and provides little common understanding of what is required substantively within or across jurisdictions.⁵² It is a principle which seems open to significant judicial discretion.⁵³ As such, it can potentially play an important role in the development of human rights adjudication in relation to childcare. In fact, human dignity has been used to highlight and protect the needs of vulnerable individuals

168/91 *Christos Konstantinidis v Stadt Altensteig - Standesamt and Landratsamt Calw – Ordnungsamt*, Opinion of Advocate General F Jacob delivered on 9 December 1992, [1993] ECR I-1191, para. 39. Furthermore, in Case C-13/94 *P v S and Cornwall County Council* [1996] ECR I-2143, the CJEU held, in relation to the treatment of transsexuals in the workplace, that “to tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard” (at para 22). In Case C-303/06 *Coleman v Attridge Law* [2008] ECR I-5603, Advocate General Maduro states that “the most obvious way in which such a person’s dignity and autonomy may be affected is when one is directly targeted because one has a suspect characteristic. Treating someone less well on the basis of reasons such as religious belief, age, disability and sexual orientation undermines this special and unique value that people have by virtue of being human. Recognising the equal worth of every human being means that we should be blind to considerations of this type when we impose a burden on someone or deprive someone of a benefit” (Opinion of Advocate General Maduro delivered on 31 January 2008, ECLI:EU:C:2008:61, para. 10 but see also paras. 8-10, 12-13, 15, and 22).

⁵¹ In fact the entire first chapter of the Charter of Fundamental Rights refers to the concept of dignity.

Article 1: “Human dignity is inviolable. It must be respected and protected.”

Article 2: “Right to Life

1. Everyone has the right to life.
2. No one shall be condemned to the death penalty, or executed.”

Article 3: “Right to the Integrity of the Person

1. Everyone has the right to respect for his or her physical and mental integrity.
2. In the fields of medicine and biology, the following must be respected in particular:
 - a. the free and informed consent of the person concerned, according to the procedures laid down by law,
 - b. the prohibition of eugenic practices, in particular those aiming at the selection of persons,
 - c. the prohibition on making the human body and its parts as such a source of financial gain,
 - d. the prohibition of the reproductive cloning of human beings.”

Article 4: “Prohibition of Torture and Inhuman or Degrading Treatment or Punishment

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

Article 5: “Prohibition of Slavery and Forced Labour

1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour.
3. Trafficking in human beings is prohibited.”

In addition, the concept of dignity is furthermore contained in Articles 25 and 31 of the Charter:

Article 25: “The rights of the elderly

The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.”

Article 31: “Fair and just working conditions

1. Every worker has the right to working conditions which respect his or her health, safety and dignity.
2. Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.”

⁵² C. McCrudden, ‘Human Dignity and Judicial Interpretation of Human Rights’ (2008) 19(1) *European Journal of International Law* 655-724.

⁵³ J. Jones, ‘Human Dignity in the EU Charter of Fundamental Rights and its Interpretation before the European Court of Justice’ (2012) 33(3) *Liverpool Law Review* 281-300.

engaged in caring relationships, be those cared for and/or carers.⁵⁴ Advocate General Maduro has for instance indicated that dignity entails “the recognition of equal worth of every individual”⁵⁵ which must be protected regardless of the economic contribution that an individual can make. Thus, human dignity represents a crucial principle for the development of childcare.

In addition, the EU is committed to combating social exclusion and discrimination as well as promoting social justice, protection and equality between women and men in Article 3 TEU. To reinforce this commitment, the Treaty on the Functioning of the European Union provides legal instruments in the form of Articles 8⁵⁶ and 10⁵⁷ TFEU, which give power to the EU to mainstream equality into all of its policies.⁵⁸ Furthermore, Article 153 TFEU⁵⁹ sets out that

⁵⁴ See also G. Moon, R. Allen, ‘Dignity Discourse in Discrimination Law: A Better Route to Equality?’ (2006) 6 *European Human Rights Law Review* 610-649.

⁵⁵ Case C-303/06 *Coleman v Attridge Law*, Opinion of Advocate General Maduro delivered on 31 January 2008, ECLI:EU:C:2008:61, para. 9 but see also paras. 8-10, 12-13, 15, and 22.

⁵⁶ Article 8 TFEU: “In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women.”

⁵⁷ Article 10 TFEU: “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.”

⁵⁸ Both Article 8 and 10 TFEU are reinforced by Article 157 TFEU, which provides for the principle of gender equality in pay and other employment areas as well as providing an option for the adoption of positive actions; and Article 19 TFEU which prohibit discrimination on the grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

⁵⁹ Article 153 TFEU: “1. With a view to achieving the objectives of Article 151, the Union shall support and complement the activities of the Member States in the following fields:

- (a) improvement in particular of the working environment to protect workers’ health and safety;
- (b) working conditions;
- (c) social security and social protection of workers;
- (d) protection of workers where their employment contract is terminated;
- (e) the information and consultation of workers;
- (f) representation and collective defence of the interests of workers and employers, including co-determination, subject to paragraph 5;
- (g) conditions of employment for third-country nationals legally residing in Union territory;
- (h) the integration of persons excluded from the labour market, without prejudice to Article 166;
- (i) equality between men and women with regard to labour market opportunities and treatment at work;
- (j) the combating of social exclusion;
- (k) the modernisation of social protection systems without prejudice to point (c).

2. To this end, the European Parliament and the Council:

- (a) may adopt measures designed to encourage cooperation between Member States through initiatives aimed at improving knowledge, developing exchanges of information and best practices, promoting innovative approaches and evaluating experiences, excluding any harmonisation of the laws and regulations of the Member States;
- (b) may adopt, in the fields referred to in paragraph 1(a) to (i), by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States. Such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings.

The European Parliament and the Council shall act in accordance with the ordinary legislative procedure after consulting the Economic and Social Committee and the Committee of the Regions.

the Union shall adopt minimum requirements, as well as support to complement the activities of the Member States in the area of working environment, working conditions, as well as equality between men and women with regard to labour market opportunities and treatment at work. Article 3 TEU, moreover, goes further by stating that the Union “shall promote (...) solidarity between generations and protection of the rights of the child”, placing the emphasis on people’s relationships in context. This is an expression of the principle that “providing care for people over the life cycle is a social responsibility, an obligation that reflects our ties to one another as a human community”.⁶⁰ In addition, the EU’s commitment to protecting children in Article 3(3) TFEU has effectively established that the status of children within the European integration process is core and essential.⁶¹

The Emerging Care Ethics under the Charter of Fundamental Rights of the EU

In addition, the EU Charter of Fundamental Rights - which now has the status of primary legislation - is legally binding and represents “an enormous transformative potential”⁶² in particular for the development of an ethic of care within EU law. Although the potential of the Charter of Fundamental Rights of the EU has yet to be fulfilled, it “has become a point of reference commonly used in the development of EU policies [...] The Commission not only guarantees that its proposals are compatible with the Charter, it also ensures that the Charter

In the fields referred to in paragraph 1(c), (d), (f) and (g), the Council shall act unanimously, in accordance with a special legislative procedure, after consulting the European Parliament and the said Committees.

The Council, acting unanimously on a proposal from the Commission, after consulting the European Parliament, may decide to render the ordinary legislative procedure applicable to paragraph 1(d), (f) and (g).

3. A Member State may entrust management and labour, at their joint request, with the implementation of directives adopted pursuant to paragraph 2, or, where appropriate, with the implementation of a Council decision adopted in accordance with Article 155.

In this case, it shall ensure that, no later than the date on which a directive or a decision must be transposed or implemented, management and labour have introduced the necessary measures by agreement, the Member State concerned being required to take any necessary measure enabling it at any time to be in a position to guarantee the results imposed by that directive or that decision.

4. The provisions adopted pursuant to this Article:

— shall not affect the right of Member States to define the fundamental principles of their social security systems and must not significantly affect the financial equilibrium thereof,

— shall not prevent any Member State from maintaining or introducing more stringent protective measures compatible with the Treaties.

5. The provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose.”

⁶⁰ J. Brenner, ‘Democratizing Care’ in J. Gornick and M. Meyers (eds) *Gender Equality, Transforming Family Divisions of Labor* (Verso 2009) 177-192, 189.

⁶¹ H. Stalford and E. Drywood, ‘Coming of Age? Children’s Rights in the European Union’ (2009) 46(1) *Common Market Law Review* 143-172.

⁶² N. Countouris and M. Freedland, ‘Resocialising Europe: Looking Back and Thinking Forward’ in N. Countouris and M. Freedland (eds) *Resocialising Europe in a Time of Crisis* (Cambridge University Press 2013) 493-503, 496.

is respected when Member States implement EU law”.⁶³ Moreover, the CJEU has increasingly been making reference to the Charter of Fundamental Rights.⁶⁴

Indeed, the EU Charter of Fundamental Rights contains several provisions which contribute to reinforcing an emerging EU support for an ethic of care. In particular, the Charter refers to specific areas that entail a caring relationship, such as that of the rights of children in Article 24,⁶⁵ the rights of the elderly in Article 25,⁶⁶ the rights of persons with disabilities in Article 26,⁶⁷ the right to respect of family life in Article 7⁶⁸ and the right to social rights as well as the right to reconciliation between work and family life in Article 33.⁶⁹ All the above provisions are complemented by the right to engage in work provided under Article 15(1)⁷⁰ and the right to fair and just conditions of work contained in Article 31, as well as the more general non-discrimination clause located under Article 21.⁷¹ Taken together, it is suggested that these provisions can contribute to support mutually interdependent connections thus reflecting a more humane face of the EU.⁷²

⁶³ European Commission, *2011 Report on the Application of the EU Charter of Fundamental Rights*, COM (2012) 169 final (Publications Office of the European Union 2012).

⁶⁴ See for instance Case C-256/11 *Murat Dereci and Others v Bundesministerium für Inneres* [2011] ECR I-11315; Case C-236/09 *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres* [2011] ECR I-773.

⁶⁵ Article 24 of the Charter of Fundamental Rights of the EU: “1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity; 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”.

⁶⁶ Article 25 of the Charter of Fundamental Rights of the EU: “The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life”.

⁶⁷ Article 26 of the Charter of Fundamental Rights of the EU: “The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community”.

⁶⁸ Article 7 of the Charter of Fundamental Rights of the EU: “Everyone has the right to respect for his or her private and family life, home and communications”.

⁶⁹ Article 33 of the Charter of Fundamental Rights of the EU: “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”. Notably, however, Article 33 of the Charter on the right to reconciliation fails to mention care. Nevertheless, as an essential element of reconciliation between work and family life, care is arguably implied in Article 33 of the Charter. See further E. Caracciolo di Torella and A. Masselot, *Reconciling Work and Family Life in EU Law and Policy* (Palgrave Macmillan 2010).

⁷⁰ Article 15(1) of the Charter of Fundamental Rights of the EU: “Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation”.

⁷¹ Article 21 of the Charter of Fundamental Rights of the EU: “1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited; 2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited”.

⁷² N. Ferreira and D. Kostakopoulou (eds), *The Human Face of the European Union* (Springer 2016).

Despite its increasing visibility, the Charter remains contested because it sits at the crossroad between economic and human/social rights and its application has been complex and ambiguous.⁷³ There is an urgent need for clarity over its rules of application, scope and conceptual interpretation.⁷⁴ The Court of Justice is to play a crucial role in this clarification exercise but a political will is also required. The recent adoption by the European Commission of the first preliminary outline of what should become the European Pillar of Social Rights⁷⁵ provides some indications that such political will exists at EU level. In this context, the Charter represents an instrument for a return to social Europe, as promoted in Articles 2 and 3 TEU, and supported by International and European human rights mechanisms such as the core ILO Conventions⁷⁶ and the European Convention of Human Rights. As outlined in the Commission's Communication on the European Pillar of Social Rights,⁷⁷ the EU Charter of Fundamental Rights should be interpreted in line with these aforementioned provisions and should be seen as conferring the EU legislator the power to adopt binding legal instruments for the protection and implementation of social rights and principles.⁷⁸

⁷³ J. Jones, 'Human Dignity in the EU Charter of Fundamental Rights and its Interpretation Before the European Court of Justice' (2012) 33(3) *Liverpool Law Review* 281-300; S. Koukoulis-Spiliotopoulos, 'The Lisbon Treaty and the Charter of Fundamental Rights: Maintaining and Developing the *Aquis* in Gender Equality' (2008) 1 *European Gender Equality Law Review* 15-24; A. Tryfonidou, '(Further) Signs of a Turn to the Tide in the CJEU's Citizenship Jurisprudence, Case C-40/11 "Iida", Judgment of 8 November 2012, not yet reported' (2013) 20(2) *Maastricht Journal of European and Comparative Law* 302-320; P. Starup and M. Elsmore, 'Taking a Logical or Giant Step Forward? Comment on *Ibrahim* and *Teixeira*' (2010) 35(4) *European Law Review* 583-584.

⁷⁴ Under Article 51 of the Charter of Fundamental Rights, there are limitations to its scope however. The Charter is addressed to the EU and the Member States "only when they are implementing EU law". The Court of Justice of the EU has further held that EU human rights law applies to Member States not only when they are implementing EU law, but whenever they are acting within the scope of EU law (Case C-578/08 *Rhimou Chakroun v Minister van Buitenlandse Zaken* [2010] ECR I-1839). The question thus remains as to whether Member States derogate from applying EU norms or when their acts affect EU law. The boundaries of application of the Charter of Fundamental Rights therefore needs to be further clarified.

⁷⁵ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Launching a consultation on a European Pillar of Social Rights, COM(2016) 127 final.

⁷⁶ In particular, in the context of this research, Articles 1 and 5 of ILO Convention concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities, 1981 (No. 156) is pressingly relevant.

⁷⁷ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Launching a consultation on a European Pillar of Social Rights, COM(2016) 127 final.

⁷⁸ N. Countouris and M. Freedland, 'Resocialising Europe: Looking Back and Thinking Forward' in N. Countouris and M. Freedland (eds) *Resocialising Europe in a Time of Crisis* (Cambridge University Press 2013) 193-503.

Nevertheless, the potential of the Charter does not create new competences for the EU, it merely enhances the status of fundamental rights within the confines of EU competence.⁷⁹ Consequently, the enhanced status of the fundamental rights under the Charter does not extend EU competences into enacting childcare-related measures beyond those already set out in the TEU and the TFEU.

The European Convention of Human Rights (ECHR)

As explained above, even though the EU Treaty does not address care as such, Treaty provisions taken together have a strong potential to provide a basis for the EU's engagement in childcare. In addition, a caring relationship would certainly be included in the protection offered by the ECHR.⁸⁰ The relationship between the EU and the ECHR has generally been harmonious and cooperative.⁸¹ For instance, the ECHR provisions have been echoed in the Charter of Fundamental Rights.⁸² In addition, the EU is obliged to make sure that any measures adopted in areas that fall within its competence are compatible with its provisions and existing jurisprudence.⁸³ Since the entry into force of the Lisbon Treaty, this relationship has been further strengthened and accession based on Article 6 TFEU⁸⁴ is likely to follow in the not too distant future.⁸⁵

First and foremost childcare is to be part of the concept of family life as encapsulated in Article 8 ECHR⁸⁶ which contributes to protecting caring relationships. This article contains both negative and positive aspects. Whilst the negative aspect (namely the principle of non-

⁷⁹ Article 6(1) TFEU and Article 51(2) of the Charter.

⁸⁰ J. Herring, *Caring and the Law* (Hart Publishing 2013).

⁸¹ S. Brittain, 'The Relationship Between the EU Charter of Fundamental Rights and the European Convention on Human Rights: An Originalist Analysis' (2015) 11(3) *European Constitutional Law Review* 482-511.

⁸² S. Douglas-Scott, 'The Relationship between the EU and the ECHR Five Years on from the Treaty of Lisbon' in U. Bernitz, S. de Vries, S. Weatherill (eds) *The EU Charter of Fundamental Rights as a Binding Instrument: Five Years Old and Growing* (Hart 2015).

⁸³ Case C-94/00 *Roquette Frères SA v Directeur général de la concurrence, de la consommation et de la répression des fraudes, and Commission of the European Communities* [2002] ECR I-9011.

⁸⁴ Article 6(2) and (3) TFEU: "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".

⁸⁵ See further P. Foubert, Š. Imamović, 'The Pregnant Workers Directive: Must Do Better - Lessons to be Learned from Strasbourg?' (2015) 37(3) *Journal of Social Welfare & Family Law* 309-320.

⁸⁶ Article 8 ECHR: "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".

interference) is the most prominent, the positive aspect requires Member States to take reasonable steps to provide services or otherwise act to maintain the familial (*in casu* caring) relationship. The relevance of the ECHR⁸⁷ is also evident in other pertinent articles, such as Article 3 ECHR on the protection from torture⁸⁸ or inhuman or degrading treatment and Article 14 ECHR on the protection from discrimination.⁸⁹ In addition, the European Court of Human Rights (ECtHR) has held that, even if Article 8 ECHR does not expressly mention care, family life does indeed depend on close, continuing and practical ties.⁹⁰ Care often takes place within the family and the latter often has an invaluable role in providing high quality care.⁹¹ For the purpose of parents and individuals who care for children, it opens up possibilities for a new discussion that emphasises the importance of the caring relationship and an alternative way to interpret the non-discrimination provisions and workplace rights.

The EU therefore has some argument to push forward an agenda in order to design a comprehensive childcare strategy rather than contribute to childcare as a by-product of broader internal market freedom, as has been the case until now. In addition, it should be acknowledged that an effective childcare strategy is achievable not only by extending the parameters of EU competences but also through a range of other non-legislative mechanisms.

Section 3: Recommendations to Improve the EU Childcare Strategy

The main EU actions relating to childcare are found in the Barcelona targets, which have been restated in the Social Investment Package (SIP). As explained in Chapter 3, under these targets the EU recommends to the Member States enhancing the availability of childcare in a bid to increase the employment rate of parents (specifically mothers). Under the perception that parenthood has a strong shaping influence on the employment rate of women, the aim of the Barcelona targets has been to “remove disincentives to female labour force

⁸⁷ See generally J. Herring, *Caring and the Law* (Hart 2013).

⁸⁸ Article 3 ECHR: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment”.

⁸⁹ Article 14 ECHR: “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”.

⁹⁰ As summarised in *Al-Nashif v Bulgaria*, Application n° 50963/99 (20 June 2002); see also *Petrovic v Austria*, Application n° 20458/92 (27 March 1998) and more recently, *Konstantin Markin v Russia*, Application n° 30078/06 (22 March 2012) and *Topčić-Rosenberg v. Croatia* Application n°19391/11 (2013).

⁹¹ See the European Parliament Resolution of 4 July 2013, Impact of the Crisis on Access to Care for Vulnerable Groups (2013/2044 (INI)).

participation⁹² by responding to the demand for pre-school childcare. In particular, it appears that closing the gap between parenthood and employment is important especially for women. Motherhood is especially negatively correlated with employment in the vast majority of the EU Member States.⁹³ The difference in employment rates between adults with and without children is indicative of the ability of parents to work and care for their children. Although the employment rate of women has increased significantly over the past few decades, the differences in employment between parents and non-parents remain persistent over time.⁹⁴ This suggests that the goals of the Barcelona targets - to increase the employment participation of parents (especially of mothers) - have remained unmet in many Member States.

The targets have so far been disappointing with only a handful of countries meeting the expected goals.⁹⁵ However, their inefficient implementation at national level represents only one of their weaknesses. At least three other shortcomings can be highlighted. First the EU has adopted an instrumental approach to childcare in which children and women are treated as a means rather than as an end. As seen in the previous section, this is inconsistent with the provisions of the Treaty which requires that the EU promotes gender equality⁹⁶ and recognises children as active subjects and citizens.⁹⁷ It is moreover incompatible with the provisions of the EU Charter of Fundamental Rights which states that children should have “the right to protection and care as is necessary for their well-being”.⁹⁸ Second, as seen in Chapter 3, the EU approach to childcare is piecemeal resulting in a distinct lack of a coherent strategy. This fragmentation arguably contradicts EU human values⁹⁹ established under the Treaty, especially since Lisbon, which centres on human rights and dignity, gender equality, children’s rights and solidarity. Finally, the EU is relying on weak coordination instruments to stimulate national policy convergence on childcare. This soft coordination process raises

⁹² European Council, Presidency Conclusions, Barcelona European Council, 15 and 16 March 2002, SN 100/1/02 REV 1 < http://ec.europa.eu/invest-in-research/pdf/download_en/barcelona_european_council.pdf > Accessed on 14 October 2015.

⁹³ S. Dex, A. Clark and M. Taylor, *Household Labour Supply* (Department of Employment 1994).

⁹⁴ M. Mills, P. Praeg, F. Tsang, K. Begall, J. Derbyshire, L. Kohle, C. Miani and S. Hoorens, *Use of Childcare Services in the EU Member States and Progress Towards the Barcelona Targets (Short Statistical Report 1)* (European Union 2014) 12.

⁹⁵ European Commission, *Barcelona Objectives: The Development of Childcare Facilities for Young Children in Europe with a View to Sustainable and Inclusive Growth* (Publications Office of the European Union 2013).

⁹⁶ Article 3 TEU and Article 157 TFEU.

⁹⁷ Article 3 TEU.

⁹⁸ Article 24 EU Charter of Fundamental Rights of the EU.

⁹⁹ N. Ferreira and D. Kostakopoulou (eds), *The Human Face of the European Union* (Springer 2016).

doubt with regards to the effectiveness of the process.¹⁰⁰ In particular, the EU's ability to monitor national performances is limited given the lack of reliable data and the wide diversity in national childcare arrangements, which makes collecting such data particularly difficult.

Although the Barcelona targets continue to be a useful (albeit limited) goal to pursue, these targets can be criticised for being conceptually narrow in their format and their formulation and for justifying recommendations in order to increase their efficiency in relation to their original goal of raising female employment rates. In addition, the targets have a much too narrow ambition, in that their only aim is to increase female employment rates, instead of being concerned with the promotion of gender equality as prescribed under the Treaty. Recommendations are therefore offered in order to reconcile the Barcelona targets with the principle of gender equality. Other considerations such as the well-being of families and/or children only appear to be accessories in the Barcelona targets. Furthermore, the means to achieve these targets are also narrow in their scope. By setting numerical blind targets, the EU is limiting its potential impact on the development of a comprehensive childcare strategy, arguably contributing to their failing. Recommendations are therefore proposed in order to broaden the scope of the Barcelona targets to reflect the EU's strong social commitments and human rights obligations.

Adjusting the Barcelona Targets

Defining Availability

The Barcelona targets focus on quantity without providing substantial explanation of what availability means. It was only after the European Commission had developed a methodology to collect data to measure progress towards the targets on a harmonised EU basis that the meaning of quantity started to emerge.¹⁰¹ The indicators were agreed in 2004 by the

¹⁰⁰ J. Plantenga, C. Remery, M. Siegel, and L. Sementini, 'Childcare Services in 25 European Union Member States: The Barcelona Targets Revisited' in A. Leira and C. Saraceno (eds) *Childhood: Changing Contexts* (Emerald Group 2008) 27-53; M. Mills, P. Praeg, F. Tsang, K. Begall, J. Derbyshire, L. Kohle, C. Miani and S. Hoorens, *Use of Childcare Services in the EU Member States and Progress towards the Barcelona Targets (Short Statistical Report 1)* (European Union 2014); B. Janta, *Caring for Children in Europe* (European Union 2014) < <http://europa.eu/epic/studies-reports/docs/rr-554-dg-employment-childcare-brief-v-0-16-final.pdf> > accessed on 29 December 2015. Commission Staff Working Document, Implementation of the Barcelona objectives concerning childcare facilities for pre-school-age children, SEC(2008) 2524; European Commission Report of 3 October 2008, *Implementation of the Barcelona Objectives Concerning Facilities for Pre-School-Age Children*, COM(2008) 638.

¹⁰¹ J. Plantenga and C. Remery, *The Provision of Childcare Services: A Comparative Review of 30 European Countries* (Office for Official Publications of the European Communities 2009).

Employment Committee and the EU Survey on Income and Living Conditions (EU-SILC) was chosen to be the European statistical source for measuring them.¹⁰² To an extent, these indicators have provided further details with regards to the meaning of the Barcelona targets. Indeed, the Barcelona targets do not consider how many hours are being made available, only that childcare should be available. The indicators adopted under EU-SILC have nevertheless distinguished between full-time and part-time formal childcare arrangements but they reveal that the definition of full-time for working parents and for childcare are incompatible.¹⁰³ Consequently, the Barcelona targets can only be meaningful in terms of enabling parents to enter the labour market on a full-time basis if Member States make childcare available for at least 40 hours per week. Presently the Barcelona target only supports a parent entering paid work on a part-time basis. It is therefore recommended that the coverage hours of the Barcelona targets be extended in order to match the definition of full-time work.

Clarifying Affordability and Quality

Although the Barcelona targets only refer to the quantity of childcare services (the availability), a number of EU documents have subsequently underscored the importance of affordability and quality.¹⁰⁴ With regards to affordability, it is recommended that the EU adopts measures to ensure that childcare services be made accessible across all social groups regardless of their financial ability. In terms of quality, it is recommended that the EU takes leadership in order to propose regulation to improve the structural environment of childcare, so as to assure a minimum level of quality. It is further recommended that when considering quality childcare facilities, the EU policy makers refer to work that has been done on this issue. Existing foundation can, especially, be found in the 1992 Recommendation on Childcare¹⁰⁵ and the proposal for “Quality Targets in Services for Young Children”¹⁰⁶ produced by the EC Childcare Network in 1996.¹⁰⁷ In particular, the Network had set up a

¹⁰² Commission Staff Working Document, Implementation of the Barcelona objectives concerning childcare facilities for pre-school-age children, SEC(2008) 2524.

¹⁰³ See Chapter 3.

¹⁰⁴ Council of the European Union, Joint Employment Report 2004, 20 February 2004, < http://aei.pitt.edu/40086/1/st06560.en04_Council_2003_2004.pdf > accessed on 17 April 2016; Communication from the Commission of 3 March 2010, Europe 2020 Strategy, A Strategy for Smart, Sustainable and Inclusive Growth, COM(2010) 2020; Communication from the Commission of 21 September 2010, Strategy for Equality between Women and Men 2010-2015, COM(2010) 491 final.

¹⁰⁵ Council Recommendation 92/241/EEC of 31 March 1992 on child care, OJ [1992] L123/16.

¹⁰⁶ European Commission Childcare Network, ‘Quality Targets in Services for Young Children’ (European Commission - Equal Opportunities Unit 1996) < <http://www.childcarecanada.org/sites/default/files/Qualitypaperthree.pdf> > accessed on 18 April 2016.

¹⁰⁷ See generally Chapter 3.

number of assumptions underpinning the approach to quality in childcare¹⁰⁸ which, it is argued, are relevant in the context of today's Treaty values¹⁰⁹ and have been backed up by OECD findings.¹¹⁰ Finally, it is recommended that structural regulation be accompanied with regular assessment and monitoring of actual impact on quality childcare, which should include the voice of service recipients, such as children, care givers and childcare workers.¹¹¹

Finally, funding is obviously a key element to ensure the sustainability of childcare in the EU.¹¹² European Funds have been crucial to putting some of the projects in place.¹¹³ In the current European Social Fund period (2014–2020), some 20% of the funding has been earmarked for social inclusion activities, including those taking place within childcare settings. Policies such as the European Fund for Strategic Investments announced by President of the European Commission Jean-Claude Juncker in late 2014 should support the construction of infrastructure and the functioning of childcare services.¹¹⁴ It is recommended that the EU step up its financial commitment to childcare by dedicating an increased amount of the European Social Fund toward the development of childcare infrastructure.

Factors Influencing Women's Employment

The idea behind the Barcelona targets was straightforward: if mothers with young children had access to childcare services, they would no longer face barriers to access the labour market. Indeed, childcare has been found to be a major factor which alleviates work-family conflict¹¹⁵ and allows women to take up full-time employment,¹¹⁶ but it is only one of many

¹⁰⁸ European Commission Childcare Network, 'Quality Targets in Services for Young Children' (European Commission - Equal Opportunities Unit 1996) <
<http://www.childcarecanada.org/sites/default/files/Qualitypaperthree.pdf>> accessed on 18 April 2016.

¹⁰⁹ See earlier in this chapter.

¹¹⁰ Organisation for Economic Co-Operation and Development (OECD), *Starting Strong: Childhood Education and Carers* (OECD 2001).

¹¹¹ Eurofound, *Early Childhood Care: Accessibility and Quality of Services* (Publications Office of the European Union 2015) 61.

¹¹² Ibid, 59.

¹¹³ Ibid, 60.

¹¹⁴ Ibid, 60.

¹¹⁵ R. Rindfuss, D. Guilkey, S. Morgan, Ø. Kravdal and K. Guzzo, 'Child Care Availability and First-Birth Timing in Norway' (2007) 44(2) *Demography* 345-372; M. Mills, R. Rindfuss, P. McDonald, and E. te Velde, 'Why do People Postpone Parenthood? Reasons and Social Policy Incentives' (2011) 17(6) *Human Reproduction Update* 848-860.

¹¹⁶ European Council, *Presidency Conclusions: Lisbon European Council, 23-24 March 2000*, <
http://www.europarl.europa.eu/summits/lis1_en.htm> accessed on 22 October 2015; Communication from the Commission of 3 March 2010, Europe 2020 Strategy, A Strategy for Smart, Sustainable and Inclusive Growth, COM(2010) 2020.

factors influencing women's employment.¹¹⁷ There are a number of other significant factors in the decision of mothers to take up full-time employment, including factors relating to institutional policies and to national cultural values concerning the role of mothers and the needs of children.¹¹⁸ Thus, if the EU is serious about raising female employment rates, a broader approach to the problem of female employment must be embraced.

In particular, cultural aspects and normative values are often key to the decision of mothers to take up full-time work. Beyond the formal constraints discussed above relating to the availability, affordability and quality of childcare, parents and mothers decide to not place their children in a formal childcare arrangement for a variety of reasons. Many prefer to have the mother provide the primary care for their children.¹¹⁹ The level of societal or communal approval as to whether a mother with young children should or should not work influences the actual employment rates of women:¹²⁰ where there is a low level of approval in the population, the adoption of a policy to increase childcare facilities in order to improve female employment rates remains ineffective. The negative perception of childcare not only results in an impediment to childcare usage but also to women's ability to enter the labour market. It also creates barriers to the adoption of childcare policies. It is recommended that alongside legal and policy approaches to develop childcare, the EU should also engage actively in adopting policy designed to raise awareness of the benefit of childcare. Cultural and normative values are often based on harmful gender stereotypes. The EU value of promoting gender equality is important because it helps to break down accepted unequal gender

¹¹⁷ G. Jay, S. Arber, J. Brannen, A. Dale, S. Dex, P. Elias, P. Moss, J. Pahl, C. Roberts and J. Rubery, 'Feminist Fallacies: A Reply to Hakim on Women's Employment' (1996) 47(1) *The British Journal of Sociology* 167-174.

¹¹⁸ The relative effects of these factors on each other's will require further multivariate analysis, which is beyond the scope of this thesis. Periods of employment breaks and of part-time work, especially when children are young, appear to contain women in segments of the employment market, often preventing them from returning to full-time employment. See G. Jay, S. Arber, J. Brannen, A. Dale, S. Dex, P. Elias, P. Moss, J. Pahl, C. Roberts and J. Rubery, 'Feminist Fallacies: A Reply to Hakim on Women's Employment' (1996) 47(1) *The British Journal of Sociology* 167-174. Other care responsibilities for older family members, for instance, also contribute to the ability to hold a full-time job. See C. O'Brien, 'Confronting the Care Penalty: The Cause for Extending Reasonable Adjustment Rights along the Disability/Care Continuum' (2012) 34 *Journal of Social Welfare and Family Law* 5-30. Moreover, employers' procedures as well as State tax and benefits policies also influence women's working hours. See G. Meszarors, and P. Moss, *Employment and Family Life: A Review of Research in the UK (1980-1994)* (Employment Department 1994). For instance, it has been shown that financial incentive for the second earner combined with childcare enrolment has a strong effect on female employment. See Organisation for Economic Co-Operation and Development (OECD), *Gender Equality in Education and Entrepreneurship: Final Report to the MCM 2012* (OECD 2012).

¹¹⁹ K. Täht and M. Mills, 'Nonstandard Work Schedules, Couple Desynchronization, and Parent-Child Interaction: A Mixed-Methods Analysis' (2012) 33(8) *Journal of Family Issues* 1054-1087.

¹²⁰ M. Mills, P. Praeg, F. Tsang, K. Begall, J. Derbyshire, L. Kohle, C. Miani and S. Hoorens, *Use of Childcare Services in the EU Member States and Progress Towards the Barcelona Targets (Short Statistical Report 1)* (European Union 2014) 14-15.

standards. Indeed, motherhood does not have to be about limitation to the home. The EU here does not need to rely on hard competence but instead it can make use of its soft power.

The EU should also consider the practices of countries that are achieving the Barcelona targets in order to consider a transplant of principle across other Member States who fail in achieving the targets¹²¹ because none of the Member States that have low female employment rates have high full-time childcare coverage rates.¹²² It is therefore recommended that the EU take stock from the best practices developed in countries which have been able to meet the Barcelona targets.

Reshaping the Barcelona Targets and the EU's Gender Equality Objectives

It has been argued that EU childcare policy has been instrumentalized narrowly towards raising women's full-time employment.¹²³ By contrast, it is the contention of this thesis that childcare has the potential to contribute to other broader EU aims such as gender equality and social justice. It is submitted that structural inequalities (other than childcare) must be tackled together with the provision of childcare in order for women to be in a position to decide whether to access the labour market.

In particular, gender equality requires an equitable distribution of unpaid care. The EU has an obligation to set up policies which challenge the gender division of paid and unpaid work and which will ultimately improve gender equality. This vision is supported by the ethics of care, which is shared by some feminist perspectives on childcare¹²⁴ and embraced by the Court of Justice of the EU.¹²⁵ The policy framework still constitutes a great barrier to the reduction of gender inequalities in terms of caring responsibilities. The distribution of time is gendered as men prioritise paid work and care done mostly by women is not properly valued. This situation hinders the measurement of work in social and monetary terms. It hampers the possibility to take care work into account to design comprehensive social protection policies and contributes to gender inequality. The EU could encourage a care parity approach,

¹²¹ M. Mills, P. Praeg, F. Tsang, K. Begall, J. Derbyshire, L. Kohle, C. Miani and S. Hoorens, *Use of Childcare Services in the EU Member States and Progress Towards the Barcelona Targets (Short Statistical Report 1)* (European Union 2014) 37. Conversely it is also important to identify the reasons why some countries have not been able to meet the targets.

¹²² *Ibid.*, 13.

¹²³ *Ibid.*

¹²⁴ J. Lewis, 'Childcare Policies and the Politics of Choice' (2008) 79(4) *The Political Quarterly* 499-507.

¹²⁵ Case C-104/09 *Roca Álvarez v Sesa Start España ETT SA* [2010] ECR I- 8661.

whereby care should be expected to be done by either gender.¹²⁶ Care work should not fall as a burden on the shoulders of a few, mainly women, but should be shared amongst men and women as a norm.¹²⁷ Thus, the early EU effort in encouraging better sharing of unpaid care should be re-kindled.¹²⁸

In addition, the EU should guarantee good working conditions for care workers in the childcare industry. In particular, the requirement of qualified and well paid employees is likely to raise the level of quality in childcare.¹²⁹ This thesis argues in favour of women's emancipation through work and this aligns with the EU's policy on supporting women to access the labour market. Indeed, it is accepted that "[t]rue interdependence between individual men and women will not be possible so long as the economic power relationships underpinning their interdependence are so unequal".¹³⁰ At the same time, this thesis also advocates that childcare should be valued and those who provide the care should be adequately remunerated. As a result, it supports the adequate payment of individuals who do care work as a profession. The importance of paid work can and must be reconciled with the value of work performed in childcare. Although childcare needs to be valued, it must be done in conjunction with the feminist goal of paid work as a tool for women's emancipation. It is therefore recommended that the EU childcare strategy includes better terms and conditions for the care sector where the workforce is predominantly feminised, badly paid and often precarious.¹³¹ The adequate payment of childcare workers aligns with the ethic of care, the gender equality principle and the value of EU law in relation to the rights of children. This could be done through the use of Article 157 TFEU and the obligation of equal pay for work

¹²⁶ N. Fraser, 'After the Family Wage: Gender Equity and the Welfare State' (1994) 22(4) *Political Theory* 591-618.

¹²⁷ M. Fineman, *The Autonomy Myth: A Theory of Dependency* (New Press 2004).

¹²⁸ Council Recommendation 92/241/EEC of 31 March 1992 on child care, OJ [1992] L123/16; European Commission Childcare Network, *Reconciling Employment and Caring for Children: What Information is Needed for an Effective Policy?* (European Commission - DG V, 1996); European Commission Childcare Network, *Childcare and Equality of Opportunity* (European Commission 1988).

¹²⁹ European Commission Childcare Network, 'Quality Targets in Services for Young Children' (European Commission - Equal Opportunities Unit 1996) < <http://www.childcarecanada.org/sites/default/files/Qualitypaperthree.pdf> > accessed on 18 April 2016; European Commission, *Barcelona Objectives: The Development of Childcare Facilities for Young Children in Europe with a View to Sustainable and Inclusive Growth* (Publications Office of the European Union 2013).

¹³⁰ B. Featherstone, 'Gender, Rights, Responsibilities and Social Policy' in J. Wallbank, S. Choudhry and J. Herring (eds) *Rights, Gender and Family Law* (Routledge 2010) 26-42 citing R. Lister, *Citizenship: Feminist Perspectives* (New York University Press 2003) 115.

¹³¹ J. Plantenga and C. Remery, *The Provision of Childcare Services: A Comparative Review of 30 European Countries* (Office for Official Publications of the European Communities 2009) 45.

of equal value.¹³² It is timely and there is space for assessing the equal pay of care workers with other workers.¹³³

Considering Childcare beyond Gender Equality

Concerns about childcare go beyond gender equality. As discussed earlier, based on the combined legal principles and values of the Treaty, the EU has the ability and the obligation to address childcare not only from the employment and economic perspective, but also from a social perspective, which must necessarily include the well-being of all children and their caregivers. As it is an essential component of the EU's social inclusion objectives, childcare policy clearly impacts children who should be integrated into the aims of the policy. It is submitted that the EU has some moral and legal responsibilities for children¹³⁴ as EU citizens¹³⁵ or otherwise.¹³⁶ Although in the past, the EU has argued that it has no competence with regards to children, since the adoption of the Lisbon Treaty, this is no longer the case. Children have previously largely been treated as dependants and therefore invisible in EU policies.¹³⁷ As a result, childcare policy has not taken the interest and the well-being of children into account. Indeed, this is shown in the Barcelona targets, which are only concerned with adult workers. In any case, EU policies, including the lack of action in childcare, have major implications for children who not only represent a large segment of the EU population, but who are also key to EU policies on social investment.¹³⁸ It has been

¹³² Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ [2006] L204/23.

¹³³ See for instance the New Zealand development on this issue: *Terranova Homes & Care Ltd v Service and Food Workers Union Ringa Tota Inc.* (CA631/2013) [2014] NZCA 516.

¹³⁴ I. Iusmen and H. Stalford, *The EU as a Children's Rights Actor: Law, Policy and Structural Dimensions* (Budrich 2015).

¹³⁵ Case C-200/02 *Kunqian Catherine Zhu, Man Lavette Chen v Secretary of State for the Home Department* [2004] ECR I-9925.

¹³⁶ Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)* [2011] ECR I-1177.

¹³⁷ See for instance Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ [2004] L158/77; Corrigendum OJ [2004] L229/35.

¹³⁸ Communication from the Commission of 20 February 2013, Towards Social Investment for Growth and Cohesion – including implementing the European Social Fund 2014-2020, COM(2013) 83; European Commission, *Social Investment Packages: Key Facts and Figures* (Publications Office of the European Union 2013). See also G. Esping Andersen, 'A Child-Centred Social Investment Strategy', in Esping Andersen (ed) *Why We Need a New Welfare State* (Oxford University Press 2002); J. Jenson, 'Social Investment for New Social Risks: Consequences of the LEGO Paradigm for Children', in J. Lewis (ed) *Children in Context: Changing Families and Welfare States* (Edward Elgar Publishing 2006).

demonstrated for instance that employment of parents and particularly of mothers is a main safeguard against child poverty.¹³⁹

Furthermore, some children have been more invisible than others and have therefore missed out on the ability to attend childcare facilities. Barriers towards childcare usage typically exist because there are socio-economic inequalities.¹⁴⁰ Where childcare is unavailable in lower socio-economic areas, it reinforces those inequalities. Access to childcare is not equal across parents and caregivers because they are not a homogeneous group: obviously there is a difference between fathers and mothers linked to gender inequalities, but there are further disparities between parents from higher and lower social-economic and educational backgrounds.¹⁴¹ In turn, the disparity in access to childcare impacts disproportionately children from lower socio-economic backgrounds. In most countries, parents from higher socio-economic backgrounds are more likely to send their children, especially those under three years old, to formal childcare compared to parents from lower socio-economic levels.¹⁴² This represents a serious concern because formal childcare is at the same time considered to be more beneficial to children from lower socio-economic backgrounds.¹⁴³ These challenges raise the need to establish a universal right to access formal childcare. The ethics of care is useful in this context because it considers the importance of the caring relationship beyond the concept of equality.

¹³⁹ D. Lichter and D. Eggebeen, 'The Effect of Parental Employment on Child Poverty' (1994) 56(3) *Journal of Marriage and the Family* 633-645.

¹⁴⁰ European Commission, *Barcelona Objectives: The Development of Childcare Facilities for Young Children in Europe with a View to Sustainable and Inclusive Growth* (Publications Office of the European Union 2013).

¹⁴¹ Some countries such as Sweden and Denmark have been able to ensure equality in access to childcare across all income levels. See M. Mills, P. Praeg, F. Tsang, K. Begall, J. Derbyshire, L. Kohle, C. Miani and S. Hoorens, *Use of Childcare Services in the EU Member States and Progress Towards the Barcelona Targets (Short Statistical Report 1)* (European Union 2014) 39.

¹⁴² J. Ghysels and W. Van Lancker, 'The Unequal Benefits of Activation. An Analysis of the Social Distribution of Family Policy among Families with Young Children' (2011) 21(5) *Journal of European Social Policy* 472–485.

¹⁴³ J. Currie and D. Almond, 'Human Capital Development Before Age Five' (2011) 4 *Handbook of Labor Economics* 1315-1486; N. Datta Gupta and M. Simonsen, 'Non-cognitive Child Outcomes and Universal High Quality Child Care' (2010) 94(1) *Journal of Public Economics* 30–43; T. Havnes and M. Mogstad, 'No Child Left Behind: Subsidized Child Care and Children's Long-Run Outcomes' (2011) 3(2) *American Economic Journal: Economic Policy* 97-129.

Section 4: A Catalogue of Rights for Parents/Carers of Children

As discussed previously in Chapters 1 and 2, it is difficult to address care relationships with legal rights. The thesis has nevertheless argued that a shift of the political and legal language can be guided by the ethics of care and gender equality principles to recognise and value childcare. The EU already has a solid basis on which to devise a clear and cohesive legal framework for protecting parents and carers of children.¹⁴⁴ At the moment these rights have limited personal and material scopes which must be broadened to incorporate care ethics and gender equality obligations.

Personal Scope of a Right to Childcare

Defining who is a caregiver in legal terms is an important and yet a deceptively simple question.¹⁴⁵ It has been assumed that parents (more specifically mothers) are the “natural” carers of children. Assumptions are made about women and their caring abilities and such assumptions have fed the perception that women are not employees in their full rights.¹⁴⁶ To counterbalance this stereotype, at the moment, the rights protecting those who care for children are almost exclusively linked to motherhood. In addition, counter assumptions are made that both parents are equally caring for children, therefore both parents should equally share the care of children following divorces when, in fact, women (the mother and often the father’s new partner) carry most of the care.¹⁴⁷ At the same time, if, on average, mothers do spend more time caring for children, it is not always the case:¹⁴⁸ some children are cared for by their father, their grandparents or other family members or friends.¹⁴⁹

¹⁴⁴ E. Caracciolo di Torella and A. Masselot, *Reconciling Work and Family Life in EU Law and Policy* (Palgrave Macmillan 2010).

¹⁴⁵ E. Caracciolo di Torella, ‘Shaping and re-shaping the care discourse in European Law: a catalogue of rights for carers?’ 2016 28(3) *Child and Family Law Quarterly* 261-279.

¹⁴⁶ A. Masselot, E. Caracciolo di Torella, and S. Burri, *Thematic Report of the European Network of Legal Experts in the Field of Gender Equality “Fighting Discrimination on the Grounds of Pregnancy, Maternity and Parenthood: The Application of EU and National Law in Practice in 33 European Countries”* (Publication of the European Commission 2012).

¹⁴⁷ J. Tolmie, V. Elizabeth and N. Gavey ‘Imposing Gender Neutral Standards on a Gendered World: Parenting Arrangements in Family Law Post Separation’ (2010) 16(2) *Canterbury Law Review* 302-330; C. Smart, ‘The Legal and Moral Ordering of Child Custody’ (1991) 18(4) *Journal of Law and Society*, 485-500; J. Herring, *Caring and the Law* (Hart 2013).

¹⁴⁸ European Foundation for the Improvement of Living and Working Conditions, *Fifth European Working Conditions Survey* (The European Foundation for the Improvement of Living and Working Conditions 2010).

¹⁴⁹ E. Caracciolo di Torella, ‘Brave New Fathers for a Brave New World? Fathers as Caregivers in an Evolving European Union’ (2014) 20(1) *European Law Journal* 88-106; R. Collier, ‘Men, gender and fathers’ rights “after equality”: New formations of rights and responsibilities in family justice’ in R. Leckey (ed) *After Legal Equality: Family, Sex, Kinship* (Routledge 2014) 59-76; Equality and Human Right Commission (EHRC), *Working Better: Fathers, Family and Work - Contemporary Perspectives* (Equality and Human Right Commission 2009); G. James, ‘Mothers and Fathers as Parents and Workers: Family-Friendly Employment

Although in many cases it might be obvious who a caregiver is, there is no definition in the EU Treaty. Yet defining a caregiver is as important as it was to define a worker in order to understand who could enjoy the EU free movement of workers' rights.¹⁵⁰ A clear definition is also critical to ensure uniformity: at the time of writing Member States provide a variety of definitions of caregivers¹⁵¹ with the risk that a caregiver in one Member State might not be considered as such in another. To allow the Member States to have different definitions of caregivers of children will only allow for confusion and potentially discriminatory treatment. In addition, according to the ethic of care, a right to care for children must reflect the reality of the diversity of caring relationships and cannot be limited by national definition.

The definition of who is a worker has been provided by the Court of Justice of the EU on a case by case approach.¹⁵² It is submitted that the same should be done about caregivers. However, this might prove difficult as the EU has no precise competences and continues to be mainly preoccupied with paid work. Consequently, the Court has fewer occasions to deliver interpretations. This thesis suggests that a definition of caregiver should use, as its starting point, the markers of care discussed in Chapter 1,¹⁵³ which point toward individuals who have little (emotional) choice but to look after a frailer dependent and who's task is relentless and often interferes with their capacity to (fully) participate in paid employment work. Obviously, the markers will need to be refined but they provide a good basis on which

Policies in an Era of Shifting Identities' (2009) 31(3) *Journal of Social Welfare & Family Law* 271-283; K. Glaser, D. Price, G. Di Gessa, E. Ribe, R. Stuchbury and A. Tinker, *Grandparenting in Europe: Family Policy and Grandparents' Role in Providing Childcare* (Grandparents Plus 2013) available at < http://www.grandparentsplus.org.uk/wp-content/uploads/2013/08/Grandparenting-in-Europe-613_Electronic.pdf > accessed on 29 December 2015; M. Jappens, and J. Van Bavel, 'Regional Family Norms and Child Care by Grandparents in Europe' (2012) 27(4) *Demographic Research* 85-120; L. Spitz, 'Grandparents: Their Role in the 21st Century Families' (2012) 42(10) *Family Law* 1254-1257.

¹⁵⁰ For a definition of worker see the case law development, inter alia: Case 53/81 *Levin v Secretary of State for Justice* [1982] ECR 1035; Case 139/85 *Kempf v Staatssecretaris van Justitie* [1986] ECR 1741; Case 39/86 *Lair v Universität Hannover* [1988] ECR 3161 and more recently Case C-507/12 *Jessy Saint Prix v Secretary of State for Work and Pensions* ECLI:EU:C:2014:2007, as noted by N. Busby, 'Crumbs of Comfort: Pregnancy and the Status of "Worker" under EU Law's Free Movement Provisions' (2015) 44 *Industrial Law Journal* 134-145.

¹⁵¹ J. Plantenga and C. Remery, *The Provision of Childcare Services: A Comparative Review of 30 European Countries* (Office for Official Publications of the European Communities 2009); M. Mills, P. Praeg, F. Tsang, K. Begall, J. Derbyshire, L. Kohle, C. Miani and S. Hoorens, *Use of Childcare Services in the EU Member States and Progress Towards the Barcelona Targets (Short Statistical Report 1)* (European Union 2014).

¹⁵² G. Mancinin, 'The Free Movement of Workers in the Case-Law of the European Court of Justice' in D. Curtin and D. O'Keefe (eds) *Constitutional Adjudication in European Community and National Law* (Butterworths 1992).

¹⁵³ The five markers include: a notion of labour; the absence of choice; financial, emotional and physical cost; personal and emotional attachment; and an element of vulnerability.

to start working on a clear definition of caregiver, in the same way as the Court of Justice has done for the concept of workers.

The Material Scope of the Right to Care for Children

As discussed in Chapter 4, there are presently limited EU employment-related rights available to some caregivers, mostly mothers and parents, to be free from (direct and indirect) discrimination and harassment¹⁵⁴ as well as some legal provisions guaranteeing the right to flexible working arrangements and to a period of leave to look after young children.¹⁵⁵ Whilst valuable, these rights are not enough to offer working caregivers much assistance in managing the demands of juggling work and childcare, especially as the children age. Caregivers need an integrated system of rights designed on a life-cycle approach which reflects the diversity of childcare relationships and takes into account the interests and well-being of children. It is moreover submitted that such a catalogue of rights needs to be defined to apply to caregivers of children but they also need to apply to care recipients because rights must be developed to accommodate the caring relationships according to the care ethics. In addition, according to the theoretical framework and the capability approach adopted in this thesis, the adoption of such a catalogue of rights will contribute to enabling choices and the realisation of individuals' freedom within the market order.

These rights should contain a mixture of positive (proactive) and negative (reactive) obligations and should reflect the fact that the caregivers of children require specifically tailored measures over their life-cycle. Many of these rights stem directly from the existing rights designed to reconcile work and family life (including leave and time provisions). It is submitted that the proposed rights should be inclusive and comprehensive.

Comprehensive Leave Provisions

First and foremost, people who care for children need to be able to take *periods of leave* from paid work in order to care for the children. The periods of leave are not only beneficial for the caregivers but they are also beneficial for the children's well-being. Leave periods, especially when relating to childcare, are not always considered to be positive for caregivers, who can

¹⁵⁴ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ [2006] L204/23.

¹⁵⁵ E. Caracciolo di Torella and A. Masselot, *Reconciling Work and Family Life in EU Law and Policy* (Palgrave Macmillan 2010).

face discrimination.¹⁵⁶ Indeed, research shows that workers who return from maternity or parental leave, for example, face high levels of discrimination.¹⁵⁷ Long leave periods also increase the chance of disconnection from the labour market and increase the difficulty of returning to paid employment.¹⁵⁸

Leave periods are currently only available at EU level to parents and adoptive parents as maternity leave under Directive 92/85/EEC¹⁵⁹ and as parental leave under Directive 2010/41/EU¹⁶⁰ or when a matter of *force majeure*¹⁶¹ arises. These periods of leave are limited to mothers in relation to pregnancy and to parents with babies and young children for parental leave. As discussed previously, although regulated to serve both parents, the period of parental leave is disproportionately taken by mothers,¹⁶² who are in turn singled out by employers as at risk of taking time off for care-related responsibilities.¹⁶³ Focussing on increasing men's care giving is likely to challenge the strong internalised cultural gender stereotypes.¹⁶⁴ It is reasonable to expect that a better repartition of childcare leave between

¹⁵⁶ P. Moss and F. Deven (eds), *Parental Leave: Progress Or Pitfall? Research and Policy Issues in Europe* (Vol. 35) (NIDI/CBGS Publications 1999).

¹⁵⁷ A. Masselot, E. Caracciolo di Torella, and S. Burri, *Thematic Report of the European Network of Legal Experts in the Field of Gender Equality "Fighting Discrimination on the Grounds of Pregnancy, Maternity and Parenthood: The Application of EU and National Law in Practice in 33 European Countries"* (Publication of the European Commission 2012); Australian Human Rights Commission, *Supporting Working Parents: Pregnancy and Return to Work National Review – Report* (Australian Human Rights Commission 2014) < <https://www.humanrights.gov.au/our-work/sex-discrimination/publications/supporting-working-parents-pregnancy-and-return-to-work> > accessed on 29 April 2016; Equality and Human Rights Commission (EHRC), *Pregnancy and Maternity Discrimination Report 2016* (EHRC 2016) < <https://www.equalityhumanrights.com/en/managing-pregnancy-and-maternity-workplace/pregnancy-and-maternity-discrimination-report> > accessed on 29 April 2016.

¹⁵⁸ K. Morgan and K. Zippel, 'Paid to Care: The Origins and Effects of Care Leave Policies in Western Europe' (2003) 10(1) *Social Politics: International Studies in Gender, State & Society* 49-85; J. Galtry and P. Callister, 'Assessing the Optimal Length of Parental Leave for Child and Parental Well-Being How Can Research Inform Policy?' (2005) 26(2) *Journal of Family Issues* 219-246.

¹⁵⁹ 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] L348/1.

¹⁶⁰ Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC (Text with EEA relevance), OJ [2010] L68/13.

¹⁶¹ Clause 7 of Directive 2010/18/EU.

¹⁶² See Chapter 4.

¹⁶³ A. Masselot, E. Caracciolo di Torella, and S. Burri, *Thematic Report of the European Network of Legal Experts in the Field of Gender Equality "Fighting Discrimination on the Grounds of Pregnancy, Maternity and Parenthood: The Application of EU and National Law in Practice in 33 European Countries"* (Publication of the European Commission 2012).

¹⁶⁴ Ibid; A. Orloff, 'Should Feminists Aim for Gender Symmetry? Why the Dual-Earner/Dual Care Model May not be Every Feminist's Utopia', in J. Gormick, M. Meyers and E. Olin Wright (eds) *Earning and Caring: Creating the Conditions for Gender-Equalitarian Families* (Verso 2009); J. Galtry and P. Callister, 'Assessing the Optimal Length of Parental Leave for Child and Parental Well-Being How Can Research Inform Policy?' (2005) 26(2) *Journal of Family Issues* 219-246.

men and women will contribute to increasing gender equality. A growing number of fathers are already willing to participate in the care of their children¹⁶⁵ and “fatherhood is now pervasive as a comfortable public identity”.¹⁶⁶ Those men should not be discouraged to do so. EU law and policy should support this increasing cohort of caring fathers by intensifying the adoption of measures designed to promote work-family reconciliation.¹⁶⁷ It is recommended that the leave provisions be expanded to cover comprehensively the spectrum of individuals who care for children and the diversity of care situations which require leave.

Maternity leave provisions are comprehensively covered under Article 8 of Directive 92/85/EEC which provides for a minimum of fourteen continuous weeks of maternity leave before and/or after birth, including at least two weeks of compulsory paid maternity leave to replace wage loss.¹⁶⁸ There have been arguments for the extension of the period of maternity leave.¹⁶⁹ However, it is contended in this thesis that the difficulty with Directive 92/85/EEC resides less in the length of the leave¹⁷⁰ and more in its lack of sufficient remuneration for workers on maternity leave. The right to remuneration is complex involving, on the one hand,

¹⁶⁵ See, for instance, Case C-104/09 *Roca Álvarez v Sesa Start España ETT SA* [2010] ECR I- 8661. N. Busby, ‘Recognition of (Some) Men’s Parental Duties under EU Law’ (2016) 2 *International Labor Rights Case Law* 254-259.

¹⁶⁶ E. Dermott, *Intimate Fatherhood: A Sociological Analysis* (Routledge 2014) 1.

¹⁶⁷ J. Lewis and M. Campbell, ‘UK Work/Family Balance Policies and Gender Equality, 1997–2005’ (2007) 14(1) *Social Politics: International Studies in Gender, State & Society* 4-30.

¹⁶⁸ Directive 92/85/EEC also provides protection in relation to health and safety. Article 5(3) of Directive 92/85/EEC obliges employers to grant a pregnant worker a leave of absence to protect her health and safety and that of the foetus if moving the worker to another job is not technically and/or objectively feasible or cannot reasonably be required on duly substantiated grounds. Leave must also be granted if a pregnant or breastfeeding worker is exposed to prohibited substances or is required to do night work, if moving her to another job or changing to daytime work is not possible (Article 5(4)). Pregnant and breastfeeding workers are not obliged to perform night work during their pregnancy and for a period following childbirth, if performing night work would be detrimental to the safety or health of the worker concerned (Article 7). A transfer to daytime work or, if this is technically and/or objectively feasible, leave from work or the extension of maternity leave should be possible. Article 9 further provides that pregnant workers must be entitled, where necessary, to time off work without loss of pay to attend antenatal examinations.

¹⁶⁹ A legislative proposal to revise the existing Pregnant Workers Directive 92/85/EEC was adopted by the European Commission in 2008 (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 breastfeeding, COM(2008) 637) and included an extension of the period of maternity leave from 14 weeks to 26 weeks. The proposal was rejected by the Council in December 2010 and axed by the Commission on 19 June 2014, arguably because it was considered “red tape”. See P. Foubert, Š. Imamović, ‘The Pregnant Workers Directive: Must Do Better - Lessons to be Learned From Strasbourg?’ (2015) 37(3) *Journal of Social Welfare & Family Law* 309-320. See also the discussion in Chapter 4.

¹⁷⁰ From a narrow labour market perspective, a leave of 14 to 18 weeks is optimal. Organisation for Economic Co-Operation and Development (OECD), *Babies and Bosses - Reconciling Work and Family Life: A Synthesis of Findings for OECD Countries* (OECD 2007); F. Jaumotte, ‘Female Labour Force Participation: Past Trends and Main Determinants in OECD Countries’ *Economics Department Working Papers No. 376* (OECD 2003). However, from a child well-being perspective, this period might be better extended. J. Plantenga and C. Remery, *The Provision of Childcare Services: A Comparative Review of 30 European Countries* (Office for Official Publications of the European Communities 2009).

the articulation of the principle of equal pay under Article 157 TFEU and the Recast Directive and, on the other hand, the right to maintenance of payment and/or an adequate allowance under Article 11 of Directive 92/85/EEC, which must be at least equivalent to sick pay benefit.¹⁷¹ The low level of remuneration associated with pregnancy leave, its comparison to sick benefit and the fact that it is not equivalent to salary replacement sends the message that reproduction and care work is not valued as much as production done in the labour market.¹⁷² It is therefore recommended that pregnancy leave be remunerated to replace in full the salary of the workers who take pregnancy leave.

Parental leave is currently guaranteed under Directive 2010/18/EU, which provides that Member States shall grant - in principle - all employees a non-transferable and unpaid right to four months' parental leave that can be used until the child has reached the age of 8 (although Clause 2 states that the precise age is to be determined by the Member States). In order to encourage a more equal take-up of leave by both parents, Directive 2010/18/EU provides that at least one month shall be provided on a non-transferable basis. However, the modalities of application of the non-transferable period are left to the Member States and in many cases, the leave remains transferable in practice.¹⁷³ This difficulty is added to another fundamental flaw: parental leave remains unpaid and this has proven to be a considerable deterrent, in particular amongst fathers.¹⁷⁴ Financial compensation is frequently identified as being the main reason why fathers do not make use of parental leave and transfer unpaid leave where possible to their female partner.¹⁷⁵ Thus, reconciliation for both parents needs to be based on a strong legal framework supplemented by financial entitlements which make the take-up of

¹⁷¹ E. Caracciolo di Torella and A. Masselot, 'The ECJ Case Law on Issues Related to Pregnancy, Maternity and the Organisation of Family Life: An Attempt at Classification' (2001) 26 *European Law Review* 239-260.

¹⁷² S. Hadj-Ayed and A. Masselot, 'Reconciliation between Work and Family Life in the EU: Reshaping Gendered Structures?' (2004) 26(3) *Journal of Social Welfare and Family Law* 325-338.

¹⁷³ A. Masselot, E. Caracciolo di Torella, and S. Burri, *Thematic Report of the European Network of Legal Experts in the Field of Gender Equality "Fighting Discrimination on the Grounds of Pregnancy, Maternity and Parenthood: The Application of EU and National Law in Practice in 33 European Countries"* (Publication of the European Commission 2012); R. Ray, J. Gornick and J. Schmitt, 'Who Cares? Assessing Generosity and Gender Equality in Parental Leave Policy Designs in 21 Countries' (2010) 20(3) *Journal of European Social Policy* 196-212.

¹⁷⁴ E. Caracciolo di Torella, 'Brave New Fathers for a Brave New World? Fathers as Caregivers in an Evolving European Union' (2014) 20(1) *European Law Journal* 88-106.

¹⁷⁵ A. Masselot, E. Caracciolo di Torella, and S. Burri, *Thematic Report of the European Network of Legal Experts in the Field of Gender Equality "Fighting Discrimination on the Grounds of Pregnancy, Maternity and Parenthood: The Application of EU and National Law in Practice in 33 European Countries"* (Publication of the European Commission 2012); R. Ray, J. Gornick and J. Schmitt, 'Who Cares? Assessing Generosity and Gender Equality in Parental Leave Policy Designs in 21 Countries' (2010) 20(3) *Journal of European Social Policy* 196-212.

childcare leave feasible for all parents regardless of their sex.¹⁷⁶ It is therefore recommended that parental leave be guaranteed for both parents by assuring an adequate level of payment for the leave and by restricting transfer between parents.

Childcare leave must moreover be extended to all individuals who care for a child, even if they are not the parent of the child. This would include grandparents of other individuals who care for a child, including adopting and surrogate parents.¹⁷⁷

One of the main gaps under EU law concerns the treatment of fathers¹⁷⁸ whose rights are still considerably underdeveloped in EU law. A strong legislative framework is needed to promote the development of these rights in the Member States under a framework which should be complemented by financial entitlement to make the take up of leave feasible. There are two main measures that allow fathers to be involved in the care of their children: paternity leave and parental leave. Paternity leave is normally a short period expressly granted to fathers around the birth of the child. Despite numerous soft law measures supporting the idea,¹⁷⁹ paid paternity leave is currently not guaranteed by EU law. Article 16 of Directive 2006/54/EC addresses paternity leave as a mere option rather than an entitlement.¹⁸⁰ However, it is increasingly becoming clear that “the position of a male and female worker, father and mother of a young child, are comparable with regard to their possible need (...) to look after the child.”¹⁸¹ The involvement of fathers represents an important element in the process of establishing gender equality when it comes to the reconciliation of work and

¹⁷⁶ E. Caracciolo Di Torella and A. Masselot, ‘Work and Family Life Balance in the EU Law and Policy 40 Years On: Still Balancing, Still Struggling’ (2013) 2 *European Gender Equality Law Review* 6-14.

¹⁷⁷ E. Caracciolo di Torella and P. Foubert, ‘Surrogacy, Pregnancy and Maternity Rights: A Missed Opportunity for a More Coherent Regime of Parental Rights in the EU?’ (2015) 40(1) *European Law Review* 52-69.

¹⁷⁸ A. Masselot, E. Caracciolo di Torella, and S. Burri, *Thematic Report of the European Network of Legal Experts in the Field of Gender Equality “Fighting Discrimination on the Grounds of Pregnancy, Maternity and Parenthood: The Application of EU and National Law in Practice in 33 European Countries”* (Publication of the European Commission 2012).

¹⁷⁹ See, for example, the 1992 Council Recommendation on childcare that encourages the equal sharing of family responsibilities between men and women. The position of men as carers was also echoed in the Council Resolution of 29 June 2000 on the balanced participation of women and men in family and working life.

¹⁸⁰ Article 16 of Directive 2006/54/EC only provides that parental leave can be protected under EU law if Member States have recognised such a right in national law.

¹⁸¹ Case C-104/09 *Roca Álvarez v Sesa Start España ETT SA* [2010] ECR I-8661, para. 24. See also Case C-173/13 *Maurice Leone, Blandine Leone v Garde des Sceaux, Ministre de la Justice, and Caisse nationale de retraites des agents des collectivités locales* ECLI:EU:C:2014:2090 and Case C-222/14 *Konstantinos Maïstrellis v Ypourgos Dikaiosynis, Diafaneias kai Anthroponon Dikaiomaton* ECLI:EU:C:2015:473. Admittedly these recent cases do not address childcare specifically. See N. Busby, ‘Recognition of (Some) Men’s Parental Duties under EU Law’ (2016) 2 *International Labor Rights Case Law* 254-259.

family life and contributes to fighting gender stereotypes in employment.¹⁸² Moreover, fathers who are involved in the daily upbringing of children are more likely to be involved in childcare at a later stage.¹⁸³ It is therefore recommended that the EU adopt regulation to guarantee the access to a period of paternity leave to comply with both the promotion of gender equality and the well-being of children.

Nevertheless, empirical evidence shows that whilst many fathers are happy to take up care work, many others are also content with the *status quo* and do not intend to increase their parental duties or reduce their working hours in order to care for their children.¹⁸⁴ The “evidence does not support great optimism about the future involvement of men in family chores and care”.¹⁸⁵ This is confirmed by time use surveys and studies on the use of flexible working time arrangements.¹⁸⁶ Moreover, fathers’ involvement in parenting is still largely unrecognised in social work practice¹⁸⁷ where mothers continue to be held responsible for child rearing and child protection. It is recommended that EU law and policy provide ways to challenge men’s preference and welfare practices in order to achieve a higher degree of gender equality. In particular, mild cohesive measures encouraging men to take leave and the payment of parental leave are strongly recommended as such measures have been adopted in the Scandinavian countries with positive results.

Finally, EU law does not protect breastfeeding breaks. Although Directive 92/85/EEC considers the position of breastfeeding workers in relation to health and safety, there is no guaranteed period of leave under the Directive.¹⁸⁸ Breastfeeding breaks are not only necessary

¹⁸² European Union Presidency Conclusions of March 2006, *European Pact for Gender Equality*, 7775/1/06/REV 1. See also European Commission, *Analysis Note: Men and Gender Equality - Tackling Gender Segregated Family Roles and Social Care Jobs* (Publication of the European Union 2010).

¹⁸³ E. Caracciolo di Torella, ‘Brave New Fathers for a Brave New World? Fathers as Caregivers in an Evolving European Union’ (2014) 20(1) *European Law Journal* 88-106.

¹⁸⁴ E. Dermott, *Intimate Fatherhood: A Sociological Analysis* (Routledge 2014).

¹⁸⁵ J. Scott, ‘Family and Gender Roles: How Attitudes are Changing’ (2006) 15 *Arxius de Ciències Socials* 143-154.

¹⁸⁶ D. Hofäcker and S. König, ‘Flexibility and Work-Life Conflict in Times of Crisis: A Gender Perspective’ (2013) 33(9) *International Journal of Sociology and Social Policy* 613-635; A. Masselot, ‘Gender Implications of the Right to Request Flexible Working Arrangements: Raising Pigs and Children in New Zealand’ (2015) 39(3) *New Zealand Journal of Employment Relations* 59-71.

¹⁸⁷ F. Kaganas, ‘Child Protection, Gender and Rights’ in J. Wallbank, S. Choudhry and J. Herring (eds) *Rights, Gender and Family Law* (Routledge 2010) 43-69.

¹⁸⁸ Under Article 6(2) of Directive 92/85/EEC workers who are breastfeeding may under no circumstances be obliged to work with hazardous products and working conditions. A list of hazardous agents and working conditions is listed under Article 7 of Directive 92/85/EEC. Moreover, breastfeeding mothers cannot be forced to continue doing night work. At the same time, workers who are breastfeeding cannot be discriminated against on that basis according to Article 2(2) of Directive 2006/54/EC.

for mothers, they also contribute to the well-being of infants. The World Health Organization recommends exclusive breastfeeding for babies until the age of 6 months, and continued breastfeeding, with appropriate complementary foods, for children of up to 2 years of age or beyond.¹⁸⁹ This recommendation can be rather problematic as it clashes with the participation of women in the labour market. The International Labour Organisation (ILO) has further reinforced this health recommendation by developing an international right to breastfeeding breaks at work in the Convention on maternity protection,¹⁹⁰ which requires Member States to provide 30 minutes of nursing breaks twice a day for breastfeeding mothers during working hours. The later Conventions - No. 103 of 1952¹⁹¹ and No. 183 of 2000¹⁹² - leave it to national laws and regulations to decide the number and duration of nursing breaks, as long as at least one break is provided. Convention No. 183 also introduced the possibility of transforming daily breaks into a daily reduction of hours of work. This right is *de facto* a right connected to the welfare of the child. For this reason, in many countries, if the child is bottle-fed, fathers can also use it.¹⁹³ It follows that it is recommended that the EU guarantee a right to paid breastfeeding breaks.

Flexible Working Time

In addition to a set of comprehensive paid leave provisions, the EU must reinforce its provisions regarding working time with a view to supporting people who care for children. In particular, individuals who care for children need to be able to introduce *flexibility* in their working arrangements. Flexibility is already one of the buzz words of EU law and is contained in many legislative and policy initiatives. Flexibility is a general term that includes multiple levels of strategy linked to time and place arrangements,¹⁹⁴ although it is not without criticism as it is not always serving the needs of caregivers.¹⁹⁵ Therefore, its focus needs to be “redesigned” with the specific needs of caregivers in mind. Caregivers need flexibility to take

¹⁸⁹ World Health Organization (WHO), *Resolution WHA54.2 of 18 May 2001: Infant and Young Child Nutrition* (2001) < http://apps.who.int/gb/archive/pdf_files/WHA54/ea54r2.pdf > accessed on 15 October 2012.

¹⁹⁰ ILO Maternity Protection Convention C003, Convention concerning the Employment of Women before and after Childbirth 1919 (No. 3).

¹⁹¹ ILO Maternity Protection Convention C103, Convention concerning Maternity Protection (Revised) 1952 (No. 103).

¹⁹² ILO Maternity Protection Convention C183, Convention concerning the revision of the Maternity Protection Convention (Revised) 2000 (No. 183).

¹⁹³ See the discussion in Chapter 4.

¹⁹⁴ J. Lewis, ‘Flexible Working Arrangements: Implementation, Outcomes and Management’ (2003) 18 *International Review of Industrial and Organizational Psychology* 1-28.

¹⁹⁵ D. Hofäcker and S. König, ‘Flexibility and Work-Life Conflict in Time of Crisis: A Gender Perspective’ (2013) 33(9) *International Journal of Sociology and Social Policy* 613-635; A. Masselot, ‘Gender Implications of the Right to Request Flexible Working Arrangements: Raising Pigs and Children in New Zealand’ (2015) 39(3) *New Zealand Journal of Employment Relations* 59-71.

into consideration the range of changing needs and the level of dependency involved in the relationship. For example, the care that an infant needs is likely to differ from the care that is necessary for a school aged child. It is recommended that a right to request flexible working arrangements on the basis of childcare be introduced in EU law and that EU provisions regarding working time be revised to include consideration of childcare.

Enforcement and Effectiveness

In terms of negative obligations, at present, there are no specific grounds prohibiting childcare discrimination. It is recommended that a new ground of discrimination be added to Article 19 TFEU. It is recommended that the EU uses its soft power to raise awareness of the importance of childcare and its positive impact on society. Moreover, the effective enforcement of anti-discrimination law includes the involvement of national and EU legislators and judiciary but also other social partners and NGOs who can also play an active role in this area.¹⁹⁶ Workers, especially younger workers (who are also potential parents), tend not to exercise their individual rights to childcare leave rights because they are afraid of the potential consequences, particularly those employed under fixed-term contracts or in other kinds of temporary positions, as they fear that their contract might not be renewed.¹⁹⁷ The crisis has exacerbated this situation which *de facto*, deprives these individuals of the choice to exercise their rights. It is recommended that adequate and strong enforcement procedures be adopted to redress discrimination on the basis of childcare. Individual rights are becoming increasingly difficult to access and enforce.¹⁹⁸ A scheme of systematic and intrusive investigations should be put in place in order to verify that no discrimination is taking place on the grounds of childcare. The model for such strong power of enforcement can be taken from EU competition law.¹⁹⁹ Moreover, strong damages for breach of the law, including punitive damages, should be adopted.

Finally, effective enforcement of anti-discrimination law implies that there is a strong

¹⁹⁶ A. Masselot, E. Caracciolo di Torella, and S. Burri, *Thematic Report of the European Network of Legal Experts in the Field of Gender Equality "Fighting Discrimination on the Grounds of Pregnancy, Maternity and Parenthood: The Application of EU and National Law in Practice in 33 European Countries"* (Publication of the European Commission 2012).

¹⁹⁷ *Ibid.*

¹⁹⁸ *Ibid.*

¹⁹⁹ Council Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Text with EEA relevance), OJ [2003] L1/1; C. Hodges, 'Competition Enforcement, Regulation and Civil Justice: What is the Case?' (2006) *European Competition Law Review* 1381–1407.

political leadership which supports equality and values childcare. The EU can and should be this leader. As shown in the Social Investment Package²⁰⁰ and the European Pillar of Social Rights,²⁰¹ which include concerns for caregivers of children, the EU has expressed its willingness to return to a more social and Human Europe.

Cost

The question of the responsibility for the cost of childcare is always asked.²⁰² Cost is frequently used to block the expansion of social rights, particularly costs related to children and connected with women.²⁰³ However, the question of cost is a biased one. As discussed earlier, work is only accounted for in traditional economics when taking place in the labour market and it remains invisible and unaccounted for when taking place within the private sphere of the family.²⁰⁴ Valuing care under the ethics of care means that people should have real options to do care and not to suffer for choosing that option. Moreover, the capability approach helps us to rethink choices and freedom in the context of the capability of individuals. Full-time employment is not a choice that all mothers or fathers want to make. In order to be effective, the rights for individuals who care for children should be complemented with additional financial support. Periods of leave need to be paid, otherwise individuals would be left to carry the financial burden of care and women would be entrenched in traditional (gendered) caring roles. Equally, the right to request flexibility in working arrangements should be complemented by some sort of financial support to help the employee in cases of unforeseeable difficulties. Valuing childcare does also mean that people who work in childcare services must be adequately remunerated.

Employment law and the childcare strategy have to be better coordinated to allow mothers to access the labour market and, at the same time, to value childcare. Consideration must be given to reinforce in-work benefits and to take into account the life-cycle of individuals in

²⁰⁰ Communication from the Commission of 20 February 2013, Towards Social Investment for Growth and Cohesion: Including Implementing the European Social Fund 2014-2020, COM(2013) 83.

²⁰¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Launching a consultation on a European Pillar of Social Rights, COM(2016) 127 final.

²⁰² The EU requires impact assessments to be carried out in relation to any new legislative initiative proposed by the European Commission in order to assess the need for EU action and the potential economic, social and environmental impacts of alternative policy options in an impact assessment. Commission Staff Working Document, Better Regulation Guidelines, 19.05.2015, SWD(2015) 111 final. See A. Masselot, 'The State of Gender Equality Law in the European Union' (2007) 13(2) *European Law Journal* 152-168.

²⁰³ See, for instance: Equality and Human Right Commission (EHRC), *Working Better: Fathers, Family and Work: Contemporary Perspectives* (Equality and Human Right Commission 2009).

²⁰⁴ See Chapters 1 and 2.

order to better shape the architecture of such benefits. The increased value of childcare work can only result from a combination of actions by the public administration, the promotion of the professionalization of childcare workers, fair collective agreements, and an increase of wages for workers in private sectors. This means that the cost of these services in the public and the private sector will increase. However, adequate accounting has to be made of the benefits of more people in the labour market with proper and decent conditions of work. The opportunity cost of not working would increase, the shadow economy and gender segregation is likely to decrease if higher wages can be obtained. Overall it is reasonable to expect that women's and men's attitudes towards childcare activities in the public and the private sphere would change.²⁰⁵

As caring relationships are valued by society, the responsibility of the financial compensation associated with leave and flexible working arrangements should be viewed as a collective burden. These proposals however might be more difficult to implement at the EU level as they involve a level of expenditure from the Member States. They could instead be formulated as soft law and “implemented” through the OMC. Here, the EU has a clear leading role to play. The basics should come from the EU, which could define the rights and a minimum level of compensation while leaving the Member States to implement the rights and sort out the finer details.

The Future of the EU Childcare Strategy: Toward a Holistic Approach to Care

While it is arguable that childcare and the rights of parents and caregivers have finally found a place on the EU agenda, the childcare strategy must be moved forward because childcare responsibilities and the disadvantages experienced by carers in the labour market impacts not only on individuals' lives but on society as a whole. Unfortunately, the EU legal framework is presently not geared up for the full integration of employment provisions with childcare needs. Substantive restructuring is required to incorporate childcare into employment. It is unlikely that solutions related to care and employment can be designed, adopted or implemented exclusively at the national level. It is also unlikely that solutions regarding childcare can be devised solely at the EU level as this risks those solutions being created in a

²⁰⁵ Organisation for Economic Co-Operation and Development (OECD), *Doing Better for Families* (OECD 2011).

vacuum detached from Member States' realities. A collaboration between the Member States and the EU would be a much more desirable solution for better outcomes in the area of childcare. This can only happen under strong EU leadership, which would take gender equally seriously and ensure that an efficient enforcement of the legal framework exists. This thesis has submitted that the EU can and should take leadership in the development of a childcare strategy which includes at its heart the EU's key values and principles. In doing so, the EU must dismiss excuses linked to complexity or cost put forward by Member States to avoid regulating childcare.

The EU leadership must go further than championing childcare alone. A society that recognises the importance of care should not limit this issue to children alone. A holistic approach to care will ultimately be necessary. Although there are clear benefits in investing in future generations, it is important to underscore that people are more than just a means of economic investment and that care does not end with children. In contrast to childcare, the care of dependant people due to old age, illness and/or disability has not generally been considered by the EU to be an investment or to be part of the market. Childcare has been deemed to be part of the market where the EU has strong competence. By contrast, the other forms of care have been linked to human rights (where the EU has weaker ability to act and where principles such as human dignity have been argued to be indeterminate).²⁰⁶ The major problem with this double standard approach is that it compartmentalises care into childcare, which can be regulated and other forms of care, which are ignored by the EU. This compartmentalisation entrenches ultimately care into the private sphere where it remains invisible, unaccounted for and undervalued.

Whether caring for children or caring for dependents adults, the social and economic impacts on carers are similar. From the perspective of caregivers, a holistic approach to the right to care is fundamental to the full ability to be a citizen as per the capability approach.²⁰⁷ Care is perhaps the most important element of the work-family reconciliation strategy. From an economic perspective, whilst a right to leave and to alter working arrangements provide

²⁰⁶ T. Khaitan, 'Dignity as an Expressive Norm: Neither Vacuous Nor a Panacea' (2012) 32(1) *Oxford Journal of Legal Studies* 1-19; C. McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19(1) *European Journal of International Law* 655-724.

²⁰⁷ E. Caracciolo di Torella, 'Shaping and re-shaping the care discourse in European Law: a catalogue of rights for carers?' 2016 28(3) *Child and Family Law Quarterly* 261-279.

individuals with *time to care*, a right to care provide individuals with *time to work*.²⁰⁸ The care element of the reconciliation measures therefore highlights that work-family reconciliation cannot exclusively be concerned with babies and young children but that dependent adults, disabled people, the elderly or chronically ill also require care. By not placing enough emphasis on care, the reconciliation strategy is unbalanced and inadequate to serve the needs of both caregivers and care recipients.

Thus, the EU needs to support a holistic approach to care, because the caring relationship is valuable in itself and not because it benefits economic competitiveness or employment rates. In this context, Herring invites us to consider an alternative society, where care is central:

“Economic productivity would be valued in so far as it is consistent with care. Those with needs would be recognised for all they contribute and would not be seen as an expensive burden. Employees would be expected to combine their employment with meeting their caring responsibilities. Workplaces would expect workers to have caring responsibilities and so have flexible hours and work and leave, and would encourage working from home where possible. The work of women and men would be valued equally”.²⁰⁹

This alternative vision of society is far from utopia. The principles underpinning such a vision are already embedded in the EU legal framework. It now requires the EU to champion its own principles into practice by taking a strong leadership in applying its proclaimed values. A much needed shift in political will and renewed social investment can start with the adoption of a coherent, comprehensive and integrated legal framework to support care. Articles 2 and 3 TEU place people firmly at the heart of the EU machinery, yet the legal framework appears to be off-centred and policies mostly focus on the realisation of the market instead of the well-being of people. Rather than being recognised for the social construction that it is, the market is increasingly assimilated to a law of physics, like the law of gravity. It appears immutable and people have to submit to it. To an extent the market is perceived to even be above science, indeed sometimes beyond climate change. Similarly, the market appears to be placed above the principles of gender equality, human rights, humane values such as solidarity, dignity or tolerance, and ultimately superior to the well-being of the

²⁰⁸ J. Lewis, ‘Childcare Policies and the Politics of Choice’ (2008) 79(4) *The Political Quarterly* 499-507.

²⁰⁹ J. Herring, *Caring and the Law* (Hart 2013) 319.

people. Instead of fundamental principles informing the market, the EU fundamental values have been used to serve the market. For example, the principle of gender equality has been instrumentalized to improve female employment rates,²¹⁰ while children are considered as investments only. The policy on economic growth urges European women to have more children, but at the same time pressures are applied for these women to be activated in the labour market where workers are expected to have no care responsibilities that could interfere with production. Little value, certainly no market value, is granted to the care relationship between parents/caregivers and children. The lack of recognition of childcare work has contributed to the unequal economic and social standing of women in society.²¹¹ At the same time, increasing life expectancy is viewed as a doom scenario, instead of being a cause for celebration.

It is argued that the present vision of society, where autonomy is revered while care is considered a burden, is outdated, illusory and unsustainable. The reality is that all human beings are in need of care at some stage in their life, as babies and children at the very least, but also later in life as no one is immune to accident or illness, and in old age an increasing number of individuals require assistance. In fact, those who are apparently the most autonomous according to the market, are also the most heavily reliant on care produced by their wives or partners, or by individuals either based locally or imported from other poorer countries. As has been previously argued, the care relationship should not be ignored by the law but should be central to legal protection. Caring is a good part of life at the individual level (for those receiving care as well as for those providing it)²¹² and at a societal level.²¹³ EU law must support, promote and protect care relationships for “the well-being of its people.”²¹⁴

²¹⁰ See in particular Chapter 3.

²¹¹ M. Fineman, *The Autonomy Myth: A Theory of Dependency* (New Press 2004) xvii.

²¹² K. Silbaugh, ‘Turning Labor into Love: Housework and the Law’ (1996) 91 *Northwestern University Law Review* 1.

²¹³ T. Knijn and C. Ungerson, ‘Introduction: Care Work and Gender in Welfare Regimes’ (1997) 4(3) *Social Politics*, 323-327.

²¹⁴ Article 3(1) TEU.

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