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**Additional (maternity) leave for women only?**  
**The Court of Justice refines its *Hofmann* test in *Syndicat CFTC (C-463/19)* yet forgets about the children**

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**Abstract**

*Syndicat CFTC v. CPAM* provided an excellent opportunity for the Court of Justice of the European Union ('CJEU') to reconsider its position taken in the *Hofmann* case, regarding the question to what extent additional maternity leave can be exclusively reserved for female workers without infringing Directive 2006/54. Whilst the CJEU has narrowed the grey zone, it refrains from clearly indicating the boundaries between 'maternity' and 'parenthood' and leaves that for the Member States to decide. Against this backdrop, this case note argues that the CJEU should cease to conflate both concepts, as it cements women into their traditional role as primary caregivers and keeps men in a role subsidiary to that of women with respect to the exercise of parental responsibilities. Ultimately, child-care related leave should be approached from a rights perspective, taking into account the best interests of the child.

**Key words**

Equal Treatment Men-Women, Leave Policies, Discrimination, Children's Rights

**Introduction**

The French case of *Syndicat CFTC*<sup>1</sup> concerns additional leave following statutory maternity leave that is exclusively reserved for women. The key question is to what extent such additional leave can be reserved for female workers, to the exclusion of male workers, without infringing Directive 2006/54.<sup>2</sup> This Directive prohibits discrimination on grounds of sex in relation to employment and working conditions.<sup>3</sup> It does leave room, however, for exceptions

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<sup>1</sup> Case C-463/19 *Syndicat CFTC du personnel de la Caisse Primaire d'Assurance Maladie de la Moselle ('Syndicat CFTC') v. Caisse Primaire d'Assurance Maladie de Moselle ('CPAM')*, EU:C:2020:932.

<sup>2</sup> 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), [2006] OJ L 204/23.

<sup>3</sup> Article 15(1)(c) of Directive 2006/54/EC.

related to 'pregnancy and maternity',<sup>4</sup> including the entitlement to a maternity leave of at least 14 weeks allocated before and/or after delivery, guaranteed by Directive 92/85.<sup>5</sup> In its *Hofmann* case (1984)<sup>6</sup> the Court of Justice of the European Union ('CJEU' or 'the Court') decided that maternity leave is a legitimate exception to the principle of equal treatment of men and women, as included in the predecessor of Directive 2006/54.<sup>7</sup> The Court recognised the legitimacy of protecting a woman's needs in two respects:

First, it is legitimate to ensure the protection of a woman's biological condition during pregnancy and thereafter until such time as her physiological and mental functions have returned to normal after childbirth; secondly, it is legitimate to protect the special relationship between a woman and her child over the period which follows pregnancy and childbirth, by preventing that relationship from being disturbed by the multiple burdens which would result from the simultaneous pursuit of employment.<sup>8</sup>

This judgment sparked quite some critique, as it allegedly enforced traditional gender roles, with men as breadwinners and women as caregivers, under the guise of protecting women's biological condition and the special relationship with their child.<sup>9</sup>

Although the CJEU has in the meantime certainly become more receptive to the dangers of imposing 'ideologies of motherhood',<sup>10</sup> this commentary argues that, in the *Syndicat CFTC* judgment, the Court still conflates the concepts of 'maternity' (the biological/gestational situation) and 'motherhood' (the situation of being a female parent).<sup>11</sup> This has consequences

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<sup>4</sup> Article 28(1) and (2) of Directive 2006/54/EC. Recital 24 of the Preamble to Directive 2006/54/EC clearly connects Art. 28(1) with Art. 28(2).

<sup>5</sup> 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), [1992] OJ L 348/1.

<sup>6</sup> Case 184/83 *Ulrich Hofmann v. Barmer Ersatzkasse*, EU:C:1984:273.

<sup>7</sup> 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, [1976] OJ L 39/40. This Directive also included an article that provides an exception from its scope for 'provisions concerning the protection of women, particularly as regards pregnancy and maternity' (Article 2(3)).

<sup>8</sup> Case 184/83 *Ulrich Hofmann v. Barmer Ersatzkasse*, para. 25. The Court has referred to this so-called '*Hofmann* test' on multiple occasions since. See, e.g., Case C-167/12 *C.D. v. S.T.*, EU:C:2014:169, para. 34; Case 450/18 *WA v. Instituto Nacional de la Seguridad Social (INSS)*, EU:C:2019:1075, para. 56.

<sup>9</sup> See, e.g., C. McGlynn, 'Reclaiming a Feminist Vision: The Reconciliation of Paid Work and Family Life in European Union Law and Policy', 7 *Columbia Journal of European Law* (2001), p. 264-265.

<sup>10</sup> See, e.g., Case C-366/99 *Griesmar v. Ministre de l'Économie, des Finances et de l'Industrie and Ministre de la Fonction publique, de la Réforme de l'État et de la Décentralisation*, EU:C:2001:648, para. 44; Case C-104/09 *Roca Álvarez v. Sesa Start España ETT SA*, EU:C:2010:561, para. 31. On the 'ideologies of motherhood', see C. McGlynn, 'Ideologies of Motherhood in European Community Sex Equality Law', 6 *European Law Journal* (2000), p. 29-44.

<sup>11</sup> See, e.g., 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', 40 *European Law Review* (2015), p. 56; M. De la Corte Rodríguez, 'Maternity leave and discrimination against fathers: current case law of the of the Court of Justice of the European Union and the way forward', 4 *International Comparative Jurisprudence* (2018), p. 36; J. Mulder, 'Pregnancy Discrimination the National Courts: Is There a Common Framework?', 31 *International Journal of Comparative Labour Law and Industrial Relations* (2015), p. 79.

for the position of both working mothers, who are entrenched in their childcaring roles and working fathers, who are neglected.<sup>12</sup>

Besides raising issues of gender inequalities, the case of *Syndicat CFTC* can also be challenged from the perspective of the children. The concept of 'care' involves care givers (in this case, parents) and care recipients (in this case, children). However, the position of the children remains overlooked, if not invisible, in the EU legal framework on child care provisions and the case law of the CJEU.<sup>13</sup> The inclusion of the best interests of the child principle should, however, be a primary consideration to ensure all children are protected and receive appropriate care that promotes their well-being.

### **Relevant Facts and National Proceedings**

The applicant, CY, was an employee at CPAM, the Local Sickness Insurance Fund of Moselle (France). Following birth of his child in 2016, he applied for the leave provided for in Article 46 of the National Collective Labour Agreement for staff of social security bodies of 8 February 1957 ('the collective agreement').<sup>14</sup> Under this provision, an employee who is bringing up her child on her own, can - on expiry of the ordinary statutory maternity leave provided for in Article 45 of the collective agreement<sup>15</sup> - apply for an additional leave of either three months on half-pay or one and a half month on full pay, and for unpaid leave of one year. CPAM refused CY's application on the ground that Article 46 was reserved for female employees. It argued that 'the leave provided for is granted only to the child's mother, the term 'employee' being in the feminine, and that that article is not discriminatory in so far as it is ancillary to Article 45 of the collective agreement, which grants a benefit only to women.'<sup>16</sup> Since CY was not entitled to the benefit in Article 45, he could not benefit from Article 46 either.

On 27 December 2017, Syndicat CFTC, a trade union acting in the interests of CY, brought an action against CPAM before the Labour Tribunal of Metz ('the Labour Tribunal' or 'the referring court'), arguing that the refusal to grant CY the benefit of the additional leave provided for in Article 46 of the collective agreement constituted discrimination on grounds of sex, prohibited both by EU law and French law. It alleged that Article 46 was not ancillary to Article 45 of the collective agreement, given that in contrast to Article 45, Article 46 is not linked to physiological considerations. It further held that since men and women are equal in the burden

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<sup>12</sup> M. Weldon-Johns, 'EU Work-Family Policies - Challenging Parental Roles or Reinforcing Gendered Stereotypes?', 19 *European Law Journal* (2013), p. 667.

<sup>13</sup> See also G. James, 'Forgotten children: work-family reconciliation in the EU', 34 *Journal of Social Welfare and Family Law* (2012), p. 365; G. James and T. Callus, 'Child welfare and work-family reconciliation policies: lessons from family law', in N. Busby and G. James (eds.), *Families, Care-giving and Paid Work – Challenging Labour Law in the 21<sup>st</sup> Century* (Edwar Elgar Publishing 2011), p. 173-174.

<sup>14</sup> Convention collective nationale de travail du personnel des organismes de sécurité sociale du 8 février 1957, [https://www.legifrance.gouv.fr/conv\\_coll/id/KALISCTA000038276893/?idConteneur=KALICONT000038292684](https://www.legifrance.gouv.fr/conv_coll/id/KALISCTA000038276893/?idConteneur=KALICONT000038292684).

<sup>15</sup> Article 45 of the collective agreement stipulates: 'For the duration of the statutory maternity leave, salary shall be maintained for staff members who have at least six month's seniority. This cannot be combined with daily allowances payable to staff members as insured persons.' The statutory maternity leave referred to in this article is 16 weeks. Article L1225-17 French Labour Code/Code du travail, <https://www.legifrance.gouv.fr/codes/id/LEGISCTA000006195592/>.

<sup>16</sup> Case C-463/19 *Syndicat CFTC v. CPAM*, para. 23.

of bringing up their children, male employees should therefore also be entitled to benefit from the leave provided for in Article 46 of the collective agreement.<sup>17</sup>

The Labour Tribunal, however, found itself confronted with a previous judgment of the French Court of Cassation which ruled that the purpose of Article 46 is to grant supplementary maternity leave on the expiry of the statutory maternity leave contained in Article 45 and that it was thus intended to protect the special relationship between a woman and her child during the period which follows pregnancy and childbirth.<sup>18</sup> As a result, the Labour Tribunal referred a preliminary question to the CJEU asking, in essence, whether Directive 2006/54 must be interpreted as meaning that the additional leave provided for in Article 46 of the collective agreement reserved for female workers only is excluded from the scope of application of that Directive.

### **The Reasoning of the Court**

The CJEU started by reiterating that Directive 2006/54 prohibits all direct or indirect discrimination on grounds of sex in relation to employment and working conditions.<sup>19</sup> Yet it continued by reaffirming that this Directive is without prejudice to the provisions concerning the protection of women, particularly as regards pregnancy and maternity. Therefore, Directive 2006/54 should be without prejudice to the provisions of Directive 92/85.<sup>20</sup>

It is settled case law that the right to maternity leave must be regarded as a particularly important mechanism of protection during the period of at least 14 weeks preceding and after childbirth.<sup>21</sup> The aim of maternity leave, as organised in Directive 92/85, is twofold: to protect a woman's biological condition during and after pregnancy and, to protect the special relationship between a mother and her child.<sup>22</sup> Directive 92/85 lays down minimum requirements, thereby allowing Member States to introduce higher levels of protection.<sup>23</sup> Thus, additional maternity leave reserved exclusively to mothers is justified, inasmuch as it seeks to protect a woman in connection with the effects of pregnancy and motherhood.<sup>24</sup> In contrast, measures designed to protect women in their capacity as parents cannot be justified under Directive 2006/54, since the situation of a male worker and that of a female worker, both having the status of parent, are comparable with respect to the bringing up of children.<sup>25</sup> In the words of the Court:

it is only if such a difference in treatment seeks the protection of the mother in connection with the effects of pregnancy and motherhood, that is to say, if it is intended to protect the woman's biological condition and the special relationship between her and her child during the period following childbirth, that it appears to be compatible with Directive 2006/54. If Article 46 of the

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<sup>17</sup> Case C-463/19 *Syndicat CFTC v. CPAM*, para. 24.

<sup>18</sup> Arrêt n° 1962 du 21 septembre 2017 (16-16.246) – Cour de cassation – Chambre sociale – ECLI:FR:CCASS:2017:SO01962.

<sup>19</sup> Article 15(1)(c) of Directive 2006/54/EC.

<sup>20</sup> Case C-463/19 *Syndicat CFTC v. CPAM*, para. 47-49.

<sup>21</sup> Case C-463/19 *Syndicat CFTC v. CPAM*, para. 50.

<sup>22</sup> Case C-463/19 *Syndicat CFTC v. CPAM*, para. 52, with reference to *Hofmann*.

<sup>23</sup> Case C-463/19 *Syndicat CFTC v. CPAM*, para. 53.

<sup>24</sup> Case C-463/19 *Syndicat CFTC v. CPAM*, para. 54. Do note that the CJEU speaks of 'motherhood', unlike Article 28(1) of Directive 2006/54/EC, that speaks of 'maternity'.

<sup>25</sup> Case C-463/19 *Syndicat CFTC v. CPAM*, para. 55.

collective agreement were to apply to women solely in their capacity as parents, that article would institute, as regards male workers, direct discrimination prohibited under Article 14(1) of that directive.<sup>26</sup>

Following the suggestion of Advocate General ('AG') Bobek, the CJEU advanced a number of factors that can be taken into account to determine whether leave granted consecutive to statutory maternity leave may be reserved for women only. The first condition relates to the question whether the leave is granted to all women, irrespective of their length of service and without the need for the employer's consent. The second relates to the duration of and the manner in which the supplementary leave is exercised: it should not exceed the period necessary for the protection of the biological and psychological condition of the woman and her special relationship with the child. Thirdly, the level of legal protection during the additional leave must be in conformity with the legal protection during statutory maternity leave in terms of, for example, protection against dismissal and the maintenance of a payment or an allowance.<sup>27</sup>

Whilst the CJEU held that it is for the referring court to determine whether the leave at issue meets the above-mentioned conditions, it did provide some guidance for the French court,<sup>28</sup> including: (1) the mere fact that the additional leave immediately follows the statutory maternity leave is not sufficient for it to be regarded as intended to protect women and, as a consequence, for it to be reserved to women exclusively; (2) the fact that Article 46 of the collective agreement falls under the chapter named 'maternity leave' is of no relevance in determining whether such a provision complies with EU law; (3) the fact that the Court referred in *Thibault*<sup>29</sup> to the leave under Article 46 of the collective agreement as 'maternity leave' is irrelevant<sup>30</sup> and (4) the duration of the additional leave - which varies from one and a half months to up to two years and three months - may be considerably greater than that of the statutory maternity leave of 16 weeks. Moreover, where the leave is taken for at least one year, it becomes unpaid, whilst pay and/or an adequate allowance is a condition for maternity leave according to Article 11(2) of Directive 92/85.

In the light of the foregoing considerations, the CJEU answered that Directive 2006/54, read in the light of Directive 92/85, does not preclude

a provision of a national collective agreement which reserves to female workers who bring up their child on their own the right to leave after the expiry of the statutory maternity leave, *provided* that such leave is intended to protect workers in connection with the effects of pregnancy and motherhood, which is for the referring court to ascertain, taking into account, inter alia, the conditions for entitlement to the leave, its length and modalities of enjoyment, and the legal protection that attaches to that period of leave.<sup>31</sup>

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<sup>26</sup> Case C-463/19 *Syndicat CFTC v. CPAM*, para. 61.

<sup>27</sup> Case C-463/19 *Syndicat CFTC v. CPAM*, para. 62-65; Opinion of AG Bobek in Case C-463/19 *Syndicat CFTC v. CPAM*, para. 71-80.

<sup>28</sup> Case C-463/19 *Syndicat CFTC v. CPAM*, para. 66-67.

<sup>29</sup> Case C-136/95 *Caisse nationale d'assurance vieillesse des travailleurs salariés (CNAVTS) v. Evelyne Thibault*, EU:C:1998:178.

<sup>30</sup> In para. 12 of the *Thibault* judgment the CJEU stated: '[Mrs. Thibault] then took maternity leave from 13 June to 1 October 1983, under Article 45 of the collective agreement, followed by maternity leave on half pay from 3 October to 16 November 1983 under Article 46 of the collective agreement.' The CJEU highlighted in *Syndicat CFTC* that this sentence 'concerns not the Court's legal reasoning and interpretation, but only the facts as they result from the request for a preliminary ruling in the case which gave rise to that judgment.' Case C-463/19 *Syndicat CFTC v. CPAM*, para. 72.

<sup>31</sup> Case C-463/19 *Syndicat CFTC v. CPAM*, para. 74 (italics added).

## Comments

As already highlighted in the introduction, the case of *Syndicat CFTC* can be commented on from a double angle. The first angle involves the question whether the CJEU seized the opportunity to rethink *Hofmann* from a gender equality perspective. As indicated above, the *Hofmann* test allowed Member States to maintain a traditional male breadwinner/ female caregiver perspective on women's and men's roles in society.<sup>32</sup> *Hofmann* supports the award of lengthy (statutory and additional) maternity leave, thereby also limiting incentives for men to take time out to care for their children.<sup>33</sup>

AG Bobek outlined the stakes of the case:

the logic and spirit of *Hofmann*, certainly if taken verbatim without any further limits and clarification, reminds one somewhat of a grandfather invited to a social event with his progeny where all the participants, albeit liking each other in principle, feel oddly disconnected and without much to really talk about.<sup>34</sup>

It is encouraging that the Court made clear that it is not sufficient to merely label a leave as 'maternity leave' to come within the ambit of the article that excludes 'provisions concerning the protection of women, particularly as regards pregnancy and maternity'<sup>35</sup> from the scope of Directive 2006/54.<sup>36</sup> For the first time the Court advanced a number of criteria that can help national legislators and judges to distinguish between, on the one hand, genuine statutory maternity leave, covered by Directive 92/85, and as such excluded from the scope of Directive 2006/54,<sup>37</sup> and on the other hand leave that relates to parenthood and childcare.<sup>38</sup> Whilst the CJEU has certainly refined *Hofmann* in its *Syndicat CFTC* judgment, the *Hofmann* test was not put aside as such, however. Even after *Syndicat CFTC*, women-only leave is allowed to safeguard a woman's biological condition during pregnancy and thereafter, and to protect the special relationship between her and her child. The line between leave that is connected with childbearing, and therefore reserved for women, and leave connected with parenting, which should be made available to men and women equally, remains blurry.<sup>39</sup>

Neither the AG nor the Court have made observations regarding the exact fit between Directive 92/85 and the provision that excludes it from the ambit of Directive 2006/54.<sup>40</sup> Whilst it is certainly true that the preliminary question referred in *Syndicat CFTC* merely concerned

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<sup>32</sup> See *supra*, note 9 and accompanying text.

<sup>33</sup> See, e.g., S. Fredman, 'Reversing roles: bringing men into the frame', 10 *International Journal of Law in Context* (2014), p. 452.

<sup>34</sup> Opinion of AG Bobek in Case C-463/19 *Syndicat CFTC v. CPAM*, para. 56.

<sup>35</sup> Article 28(1) of Directive 2006/54/EC.

<sup>36</sup> See as well Opinion of AG Bobek in Case C-463/19 *Syndicat CFTC v. CPAM*, para. 90.

<sup>37</sup> Article 28(2) of Directive 2006/54/EC.

<sup>38</sup> On the risks of excluding Directive 92/85/EEC from the scope of Directive 2006/54/EC, see, e.g., P. Foubert, *The legal protection of the pregnant worker in the European Community* (Kluwer Law International 2002), p. 122; S. Fredman, 10 *International Journal of Law in Context* (2014), p. 452.

<sup>39</sup> See as well M. De la Corte Rodriguez, 'The First Revision of the Hofmann Case Law on Maternity Leave and Discrimination Against Fathers: Care-Giving as the Pivot?', 50 *Industrial Law Journal* (2021), p. 11 (online publication 17 May 2021).

<sup>40</sup> Articles 28(1) and (2) of Directive 2006/54/EC.

additional maternity leave, the AG and the CJEU made sure to stay away from the boundaries of statutory maternity leave. Directive 92/85 obviously has the mere aim of protecting the health and safety of a worker who is pregnant/ has just given birth/ is breastfeeding. Yet the *Hofmann* test allows women-only leave that does not only protect a woman's biological condition (first prong of the *Hofmann* test), but also the special relationship that she has with her child (second prong of the *Hofmann* test). The addition of the second prong jeopardises the exact qualification of (statutory) maternity leave.<sup>41</sup> The 'special relationship' referred to in *Hofmann* seems at odds with 'maternity', as mentioned in one breath with 'pregnancy' in Directives 92/85 and 2006/54.<sup>42</sup> AG Bobek described 'maternity' as a term which 'must be understood in a narrow manner and cannot be equated with the more general concepts of motherhood or parenthood.'<sup>43</sup> The CJEU, however, uses 'maternity' and 'motherhood' interchangeably.<sup>44</sup> That provokes the question whether the *Hofmann* test respects Directives 92/85 and 2006/54 and the underlying principle of equal treatment of men and women, to the extent that it deems the special relationship of a biological mother and her child worthy of more protection than the special relationship that men have with their new-born.<sup>45</sup>

The case of *Syndicat CFTC* demonstrates (again) that the CJEU is liable to perpetuate traditional gender roles, which has adverse consequences for both women and men. The CJEU continues to allow Member States to confound pregnancy and maternity with parenting.<sup>46</sup> This is illustrated by the fact that the CJEU did not address CY's argument, that '[s]ince men and women are equal as regards the burden of bringing up their children, male workers (...) should also have the benefit of the leave provided for in Article 46 of the collective agreement.'<sup>47</sup> The CJEU carefully avoided any reference to physiological considerations when listing criteria that can guide the national court's interpretation of Directive 2006/54. It clearly did not wish to be involved in discussions regarding the question where 'maternity' ends and 'motherhood' begins, which it leaves that for the Member States to decide. As a consequence, national legal orders can still support an outdated conception of motherhood with the effect of limiting the advancement of the rights of working mothers. This tends to cement women into their traditional role of carers whilst limiting their labour market position.<sup>48</sup> The realities of

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<sup>41</sup> AG Bobek noted in this respect: '(...) recent case-law has made apparent that the two criteria of the Hofmann test cannot be considered separately as two different and disconnected instances justifying the application of Article 28(1) of Directive 2006/54. Rather, they go hand in hand. Moreover, that case-law seems to give a certain prevalence to the protective aim related to the biological condition of women.' Opinion of AG Bobek in Case C-463/19 *Syndicat CFTC v. CPAM*, para. 63.

<sup>42</sup> See also M. Weldon-Johns, 19 *European Law Journal* (2013), p. 666-667.

<sup>43</sup> Opinion of Advocate General Bobek in Case C-463/19 *Syndicat CFTC v. CPAM*, para. 62.

<sup>44</sup> See, e.g., Case C-184/83 *Ulrich Hofmann v. Barmer Ersatzkasse*, para. 26-27.

<sup>45</sup> Note that in Case C-167/12 *C.D. v. S.T.*, para. 40, the CJEU found that 'a female worker who as a commissioning mother has had a baby through a surrogacy arrangement does not fall within the scope of Article 8 of Directive 92/85, even in circumstances where she may breastfeed the baby following the birth or where she does breastfeed the baby'. This demonstrates that the criterion relating to the protection of the special connection between the mother and her child cannot be detached from the protection of the condition of the woman. M. De la Corte Rodriguez argues along the same line in his commentary of the *CFTC* case, 50 *Industrial Law Journal* (2021), p. 12-13 (online publication 17 May 2021).

<sup>46</sup> On the CJEU's approach to mothers' and fathers' roles as carers, see, e.g., E. Caracciolo di Torella 'Men in the work/family reconciliation discourse: the swallows that did not make a summer?', 37 *Journal of Social Welfare and Family Law* (2015), p. 338-340.

<sup>47</sup> Case C-463/19 *Syndicat CFTC v. CPAM*, para. 24.

<sup>48</sup> See, e.g., C. McGlynn, 6 *European Law Journal* (2000), p. 36; M. Weldon-Johns, 'EU work-family policies revisited: Finally challenging caring roles?', *European Labour Law Journal* (2020), p. 3 (online publication 19 October 2020).



employment and care hinder the achievement of the dual earner/ carer model that the EU is aiming for under which men and women participate symmetrically in both paid work whilst assuming care of their relatives.<sup>49</sup> The dual earner/ carer model ignores the reality of women's lives where they struggle to balance their caring tasks and employment.<sup>50</sup> At the same time, men who wish to take care of their children also keep bearing the burden of their ascribed breadwinner roles.<sup>51</sup>

A second angle to look at the *Syndicat CFTC* case relates to the fact that children's interests and needs remain noticeably absent from the discussion regarding child-related leave. At the very moment when 'maternity' ends and 'motherhood' and 'parenting' begin, the child's perspective should be a focal point.

Although the EU has failed until recently to recognise children's well-being as an important factor to be taken into account in leave arrangements, several references to children's rights can be found in EU primary legislation: first, Article 3(3) of the Treaty on the European Union ('TEU') explicitly provides for the protection of the children's rights as an objective of the EU. Second, Article 24(1) of the EU Charter of Fundamental Rights ('EU Charter') provides that children have 'the right to such protection and care as is necessary for their well-being'. Article 24(2) further requires that the child's best interests must be a primary consideration in *all* actions relating to children. Whilst the EU Charter does not grant new competences to the EU institutions to legislate in favour of children, it enables them to create a legal framework on child care leave that takes their interests into consideration.<sup>52</sup>

Despite those provisions contained in EU primary law, a child-centred approach to leave policies remains vastly absent. To this day, the first and only reference to children's rights in the EU legal framework on child-related leave has emerged at the occasion of the adoption of the Work-Life Balance Directive 2019/1158.<sup>53</sup> The Directive emphasises that the Member States have ratified the 1989 UN Convention on the Rights of the Child, providing that both parents have common responsibilities for the upbringing of their child and that the best interests of the child should be the parent's basic concern.<sup>54</sup> This direct reference to children's rights does not, however, provide any guidance concerning what is necessary to achieve the best interests of the child principle. The case law of the CJEU is not of much help in this respect, as it has not discussed thus far the issue of child-related leave from a children's rights perspective.<sup>55</sup> In the case of *C.D. v S.T.*, AG Kokott seemed to be in favour of considering the

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<sup>49</sup> J. C. Gornick and M. K. Meyers, *Families That Work: Policies for Reconciling Parenthood and Employment* (Russell Sage Foundation 2003), p. 92.

<sup>50</sup> See, e.g., E. Caracciolo di Torella and A. Masselot, *Caring Responsibilities in European Law and Policy* (Routledge 2020), p. 58; J. C. Gornick and M. K. Meyers, 'Building the Dual Earner/Dual Carer Society: Policy Developments in Europe', CES Working Paper, no. 82, (2002), <http://aei.pitt.edu/9143/1/GornickMeyers.pdf>, p. 4.

<sup>51</sup> On the access of fathers to care, see, e.g., E. Caracciolo di Torella, 'Brave New Fathers for a Brave New World? Fathers as Caregivers in an Evolving European Union', 20 *European Law Journal* (2014), p. 88-106.

<sup>52</sup> See, e.g., P. Foubert, 'Child Care Leave 2.0 – Suggestions for the improvement of the EU Maternity and Parental Leave Directives from a rights perspective', 24 *Maastricht Journal of European and Comparative Law* (2017), p. 262; H. Stalford and M. Schuurman, 'Are We There Yet?: the Impact of the Lisbon Treaty on the EU Children's Rights Agenda', 19 *International Journal of Children's Rights* (2011), p. 397.

<sup>53</sup> Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, [2019] OJ L 188/79.

<sup>54</sup> Recital 5 to the Preamble of Directive (EU) 2019/1158.

<sup>55</sup> See, e.g., S. De Groof, *Arbeidstijd en vrije tijd in het arbeidsrecht* (Die Keure 2017), p. 59-60.; G. James, 34 *Journal of Social Welfare and Family Law* (2012), p. 368; G. James and T. Callus, *Families, Care-giving and Paid Work – Challenging Labour Law in the 21<sup>st</sup> Century*, p. 173.

best interests of the child in an issue concerning a surrogate mother who applied for maternity leave<sup>56</sup> but the CJEU did not develop on this rights-based approach. In addition, in cases where the CJEU has promoted a more gender-neutral family model where parental responsibility is shared between both parents<sup>57</sup> and although this is assumed to be in the child's best interests, the CJEU does not explicitly include a children's rights perspective. In contrast to the CJEU, the European Court of Human Rights ('ECtHR') has attached great importance to the best interests of the child principle in a number of cases. Although these cases were not raised in the context of leave policies, explicit references to children and their best interests have been made in relation to custody and contact.<sup>58</sup> Article 8 of the European Convention of Human Rights ('ECHR')<sup>59</sup> implicitly recognises the right of the child to maintain contact with both parents and the ECtHR has affirmed that 'the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life'.<sup>60</sup> The parents' interests in having regular contact with their child may, however, be limited by the best interests of the child.<sup>61</sup>

There are convincing arguments to take into account children's needs within leave policies. The absence of a paternal figure during the early stages of childhood raises concerns for the child's well-being. Although studies on the effect of the role of father in children's education are characterised by their heterogeneity, there is general agreement that a strong paternal involvement is beneficial to the child's development.<sup>62</sup> Children enjoy higher cognitive and emotional outcomes and physical health.<sup>63</sup> Conversely, a lack of paternal proximity often has a deleterious effect on the child's development.<sup>64</sup> EU law also impliedly acknowledges that it is in the child's best interests to receive care from both parents.<sup>65</sup> There seems to be a consensus regarding the importance of developing leave policies which promote a greater involvement of fathers in the upbringing of their children, be it to combat gender inequalities, to grant an individual right to fathers but more importantly, in the children's best interests.<sup>66</sup>

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<sup>56</sup> Opinion of Advocate General Kokott in Case C-167/12 *C.D. v S.T.*, EU:C:2013:600, para. 75.

<sup>57</sup> See, e.g., Case C-104/09 *Roca Álvarez v. Sesa Start España ETT SA*; Case 312/86 *Commission v. France*, EU:C:1988:485.

<sup>58</sup> See, e.g., ECtHR, *Schneider v. Germany*, Judgment of 15 September 2011, Application No. 17080/07; ECtHR, *Levin v. Sweden*, Judgment of 15 March 2012, Application No. 35141/06; ECtHR, *Sommerfeld v. Germany*, Judgment of 8 July 2003, Application No. 31871/96.

<sup>59</sup> Article 8 of ECHR provides for the right to respect for private and family life to both parents and children.

<sup>60</sup> ECtHR, *K. and T. v. Finland*, Judgment of 12 July 2001, Application No. 25702/94, para. 151.

<sup>61</sup> ECtHR, *Neulinger and Shuruk v. Switzerland*, Judgment of 6 July 2010, Application No. 41615/07, para. 148.

<sup>62</sup> See, e.g., T. Cano *et al.*, 'A Matter of Time: Father Involvement and Child Cognitive Outcomes', 81 *Journal of Marriage and Family* (2019), p. 177-179; C. Lewis and M. E. Lamb, 'Father's influences on children's development: The evidence from two-parent families', 18 *European Journal of Psychology of Education* (2003), p. 211-212; L. Rollè *et al.*, 'Father Involvement and Cognitive Development in Early and Middle Childhood: A Systematic Review', 10 *Frontiers in Psychology* (2019), p. 13-14.

<sup>63</sup> OECD, 'Policy Brief: Parental leave: Where are the fathers?', OECD (2016), <https://www.oecd.org/policy-briefs/parental-leave-where-are-the-fathers.pdf>.

<sup>64</sup> M.E. Lamb, 'Fathers: Forgotten Contributors to Development', 18 *Human Development* (1975), p. 254.

<sup>65</sup> Article 24(3) of EU Charter establishes that '(e)very 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 interest'.

<sup>66</sup> E. Dermine, 'Tendre vers une égalité effective entre les femmes et les hommes sur le marché du travail. Arguments juridiques en faveur de l'allongement du congé de naissance', 2021 *Revue de Droit Social* (2021), p. 66; G. James, 34 *Journal of Social Welfare and Family Law* (2012), p. 366.

As mentioned previously, care involves care givers and care recipients.<sup>67</sup> In the context of parental care, the EU only takes the former (men and women) into consideration and does not include the latter (children). Whilst the rights of the parents to take care of their children and to spend time with them should not be underestimated, these should be balanced against the rights of the children. After all, children have the 'right to such protection and care as is necessary for their well-being'.<sup>68</sup> Taking a children's rights perspective allows to provide them with a right to parental care. Furthermore, this allows to account for the differences in family formations and to treat all children equally regardless of their families. It is assumed all children are in a comparable situation regarding caring needs, whether they grow up in traditional nuclear families or in atypical family formats. Therefore, equal access to parental care for children should be guaranteed by looking at the best interest of the child, in accordance with Article 3(3) TEU and more importantly, Article 24 of the EU Charter.

## **Conclusion**

Whilst the grey zone has narrowed, *Syndicat CFTC* still leaves Member States with a wide margin of appreciation as regards measures intended to guarantee the protection of women in connection with pregnancy and maternity. In not adding clear limits to *Hofmann*, the Court's guidance is likely to perpetuate traditional approaches to females as caregivers and male as breadwinners. Furthermore, it is apparent that a children's rights dimension remains under-explored in this case as well, despite the fact that parenting-related leave is intended as a measure for children. In addition to ensuring the child's best interests, including a children's rights perspective may be an alternative way to approach parenthood in more gender neutral terms.<sup>69</sup> Such approach would also allow to better take into account the fact that 'parenthood' may exist independently from 'maternity'. Being a 'parent' is a role that may be fulfilled by biological mothers and fathers, but also by any person who takes responsibility over a child.<sup>70</sup> For children who grow up in difficult circumstances, this shift might come as a much-needed additional perspective. Given the fact that leave arrangements seriously impact on children's day to day lives, the EU ought to recognise children's well-being as an important factor to be taken into account when regulating leave policies.<sup>71</sup>

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<sup>67</sup> For an in-depth discussion on the concept of care and how the EU engages with it, see E. Caracciolo di Torella and A. Masselot, *Caring Responsibilities in European Law and Policy*.

<sup>68</sup> Article 24(1) of Charter of Fundamental Rights of the European Union, [2000] OJ C 364/01.

<sup>69</sup> See, e.g., S.H. Ayed and A. Masselot, 'Reconciliation between Work and Family Life in the EU: reshaping gendered structures?', 26 *Journal of Social Welfare and Family Law* (2004), p. 332; E. Caracciolo di Torella and A. Masselot, *Caring Responsibilities in European Law and Policy*, p. 78.

<sup>70</sup> See, e.g., E. Caracciolo di Torella and A. Masselot, *Caring Responsibilities in European Law and Policy*, p. 140; P. Foubert, 24 *Maastricht Journal of European and Comparative Law* (2017), p. 249-250; R. Russell and A. Masselot, 'Why Do We Care? The Shifting Concept of Care in New Zealand and in the United Kingdom', 36 *International Journal of Comparative Labour Law and Industrial Relations* (2020), p. 86-87.

<sup>71</sup> See, e.g., G. James, 34 *Journal of Social Welfare and Family Law* (2012), p. 371.