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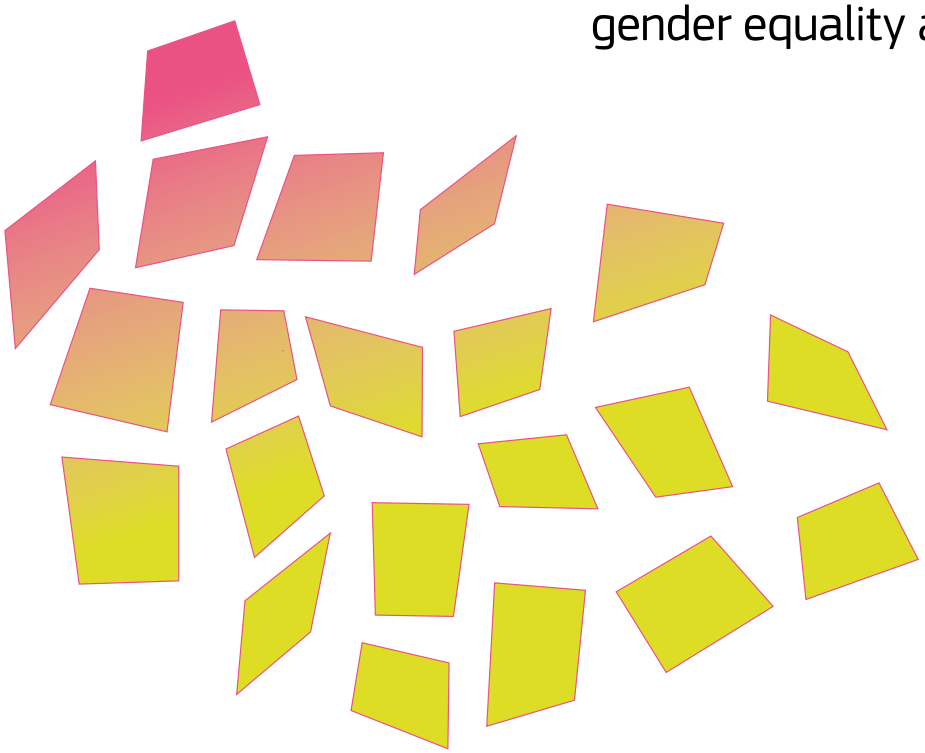

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The transposition of the Work-Life Balance Directive in EU Member States: A long way ahead

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The transposition of the Work-Life Balance Directive in EU Member States: A long way ahead

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List of abbreviations

AT	Austria
BE	Belgium
BG	Bulgaria
CJEU	Court of Justice of the European Union
CY	Cyprus
CZ	Czechia
DE	Germany
DK	Denmark
EE	Estonia
EL	Greece
ES	Spain
EU	European Union
FI	Finland
FWA	Flexible working arrangement
FWAs	Flexible working arrangements
FR	France
HR	Croatia
HU	Hungary
IE	Ireland
IT	Italy
LT	Lithuania
LU	Luxembourg
LV	Latvia
MT	Malta
NL	Netherlands
PL	Poland
PT	Portugal
RO	Romania
SE	Sweden
SI	Slovenia
SK	Slovakia
WLB	Work-life balance

Executive summary

1 Presentation of Directive 2019/1158

Directive 2019/1158 on work-life balance (WLB) for parents and carers (the WLB Directive), has been a milestone in EU legislation concerning the reconciliation of work and family life. This Directive modernises some existing rights, namely parental leave and the right to request flexible working arrangements (FWAs), and creates new rights at European level, i.e. paternity leave and carers' leave.

The WLB Directive aims to establish a new distribution of the risks connected with care-giving. Its objective is to improve the situation of women in the labour market by creating better WLB measures and promoting a better sharing of caring responsibilities between women and men. There are two strands of reform in the Directive. The first one is the special focus on fathers. On the one hand, a specific right for fathers is created for the first time at EU level, i.e. the right to paternity leave. On the other hand, effective incentives for fathers to take parental leave are introduced, namely the combination of non-transferable and adequately paid periods of leave. The second strand of reform is a life-cycle approach especially addressed at WLB issues. Unlike the previous legislative framework, which was focused on parents, it is acknowledged that the need for workers to reconcile work and family may appear at any point during their working lives: not only when they have children, but also when they have a severely ill partner or a dependent parent. In concrete terms, this life-cycle approach is materialised through the new right to carers' leave and the extension to carers of the right to request FWAs.

The personal scope of the WLB Directive covers all workers, men and women, who have an employment contract or an employment relationship. This includes part-time workers, fixed-term contract workers or persons with a contract of employment or employment relationship with a temporary agency. Although it is for Member States to define employment contracts and employment relationships, according to the laws, collective agreements or practice in force in each Member State, the freedom of Member States to define such contracts and relationships is not unlimited, as the case law of the Court of Justice of the EU (CJEU) has to be taken into account. The material scope of the WLB Directive includes paternity leave (new right), parental leave (right strengthened), carers' leave (new right) and FWA (the right to request FWA is strengthened). In addition, the already existing right to time off from work on grounds of *force majeure* (*force majeure* leave) is maintained with no changes.

A new EU right to at least 10 working days of paternity leave, equivalent to two calendar weeks, is created for fathers to be taken on the occasion of the birth of a child for the purposes of providing care. It aims to allow for the early creation of a bond between fathers and children and ultimately to encourage a more equal sharing of caring responsibilities between women and men. During the minimum period of paternity leave, the worker must receive a payment or allowance at least equivalent to the national sick pay level.

The already existing EU right to parental leave contained in Directive 2010/18 (four unpaid months for each parent, one of which on a non-transferable basis) is reinforced in the WLB Directive, mainly with the increase from one month to two of the minimum period which is non-transferable between parents and the introduction of a requirement to provide for a payment or an allowance during the two non-transferable months. During the two non-transferable months of parental leave for each parent, an adequate payment or allowance has to be provided, the level of which is to be defined at national level.

Carers' leave is a new right at EU level and is defined as leave from work for carers, defined in turn as workers who provide personal care or support to a relative, or to a person who lives in the same household as the worker, and who is in need of significant care or support for a serious medical reason, as defined

by each Member State. The duration of carers' leave is at least five working days per year per worker, but the WLB Directive does not require a payment or an allowance during that period.

The right to request FWAs in Directive 2010/18 is strongly reinforced, going from a limited right (only available for parents when returning from parental leave) to a fully-fledged right (an autonomous right for parents and carers). However, unlike paternity, parental and carers' leave, which are absolute rights or rights to obtain (the employer cannot refuse the request from the worker), the right here is only a relative one, i.e. a right to request the employer (the employer can refuse the request). Under the WLB Directive, the right to request FWAs is extended to include parents with children up to a certain age which shall be at least eight years old, regardless of whether or not they have taken parental leave, and all carers. Member States shall ensure that the right to request remote working arrangements, flexible working schedules and reduced working hours is available to such workers.

Force majeure leave is not new. In fact, the WLB Directive replicates the wording of Directive 2010/18 on parental leave and its predecessor Directive 96/34. Member States shall ensure that each worker has the right to *force majeure* leave for urgent family reasons in the case of illness or accident making the immediate attendance of the worker indispensable. The WLB Directive does not require a payment or an allowance during this leave.

Workers who request or take family leave and FWAs are legally protected through several measures. Member States shall ensure that rights acquired or in the process of being acquired by workers on the date on which a period of leave starts are maintained until the end of the leave and that workers are entitled to return to their jobs at the end of the leave. They shall also prohibit less favourable treatment and the dismissal of workers on the ground that they have applied for, or have taken, a period of leave or an FWA. Further legal protection is granted by means of penalties, protection against retaliation and equality bodies.

2 General implementation issues

The WLB Directive should have been transposed in Member States by 2 August 2022, except for the payment or allowance for the last two weeks of parental leave, for which the implementation period is extended until 2 August 2024. Although all EU countries needed some implementing measures to meet the requirements of the Directive, by the cut-off date for this thematic report (31 August 2022) only 15 countries had adopted any new legislation in order to transpose the Directive or some parts of it (BG, CZ, DK, EE, EL, FI, HR, HU, IT, LT, LV, MT, NL, RO and SE), while the other 12 had adopted no new legislation at all in this respect (AT, BE, CY, DE, ES, FR, IE, LU, PL, PT, SI and SK). This means that almost half of EU countries are behind with the implementation of the WLB Directive, despite the relatively long transposition period of three years.

Furthermore, if national rules in force by 31 August 2022 (the cut-off date for this thematic report) are considered, the transposition of the WLB Directive is generally satisfactory in just one Member State (DK), leaving 26 countries with important implementation gaps. The data shows that the main problems occur in relation to parental leave or allowance, FWAs and legal protection. There are fewer gaps in the case of paternity leave or allowance, *force majeure* leave and personal scope. The position in relation to carers' leave lies somewhere in between.

3 Personal scope of the Work-Life Balance Directive

According to the national experts, the personal scope of the WLB Directive is generally well implemented, except for a few exceptions. All workers in the private and public sectors, regardless of the size of the company or organisation, are covered by the existing national measures implementing the WLB Directive,

with the exception of five countries (DE in the private sector and BE, BG, IE and LU in the public sector). In contrast, in all EU Member States part-time workers, fixed-term contract workers and persons with a contract of employment or employment relationship with a temporary agency are covered by the national measures implementing the WLB Directive, with no exceptions. Finally, the most problematic point seems to be the lack of coverage by the national measures implementing the WLB Directive of persons who would fit the EU definition of worker, i.e. a person who for a certain period of time performs services for and under the direction of another person in return for which they receive remuneration. National experts report issues in seven Member States (AT, EL, FR, HR, HU, LT and NL), most of them related to 'false' self-employed workers. This refers to workers who are registered as self-employed but are de facto employed under conditions similar to those of salaried workers.

4 Paternity leave

4.1 The right to paternity leave itself

All Member States but two (DE and SK) have implemented, at least partially, the EU right to paternity leave. In the 25 countries with paternity leave, the duration of paternity leave is generally equal to or higher than the EU minimum standard of 10 working days or two weeks. There are two countries which do not fulfil the EU requirement as regards duration, namely HU (five working days) and LV (10 calendar days).

Fathers are always entitled to this right. The situation for equivalent second parents, such as co-mothers in a lesbian relationship, is quite evenly balanced, since of the 25 countries with paternity leave, 15 grant this right to an equivalent second parent while the other 10 do not. Paternity leave is an individual and non-transferable right of the father (or the equivalent second parent) in all EU Member States.

The period during which paternity leave can be taken varies considerably between Member States, from the requirement to use the leave immediately after the birth to the possibility of taking the leave up until the child turns three years old. The situation is problematic in the six countries where the minimum period of paternity leave (10 working days) or part of it can be taken after the child turns six months old (EE, FI, FR, LT, PL and SI), as the leave is 'to be taken on the occasion of the birth of the worker's child' and 'around the time of the birth of the child' with the aim of allowing 'the early creation of a bond between fathers and children'. Furthermore, in EE and IT it is possible to take the whole period of paternity leave before the birth of the child, which seems to be contrary to the WLB Directive, since the Directive only allows the leave to be taken partly (and not wholly) before the birth of the child.

Concerning the qualifying conditions for the leave itself (not for the compensation attached to it), of the 25 EU countries with paternity leave, there are no qualifying conditions in the vast majority of them (21). These Member States seem to make a proper interpretation of the WLB Directive, which would allow no qualifying condition whatsoever. This is why the conditions of eligibility established by the remaining four Member States (AT, BG, CY and EE) appear to go against the WLB Directive.

4.2 Payment or allowance during paternity leave

The 25 Member States where paternity leave exists provide compensation for the whole period of leave. The payment or allowance is generally calculated as a percentage of the worker's previous wage (in 23 Member States), with only two countries offering a flat-rate allowance. The percentage of the worker's previous wage is generally quite high, ranging from 70 % to 100 %. In all Member States but three (AT, SE and SI) the payment or allowance for paternity leave is always equal to or higher than the national sick pay level, as required by the WLB Directive.

Of the 25 Member States with paternity leave, most of them (14) do not make the right to compensation subject to any conditions. The rest of the countries (11) have availed themselves of the possibility to make the right to a payment or an allowance during paternity leave subject to a period of previous employment. However, five of these countries have problematic systems: three (HR, IE and LT) require a period of previous employment that goes beyond what is permitted by the Directive – six months immediately prior to the expected date of the birth of the child – and in the other two (DK and FR) the periods of previous employment may be discriminatory against part-time workers. Moreover, there is one country (AT) which has established additional qualifying conditions, besides a period of previous employment. This appears to be contrary to the case law of the CJEU, which would not allow Member States to introduce qualifying conditions other than the ones mentioned in the Directive.

5 Parental leave

5.1 The right to parental leave itself

All Member States offer periods of parental leave for biological and adoptive parents. The duration of parental leave varies substantially from one country to another, ranging from the minimum of four months per parent established in the WLB Directive to up to three years per parent. Most EU countries (23) go beyond the EU minimum requirements in this respect.

Biological and adoptive mothers and fathers are always entitled to parental leave. The situation for co-parents, defined as a co-mother in a lesbian relationship and a co-father in a male homosexual relationship if they are not regarded as adoptive parents, is mixed, as 15 countries grant this right to co-parents whereas the other 12 do not.

The requirement for two individual and non-transferable months of parental leave for each parent is fulfilled by the majority of Member States (19). The rest of the EU countries (eight) have gaps with regard to the required two non-transferable months per parent. In four of them (BG, PL, RO and SI) the individual and non-transferable period is shorter than two months. In two countries the whole leave is designed as a family right to be shared between parents, namely EE and HU. Finally, in two countries (AT and LT), the whole period of parental leave is formally individual and non-transferable. However, the singular characteristics of the system transform the leave into a family right. Firstly, the leave cannot be taken by the two parents simultaneously. Secondly, the length of the leave covers the whole period during which the leave can be taken. As a result, it is exclusively up to parents to decide how to distribute the full period of leave, in the same way as a family entitlement works.

The period during which parental leave can be taken varies. In almost half of the Member States (12) parents can take the full period of parental leave or the greatest part of it during the three years after the birth or adoption. In the rest of the countries (15) there is more time to take the whole period of parental leave or at least half of it, ranging from four years after the birth/adoption to 12 years after the birth/adoption. Member States are not completely free when setting the period during which parental leave can be taken. When setting this period, they must do it in a way that ensures that 'each parent is able to exercise their right to parental leave effectively and on an equal basis'. Most Member States (18) fulfil this requirement, leaving nine countries with systems that might be problematic (AT, CZ, EE, ES, FR, HU, LT, RO and SK). In these nine countries the length of parental leave covers (almost) the whole period during which the leave can be taken, leaving no (complete) 'space' of 4 months for the other parent.

The majority of Member States (23) have established periods of notice that are to be given by workers to employers where they exercise their right to parental leave, as required by the WLB Directive. The countries that have not fully implemented such periods are CZ, ES, HR and RO. Of the 23 Member States that have actually set periods of notice, there are three (AT, DE and LU) with periods that could be considered excessively lengthy because they are longer than two months.

Most Member States (14) do not make the right to parental leave subject to any qualifying conditions. Of the remaining countries (13), there is one country (EL) with an excessive length of service qualification (longer than the maximum of one year permitted by the WLB Directive): one year is required, not in general but for each child. This means that an additional year of service with the employer is required for the second (and each subsequent) child after the end of the parental leave with the previous child. Besides this, there are five countries (AT, DE, HR, LU and PT) which set conditions other than qualifying periods, which goes against the case law of the CJEU, which would not allow Member States to introduce qualifying conditions other than the ones mentioned in the Directive.

The majority of Member States (18) do not allow employers to postpone the granting of parental leave. The remaining countries (nine) do permit the employer to postpone parental leave. However, only eight of them (all but HR) have established the circumstances in which the employer is allowed to postpone the granting of the leave, as required by the WLB Directive. Of these eight countries, only one (EL) refers to a serious disruption of the good functioning of the employer; the other seven (BE, CY, ES, PT, IE, LU and MT) establish more lenient circumstances which seem not to be in line with the Directive.

The WLB Directive obliges Member States to ensure that workers have the right to request the option to take parental leave on a part-time basis and for alternating periods. However, only 15 countries fulfil this EU requirement. The rest of the Member States (12) offer only one of the two flexible options or none at all. There are four countries (CZ, LT, RO and SK) that offer no possibility whatsoever to take parental leave on a part-time basis or in different blocks. The other eight Member States offer either a part-time option for parental leave or the possibility to take the leave in different blocks, but not both: only part-time in two countries (FR and SI) and only alternating periods in six countries (AT, BG, CY, EE, HU and LV).

Most EU countries (19) have adopted specific measures for parental leave for at least one of the following groups of parents: adoptive parents, parents with a disability and parents with children with a disability or a long-term illness. The other eight Member States (BG, CZ, EE, HR, LT, LV, MT and NL) have adopted no specific measures for such parents within the framework of parental leave.

5.2 Payment or allowance during parental leave

Parental leave is compensated with a payment or an allowance in the majority of Member States (all but CY). All of the 26 countries that offer compensation do so in the form of an allowance (provided by the State). In 12 of them the allowance is provided for the whole period of parental leave, while in the other 14 only part of the parental leave is paid. Disregarding the question of non-transferability, the period of parental allowance is longer than the two months per parent required by the WLB Directive (four months in total) in 20 EU countries.

Taking into consideration the EU requirement of two non-transferable months per parent with a payment or an allowance, apart from the Member State mentioned (CY), where no compensation is granted, 10 do not reach the minimum standard, but for different reasons. In two of them (ES and IE) the period of paid leave, albeit individual and non-transferable, is not long enough. In the other eight countries (CZ, EE, HU, LT, LV, PL, RO and SI) the EU minimum standard is not complied with, not because of the duration of the allowance (which is even longer than two months), but due to the lack of two non-transferable months of parental leave (during which the allowance has to be paid according to the WLB Directive).

Of the 26 EU countries with compensation, in nine Member States the level of the allowance seems to be inadequate: among these, seven (BE, BG, CZ, EL, FR, IE and MT) provide a flat-rate allowance that is rather moderate; in the other two countries (IT and PT), the percentage of income replacement is too low (30 % in IT and 25 % in PT). In three countries (HR, HU and LU) the percentage applied to the worker's previous wage is quite high, but the upper ceiling of the allowance may be too low. In the remaining 14 Member States the level of the allowance could be considered as adequate.

All things considered, there are only seven countries (AT, DE, DK, FI, NL, SE and SK) with two non-transferable months of parental leave that are in principle compensated at an adequate level.

Member States should only grant the payment or allowance foreseen for parental leave if a parent is actually on leave. However, in LV it is possible to decouple parental leave from the parental allowance. A worker could remain working and receive the parental allowance, albeit only 30 % of the amount they would have received had they been on parental leave. Furthermore, in other Member States (AT, CZ, EE, HU and SK), it is possible to work while being on full-time parental leave and receiving the full parental allowance. This situation should be prohibited or extremely limited, as it is detrimental to the very aim of parental leave, which is to have time off work in order to take care of a child.

Besides the qualifying conditions for parental leave itself, only 12 Member States (out of the 26 which provide an allowance) require additional conditions for workers to be entitled to the parental allowance. There is one country (FR) with an excessive period of work qualification (longer than the maximum of one year permitted by the WLB Directive): workers are required to have worked during the two years preceding birth. In two countries the period required could be considered discriminatory against part-time workers (DK) or on the grounds of sex (HU). There are three countries which set conditions other than qualifying periods, which goes against the case law of the CJEU.

6 Carers' leave

All EU Member States except CY offer carers' leave, with eight countries offering not only one kind of leave but several. Apart from CY, where carers' leave is not provided for, there is one country with problems of personal scope: in DE enterprises with up to 15 employees are excluded from the right to carers' leave.

The system to allocate carers' leave varies considerably from country to country. Of the 26 EU countries that offer this leave, only 12 follow the general system of the WLB Directive (duration per year), while nine adopt a different approach: duration per episode of need or support (per case) in four countries and duration per person in need of care or support (per beneficiary) in five countries. The other five Member States adopt several approaches, depending on the national system or on the beneficiary.

The 26 countries that offer carers' leave respect the EU minimum duration of five working days per year. Moreover, most Member States (20) have more generous systems of carers' leave, ranging from seven working days per year to two years per case. However, in two countries (BE and IE), which have quite long carers' leave, there may be a clash with the system designed by the WLB Directive, which seems to guarantee a piecemeal use of the leave of five working days per year or less. In BE the thematic leave for informal carers must be taken in periods of at least one month, whereas in IE the minimum period of carers' leave is 13 weeks (unless the employer agrees otherwise).

Concerning the type of entitlement, the right to carers' leave is per worker only in 15 Member States, whereas the other 11 have at least one system which is a family right, meaning that the right could be shared between different workers, e.g. two parents to take care of a child or two spouses/partners to look after an elderly relative. Family rights exist typically when the duration is allocated per beneficiary (BE, DE, FR, IE and SE), but also when it comes to taking care of children (BG, EE, PL, PT, RO and SI). This is problematic from a gender perspective, as family rights are mostly used by women, which does not contribute to a more equal sharing of caring responsibilities between men and women. In this sense, an individual and non-transferable right for each worker is better from a gender equality point of view.

The beneficiaries of carers' leave (the persons receiving care or support) are very different at national level. Of the 26 Member States with carers' leave, in 12 of them only relatives can be beneficiaries of carers' leave. In nine countries, workers can be entitled to carers' leave not only to look after relatives, but also to care for persons who live in the same household as the worker. Three countries are even

more flexible because any individual can be a beneficiary. Finally, two countries have blended systems. In all, only 12 EU countries seem to be in conformity with the minimum standards of the WLB Directive, meaning that they include both relatives (at least children, parents and spouse) and persons living in the same household as the worker. There are then 14 problematic Member States (AT, BG, DE, EE, ES, FR, HR, HU, IT, LT, LU, PL, RO and SI), mainly because persons living in the same household as the worker are not included among the beneficiaries of carers' leave.

The situations covered under carers' leave at national level are very varied. Of the 26 Member States with carers' leave, 16 include sickness, illness or a medical reason among the protected situations, three only cover dependency, two only disability and one refers to the need for substantial care and support. The four remaining countries have provision for different situations, depending on the national system of carers' leave. There are 10 countries (BE, CZ, DE, EE, FI, HU, IE, PT, RO and SE) out of 26 which seem not to be in conformity with the WLB Directive, either because the material scope looks too restrictive or because the national leave only appears to cover long-term care needs, which would not guarantee a piecemeal use of the leave of five working days per year or less.

It may be understood that Member States cannot make the right to carers' leave subject to a period of work qualification or to a length of service qualification or to any other qualifying conditions. This is the reason why the eligibility conditions established by six Member States (BE, EL, IE, NL, PL and RO) appear to go against the WLB Directive.

7 Force majeure leave

All EU countries (except RO) provide for *force majeure* leave, with six Member States offering several types of leave.

The system to allocate *force majeure* leave is as varied as in the case of carers' leave. Out of the 26 EU countries that make this leave available, nine offer a certain duration per year; eight do not specify a concrete duration, which means that the leave can be used during the time required; in four countries the duration is set per episode of *force majeure* (per case); and in one country the duration is per person in need of care or support (per beneficiary). The other four Member States adopt several approaches, depending on the national system.

As there is no minimum standard regarding the duration of *force majeure* leave, there are no problems of compliance with the WLB Directive. The duration is unspecified in eight countries, whereas in the remaining 18 countries the duration is quantified, ranging from one working day per case to 310 working days per child per case.

Regarding the type of entitlement, the right to *force majeure* leave is per worker in 21 Member States, whereas the other five have at least one system which is a family right. Family rights exist typically when the duration is allocated per beneficiary (FR), but also when it comes to taking care of children (BG, PL, PT and SI). As previously explained, this is problematic from a gender perspective, as family rights are mostly used by women.

As for the situations covered under *force majeure* leave, there are eight countries (DE, EL, FR, IT, LT, LU, PL and SI) out of 26 which seem not to be in line with the WLB Directive, given that the material scope looks too restrictive, the personal scope appears too limited or the two circumstances combined occur.

It could be argued that Member States cannot make the right to *force majeure* leave subject to any qualifying conditions. This is actually the case in the 26 Member States that offer *force majeure* leave, except for PL.

8 Flexible working arrangements

Overall, 21 Member States offer FWAs to workers, with nine countries not offering a single national system of FWAs but several. The remaining six countries (CY, FR, HR, IE, LU and RO) did not offer any of the FWAs required by the WLB Directive by the cut-off date for this thematic report (31 August 2022). Of the 21 with FWAs, the majority of them (12) provide for a relative right, i.e. a mere right to request an FWA from the employer (the employer can refuse the worker's request), while there is an absolute right, namely a right to obtain an FWA (the employer cannot refuse the worker's request) in only three countries. The remaining six countries combine relative and absolute rights. The nine countries which partly or wholly recognise absolute rights go beyond the EU minimum standard of the WLB Directive, which is just a relative right.

Of the 18 Member States with at least a relative right, most of them (14) establish a procedure by which the employer has to consider and respond to the worker's request and, if the request is refused, the employer has to provide reasons for the refusal, as required by the WLB Directive. The other four countries (BE, DE, IT and PL) do not provide such a procedure.

The possibility of limiting the duration of FWAs is rarely used. Of the 21 EU countries with FWAs, 15 do not contemplate such a possibility, whereas the other six do so for at least one national system. The six countries that limit the duration of FWAs entitle workers to return to the original working pattern at the end of the FWAs.

Considering the material scope, which must include reduced working hours, flexible working schedules and the use of remote working arrangements, and the personal scope, which has to cover parents with children up to a certain age which shall be at least eight years old and all carers, apart from the six countries with no FWAs (CY, FR, HR, IE, LU and RO), there are 13 (AT, BE, CZ, DE, ES, FI, HU, IT, PL, PT, SE, SI and SK) with gaps in this respect. Considering the national system or systems of FWA, they do not offer the three types of FWA (part-time working, flexitime and teleworking) or do offer them but not for all parents with children under eight and carers.

Of the 21 Member States with FWAs, 11 do not make the absolute or relative right to FWAs subject to any qualifying conditions. Among the other 10 countries, FI and NL make the right to FWAs subject to a qualifying period not exceeding six months (the maximum allowed by the WLB Directive), but they do not fully guarantee that in the case of successive fixed-term contracts with the same employer, the sum of those contracts is taken into account for the purpose of calculating the qualifying period, as required by the WLB Directive. Secondly, there are two countries (AT and BE) with an excessive length of service qualification, going beyond the permitted six months. Finally, there is one country (HU) which sets conditions other than qualifying periods, which seems to go against the case law of the CJEU, according to which it would not be possible to introduce qualifying conditions other than the ones mentioned in the Directive.

9 Legal protection

In the first place, the maintenance of previous employment rights, which applies to paternity leave, parental leave, carers' leave and *force majeure* leave, is granted for all kinds of existing national leave in 17 EU countries, leaving 10 countries with gaps in this respect: in three countries (BE, HU and PL) this protection is not granted for any type of national leave, while in the other seven countries it is granted, but only for some kinds of national leave. The right to return to the previous job, which applies to paternity leave, parental leave and carers' leave, is guaranteed for all types of national leave in only 16 countries. This leaves 11 countries with problems in the transposition of this legal protection. In three countries (BE, DE and HU), there is no protection for any type of national leave. Of the remaining eight countries, seven

exclude some types of national leave from this protection (BG, HR, IT, LU, PL, SI and SK) and in one (ES) this legal protection is granted but only for part of the leave.

Regarding the prohibition of less favourable treatment of workers on the ground that they have applied for, or have taken, leave or an FWA, which applies to all measures of the WLB Directive, only 14 Member States offer this legal protection, leaving as many as 13 countries with implementation issues: 10 countries (BE, BG, CY, CZ, DE, FR, HR, LU, LV and PL) do not offer protection for any national measure, while the other three countries exclude some national measures from this protection.

Regarding the prohibition of dismissal of workers on the grounds that they have applied for, or have taken, leave or an FWA, which applies to paternity leave, parental leave, carers' leave and FWAs, this legal protection is more widespread as it is offered by 19 EU countries. The other eight countries (DE, FR, HR, HU, LU, PL, RO and SI) do not provide this protection for any of their national measures.

The reversal of the burden of proof in the case of dismissal applies to paternity leave, parental leave and carers' leave, i.e. where workers who consider that they have been dismissed on the grounds that they have applied for, or have taken, leave establish, before a court or other competent authority, facts capable of giving rise to a presumption that they have been dismissed on such grounds, it is for the employer to prove that the dismissal was based on other grounds. This legal mechanism is available in 11 EU countries. The remaining 16 countries do not provide for the reversal of the burden of proof specifically designed by the WLB Directive in case of dismissal related to paternity leave, parental leave and carers' leave. However, seven of them go beyond the EU minimum standard because the employer always carries the burden of proof in the case of dismissal. Thus, there is an implementation gap in the other nine countries (AT, BG, CY, CZ, ES, FR, LV, PL and SI).

Member States have to provide for penalties applicable to infringements of national provisions adopted pursuant to the WLB Directive, or the relevant provisions already in force concerning the rights which are within the scope of this Directive, namely paternity leave, parental leave, carers' leave, *force majeure* leave and FWAs. However, penalties are only available in 21 Member States, which leaves six countries with transposition gaps, namely AT, BG, DE, ES, IT and LV. Moreover, of the 21 Member States with penalties, national experts consider that they are not effective, proportionate and dissuasive, as required by the WLB Directive, in 14 Member States (BE, CZ, DK, EE, EL, FI, FR, IE, LT, LU, MT, NL, PL and RO).

Regarding the protection against retaliation, only 15 countries make this legal protection available to workers. Of the other 12, 11 do not offer this protection at all (BG, CY, DE, ES, FR, HR, IT, LT, LU, PL and RO), while one country (PT) offers it but only to employees' representatives.

Finally, regarding national equality bodies, Member States have to make the national equality body or bodies competent with regard to all the issues relating to discrimination falling within the scope of the WLB Directive. This is actually the case in 17 Member States. The other 10 have not made them competent in this area (CY, DE, FI, IE, MT, PL and RO) or at least not formally (AT, ES and LU).

10 Overall assessment and conclusions

The objective of this thematic report was to gain insight into the most important aspects about the implementation of the WLB Directive in the EU Member States. However, given the late implementation in most countries, the report has mainly become an analysis of the gaps that national systems have to close to reach the minimum standards of the Directive when the transposition takes place. In this sense, it is quite telling that only one country has transposed the Directive in a more or less satisfactory way. The other countries (26) have important gaps in one or several areas. The areas with more gaps are parental leave or allowance (present in 20 countries), FWAs (19 countries) and legal protection (17 countries).

Despite the apparently dark picture, there are also positive aspects in the implementation process. Paternity leave is generally well implemented and as many as 12 Member States provide for a duration that goes beyond 10 working days or two weeks. As for parental leave, despite the generalised problems of non-transferability and adequate allowance, several countries have generous national systems of parental leave, going well beyond the minimum standards of the Directive in terms of the duration of the leave (in 23 countries) and the period of parental allowance (in 20 countries). As regards carers' leave, most Member States (20) have more generous systems in terms of duration. Finally, there are nine EU countries that recognise some absolute rights to FWAs, going further than the right to request required by the WLB Directive.

The inclusiveness of the national measures implementing the WLB Directive is far from being ideal, as there are a few problems of personal scope and above all several unlawful eligibility conditions for all specific measures in the Directive. Regarding the personal scope of the WLB Directive, it is generally well implemented, apart from a few exceptions. In seven Member States the national measures implementing the WLB Directive lack coverage of persons who would fit the EU definition of worker – mainly associated with 'false' self-employed workers. In addition, enterprises with only a few employees in one country and certain categories of public employees or institutions in four countries are excluded from some national measures. Furthermore, there are unlawful qualifying conditions for each individual measure of the WLB Directive: in four countries for paternity leave itself; in six countries for the paternity payment or allowance; in six countries for parental leave itself; in six countries for the parental allowance; in six countries for carers' leave; in one country for *force majeure* leave; and in five countries for FWAs.

There is both light and shade in relation to the gender equality dimensions regarding the possibility of sharing or transferring rights between parents or carers (which goes against the aim of better sharing of caring responsibilities between men and women) and the payment or allowance for the different kinds of leave (since adequate compensation encourages men to take leave). On the one hand, paternity leave is an individual and non-transferable right of the father (or the equivalent second parent) in all EU Member States and the payment or allowance is generally calculated as a percentage of the worker's previous wage, which ranges from 70 % to 100 %. On the other hand, there are only seven countries with two non-transferable months of parental leave per parent that are compensated at an adequate level. This means that 20 Member States have problems of non-transferability, the level of parental allowance or both. This is worrisome, as only a combination of the father's quota and a high level of benefit leads to a high take-up of parental leave by fathers.

Furthermore, it has been revealed that in some countries some rights to carers' leave and *force majeure* leave are a family right, meaning that the right could be shared between different workers, for example two parents in the case of a child or two spouses/partners in the case of an elderly relative. This is the case in 11 Member States for carers' leave and five countries for *force majeure* leave. This is problematic from a gender perspective, as family rights are mostly used by women.

All in all, it may be concluded that there is plenty of work to do at national level to achieve a proper implementation of the WLB Directive. Special attention should be paid to the inclusiveness of the national measures implementing the WLB Directive and to gender equality dimensions related to non-transferability and the level of payment and allowance. This will be the only way to ensure that WLB is accessible to all workers, including non-standard workers, and that caring responsibilities are fairly distributed between men and women.

Résumé

1 Présentation de la directive 2019/1158

La directive 2019/1158 concernant l'équilibre entre vie professionnelle et vie privée des parents et des aidants (directive WLB – *Work-Life Balance*) a marqué une étape importante dans le développement de la législation de l'UE sur la conciliation de la vie privée et professionnelle. Cette directive actualise plusieurs droits existants, en l'occurrence le congé parental et le droit de demander des formules souples de travail, et crée de nouveaux droits au niveau européen, à savoir le congé de paternité et le congé d'aidant.

La directive WLB vise à instaurer une nouvelle répartition des risques liés à la prestation de garde et de soins. Son objectif est d'améliorer la situation des femmes sur le marché du travail en mettant en place de meilleures mesures en matière de conciliation entre vie professionnelle et privée, et en favorisant un meilleur partage des responsabilités de garde et de soins entre femmes et hommes. La directive prévoit deux axes de réforme. Le premier est l'octroi d'une attention spéciale aux pères. D'une part, un droit spécifique est instauré pour la première fois au niveau de l'UE à l'intention de ces derniers: il s'agit du droit au congé de paternité. D'autre part, des incitations efficaces sont mises en place à l'intention des pères pour qu'ils prennent un congé parental, à savoir des périodes de congé non transférables et suffisamment rémunérées. Le second axe de réforme est l'adoption d'une approche fondée sur le cycle de vie pour ce qui concerne la problématique spécifique de la conciliation entre vie professionnelle et privée. À l'inverse du précédent cadre législatif, focalisé sur les parents, il est admis ici que les travailleurs peuvent éprouver le besoin de cette conciliation à tout moment de leur vie professionnelle – autrement dit, pas uniquement lorsqu'ils ont des enfants, mais également lorsqu'ils ont un partenaire gravement malade ou un parent à charge. En termes concrets, cette approche fondée sur le cycle de vie se matérialise par l'instauration du droit au congé d'aidant et par l'élargissement aux aidants du droit de demander des formules souples de travail.

Le champ d'application personnel de la directive WLB couvre tous les travailleurs, hommes et femmes, qui ont un contrat de travail ou une relation de travail. Sont dès lors inclus les travailleurs à temps partiel, les travailleurs ayant un contrat à durée déterminée ou les personnes ayant un contrat de travail ou une relation de travail avec une entreprise de travail intérimaire. Bien qu'il appartienne aux États membres de définir les contrats de travail et les relations de travail, dans le respect de la législation, des conventions collectives ou des pratiques en vigueur sur leurs territoires respectifs, cette latitude connaît certaines limites puisque la jurisprudence de la Cour de justice de l'Union européenne (CJUE) doit être prise en compte. Le champ d'application matériel de la directive WLB couvre le congé de paternité (nouveau droit), le congé parental (droit renforcé), le congé d'aidant (nouveau droit) et la demande de formules souples de travail (droit renforcé). Le droit préexistant à une absence du travail pour raisons de force majeure est en outre maintenu sans modification.

Un nouveau droit européen à un minimum de dix jours ouvrables de congé de paternité, correspondant à deux semaines civiles, est instauré pour les pères – à prendre à l'occasion de la naissance d'un enfant dans le but d'assurer une garde et des soins. Ce congé vise à permettre la création d'un lien précoce entre pères et enfants, et, en définitive, à favoriser une répartition plus égale des responsabilités de garde et de soins entre les femmes et les hommes. Le travailleur doit percevoir, durant la période minimale de congé de paternité, une rémunération ou une allocation qui soit au moins équivalente au niveau de la prestation de maladie à l'échelon national.

Le droit européen déjà en place en matière de congé parental, consacré par la directive 2010/18 (quatre mois non rémunérés pour chaque parent, l'un des quatre mois ne pouvant être transféré) est renforcé par

la directive WLB, laquelle fait principalement passer à deux mois, au lieu d'un, la période minimale non transférable entre parents, et inclut l'exigence que ces deux mois donnent lieu à une rémunération ou une allocation. Une rémunération ou une allocation adéquate, dont le niveau est fixé au niveau national, doit donc être prévue pour chacun des parents durant les deux mois de congé parental qu'ils ne peuvent transférer.

Le congé d'aidant est un nouveau droit à l'échelon de l'UE: il est défini comme un congé du travail pour les aidants, définis à leur tour comme des travailleurs qui apportent des soins personnels ou une aide personnelle à un membre de la famille ou à une personne qui vit dans le même ménage et qui nécessite des soins ou une aide considérables pour raison médicale grave telle que définie par chaque État membre. La durée du congé d'aidant est de cinq jours au moins par an et par travailleur, mais la directive WLB n'exige pas le versement d'une rémunération ou d'une allocation durant cette période.

Le droit de demander un assouplissement des conditions de travail, prévu par la directive 2010/18, est considérablement renforcé puisqu'il passe d'un droit limité (que les parents pouvaient uniquement exercer à leur retour d'un congé parental) à un droit à part entière (autrement dit un droit autonome pour les parents et les aidants). Il convient de préciser toutefois que, contrairement aux congés de paternité, parental et d'aidant qui constituent des droits absolus ou des droits à l'obtention (l'employeur ne peut refuser la demande que lui adresse le travailleur), le droit visé ici n'est qu'un droit relatif, c'est-à-dire un droit d'adresser une demande à l'employeur (lequel peut la rejeter). Le droit de demander des formules souples de travail est étendu, en vertu de la directive WLB, aux parents d'enfants jusqu'à ce que ceux-ci atteignent un âge déterminé qui ne peut être inférieur à huit ans, qu'ils aient pris ou non un congé parental, et à tous les aidants. Les États membres sont tenus de veiller à ce que le droit de demander l'aménagement de leur régime de travail par le recours au travail à distance, à des horaires de travail souples ou à une réduction du temps de travail, soit accessible à ces travailleurs.

L'absence du travail pour raisons de force majeure n'est pas neuve. En réalité, la directive WLB reprend le libellé de la directive 2010/18 relative au congé parental et de la directive 96/34 qui l'avait précédée. Les États membres doivent prendre les mesures nécessaires pour que chaque travailleur ait le droit de s'absenter du travail pour cause de force majeure liée à des raisons familiales urgentes en cas de maladie ou d'accident qui rend indispensable la présence immédiate du travailleur. La directive WLB n'exige pas de rémunération ou d'allocation durant ce congé.

Les travailleurs qui demandent ou optent pour un congé familial et des formules souples de travail sont légalement protégés par une série de mesures. Les États membres doivent faire en sorte que les droits acquis ou en cours d'acquisition par des travailleurs à la date de début du congé soient maintenus jusqu'à la fin dudit congé, et que les travailleurs aient le droit de retrouver leur emploi à la fin du congé. Ils veillent par ailleurs à interdire tout traitement moins favorable ainsi que le licenciement de travailleurs au motif qu'ils ont demandé ou pris une période de congé ou une formule souple de travail. Une protection juridique supplémentaire est octroyée au moyen de sanctions, d'une protection contre les représailles ou via les organismes de promotion de l'égalité.

2 Questions générales de mise en œuvre

La directive WLB doit avoir été transposée dans les États membres au plus tard le 2 août 2022, hormis en ce qui concerne la rémunération ou l'allocation correspondant aux deux dernières semaines de congé parental – la période de mise en œuvre étant ici prolongée jusqu'au 2 août 2024. Si tous les pays de l'UE ont eu besoin d'instaurer des mesures d'exécution pour satisfaire aux exigences de la directive, quinze d'entre eux seulement avaient adopté, à la date butoir fixée pour le présent rapport thématique (31 août 2022), de nouvelles dispositions législatives en vue de sa transposition intégrale ou partielle (BG, CZ, DK, EE, EL, FI, HR, HU, IT, LT, LV, MT, NL, RO et SE), tandis que les douze autres n'avaient adopté absolument aucune nouvelle législation à cette fin (AT, BE, CY, DE, ES, FR, IE, LU, PL, PT, SI and SK). Autrement dit,

quasiment la moitié des pays de l'UE accusent un retard dans la mise en œuvre de la directive WLB, en dépit d'une période de transposition relativement longue (trois ans).

Il apparaît de surcroît, au vu des règles nationales en vigueur au 31 août 2022 (date limite fixée pour le présent rapport thématique), que la directive WLB n'a été transposée de manière globalement satisfaisante que dans un seul État membre (DK), ce qui signifie que des lacunes dans sa mise en œuvre subsistent dans 26 pays. Les chiffres montrent que les principales difficultés sont liées au congé parental et à l'allocation parentale, aux formules souples de travail et à la protection juridique. Les lacunes sont moindres en ce qui concerne le congé ou l'allocation de paternité, le congé pour raisons de force majeure et le champ d'application personnel. Le congé d'aidant se trouve quelque part entre ces deux situations.

3 Champ d'application personnel de la directive sur l'équilibre entre vie professionnelle et vie privée

Selon les experts nationaux, le champ d'application personnel de la directive est généralement bien implémenté, à quelques exceptions près. Tous les travailleurs du secteur privé et du secteur public, quelle que soit la taille de l'entreprise ou de l'organisation, sont couverts par les mesures nationales existantes mettant en œuvre la directive WLB, hormis cinq pays (DE dans le secteur privé et BE, BG, IE et LU dans le secteur public). Les travailleurs à temps partiel, les travailleurs ayant un contrat à durée déterminée ou les personnes ayant un contrat de travail ou une relation de travail avec une entreprise de travail intérimaire sont, en revanche, couverts sans exception dans tous les États membres de l'UE par les mesures nationales d'exécution de la directive. Il semble pour terminer que le point le plus problématique soit la non-couverture par ces mesures nationales d'exécution de personnes qui relèveraient de la définition européenne d'un travailleur, à savoir une personne qui effectue pendant une certaine période pour et sous la direction d'une autre personne des services pour lesquels elle est rémunérée. Les experts nationaux signalent des problèmes à cet égard dans sept États membres (AT, EL, FR, HR, HU, LT et NL), en rapport le plus souvent avec des travailleurs «faux indépendants». Ce terme désigne des travailleurs enregistrés en qualité d'indépendants mais employés de fait dans des conditions similaires à celles appliquées aux salariés.

4 Congé de paternité

4.1 Le droit au congé de paternité proprement dit

Tous les États membres de l'UE sauf deux (DE et SK) ont mis en œuvre, en partie du moins, le droit européen au congé de paternité. Dans les 25 pays où tel est le cas, ce congé de paternité a une durée généralement égale ou supérieure à la norme minimale fixée par l'UE, à savoir dix jours ouvrables ou deux semaines. Deux pays ne respectent pas cette exigence de l'UE en termes de durée: HU (cinq jours ouvrables) et LV (10 jours civils).

Les pères peuvent toujours exercer ce droit. La situation des personnes reconnues comme seconds parents équivalents (co-mères dans une relation homosexuelle, par exemple), est assez équilibrée puisque, parmi les 25 pays dotés d'un congé de paternité, quinze accordent ce droit à un second parent équivalent contre dix qui ne l'accordent pas. Le congé de paternité est un droit individuel non transférable du père (ou du second parent équivalent) dans tous les États membres de l'UE.

La période durant laquelle le congé de paternité peut être pris varie considérablement selon les États membres, puisqu'elle peut aller de l'obligation d'exercer ce droit immédiatement après la naissance de l'enfant à la possibilité de prendre ce congé jusqu'à son troisième anniversaire. La situation pose problème dans les six pays où la période minimale de congé de paternité (10 jours ouvrables) ou une partie de celle-ci peut être prise après que l'enfant ait atteint l'âge de six mois (EE, FI, FR, LT, PL et SI), étant donné

que le congé «doit être pris à l'occasion de la naissance de l'enfant du travailleur» et «autour de la date de la naissance» afin «qu'un lien entre les pères et les enfants se tisse tôt». Il est possible en outre, en EE et IT, de prendre la totalité de la période de congé de paternité avant la naissance de l'enfant, ce qui semble contraire à la directive, qui autorise uniquement une prise partielle (et non intégrale) de ce congé avant la naissance.

En ce qui concerne les conditions d'éligibilité au congé proprement dit (et non à l'indemnité qui lui est associée), aucune n'est exigée dans la grande majorité des pays de l'UE dotés du congé de paternité (21 sur 25) – autant d'États membres qui ont dès lors une interprétation correcte de la directive WLB puisque celle-ci n'admet aucune condition d'éligibilité. Les conditions d'admissibilité fixées par les quatre autres États membres (AT, BG, CY et EE) semblent donc aller à l'encontre de la directive WLB.

4.2 Rémunération ou allocation pendant le congé de paternité

Les 25 États membres où existe le congé de paternité prévoient une indemnisation couvrant la totalité de la période de congé. La rémunération ou l'allocation est généralement calculée comme un pourcentage du salaire antérieur du travailleur (dans 23 États membres) tandis que deux pays seulement proposent une allocation forfaitaire. Le pourcentage du salaire antérieur du travailleur est le plus souvent assez élevé puisqu'il va de 70 à 100%. Dans tous les États membres hormis trois (AT, SE et SI), la rémunération ou l'allocation durant le congé de paternité est toujours égale ou supérieure à la prestation de maladie à l'échelon national, comme l'exige la directive WLB.

La majorité des 25 États membres avec congé de paternité, à savoir quatorze d'entre eux, ne soumettent pas le droit d'indemnisation à la moindre condition. Les onze autres se sont réservé la possibilité de subordonner le droit de percevoir une rémunération ou une allocation durant le congé de paternité à une période d'emploi antérieur déterminée. Cinq de ces pays ont cependant instauré un système qui pose problème: trois (HR, IE et LT) exigent une période antérieure d'emploi supérieure à ce qu'autorise la directive – à savoir six mois précédant immédiatement la date prévue de la naissance de l'enfant – et dans les deux autres (DK et FR) les périodes d'emploi antérieures pourraient s'avérer discriminatoires envers les travailleurs à temps partiel. Un pays (AT) a instauré en outre des conditions d'éligibilité supplémentaires, en sus d'une période d'emploi préalable – ce qui semble aller à l'encontre de la jurisprudence de la CJUE, laquelle n'autoriserait pas les États membres à introduire des conditions d'éligibilité autres que celles mentionnées dans la directive.

5. Congé parental

5.1 Le droit au congé parental proprement dit

Tous les États membres proposent des périodes de congé parental aux parents biologiques et adoptifs. La durée de ce congé varie fortement d'un pays à l'autre puisqu'il va du minimum de quatre mois par parent fixé par la directive jusqu'à trois ans par parent. Il va au-delà des exigences minimales de l'UE dans la plupart États membres (23).

Les mères et pères biologiques et adoptifs ont toujours droit au congé parental. La situation des co-parents, définis comme des co-mères et des co-pères vivant dans une relation homosexuelle s'ils ne sont pas considérés comme parents adoptifs, est contrastée dans la mesure où quinze pays accordent ce droit aux co-parents tandis que les douze autres ne leur accordent pas.

L'exigence de deux mois de congé parental individuels et non transférables pour chaque parent est satisfaite dans la majorité des États membres (dix-neuf). Les huit autres pays de l'UE présentent des lacunes en ce qui concerne les deux mois non transférables exigés par parent. Dans quatre d'entre eux (BG, PL, RO et SI), la période individuelle et non transférable est inférieure à deux mois. Dans deux pays,

en l'occurrence EE et HU, l'ensemble du congé est envisagé comme un droit familial à répartir entre parents. Enfin, dans deux pays (AT et LT), la totalité de la période de congé parental est officiellement individuelle et non transférable. Les spécificités du système font pourtant du congé un droit familial. Premièrement, le congé ne peut être pris simultanément par les deux parents. Deuxièmement, la durée du congé couvre la totalité de la période pendant laquelle le congé peut être pris. En conséquence, il appartient exclusivement aux parents de décider de la manière de répartir l'ensemble de la période de congé, exactement comme fonctionne un droit familial.

La période au cours de laquelle le congé parental peut être pris diffère selon les États membres. Dans près de la moitié d'entre eux (douze), les parents peuvent prendre la totalité ou la plus grande partie de la période de congé parental au cours des trois années qui suivent la naissance ou l'adoption. Les quinze autres prévoient une période plus longue pour prendre la totalité ou au moins la moitié du congé parental: elle va de quatre à douze ans après la naissance/l'adoption. Les États membres ne sont pas totalement libres lors de la fixation de la période au cours de laquelle le congé parental peut être pris puisqu'il doivent fixer celle-ci «de manière à garantir la possibilité pour chaque parent d'exercer son droit au congé parental de manière effective et dans des conditions d'égalité». La plupart des États membres (dix-huit) satisfont cette exigence – ce qui en laisse neuf dans lesquels le système pourrait poser problème (AT, CZ, EE, ES, FR, HU, LT, RO et SK) dans la mesure où la durée du congé parental y couvre la (quasi-) totalité de la période au cours de laquelle le congé peut être pris et ne laisse donc pas «l'espace» (complet) de quatre mois pour l'autre parent.

La majorité des États membres (23) ont établi des durées de préavis à donner par le travailleur à l'employeur lorsqu'il exerce son droit au congé parental, comme l'exige la directive WLB. Les pays qui n'ont pas pleinement prévu ces périodes sont CZ, ES, HR et RO. Parmi les États membres qui ont effectivement fixé des périodes de préavis, celles-ci pourraient être considérées comme excessivement longues dans trois cas (AT, DE et LU) dans la mesure où elles sont supérieures à deux mois.

La plupart des États membres (quatorze) ne subordonnent pas le droit au congé parental à la moindre condition d'éligibilité. Parmi les (treize) autres, un pays (EL) a fixé une durée d'ancienneté excessive (supérieure au maximum d'un an autorisé par la directive WLB): une année est exigée, non pas de façon générale mais pour chaque enfant. Autrement dit, une année d'ancienneté supplémentaire auprès de l'employeur est exigée pour le deuxième enfant (et chacun des suivants) après la fin du congé parental pour l'enfant précédent. On observe par ailleurs cinq pays (AT, DE, HR, LU et PT) qui requièrent d'autres conditions que des périodes d'admissibilité, ce qui va à l'encontre de la jurisprudence de la CJUE – laquelle n'autoriserait pas des États membres à introduire d'autres conditions d'éligibilité que celles mentionnées dans la directive.

La majorité des États membres (dix-huit) n'autorisent pas les employeurs à différer l'octroi du congé parental. Les neuf autres les y autorisent mais huit seulement d'entre eux (tous sauf HR) ont précisé, comme l'exige la directive WLB, les circonstances dans lesquelles l'employeur peut reporter l'octroi du congé parental. Un seul de ces huit pays (EL) fait référence à une grave perturbation du bon fonctionnement de l'employeur; les sept autres (BE, CY, ES, PT, IE, LU et MT) établissent des circonstances plus laxistes qui ne semblent pas conformes à la directive.

La directive WLB oblige les États membres à faire en sorte que les travailleurs aient le droit de demander à prendre un congé parental à temps partiel et par périodes alternées. Or quinze États membres seulement satisfont cette exigence européenne. Les douze autres ne proposent qu'une seule des deux solutions flexibles possibles, voire aucune. Quatre pays (CZ, LT, RO et SK) n'offrent absolument aucune possibilité de prendre un congé parental à temps partiel ou en plusieurs blocs. Les huit autres proposent soit une solution de congé parental à temps partiel, soit une possibilité de prendre ce congé en différents blocs, mais pas les deux: temps partiel uniquement dans deux pays (FR et SI) et périodes alternées uniquement dans six pays (AT, BG, CY, EE, HU et LV).

La plupart des pays de l'UE (dix-neuf) ont adopté des mesures spécifiques en matière de congé parental à l'intention de l'un au moins des groupes de parents suivants: les parents adoptifs, les parents ayant un handicap et les parents dont les enfants ont un handicap ou souffrent d'une maladie de longue durée. Les huit autres États membres (BG, CZ, EE, HR, LT, LV, MT et NL) n'ont pas adopté de mesures spécifiques à l'intention de ces groupes de parents dans le cadre du congé parental.

5.2 Rémunération ou allocation durant le congé parental

Le congé parental est indemnisé au moyen d'une rémunération ou d'une allocation dans la majorité des États membres (tous sauf CY). Les 26 pays prévoyant une indemnisation allouent celle-ci sous la forme d'une allocation (octroyée par l'État). Dans douze d'entre eux, l'allocation est attribuée pour toute la période de congé parental tandis que, dans les quatorze autres, le congé parental n'est que partiellement rémunéré. Ne tenant pas compte de la question de non-transférabilité, la période couverte par l'allocation parentale est, dans 20 pays de l'UE, supérieure aux deux mois par parent exigés par la directive WLB (quatre mois au total).

En tenant compte de l'exigence européenne de deux mois par parent non transférables bénéficiant d'une rémunération ou d'une allocation, hormis l'État membre cité (CY) dans lequel aucune indemnisation n'est allouée, dix ne respectent pas la norme minimale, mais pour des raisons différentes. Dans deux d'entre eux (ES et IE), la période de congé rémunéré, bien qu'individuelle et non transférable, n'est pas suffisamment longue. Si, dans les huit autres (CZ, EE, HU, LT, LV, PL, RO et SI), la norme minimale de l'UE n'est pas respectée, ce n'est pas en raison de la durée d'attribution de l'allocation (qui est même supérieure à deux mois) mais en raison de l'inexistence de deux mois de congé parental non transférables (durant lesquels l'allocation doit être versée en vertu de la directive WLB).

L'allocation semble inadéquate dans neuf des 26 États membres de l'UE prévoyant une indemnisation: dans sept cas (BE, BG, CZ, EL, FR, IE et MT), l'allocation forfaitaire prévue est assez modeste; dans les deux autres cas (IT et PT), le pourcentage que représente le revenu de remplacement est trop faible (30% en IT et 25% au PT). Dans trois pays (HR, HU et LU), le pourcentage appliqué au salaire antérieur du travailleur est assez élevé, mais le plafond fixé pour l'allocation pourrait être trop bas. Dans les quatorze derniers pays, l'allocation peut être considérée comme adéquate.

Tout bien considéré, seuls sept pays (AT, DE, DK, FI, NL, SE et SK) prévoient deux mois de congé parental non transférables qui bénéficient en principe d'une indemnisation adéquate.

Les États membres doivent uniquement allouer la rémunération ou l'allocation prévue pour le congé parental si un parent est effectivement en congé. En LV, il est néanmoins possible de dissocier le congé parental de l'allocation parentale. Les travailleurs peuvent rester au travail et percevoir l'allocation parentale, mais celle-ci ne représente que 30% du montant qu'ils percevraient s'ils étaient en congé parental. Il est possible en outre, dans d'autres États membres (AT, CZ, EE, HU et SK), de travailler tout en étant en congé parental à temps plein et en percevant la totalité de l'allocation parentale. Cette situation devrait être interdite ou très fortement limitée, car elle va à l'encontre de l'objectif même du congé parental qui est de pouvoir s'absenter du travail pour s'occuper d'un enfant.

Douze États membres seulement (sur les 26 prévoyant une allocation) imposent aux travailleurs des exigences supplémentaires, en sus des conditions d'éligibilité, pour pouvoir bénéficier de l'allocation parentale. L'un de ces pays (FR) requiert une période d'ancienneté excessive (plus longue que le maximum d'un an autorisé par la directive WLB) puisque les travailleurs doivent avoir travaillé pendant les deux années qui précèdent la naissance. Dans deux pays, la période exigée pourrait être considérée comme discriminatoire envers les travailleurs à temps partiel (DK) ou comme discriminatoire par rapport au sexe (HU). Trois pays ont fixé d'autres conditions que la durée de l'ancienneté, ce qui va à l'encontre de la jurisprudence de la CJUE.

6 Congé d'aidant

Tous les États membres de l'UE hormis CY ont instauré le congé d'aidant, lequel est même proposé sous plusieurs formes dans huit d'entre eux. En dehors de CY, où aucun congé de ce type n'est prévu, un pays pose problème en termes de champ d'application personnel: en DE, en effet, les entreprises de moins de quinze salariés sont exclues du droit au congé d'aidant.

Le régime d'octroi d'un congé d'aidant varie considérablement d'un pays à l'autre. Parmi les 26 États membres qui le proposent, douze seulement ont adopté le régime général visé par la directive WLB (durée par an) tandis que neuf ont opté pour une approche différente: la durée par épisode de besoin ou d'aide (par évènement) dans quatre de ces pays, et la durée par personne ayant besoin de soins ou d'aide (par bénéficiaire) dans les cinq autres. Les cinq derniers États membres ont adopté des approches diverses en fonction de leur régime national ou du bénéficiaire.

Les 26 pays qui prévoient le congé d'aidant respectent sa durée minimale fixée par l'UE, à savoir cinq jours ouvrables par an. La plupart des États membres (20) se sont dotés en outre de régimes de congé d'aidant plus généreux allant de sept jours ouvrables par an à deux ans par évènement. Dans deux pays (BE et IE) dotés d'un congé d'aidant assez long, un conflit pourrait toutefois exister par rapport au régime tel qu'il a été conçu par la directive WLB, qui semble vouloir garantir un usage ponctuel de cinq jours au maximum par an. En BE le congé thématique octroyé aux aidants informels doit être pris en périodes minimales d'un mois, tandis que la période de congé d'aidant est de treize semaines au minimum en IE (sauf si l'employeur en convient autrement).

En ce qui concerne le type de droit, le droit au congé d'aidant n'est conféré par travailleur que dans quinze États membres; les onze autres se sont dotés d'au moins un régime conférant un droit familial, autrement dit un droit pouvant être partagé entre différents travailleurs (par exemple deux parents pour s'occuper d'un enfant ou deux époux/partenaires pour s'occuper d'un proche âgé). Les droits familiaux existent généralement lorsque la durée du congé est allouée par bénéficiaire (BE, DE, FR, IE et SE), mais également lorsqu'il s'agit de s'occuper d'enfants (BG, EE, PL, PT, RO et SI). Cette approche s'avère problématique dans une perspective de genre, étant donné que les droits familiaux sont principalement exercés par des femmes, ce qui ne contribue pas à un partage plus égal des responsabilités de garde et de soins entre hommes et femmes. Dans ce sens, un droit individuel et non transférable pour chaque travailleur présente un avantage du point de vue de l'égalité hommes-femmes.

Les bénéficiaires du congé d'aidant (à savoir les personnes bénéficiant des soins ou de l'aide) diffèrent fortement d'un pays à l'autre. Parmi les 26 États membres proposant ce congé, les personnes susceptibles d'en bénéficier sont exclusivement, dans douze d'entre eux, des membres de la famille. Dans neuf pays, les travailleurs peuvent avoir droit à un congé d'aidant non seulement pour s'occuper de membres de leur famille mais également pour s'occuper de personnes vivant sous leur toit. Trois pays offrent davantage de flexibilité encore puisque toute personne peut être bénéficiaire. Enfin, deux pays se sont dotés de régimes mixtes. Dans l'ensemble, douze pays seulement de l'UE semblent respecter les normes minimales fixées par la directive WLB, à savoir qu'ils couvrent à la fois les membres de la famille (au moins les enfants, les parents et le conjoint) et des personnes vivant dans le même ménage que le travailleur. On compte dès lors quatorze États membres problématiques (AT, BG, DE, EE, ES, FR, HR, HU, IT, LT, LU, PL, RO et SI), essentiellement du fait que les personnes vivant sous le même toit que le travailleur ne sont pas inclus parmi les bénéficiaires d'un congé d'aidant.

Les situations visées par le congé d'aidant au niveau national sont très diverses. Parmi les 26 États membres prévoyant le congé d'aidant, seize incluent en tant que situations protégées une maladie, une affection ou une raison médicale; trois incluent exclusivement la dépendance; et un pays fait référence au besoin d'une aide ou de soins importants. Les quatre derniers ont prévu, en fonction du régime national de congé d'aidant, des dispositions relatives à différentes situations. Dix pays (BE, CZ, DE, EE, FI, HU, IE, PT,

RO et SE) sur 26 ne sont apparemment pas en conformité avec la directive WLB, soit parce que le champ d'application matériel semble trop restrictif, soit parce que le congé national semble couvrir uniquement les besoins de soins de longue durée – ce qui ne garantirait pas un usage ponctuel du congé de cinq jours ouvrables au maximum par an.

Il pourrait être entendu que les États membres ne peuvent subordonner le droit au congé d'aidant à une période d'ancienneté ni à aucune autre condition d'éligibilité. Aussi les conditions d'éligibilité établies par six États membres (BE, EL, IE, NL, PL et RO) semblent-t-elles aller à l'encontre de la directive WLB.

7 Congé pour cause de force majeure

Tous les pays de l'UE (sauf RO) prévoient un congé pour cause de force majeure, lequel peut, dans six États membres, être pris sous différentes formes.

Le régime d'octroi de ce congé est aussi diversifié que celui qui régit le congé d'aidant. Sur les 26 pays de l'UE qui le mettent à disposition, neuf prévoient une durée déterminée par année; huit ne stipulent pas de durée précise, ce qui signifie que le congé peut être pris aussi longtemps que nécessaire; dans quatre pays, la durée est fixée par épisode de force majeure (par évènement); et dans un seul pays elle est fixée par personne ayant besoin de soins ou d'aide (par bénéficiaire). Les quatre autres États membres adoptent des approches diverses en fonction de leur régime national.

En l'absence de norme minimale pour ce qui concerne la durée du congé pour cause de force majeure, aucun problème de conformité ne se pose par rapport à la directive WLB. La durée n'est pas précisée dans huit pays, tandis qu'elle est quantifiée dans les dix-huit autres, allant d'un seul jour ouvrable par évènement à 310 jours ouvrables par enfant et par évènement.

En ce qui concerne le type de droit, le droit au congé pour raisons de force majeure est octroyé par travailleur dans 21 États membres alors que les cinq autres disposent d'un régime au moins de droit familial. Les droits familiaux existent généralement lorsque la durée du congé est allouée par bénéficiaire (FR), mais également lorsqu'il s'agit de s'occuper d'enfants (BG, PL, PT et SI). Comme expliqué précédemment, cette approche s'avère problématique dans une perspective de genre, étant donné que les droits familiaux sont principalement exercés par des femmes.

Quant aux situations visées par le congé pour cause de force majeure, il semblerait que huit pays (DE, EL, FR, IT, LT, LU, PL et SI) sur 26 ne soient pas en conformité avec la directive WLB du fait d'un champ d'application apparemment trop restrictif, d'un champ d'application personnel trop limité, ou d'une combinaison de ces deux éléments.

On pourrait faire valoir que les États membres ne peuvent subordonner le droit au congé pour raisons de force majeure à aucune condition d'éligibilité. Tel est effectivement le cas dans les 26 États membres qui ont instauré le congé pour cause de force majeure, excepté PL.

8 Formules souples de travail

De façon générale, 21 États membres offrent des formules souples de travail; dans neuf cas, il ne s'agit pas d'un régime national unique mais de régimes multiples. Les six autres pays (CY, FR, HR, IE, LU et RO) ne proposaient aucune des formules exigées par la directive WLB à la date de clôture du présent rapport thématique (31 août 2022). Parmi les 21 offrant cette possibilité, une majorité (treize) ont opté en la matière pour un droit relatif, à savoir un simple droit de demander une formule souple de travail à l'employeur (ce dernier pouvant refuser d'accéder à cette demande); trois pays seulement ont opté pour un droit absolu, à savoir le droit d'obtenir une formule souple de travail (l'employeur ne pouvant rejeter

la demande du travailleur). Les six derniers pays combinent droit relatif et droit absolu. Les neuf pays qui reconnaissent des droits absolus, en tout ou en partie, vont au-delà de la norme minimale fixée par l'UE dans la directive WLB, laquelle consiste uniquement en un droit relatif.

La plupart des dix-huit États membres dotés au moins d'un droit relatif, soit quatorze d'entre eux, établissent une procédure selon laquelle l'employeur est tenu d'examiner la demande du travailleur et d'y répondre; et, s'il la rejette, de justifier ce refus, comme l'exige la directive WLB. Les quatre autres pays (BE, DE, IT et PL) n'ont pas instauré de procédure de ce type.

La possibilité de limiter la durée des formules souples de travail est rarement utilisée. Parmi les 21 pays de l'UE qui proposent ces formules, quinze n'envisagent pas cette option et les six autres y recourent pour un régime national au moins. Les six pays qui limitent la durée des formules souples de travail permettent aux travailleurs, lorsque celle-ci arrive à échéance, de revenir à leur régime de travail de départ.

En ce qui concerne le champ d'application matériel, qui doit inclure des aménagements tels qu'une réduction du temps de travail, des horaires de travail souples et le recours au travail à distance, et le champ d'application personnel, qui doit couvrir les parents d'enfants jusqu'à un âge défini, qui ne peut être inférieur à huit ans, et tous les aidants, on relève – en dehors des six pays non dotés de formules souples de travail (CY, FR, HR, IE, LU et RO) – treize pays (AT, BE, CZ, DE, ES, FI, HU, IT, PL, PT, SE, SI et SK) qui présentent des lacunes à cet égard. L'analyse de leur(s) régime(s) national (nationaux) de formules souples de travail montre qu'ils ne proposent pas les trois types de formules (travail à temps partiel, horaires flexibles et télétravail) ou qu'ils les proposent sans en permettre l'accès à tous les parents d'enfants de moins de huit ans ni à tous les aidants.

Parmi les 21 États membres qui ont instauré les formules souples de travail, onze ne subordonnent pas le droit absolu ou relatif à une quelconque condition d'éligibilité. En ce qui concerne les dix autres, FI et NL soumettent l'obtention du droit à une période d'admissibilité ne pouvant dépasser six mois (durée maximale autorisée par la directive WLB), mais sans garantir totalement qu'en cas de contrats à durée déterminée successifs avec le même employeur, la somme de ces contrats sera prise en compte pour le calcul de la période d'admissibilité, comme l'exige la directive WLB. Deuxièmement, deux pays (AT et BE) exigent une période d'ancienneté excessive, autrement dit plus longue que les six mois autorisés. Enfin, un pays (HU) fixe d'autres conditions que les périodes d'admissibilité, ce qui semble aller à l'encontre de la jurisprudence de la CJUE en vertu de laquelle il n'est pas possible d'introduire d'autres conditions d'éligibilité que celles mentionnées dans la directive.

9 Protection juridique

Tout d'abord, dix-sept États membres de l'UE assurent, pour tous les types de congé national existant, le maintien des droits antérieurs en matière d'emploi, lequel s'applique au congé de paternité, au congé parental, au congé d'aidant et au congé pour raisons de force majeure; il en découle que dix pays de l'UE présentent des lacunes à cet égard: dans trois pays (BE, HU et PL), cette protection n'est octroyée dans aucun des régimes nationaux de congé; elle est accordée dans les sept autres mais pour certains types de congé nationaux seulement. Seuls seize pays garantissent, dans tous les types de régimes nationaux de congé, le droit de retrouver l'emploi antérieur, lequel s'applique au congé de paternité, au congé parental et au congé d'aidant. Autrement dit, onze pays connaissent des problèmes au niveau de la transposition de cette protection juridique. Dans trois pays (BE, DE et HU), aucune protection n'est prévue quel que soit le type de congé national concerné. Parmi les huit autres, sept excluent certains régimes de cette protection (BG, HR, IT, LU, PL, SI et SK) et le dernier (ES) prévoit une protection juridique couvrant une partie seulement du congé.

En ce qui concerne l'interdiction de traitement défavorable des travailleurs au motif qu'ils ont demandé ou qu'ils ont pris un congé ou une formule souple de travail – interdiction qui s'applique à toutes les

mesures visées par la directive WLB –, seuls quatorze États membres l'ont instaurée, ce qui pose un problème de mise en œuvre dans pas moins de treize pays: dix de ces derniers (BE, BG, CY, CZ, DE, FR, HR, LU, LV et PL) n'assurent de protection pour aucune mesure nationale tandis que les trois autres excluent certaines mesures nationales de cette protection.

En ce qui concerne l'interdiction de licencier des travailleurs au motif qu'ils ont demandé ou pris un congé ou une formule souple de travail – interdiction qui s'applique au congé de paternité, au congé parental, au congé d'aidant et aux formules souples de travail –, la protection juridique est plus répandue puisqu'elle est en place dans dix-neuf pays de l'UE. Les huit autres (DE, FR, HR, HU, LU, PL, RO et SI) n'offrent cette protection pour aucune de leurs mesures nationales.

Le renversement de la charge de la preuve en cas de licenciement s'applique au congé de paternité, au congé parental et au congé d'aidant, en l'occurrence lorsque des travailleurs estimant avoir été licenciés au motif qu'ils ont demandé ou pris un congé établissent devant une juridiction ou autre autorité compétente des faits laissant présumer qu'ils ont été licenciés pour de tels motifs, il incombe à l'employeur de prouver que le licenciement était fondé sur d'autres motifs. Ce mécanisme juridique est en place dans onze pays de l'UE. Les seize autres ne prévoient pas le renversement de la charge de la preuve spécifiquement établi par la directive WLB en cas de licenciement lié à un congé de maternité, un congé parental et un congé d'aidant. Sept d'entre eux vont cependant au-delà de l'exigence minimale de l'UE puisque la charge de la preuve incombe toujours à l'employeur en cas de licenciement. Il y a donc défaut de mise en œuvre dans les neuf autres pays (AT, BG, CY, CZ, ES, FR, LV, PL et SI).

Les États membres sont tenus de prévoir des sanctions applicables aux violations des dispositions nationales adoptées conformément à la directive WLB, ou des dispositions pertinentes déjà en vigueur concernant les droits relevant du champ d'application de cette directive, à savoir le congé de paternité, le congé parental, le congé d'aidant, le congé pour raisons de force majeure et les formules souples de travail. Or des sanctions n'ont été instaurées que dans 21 États membres, ce qui signifie que six pays présentent des lacunes en termes de transposition: AT, BG, DE, ES, IT et LV. Les experts considèrent en outre que si 21 États membres ont prévu des sanctions, celles-ci ne sont guère effectives, proportionnées et dissuasives, ce qu'exige pourtant la directive WLB, dans quatorze d'entre eux (BE, CZ, DK, EE, EL, FI, FR, IE, LT, LU, MT, NL, PL et RO).

En ce qui concerne la protection contre les représailles, quinze pays seulement prévoient cette protection juridique pour les travailleurs. Quant aux douze autres, onze n'offrent absolument pas cette protection (BG, CY, DE, ES, FR, HR, IT, LT, LU, PL et RO), et le douzième (PT) la prévoit mais uniquement à l'intention des représentants des travailleurs.

Enfin, en ce qui concerne les organismes nationaux de promotion de l'égalité, les États membres doivent faire en sorte que l'organisme national ou les organismes nationaux pour l'égalité soient compétents pour toutes les questions de discrimination qui relèvent de la directive WLB. Tel est effectivement le cas dans dix-sept États membres. Les dix autres ne leur ont pas conféré de compétence dans ce domaine (CY, DE, FI, IE, MT, PL et RO) ou du moins pas de manière formelle (AT, ES et LU).

10 Appréciation globale et conclusions générales

Le présent rapport thématique visait à mieux cerner les aspects majeurs de la mise en œuvre de la directive WLB dans les États membres de l'UE. Cependant, étant donné la mise en œuvre tardive de celle-ci dans la plupart des pays, le rapport se présente essentiellement aujourd'hui comme une analyse des lacunes que les régimes nationaux sont appelés à combler pour respecter les normes minimales de la directive lors de sa transposition. Il est assez révélateur de constater dans cette optique qu'un seul pays a transposé la directive de manière plus ou moins satisfaisante. Les 26 autres présentent des lacunes majeures à un ou plusieurs égards. Des lacunes plus importantes sont relevées en ce qui concerne le

congé parental ou l'allocation parentale (elles sont constatées dans 20 pays), les formules souples de travail (19 pays) et la protection juridique (17 pays).

Ce tableau apparemment sombre ne doit pas faire oublier les aspects positifs du processus de mise en œuvre. Le congé de paternité est, de façon générale, bien établi et bénéficie dans pas moins de douze États membres d'une durée supérieure aux dix jours ouvrables ou deux semaines visés par la directive. En ce qui concerne le congé parental, en dépit des problèmes généralisés de non-transférabilité et d'allocation adéquate, plusieurs pays sont dotés de régimes nationaux généreux en matière de congé parental puisqu'ils vont largement au-delà des normes minimales fixées par la directive en termes de durée du congé (dans 23 pays) et de période de perception de l'allocation parentale (dans 20 pays). En ce qui concerne le congé d'aidant, la plupart des États membres (20) ont adopté des systèmes plus généreux que la directive en termes de durée. Enfin, neuf pays de l'UE reconnaissent certains droits absolus aux formules souples de travail, allant ainsi plus loin que le droit d'en faire la demande tel qu'exigé par la directive WLB.

Le caractère inclusif des mesures nationales de mise en œuvre de la directive WLB est loin d'être parfait puisqu'on observe quelques problèmes en termes de champ d'application personnel et, surtout, l'existence de plusieurs conditions d'éligibilité illégales figurant dans l'ensemble des mesures spécifiques énoncées dans la directive. En ce qui concerne le champ d'application personnel de la directive WLB, il est généralement bien implémenté, à quelques exceptions près. Dans sept États membres, les mesures nationales d'exécution de la directive WLB ne couvrent pas des personnes qui correspondent à la définition européenne du travailleur – principalement associées à de «faux indépendants». De surcroît, plusieurs mesures nationales excluent, dans un pays, les entreprises n'occupant que quelques salariés, et, dans quatre pays, certaines catégories de fonctionnaires ou d'institutions. On observe en outre des conditions illégales d'éligibilité au bénéfice des différentes mesures visées par la directive WLB: dans quatre pays pour ce qui concerne le congé de paternité proprement dit; dans six pays pour ce qui concerne la rémunération ou l'allocation de paternité; dans six pays pour ce qui concerne le congé parental proprement dit; dans six pays pour ce qui concerne l'allocation parentale; dans six pays pour ce qui concerne le congé d'aidant; dans un pays pour ce qui concerne le congé pour raisons de force majeure; et dans cinq pays pour ce qui concerne les formules souples de travail.

L'analyse des dimensions relatives à l'égalité hommes-femmes, et plus particulièrement la possibilité de partager ou de transférer des droits entre parents ou entre aidants (ce qui va à l'encontre de l'objectif d'un meilleur partage des responsabilités de garde et de soins entre hommes et femmes) et le versement d'une rémunération ou d'une allocation pour les différents types de congé (étant donné qu'une compensation adéquate encourage les hommes à exercer leur droit au congé), conduit à un bilan très nuancé. D'une part, le congé de paternité constitue un droit individuel et non transférable du père (ou du second parent équivalent) dans tous les États membres de l'UE et la rémunération ou l'allocation est généralement calculée en tant que pourcentage (allant de 70 à 100%) du salaire antérieur du travailleur. D'autre part, seuls sept pays ont instauré deux mois non transférables de congé parental par parent indemnisés à un niveau satisfaisant. En d'autres termes, 20 États membres connaissent des problèmes pour ce qui concerne la non-transférabilité, le niveau de l'allocation parentale, ou les deux. Cette situation est préoccupante car seule la combinaison du quota du père et du niveau élevé de la prestation financière peut faire en sorte que les pères exercent largement leur droit au congé parental.

Il est apparu en outre que, dans plusieurs pays, certains droits au congé d'aidant et au congé pour cause de force majeure constituent un droit familial – autrement dit, un droit susceptible d'être partagé entre différents travailleurs, tels les deux parents lorsqu'il s'agit d'un enfant ou les deux époux lorsqu'il s'agit d'un proche âgé. Tel est le cas dans onze États membres pour ce qui concerne le congé d'aidant, et dans cinq pays pour ce qui concerne le congé pour raisons de force majeure. Ce constat pose problème dans une perspective de genre, étant donné que les droits aux congés familiaux sont principalement exercés par des femmes.

L'ensemble de l'analyse conduit à conclure qu'une tâche considérable doit encore être accomplie au niveau national pour parvenir à une mise en œuvre correcte de la directive concernant l'équilibre entre vie professionnelle et vie privée des parents et des aidants. Une attention toute particulière doit être accordée au caractère inclusif des mesures nationale d'exécution de cette directive ainsi qu'à la dimension de l'égalité hommes-femmes pour ce qui concerne la non-transférabilité et le niveau de la rémunération ou de l'allocation. Telle est l'unique voie permettant de veiller à ce que l'équilibre entre vie professionnelle et vie privée soit accessible à tous les travailleurs, y compris les travailleurs atypiques, et à ce que les responsabilités de garde et de soins soient équitablement réparties entre hommes et femmes.

Zusammenfassung

1 Vorstellung der Richtlinie 2019/1158

Die Richtlinie 2019/1158 zur Vereinbarkeit von Beruf und Privatleben für Eltern und pflegende Angehörige (Vereinbarkeitsrichtlinie) ist ein Meilenstein in der EU-Gesetzgebung zur Vereinbarung von Berufs- und Familienleben. Sie modernisiert einige bestehende Rechte, namentlich das Recht auf Elternurlaub sowie das Recht, flexible Arbeitsregelungen (FAR) zu beantragen, und führt neue Rechte auf europäischer Ebene ein: das Recht auf Vaterschaftsurlaub und das Recht auf Urlaub für pflegende Angehörige.

Ziel der Vereinbarkeitsrichtlinie ist es, die mit Betreuung und Pflege verbundenen Risiken neu zu verteilen. Durch Etablierung besserer Vereinbarkeitsmaßnahmen und eine gerechtere Aufteilung von Betreuungs- und Pflegeaufgaben zwischen Frauen und Männern soll die Situation von Frauen auf dem Arbeitsmarkt verbessert werden. Die Richtlinie enthält zwei Reformstränge. Der erste Reformstrang ist der besondere Fokus auf Väter: Zum einen wird auf EU-Ebene erstmalig ein spezielles Recht für Väter geschaffen, nämlich das Recht auf Vaterschaftsurlaub; zum anderen werden durch die Kombination von nicht übertragbaren und angemessen bezahlten Urlaubszeiten wirksame Anreize für Väter geschaffen, Elternurlaub in Anspruch zu nehmen. Der zweite Reformstrang ist ein lebenszyklusorientierter Ansatz, der speziell auf Aspekte der Vereinbarkeit von Beruf und Privatleben ausgerichtet ist. Anders als im vorherigen Rechtsrahmen, der auf Eltern ausgerichtet war, wird der Tatsache Rechnung getragen, dass Arbeitnehmer sich an jedem Punkt ihres Arbeitslebens vor die Notwendigkeit gestellt sehen können, Beruf und Familie zu vereinbaren – nicht nur wenn sie Kinder haben, sondern auch wenn sie einen schwer kranken Partner oder einen pflegebedürftigen Elternteil haben. Konkret wird dieser lebenszyklusorientierte Ansatz durch das neue Recht auf Urlaub für pflegende Angehörige und die Ausweitung des Rechts auf Beantragung von FAR auf pflegende Angehörige umgesetzt.

Der persönliche Geltungsbereich der Vereinbarkeitsrichtlinie erstreckt sich auf alle Arbeitnehmer, Männer wie Frauen, die einen Arbeitsvertrag haben oder in einem Beschäftigungsverhältnis stehen. Dies schließt Personen mit ein, die in Teilzeit oder befristet beschäftigt sind oder die mit einem Leiharbeitsunternehmen einen Arbeitsvertrag geschlossen haben oder ein Beschäftigungsverhältnis eingegangen sind. Zwar ist es Sache der Mitgliedstaaten, die Begriffe „Arbeitsvertrag“ und „Beschäftigungsverhältnis“ gemäß ihren jeweiligen nationalen Gesetzen, Kollektiv- bzw. Tarifverträgen oder Gepflogenheiten zu definieren, doch ist diese Freiheit der Mitgliedstaaten nicht unbegrenzt, da die Rechtsprechung des Europäischen Gerichtshofs (EuGH) berücksichtigt werden muss. Der materielle Geltungsbereich der Vereinbarkeitsrichtlinie umfasst Vaterschaftsurlaub (neues Recht), Elternurlaub (gestärktes Recht), Urlaub für pflegende Angehörige (neues Recht) und FAR (das Recht, FAR zu beantragen, wird gestärkt). Außerdem wird das bereits bestehende Recht auf Arbeitsfreistellung wegen höherer Gewalt unverändert beibehalten.

Für Väter schafft die EU ein neues Recht auf mindestens zehn Arbeitstage bzw. zwei Kalenderwochen Vaterschaftsurlaub, der anlässlich der Geburt eines Kindes zu Pflege- oder Betreuungszwecken genommen werden muss. Ziel ist es, den frühzeitigen Aufbau einer engen Bindung zwischen Vätern und Kindern zu ermöglichen und letztlich eine gleichmäßigere Aufteilung der Betreuungs- und Pflegeaufgaben zwischen Frauen und Männern zu fördern. Während des Mindestzeitraums des Vaterschaftsurlaubs muss der Arbeitnehmer eine Bezahlung oder Vergütung erhalten, die mindestens der Höhe des Krankengeldes in dem jeweiligen Mitgliedstaat entspricht.

Das bereits bestehende Recht auf Elternurlaub, das in der Richtlinie 2010/18 verankert ist (vier unbezahlte Monate pro Elternteil, davon ein Monat nicht übertragbar), wird in der Vereinbarkeitsrichtlinie gestärkt, insbesondere durch Anhebung des zwischen den Elternteilen nicht übertragbaren Mindestzeitraums von

einem auf zwei Monate und die Einführung des Gebots, während der beiden nicht übertragbaren Monate eine Bezahlung oder Vergütung zu gewähren. Während der beiden nicht übertragbaren Monate des Elternurlaubs für jeden Elternteil muss eine angemessene Bezahlung oder Vergütung gewährt werden, deren Höhe auf nationaler Ebene festzusetzen ist.

Urlaub für pflegende Angehörige ist ein neues Recht auf EU-Ebene und wird definiert als Arbeitsfreistellung für pflegende Angehörige, die ihrerseits definiert werden als Arbeitnehmer, die einen Angehörigen oder eine im gleichen Haushalt wie der Arbeitnehmer lebende Person, der bzw. die aus schwerwiegenden medizinischen Gründen gemäß der Definition in jedem Mitgliedstaat auf erhebliche Pflege und Unterstützung angewiesen ist, pflegen oder unterstützen. Die Dauer des Urlaubs für pflegende Angehörige beträgt mindestens fünf Arbeitstage pro Jahr und Arbeitnehmer, eine Bezahlung oder Vergütung während dieses Zeitraums schreibt die Vereinbarkeitsrichtlinie jedoch nicht vor.

Das Recht auf Beantragung von FAR gemäß der Richtlinie 2010/18 wird deutlich gestärkt, von einem beschränkten Recht (nur für Eltern, die aus dem Elternurlaub zurückkehren) hin zu einem vollwertigen Recht (eigenständiges Recht für Eltern und pflegende Angehörige). Anders als beim Vaterschaftsurlaub, Elternurlaub und Urlaub für pflegende Angehörige, bei denen es sich um absolute Rechte bzw. Rechte auf Inanspruchnahme handelt (der Arbeitgeber kann den Antrag des Arbeitnehmers nicht ablehnen), handelt es sich hier jedoch nur um ein relatives Recht, d.h. um das Recht, beim Arbeitgeber einen Antrag zu stellen (der Arbeitgeber kann den Antrag ablehnen). Im Rahmen der Vereinbarkeitsrichtlinie wird das Recht, FAR zu beantragen, auf Eltern mit Kindern bis zu einem bestimmten Alter, mindestens jedoch bis zum Alter von acht Jahren, unabhängig davon, ob sie Elternurlaub genommen haben oder nicht, sowie auf alle pflegenden Angehörigen ausgeweitet. Die Mitgliedstaaten müssen gewährleisten, dass diese Arbeitnehmer das Recht ausüben können, Telearbeit, flexible Arbeitspläne oder eine Reduzierung der Arbeitszeiten zu beantragen.

Arbeitsfreistellung wegen höherer Gewalt ist nichts Neues. Tatsächlich wiederholt die Vereinbarkeitsrichtlinie den Wortlaut der Richtlinie 2010/18 über Elternurlaub und deren Vorgängerrichtlinie 96/34. Die Mitgliedstaaten müssen sicherstellen, dass Arbeitnehmer das Recht auf Arbeitsfreistellung aus dringenden familiären Gründen haben, wenn eine Erkrankung oder ein Unfall ihre unmittelbare Anwesenheit erfordern. Die Vereinbarkeitsrichtlinie schreibt während dieser Arbeitsfreistellung keine Bezahlung oder Vergütung vor.

Arbeitnehmer, die Urlaub aus familiären Gründen oder FAR beantragen bzw. in Anspruch nehmen, sind durch verschiedene Maßnahmen rechtlich geschützt. Die Mitgliedstaaten haben dafür zu sorgen, dass Ansprüche, die die Arbeitnehmer zu Beginn eines Urlaubs oder einer Arbeitsfreistellung bereits erworben haben oder im Begriff sind zu erwerben, bis zum Ende eines solchen Urlaubs oder einer solchen Arbeitsfreistellung erhalten bleiben und dass die Arbeitnehmer nach Ablauf eines solchen Urlaubs an ihren Arbeitsplatz zurückkehren können. Sie sorgen außerdem für ein Verbot der Schlechterstellung oder Kündigung von Arbeitnehmern aufgrund der Beantragung oder Inanspruchnahme eines Urlaubs, einer Arbeitsfreistellung oder einer FAR. Weiterer Rechtsschutz wird durch Sanktionen, den Schutz vor Vergeltungsmaßnahmen und die Gleichbehandlungsstellen gewährt.

2 Allgemeine fragen der Umsetzung

Die Vereinbarkeitsrichtlinie hätte in den Mitgliedstaaten bis zum 2. August 2022 umgesetzt werden müssen, mit Ausnahme der Bezahlung oder Vergütung für die letzten beiden Wochen des Elternurlaubs, für die die Umsetzungsfrist bis zum 2. August 2024 verlängert wurde. Obwohl in allen EU-Ländern gewisse Umsetzungsmaßnahmen erforderlich waren, um die Anforderungen der Richtlinie zu erfüllen, hatten bis zum Stichtag für diesen Themenbericht (31. August 2022) lediglich 15 Länder neue Rechtsvorschriften erlassen, um die Richtlinie bzw. Teile davon umzusetzen (BG, CZ, DK, EE, EL, FI, HR, HU, IT, LT, LV, MT, NL, RO und SE); die anderen zwölf Länder hatten diesbezüglich keinerlei neue Rechtsvorschriften erlassen

(AT, BE, CY, DE, ES, FR, IE, LU, PL, PT, SI und SK). Dies bedeutet, dass fast die Hälfte der EU-Länder mit der Umsetzung der Vereinbarkeitsrichtlinie im Rückstand ist, trotz der relativ langen Umsetzungsfrist von drei Jahren.

Berücksichtigt man darüber hinaus die am 31. August 2022 (dem Stichtag für diesen Themenbericht) in Kraft befindlichen nationalen Vorschriften, so ist die Umsetzung der Vereinbarkeitsrichtlinie nur in einem Mitgliedstaat (DK) insgesamt zufriedenstellend, wohingegen 26 Länder noch erhebliche Umsetzungslücken aufweisen. Aus den Daten geht hervor, dass die größten Probleme beim Elternurlaub bzw. der entsprechenden Vergütung, bei FAR und beim Rechtsschutz auftreten. Weniger Lücken gibt es beim Vaterschaftsurlaub bzw. der entsprechenden Vergütung, bei Arbeitsfreistellung wegen höherer Gewalt und beim persönlichen Geltungsbereich. Die Situation beim Urlaub für pflegende Angehörige liegt irgendwo dazwischen.

3 Persönlicher Geltungsbereich der Vereinbarkeitsrichtlinie

Den nationalen Expertinnen und Experten zufolge wurde der persönliche Geltungsbereich der Vereinbarkeitsrichtlinie, abgesehen von ein paar wenigen Ausnahmen, insgesamt gut umgesetzt. Alle Arbeitnehmer im privaten und öffentlichen Sektor, unabhängig von der Größe des Unternehmens oder der Organisation, werden von den bestehenden nationalen Vorschriften zur Umsetzung der Vereinbarkeitsrichtlinie erfasst, mit Ausnahme von fünf Ländern (DE im privaten Sektor und BE, BG, IE und LU im öffentlichen Sektor). Im Gegensatz dazu werden in allen EU-Mitgliedstaaten ohne Ausnahme Personen, die in Teilzeit bzw. befristet beschäftigt sind oder mit einem Leiharbeitsunternehmen einen Arbeitsvertrag geschlossen haben bzw. ein Beschäftigungsverhältnis eingegangen sind, von den nationalen Vorschriften zur Umsetzung der Vereinbarkeitsrichtlinie erfasst. Der problematischste Punkt dürfte sein, dass Personen, die der EU-Definition von „Arbeitnehmer“ – Person, die während einer bestimmten Zeit für eine andere nach deren Weisungen Leistungen erbringt, für die sie als Gegenleistung eine Vergütung erhält – entsprechen, von den nationalen Vorschriften zur Umsetzung der Vereinbarkeitsrichtlinie nicht erfasst werden. Die nationalen Expertinnen und Experten berichten über entsprechende Probleme in sieben Mitgliedstaaten (AT, EL, FR, HR, HU, LT und NL), die meisten davon im Zusammenhang mit „Scheinselbständigen“. Dabei handelt es sich um Erwerbstätige, die als Selbstständige registriert sind, de facto aber unter ähnlichen Bedingungen arbeiten wie abhängig Beschäftigte.

4 Vaterschaftsurlaub

4.1 Das Recht auf Vaterschaftsurlaub als solchen

Alle Mitgliedstaaten bis auf zwei (DE und SK) haben das Recht auf Vaterschaftsurlaub zumindest teilweise umgesetzt. In den 25 Ländern, die Vaterschaftsurlaub gewähren, entspricht die Dauer dieses Urlaubs im Allgemeinen der EU-Mindestvorgabe von zehn Arbeitstagen bzw. zwei Wochen oder liegt darüber. Es gibt zwei Länder, die die Anforderungen hinsichtlich der Dauer nicht erfüllen, namentlich HU (fünf Arbeitstage) und LV (zehn Kalendertage).

Väter haben immer Anspruch auf dieses Recht. Die Situation in Bezug auf gleichgestellte zweite Elternteile, z. B. Co-Mütter in lesbischen Beziehungen, ist relativ ausgewogen, da von den 25 Ländern mit Vaterschaftsurlaub 15 dieses Recht einem gleichgestellten zweiten Elternteil gewähren, die anderen zehn hingegen nicht. Vaterschaftsurlaub ist in allen EU-Mitgliedstaaten ein individuelles, nicht übertragbares Recht des Vaters (bzw. des gleichgestellten zweiten Elternteils).

Der Zeitraum, in dem der Vaterschaftsurlaub in Anspruch genommen werden kann, ist in den jeweiligen Mitgliedstaaten sehr unterschiedlich und reicht von der Vorgabe, den Urlaub unmittelbar nach der Geburt in Anspruch zu nehmen, bis hin zu der Möglichkeit, den Urlaub bis zum dritten Lebensjahr des

Kindes zu nehmen. Problematisch ist die Situation in sechs Ländern, in denen der Mindestzeitraum des Vaterschaftsurlaubs (zehn Arbeitstage) ganz oder teilweise nach dem sechsten Lebensmonat des Kindes genommen werden kann (EE, FI, FR, LT, PL und SI), da der Vaterschaftsurlaub „anlässlich der Geburt des Kindes des Arbeitnehmers“ und „um den Zeitpunkt der Geburt des Kindes herum“ genommen werden soll, um „den frühzeitigen Aufbau einer engen Bindung zwischen Vätern und Kindern“ zu ermöglichen. In EE und IT ist es darüber hinaus möglich, den gesamten Vaterschaftsurlaub vor der Geburt des Kindes zu nehmen, was offenbar im Widerspruch zur Vereinbarkeitsrichtlinie steht, da es der Richtlinie zufolge lediglich erlaubt ist, den Urlaub teilweise (nicht jedoch vollständig) vor der Geburt des Kindes zu nehmen.

Was die Voraussetzungen für den Anspruch auf Urlaub als solchen (nicht für die damit verbundene Bezahlung oder Vergütung) betrifft, so haben von den 25 EU-Ländern, die Vaterschaftsurlaub gewähren, die meisten (21) keine Anspruchsvoraussetzungen festgelegt. Diese Mitgliedstaaten legen die Vereinbarkeitsrichtlinie offenbar richtig aus, da diese keinerlei Anspruchsvoraussetzungen zulässt. Die von den übrigen vier Mitgliedstaaten (AT, BG, CY und EE) festgelegten Anspruchsvoraussetzungen scheinen daher gegen die Vereinbarkeitsrichtlinie zu verstoßen.

4.2 Bezahlung oder Vergütung während des Vaterschaftsurlaubs

In den 25 Mitgliedstaaten, in denen es ein Recht auf Vaterschaftsurlaub gibt, wird für den gesamten Zeitraum des Urlaubs eine Bezahlung oder Vergütung gewährt. Diese wird im Allgemeinen als Prozentsatz des vorherigen Einkommens des Arbeitnehmers berechnet (in 23 Mitgliedstaaten); nur zwei Länder wenden eine Pauschalvergütung an. Der Prozentsatz des vorherigen Einkommens des Arbeitnehmers ist im Allgemeinen recht hoch und reicht von 70 % bis 100 %. In allen Mitgliedstaaten außer dreien (AT, SE und SI) wird, wie in der Vereinbarkeitsrichtlinie vorgeschrieben, während des Vaterschaftsurlaubs eine Bezahlung oder Vergütung gewährt, die gleich oder höher als das in dem jeweiligen Land gewährte Krankengeld ist.

Von den 25 Mitgliedstaaten mit Vaterschaftsurlaub machen die meisten (14) den Anspruch auf eine Bezahlung oder Vergütung von keinerlei Bedingungen abhängig. Die übrigen Länder (11) haben von der Möglichkeit Gebrauch gemacht, den Anspruch auf Bezahlung oder Vergütung während des Vaterschaftsurlaubs von einer vorherigen Beschäftigungsdauer abhängig zu machen. In fünf dieser Länder sind die entsprechenden Regelungen jedoch problematisch: Drei Länder (HR, IE und LT) verlangen eine vorherige Beschäftigungsdauer, die über das in der Richtlinie erlaubte Maß – sechs Monate unmittelbar vor dem errechneten Geburtstermin des Kindes – hinausgeht, in den beiden anderen Ländern (DK und FR) kann die jeweils verlangte vorherige Beschäftigungsdauer für Personen, die in Teilzeit arbeiten, diskriminierend sein. Darüber hinaus gibt es ein Land (AT), das zusätzlich zu einer vorherigen Beschäftigungsdauer weitere Bedingungen festgelegt hat. Dies steht offenbar im Widerspruch zur Rechtsprechung des EuGH, die es den Mitgliedstaaten nicht erlaubt, andere als die in der Richtlinie genannten Zugangsbedingungen festzulegen.

5 Elternurlaub

5.1 Das Recht auf Elternurlaub als solchen

Alle Mitgliedstaaten gewähren Elternurlaub für biologische Eltern und Adoptiveltern. Die Dauer des Elternurlaubs ist von Land zu Land sehr unterschiedlich und reicht von dem in der Vereinbarkeitsrichtlinie festgelegten Minimum von vier Monaten pro Elternteil bis zu drei Jahren pro Elternteil. Die meisten EU-Länder (23) gehen in dieser Hinsicht über die EU-Mindestvorgaben hinaus.

Biologische Mütter und Väter sowie Adoptivmütter und -väter haben immer Anspruch auf Elternurlaub. Bei Co-Eltern – definiert als Co-Mutter in einer lesbischen Beziehung bzw. als Co-Vater in einer männlichen homosexuellen Beziehung –, die nicht als Adoptiveltern gelten, ist die Situation uneinheitlich: 15 Länder gewähren Co-Eltern das Recht auf Elternurlaub, die anderen zwölf tun dies nicht.

Die Vorgabe, jedem Elternteil zwei individuelle, nicht übertragbare Monate Elternurlaub zu gewähren, wird von den meisten Mitgliedstaaten (19) erfüllt. In den übrigen EU-Ländern (acht) bestehen, was die vorgeschriebenen zwei nicht übertragbaren Monate pro Elternteil betrifft, Lücken. In vier von ihnen (BG, PL, RO und SI) ist der individuelle, nicht übertragbare Zeitraum kürzer als zwei Monate. In zwei Ländern (EE und HU) ist der gesamte Elternurlaub als familienbezogenes Recht konzipiert, das von den Elternteilen gemeinsam genutzt werden kann. In zwei Ländern (AT und LT) schließlich ist der gesamte Zeitraum des Elternurlaubs formal individuell und nicht übertragbar, die besonderen Eigenschaften des Systems machen den Elternurlaub jedoch zu einem familienbezogenen Recht: Erstens kann der Urlaub nicht von beiden Elternteilen gleichzeitig genommen werden und zweitens erstreckt sich die Dauer des Urlaubs auf den gesamten Zeitraum, in dem er genommen werden kann. Folglich ist es – wie bei einem familienbezogenen Recht auch – ausschließlich Sache der Eltern zu entscheiden, wie sie den Urlaub unter sich aufteilen.

Der Zeitraum, in dem der Elternurlaub genommen werden kann, ist unterschiedlich. In fast der Hälfte der Mitgliedstaaten (12) kann der Elternurlaub ganz oder größtenteils innerhalb eines Zeitraums von drei Jahren nach der Geburt/Adoption genommen werden. In den übrigen Ländern (15) sind für die Inanspruchnahme des gesamten Elternurlaubs oder zumindest der Hälfte desselben längere Zeiträume vorgesehen, die von vier Jahren nach der Geburt/Adoption bis zu zwölf Jahren nach der Geburt/Adoption betragen. Die Mitgliedstaaten sind bei der Festlegung des Zeitraums, in dem der Elternurlaub genommen werden kann, nicht völlig frei. Dieser Zeitraum muss so festgelegt werden, dass „jeder Elternteil sein Recht auf Elternurlaub tatsächlich und gleichberechtigt wahrnehmen kann“. Die meisten Mitgliedstaaten (18) erfüllen diese Anforderung. In neun Ländern sind die entsprechenden Regelungen möglicherweise problematisch (AT, CZ, EE, ES, FR, HU, LT, RO und SK). In diesen Ländern erstreckt sich die Dauer des Elternurlaubs (fast) über den gesamten Zeitraum, in dem der Urlaub genommen werden kann, so dass für den anderen Elternteil keine (komplette) „Lücke“ von vier Monaten bleibt.

Die meisten Mitgliedstaaten (23) haben, wie in der Vereinbarkeitsrichtlinie vorgesehen, Fristen festgelegt, innerhalb derer die Arbeitnehmer ihren Arbeitgeber über die Inanspruchnahme ihres Rechts auf Elternurlaub informieren müssen. Länder, die diese Fristen nicht vollständig umgesetzt haben, sind CZ, ES, HR und RO. Unter den 23 Mitgliedstaaten, die Meldefristen festgelegt haben, sind drei (AT, DE und LU), in denen diese Fristen als übermäßig lang angesehen werden könnten, da sie mehr als zwei Monate betragen.

Die meisten Mitgliedstaaten (14) knüpfen das Recht auf Elternurlaub an keinerlei Bedingungen. Unter den übrigen Ländern (13) ist ein Land (EL), in dem eine übermäßig lange Betriebszugehörigkeitsdauer vorausgesetzt wird (länger als das nach der Vereinbarkeitsrichtlinie zulässige Maximum von einem Jahr): Ein Jahr wird nicht generell, sondern für jedes Kind verlangt. Anders ausgedrückt: Für das zweite (und jedes weitere) Kind ist nach Beendigung des Elternurlaubs für das vorherige Kind ein weiteres Jahr Betriebszugehörigkeit bei dem Arbeitgeber erforderlich. Darüber hinaus gibt es fünf Länder (AT, DE, HR, LU und PT), die den Anspruch auf Elternurlaub an andere Bedingungen als an Wartezeiten knüpfen, was der Rechtsprechung des EuGH widerspricht, die es den Mitgliedstaaten nicht erlaubt, andere als die in der Richtlinie genannten Zugangsbedingungen festzulegen.

In den meisten Mitgliedstaaten (18) ist es den Arbeitgebern nicht gestattet, die Gewährung des Elternurlaubs aufzuschieben. Die übrigen Länder (neun) erlauben den Arbeitgebern, den Elternurlaub aufzuschieben. Allerdings haben nur acht von ihnen (alle außer HR) die Umstände festgelegt, unter denen der Arbeitgeber die Gewährung des Elternurlaubs aufschieben darf, wie in der Vereinbarkeitsrichtlinie vorgesehen. Von diesen acht Ländern führt nur eines (EL) eine gravierende Störung der Abläufe beim Arbeitgeber an; die anderen sieben (BE, CY, ES, PT, IE, LU und MT) haben weniger gravierende Umstände festgelegt, die nicht im Einklang mit der Richtlinie zu stehen scheinen.

Die Vereinbarkeitsrichtlinie verpflichtet die Mitgliedstaaten, dafür zu sorgen, dass die Arbeitnehmer die Möglichkeit haben, Elternurlaub auf Teilzeitbasis und für abwechselnde Zeiträume zu beantragen. Lediglich 15 Länder erfüllen diese Anforderung. Der Rest der Mitgliedstaaten (12) gewährt entweder

nur eine der beiden möglichen flexiblen Lösungen oder gar keine. Vier Länder (CZ, LT, RO und SK) bieten überhaupt keine Möglichkeit an, Elternurlaub auf Teilzeitbasis oder in verschiedenen Blöcken zu nehmen. In den übrigen acht Mitgliedstaaten besteht entweder die Möglichkeit, den Elternurlaub auf Teilzeitbasis zu nehmen, oder die Möglichkeit, den Urlaub in verschiedenen Blöcken zu nehmen, nicht jedoch beides: ausschließlich Teilzeit in zwei Ländern (FR und SI) und ausschließlich abwechselnde Zeiträume in sechs Ländern (AT, BG, CY, EE, HU und LV).

Die meisten EU-Länder (19) haben im Hinblick auf die Anwendung von Elternurlaub für mindestens eine der folgenden Gruppen von Eltern spezielle Maßnahmen getroffen: Adoptiveltern, Eltern mit einer Behinderung und Eltern von Kindern mit einer Behinderung oder einer chronischen Erkrankung. Die übrigen acht Mitgliedstaaten (BG, CZ, EE, HR, LT, LV, MT und NL) haben für diese Eltern im Rahmen des Elternurlaubs keine speziellen Maßnahmen getroffen.

5.2 Bezahlung oder Vergütung während des Elternurlaubs

Die meisten Mitgliedstaaten (alle außer CY) gewähren bei Elternurlaub eine Bezahlung oder Vergütung. Alle 26 Länder, die einen finanziellen Ausgleich gewähren, tun dies in Form einer (vom Staat gewährten) Vergütung. In zwölf dieser Länder wird die Vergütung für die gesamte Dauer des Elternurlaubs gezahlt, in den anderen 14 ist hingegen nur ein Teil des Elternurlaubs bezahlt. Unabhängig von der Frage der Nichtübertragbarkeit ist der Zeitraum, in dem eine Vergütung gewährt wird, in 20 Mitgliedstaaten länger als die in der Vereinbarkeitsrichtlinie vorgeschriebenen zwei Monate pro Elternteil (insgesamt vier Monate).

Unter Berücksichtigung der EU-Vorgabe von zwei nicht übertragbaren Monaten pro Elternteil, für die eine Bezahlung bzw. Vergütung gewährt werden muss, erfüllen – abgesehen von dem genannten Mitgliedstaat (CY), in dem kein finanzieller Ausgleich existiert – zehn Länder den Mindeststandard nicht, allerdings aus unterschiedlichen Gründen. In zwei von ihnen (ES und IE) ist die Dauer des bezahlten Urlaubs – der zwar individuell und nicht übertragbar ist – nicht lang genug. In den anderen acht Ländern (CZ, EE, HU, LT, LV, PL, RO und SI) wird der EU-Mindeststandard nicht erfüllt, und zwar nicht wegen der Dauer der Vergütung (die sogar mehr als zwei Monate beträgt), sondern wegen des Fehlens von zwei nicht übertragbaren Monaten Elternurlaub (während derer die Vergütung laut Vereinbarkeitsrichtlinie gezahlt werden muss).

Von den 26 Mitgliedstaaten, die einen finanziellen Ausgleich gewähren, scheint dieser in neun Mitgliedstaaten unzureichend zu sein: Sieben dieser Länder (BE, BG, CZ, EL, FR, IE und MT) gewähren einen eher bescheidenen Pauschalbetrag; in den beiden anderen (IT und PT) ist der Prozentsatz der Einkommensersatzleistung zu niedrig (30 % in IT und 25 % in PT). In drei Ländern (HR, HU und LU) ist der auf das Einkommen des Arbeitnehmers angewandte Prozentsatz zwar recht hoch, die Obergrenze der Vergütung könnte aber zu niedrig sein. In den übrigen 14 Mitgliedstaaten kann die Vergütung als angemessen gelten.

Alles in allem gibt es nur sieben Länder (AT, DE, DK, FI, NL, SE und SK) mit zwei nicht übertragbaren Monaten Elternurlaub, die im Prinzip angemessen vergütet werden.

Die Mitgliedstaaten sollten die für den Elternurlaub vorgesehene Bezahlung oder Vergütung nur dann gewähren, wenn ein Elternteil tatsächlich im Urlaub ist. In LV ist es jedoch möglich, den Elternurlaub von der entsprechenden Vergütung zu entkoppeln. Ein Arbeitnehmer kann weiterarbeiten und die Vergütung beziehen – wenn auch nur 30 % des Betrags, den er erhalten hätte, wenn er im Elternurlaub gewesen wäre. In anderen Mitgliedstaaten (AT, CZ, EE, HU und SK) ist es möglich, dass Arbeitnehmer arbeiten, während sie im Vollzeit-Elternurlaub sind und die volle Vergütung erhalten. Dies sollte untersagt oder sehr stark eingeschränkt werden, da es dem eigentlichen Zweck des Elternurlaubs zuwiderläuft, der darin besteht, von der Arbeit freigestellt zu sein, um ein Kind zu betreuen.

Abgesehen von den Zugangsbedingungen für Elternurlaub als solchen haben nur zwölf Mitgliedstaaten (von den 26, die eine Vergütung gewähren) zusätzliche Bedingungen festgelegt, damit Arbeitnehmer im Elternurlaub Anspruch auf Vergütung haben. In einem Land (FR) ist die geforderte Beschäftigungsdauer übermäßig lang (länger als das nach der Vereinbarkeitsrichtlinie zulässige Maximum von einem Jahr), da Arbeitnehmer während der letzten zwei Jahre vor der Geburt gearbeitet haben müssen. In zwei Ländern könnte der geforderte Zeitraum als diskriminierend für Personen, die in Teilzeit arbeiten, (DK) bzw. als diskriminierend wegen des Geschlechts (HU) angesehen werden. Drei Länder haben außer Wartezeiten noch andere Bedingungen festgelegt, was der Rechtsprechung des EuGH widerspricht.

6 Urlaub für pflegende Angehörige

Alle EU-Mitgliedstaaten außer CY gewähren Urlaub für pflegende Angehörige, wobei in acht Ländern nicht nur eine, sondern mehrere Arten dieses Urlaubs existieren. Abgesehen von CY, wo Urlaub für pflegende Angehörige nicht vorgesehen ist, gibt es in einem Land Probleme beim persönlichen Geltungsbereich: In DE sind Betriebe mit bis zu 15 Beschäftigten vom Recht auf Urlaub für pflegende Angehörige ausgenommen.

Die Regelungen zur Gewährung des Urlaubs für pflegende Angehörige sind von Land zu Land sehr unterschiedlich. Von den 26 EU-Ländern, die diesen Urlaub gewähren, folgen nur zwölf dem allgemeinen System der Vereinbarkeitsrichtlinie (Dauer pro Jahr), wohingegen neun Länder einen anderen Ansatz gewählt haben: Dauer pro Episode des Pflege- oder Betreuungsbedarfs (pro Fall) in vier Ländern und Dauer pro pflege- oder betreuungsbedürftiger Person (pro Leistungsempfänger) in fünf Ländern. Die übrigen fünf Mitgliedstaaten haben, je nach nationalem System oder Leistungsempfänger, unterschiedliche Ansätze gewählt.

Die 26 Länder, die Urlaub für pflegende Angehörige gewähren, halten die EU-Mindestdauer von fünf Arbeitstagen pro Jahr ein. In den meisten Mitgliedstaaten (20) gelten großzügigere Regelungen, die von sieben Arbeitstagen pro Jahr bis zu zwei Jahren pro Fall reichen. In zwei Ländern (BE und IE), in denen der Urlaub für pflegende Angehörige ziemlich lang ist, kann es jedoch zu Konflikten mit dem in der Vereinbarkeitsrichtlinie vorgesehenen System kommen, das eine stückweise Inanspruchnahme von maximal fünf Arbeitstagen pro Jahr oder weniger zu gewährleisten scheint. In BE muss der „thematische" Urlaub für informelle Pflege- und Betreuungspersonen in Zeiträumen von mindestens einem Monat genommen werden, während in IE die Mindestdauer des Urlaubs für pflegende Angehörige 13 Wochen beträgt (es sei denn, der Arbeitgeber stimmt etwas anderem zu).

Was die Art des Anspruchs betrifft, so ist der Urlaub für pflegende Angehörige nur in 15 Mitgliedstaaten ein individuelles Recht; die anderen elf Mitgliedstaaten verfügen über mindestens ein System, bei dem es sich um ein familienbezogenes Recht handelt, d. h. der Anspruch kann zwischen mehreren Arbeitnehmern aufgeteilt werden, z. B. zwischen zwei Elternteilen, die ein Kind betreuen, oder zwischen zwei Ehepartnern/Partnern, die sich um einen älteren Angehörigen kümmern. Um familienbezogene Rechte handelt es sich in der Regel dann, wenn die Dauer pro Leistungsempfänger gewährt wird (BE, DE, FR, IE und SE), aber auch dann, wenn es um die Betreuung von Kindern geht (BG, EE, PL, PT, RO und SI). Unter Aspekten der Geschlechtergleichstellung ist dies problematisch, da familienbezogene Rechte überwiegend von Frauen in Anspruch genommen werden, was nicht zu einer gerechteren Verteilung von Betreuungs- und Pflegeaufgaben zwischen Männern und Frauen beiträgt. Im Hinblick auf die Geschlechtergleichstellung ist ein individuelles, nicht übertragbares Recht für jeden Arbeitnehmer daher zu bevorzugen.

Beim Urlaub für pflegende Angehörige sind die Leistungsempfänger (Personen, die Pflege oder Unterstützung erhalten) von Land zu Land sehr unterschiedlich. In zwölf der 26 Mitgliedstaaten, die Urlaub für pflegende Angehörige gewähren, können im Rahmen dieses Urlaubs nur Angehörige Leistungsempfänger sein. In neun Ländern können Arbeitnehmer Anspruch auf Urlaub für pflegende Angehörige haben, nicht nur, um sich um Angehörige zu kümmern, sondern auch, um Personen zu pflegen, die mit ihnen im gleichen Haushalt leben. Drei Länder bieten noch mehr Flexibilität: Hier kann jede beliebige Person Leistungsempfänger

sein. Zwei Länder schließlich haben gemischte Systeme. Insgesamt scheinen nur zwölf EU-Länder die Mindeststandards der Vereinbarkeitsrichtlinie zu erfüllen, da sie sowohl Angehörige (zumindest Kinder, Eltern und Ehepartner) als auch Personen einbeziehen, die im selben Haushalt wie der Arbeitnehmer leben. Daneben gibt es 14 Mitgliedstaaten (AT, BG, DE, EE, ES, FR, HR, HU, IT, LT, LU, PL, RO und SI), die problematisch sind, weil insbesondere Personen, die im gleichen Haushalt wie der Arbeitnehmer leben, nicht zu den Leistungsempfängern des Urlaubs für pflegende Angehörige zählen.

Die Situationen, die auf nationaler Ebene vom Urlaub für pflegende Angehörige abgedeckt werden, sind sehr unterschiedlich. In 16 der 26 Mitgliedstaaten, in denen Urlaub für pflegende Angehörige gewährt wird, zählen Erkrankungen, Leiden oder medizinische Gründe zu den geschützten Situationen; in drei Ländern wird nur Pflegebedürftigkeit abgedeckt, in zwei Ländern nur Behinderung, und ein Land verweist auf einen Bedarf an erheblicher Pflege und Unterstützung. In den übrigen vier Ländern gibt es, abhängig vom jeweiligen nationalen System des Urlaubs für pflegende Angehörige, Regelungen für unterschiedliche Situationen. Zehn Länder (BE, CZ, DE, EE, FI, HU, IE, PT, RO und SE) der insgesamt 26 scheinen mit der Vereinbarkeitsrichtlinie nicht in Einklang zu stehen, entweder weil der materielle Geltungsbereich offenbar zu restriktiv ist oder weil die nationale Urlaubsregelung anscheinend nur den Bedarf an Langzeitpflege abdeckt, was eine stückweise Inanspruchnahme des Urlaubs, der pro Jahr fünf Arbeitstage oder weniger umfasst, nicht gewährleisten würde.

Es kann davon ausgegangen werden, dass die Mitgliedstaaten das Recht auf Urlaub für pflegende Angehörige an keine bestimmte Beschäftigungs- oder Betriebszugehörigkeitsdauer und an keine sonstigen Bedingungen knüpfen dürfen. Aus diesem Grund scheinen die von sechs Mitgliedstaaten (BE, EL, IE, NL, PL und RO) festgelegten Anspruchsvoraussetzungen der Vereinbarkeitsrichtlinie zu widersprechen.

7 Arbeitsfreistellung wegen höherer Gewalt

Alle EU-Länder (mit Ausnahme von RO) sehen eine Arbeitsfreistellung wegen höherer Gewalt vor, wobei sechs Mitgliedstaaten mehrere Arten von Arbeitsfreistellung anbieten.

Die Regelungen zur Gewährung einer Arbeitsfreistellung wegen höherer Gewalt sind ebenso vielfältig wie im Fall des Urlaubs für pflegende Angehörige. Von den 26 EU-Ländern, die eine solche Arbeitsfreistellung gewähren, haben neun diese auf eine bestimmte Zeitspanne pro Jahr beschränkt; acht Länder haben keine konkrete Zeitspanne festgelegt, d.h. die Arbeitsfreistellung kann so lange in Anspruch genommen werden wie erforderlich; in vier Ländern wird die Zeitspanne nach Episoden höherer Gewalt (pro Fall) und in einem Land nach pflege- oder betreuungsbedürftigen Personen (pro Leistungsempfänger) bemessen. Die übrigen vier Mitgliedstaaten verfolgen unterschiedliche Ansätze, abhängig von ihrem jeweiligen nationalen System.

Da hinsichtlich der Dauer der Arbeitsfreistellung wegen höherer Gewalt keine Mindestvorgabe existiert, ergeben sich keine Probleme bezüglich der Einhaltung der Vereinbarkeitsrichtlinie. In acht Ländern ist keine genaue Dauer festgelegt; in den übrigen 18 Ländern ist die Dauer hingegen quantifiziert und reicht von einem Arbeitstag pro Fall bis zu 310 Arbeitstagen pro Kind und Fall.

Was die Art des Anspruchs betrifft, so ist die Arbeitsfreistellung wegen höherer Gewalt in 21 Mitgliedstaaten ein individuelles Recht, wohingegen in den anderen fünf Mitgliedstaaten mindestens ein System existiert, bei dem es sich um ein familienbezogenes Recht handelt. Um familienbezogene Rechte handelt es sich in der Regel dann, wenn die Freistellung pro Leistungsempfänger gewährt wird (FR), aber auch dann, wenn es um die Betreuung von Kindern geht (BG, PL, PT und SI). Wie bereits erwähnt, ist dies unter Aspekten der Geschlechtergleichstellung problematisch, da familienbezogene Rechte überwiegend von Frauen in Anspruch genommen werden.

Was die Situationen betrifft, die von der Arbeitsfreistellung wegen höherer Gewalt abgedeckt werden, so scheinen acht Länder (DE, EL, FR, IT, LT, LU, PL und SI) von insgesamt 26 nicht mit der Vereinbarkeitsrichtlinie in Einklang zu stehen, da entweder der sachliche Geltungsbereich zu restriktiv oder der persönliche Geltungsbereich zu begrenzt ist oder weil eine Kombination beider Elemente vorliegt.

Es ist davon auszugehen, dass die Mitgliedstaaten das Recht auf Arbeitsfreistellung wegen höherer Gewalt an keinerlei Zugangsbedingungen knüpfen dürfen. Tatsächlich ist dies in den 26 Mitgliedstaaten, die Arbeitsfreistellungen wegen höherer Gewalt gewähren, auch der Fall, mit Ausnahme von PL.

8 Flexible Arbeitsregelungen

Insgesamt existiert in 21 Mitgliedstaaten für Arbeitnehmer die Möglichkeit, flexible Arbeitsregelungen (FAR) zu beantragen, wobei neun Länder nicht nur über ein nationales System verfügen, sondern über mehrere. Die übrigen sechs Länder (CY, FR, HR, IE, LU und RO) boten zum Stichtag dieses Themenberichts (31. August 2022) keine der in der Vereinbarkeitsrichtlinie vorgeschriebenen FAR an. Von den 21 Ländern, die diese Möglichkeit anbieten, haben sich die meisten (12) für ein relatives Recht entschieden, d.h. für ein simples Recht, beim Arbeitgeber FAR zu beantragen (der Arbeitgeber kann den Antrag des Arbeitnehmers ablehnen); nur in drei Ländern handelt es sich um ein absolutes Recht, sprich: um ein Recht, FAR in Anspruch zu nehmen (der Arbeitgeber kann den Antrag des Arbeitnehmers nicht ablehnen). Die übrigen sechs Länder kombinieren relative und absolute Rechte. Die neun Länder, in denen teilweise oder vollständig absolute Rechte gelten, gehen über den Mindeststandard der Vereinbarkeitsrichtlinie hinaus, bei dem es sich nur um ein relatives Recht handelt.

Von den 18 Mitgliedstaaten, die zumindest ein relatives Recht gewähren, haben die meisten (14) ein Verfahren etabliert, nach dem der Arbeitgeber den Antrag des Arbeitnehmers prüfen und beantworten muss. Wird der Antrag abgelehnt, so muss der Arbeitgeber, wie in der Vereinbarkeitsrichtlinie vorgeschrieben, die Ablehnung begründen. In den anderen vier Ländern (BE, DE, IT und PL) existiert ein solches Verfahren nicht.

Die Möglichkeit, FAR zeitlich zu begrenzen, wird nur selten genutzt. Von den 21 EU-Ländern, die FAR gewähren, sehen 15 diese Möglichkeit nicht vor, die anderen sechs nutzen sie mindestens für ein nationales System. In den sechs Ländern, in denen FAR zeitlich begrenzt sind, haben Arbeitnehmer das Recht, nach Ablauf der FAR zu ihrem früheren Arbeitsmuster zurückzukehren.

Was den materiellen Geltungsbereich betrifft, der reduzierte Arbeitszeiten, flexible Arbeitspläne und die Nutzung von Telearbeit einschließen muss, sowie den persönlichen Geltungsbereich, der Eltern mit Kindern bis zu einem bestimmten Alter, mindestens jedoch bis zum Alter von acht Jahren, sowie pflegende Angehörige erfassen muss, so gibt es – abgesehen von den sechs Ländern, die keine FAR anbieten (CY, FR, HR, IE, LU und RO) – 13 Länder (AT, BE, CZ, DE, ES, FI, HU, IT, PL, PT, SE, SI und SK), die diesbezüglich Lücken aufweisen. Die Analyse ihres nationalen Systems bzw. ihrer nationalen Systeme zeigt, dass sie nicht alle drei Arten von FAR (Teilzeitarbeit, Gleitzeit und Telearbeit) vorsehen bzw. dass sie diese vorsehen, aber nicht für alle Eltern mit Kindern unter acht Jahren und pflegende Angehörige.

Von den 21 Mitgliedstaaten, die FAR anbieten, machen elf das absolute oder relative Recht auf FAR von keinerlei Bedingungen abhängig. Von den übrigen zehn Ländern machen FI und NL das Recht auf FAR von einer Wartezeit von höchstens sechs Monaten (das nach der Vereinbarkeitsrichtlinie zulässige Maximum) abhängig, garantieren aber nicht in vollem Umfang, dass, wie in der Vereinbarkeitsrichtlinie vorgeschrieben, bei aufeinanderfolgenden befristeten Verträgen mit demselben Arbeitgeber die Gesamtlaufzeit dieser Verträge bei der Berechnung der Wartezeit berücksichtigt wird. Außerdem gibt es zwei Länder (AT und BE), in denen die Betriebszugehörigkeitsdauer übermäßig lang ist und über die zulässigen sechs Monate hinausgeht. Schließlich gibt es ein Land (HU), das andere Bedingungen als Wartezeiten festlegt, was im

Widerspruch zur Rechtsprechung des EuGH stehen dürfte, wonach es nicht möglich ist, andere als die in der Richtlinie genannten Zugangsbedingungen festzulegen.

9 Rechtsschutz

In erster Linie ist festzustellen, dass die Aufrechterhaltung früherer Beschäftigungsansprüche, die für Vaterschaftsurlaub, Elternurlaub, Urlaub für pflegende Angehörige und Arbeitsfreistellungen wegen höherer Gewalt gilt, in 17 EU-Ländern für alle im nationalen Recht vorgesehenen Arten von Urlaub oder Arbeitsfreistellung gewährt wird. Zehn Länder weisen diesbezüglich jedoch Lücken auf: In drei Ländern (BE, HU und PL) wird der genannte Schutz für keine der im nationalen Recht vorgesehenen Arten von Urlaub gewährt, in den anderen sieben Ländern wird er zwar gewährt, aber nur für manche im nationalen Recht vorgesehene Arten von Urlaub. Das Recht auf Rückkehr an den früheren Arbeitsplatz, das für Vaterschaftsurlaub, Elternurlaub und Urlaub für pflegende Angehörige gilt, ist nur in 16 Ländern für alle Arten von nationalem Urlaub gewährleistet. In elf Ländern existieren somit Probleme bei der Umsetzung dieses Rechtsschutzes. In drei Ländern (BE, DE und HU) wird für keine Art von nationalem Urlaub Schutz gewährt. Von den verbleibenden acht Ländern schließen sieben bestimmte Arten von nationalem Urlaub von diesem Schutz aus (BG, HR, IT, LU, PL, SI und SK); in einem Land (ES) wird dieser Rechtsschutz zwar gewährt, aber nur für einen Teil des Urlaubs.

Was das Verbot einer Schlechterstellung von Arbeitnehmern aufgrund der Beantragung oder Inanspruchnahme eines Urlaubs oder einer FAR betrifft, das für alle Maßnahmen der Vereinbarkeitsrichtlinie gilt, so gewähren nur 14 Mitgliedstaaten diesen Rechtsschutz. In nicht weniger als 13 Ländern bestehen diesbezüglich Umsetzungsprobleme: zehn Länder (BE, BG, CY, CZ, DE, FR, HR, LU, LV und PL) gewähren für keine ihrer nationalen Maßnahmen Rechtsschutz, die anderen drei Länder schließen bestimmte nationale Maßnahmen von dem Schutz aus.

Was das Verbot der Kündigung von Arbeitnehmern aufgrund der Beantragung oder Inanspruchnahme eines Urlaubs oder einer FAR betrifft, das für Vaterschaftsurlaub, Elternurlaub, Urlaub für pflegende Angehörige und FAR gilt, so ist dieser Rechtsschutz weiter verbreitet, da er von 19 EU-Ländern gewährt wird. Die anderen acht Länder (DE, FR, HR, HU, LU, PL, RO und SI) sehen diesen Schutz für keine ihrer nationalen Maßnahmen vor.

Die Umkehr der Beweislast im Falle einer Kündigung gilt für den Vaterschaftsurlaub, den Elternurlaub und den Urlaub für pflegende Angehörige: Wenn Arbeitnehmer, die der Ansicht sind, ihre Kündigung sei aufgrund der Beantragung oder Inanspruchnahme eines Urlaubs erfolgt, vor einem Gericht oder einer anderen zuständigen Stelle Tatsachen anführen, die darauf schließen lassen, dass die Kündigung aus diesen Gründen erfolgt ist, obliegt dem Arbeitgeber der Nachweis, dass die Kündigung aus anderen Gründen erfolgt ist. Dieser Rechtsmechanismus steht in elf EU-Ländern zur Verfügung. Die übrigen 16 Länder sehen eine Umkehr der Beweislast, wie in der Vereinbarkeitsrichtlinie speziell für den Fall einer Kündigung im Zusammenhang mit Vaterschaftsurlaub, Elternurlaub und Urlaub für pflegende Angehörige vorgeschrieben, nicht vor. Sieben von ihnen gehen jedoch über den EU-Mindeststandard hinaus, da der Arbeitgeber im Falle einer Kündigung immer die Beweislast trägt. In den anderen neun Ländern (AT, BG, CY, CZ, ES, FR, LV, PL und SI) besteht somit eine Umsetzungslücke.

Die Mitgliedstaaten müssen Sanktionen vorsehen, die bei Verstößen gegen die gemäß der Vereinbarkeitsrichtlinie erlassenen nationalen Vorschriften oder die bereits geltenden einschlägigen Vorschriften zu Rechten, die in den Geltungsbereich dieser Richtlinie fallen – sprich: Vaterschaftsurlaub, Elternurlaub, Urlaub für pflegende Angehörige, Arbeitsfreistellung wegen höherer Gewalt und FAR –, verhängt werden können. Nur in 21 Mitgliedstaaten wurden jedoch Sanktionen festgeschrieben, was bedeutet, dass in sechs Ländern (AT, BG, DE, ES, IT und LV) diesbezüglich Umsetzungslücken bestehen. Die nationalen Expertinnen und Experten sind außerdem der Meinung, dass 21 Mitgliedstaaten zwar Sanktionen vorsehen, diese in 14 Mitgliedstaaten (BE, CZ, DK, EE, EL, FI, FR, IE, LT, LU, MT, NL, PL und

RO) jedoch nicht wirksam, verhältnismäßig und abschreckend sind, wie in der Vereinbarkeitsrichtlinie gefordert.

Was den Schutz der Arbeitnehmer vor Vergeltungsmaßnahmen angeht, so wird dieser Rechtsschutz nur von 15 Ländern gewährt. Von den übrigen zwölf Ländern gewähren elf diesen Schutz überhaupt nicht (BG, CY, DE, ES, FR, HR, IT, LT, LU, PL und RO); ein Land (PT) gewährt ihn zwar, aber nur für Arbeitnehmervertreterinnen und vertreter.

Was schließlich die nationalen Gleichbehandlungsstellen betrifft, so müssen die Mitgliedstaaten dafür sorgen, dass diese für alle Fragen im Zusammenhang mit Diskriminierung zuständig sind, die unter die Vereinbarkeitsrichtlinie fallen. Dies ist derzeit in 17 Mitgliedstaaten der Fall. Die übrigen zehn Mitgliedstaaten haben den Gleichbehandlungsstellen in diesem Bereich keine Zuständigkeit übertragen (CY, DE, FI, IE, MT, PL und RO) oder haben dies zumindest nicht formell getan (AT, ES und LU).

10 Gesamtbewertung und Schlussfolgerungen

Ziel dieses Themenberichts war es, einen Einblick in die wichtigsten Aspekte der Durchführung der Vereinbarkeitsrichtlinie in den EU-Mitgliedstaaten zu gewinnen. Angesichts der späten Umsetzung der Richtlinie in den meisten Ländern wurde der Bericht jedoch im Wesentlichen zu einer Analyse der Lücken, die in den nationalen Systemen beseitigt werden müssen, um bei der Umsetzung der Richtlinie die Mindeststandards zu erreichen. In dieser Hinsicht ist es recht aufschlussreich festzustellen, dass nur ein Land die Richtlinie mehr oder weniger zufriedenstellend umgesetzt hat. Die anderen 26 Länder weisen in einem oder mehreren Bereichen erhebliche Lücken auf. Die meisten Lücken finden sich beim Elternurlaub oder bei der Vergütung des Elternurlaubs (20 Länder), bei flexiblen Arbeitsregelungen (19 Länder) und beim Rechtsschutz (17 Länder).

Dieses scheinbar düstere Bild soll jedoch die positiven Aspekte des Umsetzungsprozesses nicht überschatten. Der Vaterschaftsurlaub wurde im Allgemeinen gut umgesetzt, und nicht weniger als zwölf Mitgliedstaaten gewähren ihn mit einer Dauer, die zehn Arbeitstage bzw. zwei Wochen übersteigt. Was den Elternurlaub betrifft, so existieren in mehreren Ländern – ungeachtet der generalisierten Probleme der Nichtübertragbarkeit und der angemessenen Vergütung – großzügige nationale Elternurlaubsregelungen, die hinsichtlich der Dauer des Urlaubs (in 23 Ländern) und der Dauer der Vergütung (in 20 Ländern) weit über die Mindestvorgaben der Richtlinie hinausgehen. Beim Urlaub für pflegende Angehörige haben die meisten Mitgliedstaaten (20), was dessen Dauer betrifft, großzügigere Regelungen getroffen als in der Richtlinie vorgesehen. Schließlich gibt es neun EU-Länder, die gewisse absolute Rechte auf flexible Arbeitsregelungen anerkennen und damit über das in der Vereinbarkeitsrichtlinie vorgesehene Beantragungsrecht hinausgehen.

Die Inklusivität der nationalen Maßnahmen zur Umsetzung der Vereinbarkeitsrichtlinie ist alles andere als perfekt, da es einige Probleme in Bezug auf den persönlichen Geltungsbereich und vor allem etliche unzulässige Anspruchsvoraussetzungen für alle in der Richtlinie vorgesehenen spezifischen Maßnahmen gibt. Was den persönlichen Geltungsbereich der Richtlinie betrifft, so wurde dieser – abgesehen von einigen Ausnahmen – im Allgemeinen gut umgesetzt. In sieben Mitgliedstaaten werden Personen, die der EU-Definition von „Arbeitnehmer“ entsprechen – überwiegend assoziiert mit „Scheinselbständigen“ –, von den nationalen Maßnahmen zur Umsetzung der Vereinbarkeitsrichtlinie nicht erfasst. Des Weiteren sind in einem Land Betriebe mit nur wenigen Beschäftigten und in vier Ländern bestimmte Kategorien von öffentlich Bediensteten oder Einrichtungen von einigen nationalen Maßnahmen ausgeschlossen. Darüber hinaus existieren unzulässige Anspruchsvoraussetzungen für einzelne Maßnahmen der Vereinbarkeitsrichtlinie: in vier Ländern betreffen diese den Vaterschaftsurlaub als solchen, in sechs Ländern die Bezahlung oder Vergütung bei Vaterschaftsurlaub, in sechs Ländern den Elternurlaub als solchen, in sechs Ländern die Vergütung bei Elternurlaub, in sechs Ländern den Urlaub für pflegende Angehörige, in einem Land die Arbeitsfreistellung wegen höherer Gewalt und in fünf Ländern flexible Arbeitsregelungen.

Was die Gleichstellungsdimensionen betrifft, so ist die Bilanz durchwachsen, sowohl hinsichtlich der Möglichkeit der Aufteilung oder Übertragung von Ansprüchen zwischen Eltern oder pflegenden Angehörigen (was dem Ziel einer besseren Aufteilung von Pflege- und Betreuungsaufgaben zwischen Männern und Frauen zuwiderläuft) als auch hinsichtlich der Bezahlung oder Vergütung bei den verschiedenen Arten von Urlaub (da ein angemessener finanzieller Ausgleich Männer dazu ermutigt, Urlaub in Anspruch zu nehmen). Einerseits ist der Vaterschaftsurlaub in allen EU-Mitgliedstaaten ein individuelles, nicht übertragbares Recht des Vaters (oder des gleichgestellten zweiten Elternteils), wobei die Bezahlung oder Vergütung im Allgemeinen als Prozentsatz des Einkommens des Arbeitnehmers berechnet wird und zwischen 70 % und 100 % desselben beträgt. Andererseits gibt es nur sieben Länder mit zwei nicht übertragbaren Monaten Elternurlaub pro Elternteil, die in einer angemessenen Höhe bezahlt oder vergütet werden. Dies bedeutet, dass in 20 Mitgliedstaaten Probleme mit der Nichtübertragbarkeit, der Höhe der Vergütung während des Elternurlaubs oder mit beidem bestehen. Dies ist besorgniserregend, da nur eine Kombination aus Vaterquote und hoher finanzieller Leistung dafür sorgen kann, dass Väter ihr Recht auf Elternurlaub in großem Umfang wahrnehmen.

Darüber hinaus hat sich gezeigt, dass in einigen Ländern bestimmte Rechte auf Urlaub für pflegende Angehörige bzw. auf Arbeitsfreistellung wegen höherer Gewalt familienbezogene Rechte sind, was bedeutet, dass mehrere Arbeitnehmer sich den Anspruch teilen können, z. B. zwei Elternteile im Falle eines Kindes oder zwei Ehepartner/Partner im Falle eines älteren Angehörigen. Beim Urlaub für pflegende Angehörige ist dies in elf Mitgliedstaaten, bei der Arbeitsfreistellung wegen höherer Gewalt in fünf Ländern der Fall. Unter dem Aspekt der Geschlechtergleichstellung ist dies problematisch, da familienbezogene Rechte meist von Frauen in Anspruch genommen werden.

Zusammenfassend kann festgestellt werden, dass es auf nationaler Ebene noch viel zu tun gibt, um eine ordnungsgemäße Umsetzung der Vereinbarkeitsrichtlinie zu erreichen. Besonderes Augenmerk sollte auf die Inklusivität der nationalen Maßnahmen zur Umsetzung der Richtlinie und auf Gleichstellungsaspekte im Zusammenhang mit der Nichtübertragbarkeit und der Höhe der Bezahlung bzw. Vergütung gelegt werden. Nur so kann sichergestellt werden, dass die Vereinbarkeit von Beruf und Privatleben allen Arbeitnehmern, auch atypisch Beschäftigten, zugänglich ist und dass die Pflege- und Betreuungsaufgaben gerecht zwischen Männern und Frauen verteilt werden

1 Introduction[1]

1.1 Presentation of the Work-Life Balance Directive

1.1.1 Context of the Work-Life Balance Directive

The focus of European Union (EU) legislation to address the reconciliation of work and family life of workers has varied over time. Initially, EU legislation (Directive 92/85[2]) focused on mothers (pregnant workers and workers who have recently given birth) and granted to them the right to a minimum of 14 weeks of maternity leave, which must be paid at least at the national sick pay level. Subsequently, a right to at least three months of parental leave was created in 1996 (Directive 96/34[3]) for each biological or adoptive parent, male or female, but with no obligation to compensate the leave. This right was reinforced several years later in 2010 (Directive 2010/18[4]) by increasing the minimum period to four months and by designing the extra month on a non-transferable basis (one parent could not transfer this part of the leave to the other parent). The introduction of one non-transferable month, which was intended to incentivise the take-up of the leave by fathers, was unsuccessful, as the leave remained unpaid. Directive 2010/18 also created a right to request flexible working arrangements (FWAs) for parents when returning from parental leave.

The above-mentioned EU framework explains why mothers continue to be the main takers of leave entitlements, along with cultural and economic considerations.[5] This framework does not encourage a balanced use of family-related leave between mothers and fathers and helps to perpetuate the traditional role of women as care-givers. In this sense, the work-related risks associated with care-giving continue to fall mostly on women. Providing care to young children or other dependent relatives is time-consuming and often implies a reduction of working hours, the use of some form of leave or even dropping out of the labour market for some time. Economists have shown the adverse effects work interruptions have on women, both in terms of earnings and, when absences from work are too long, also in terms of labour market participation.[6] Part-time work is also linked to lower hourly salaries.[7]

Directive 2019/1158 on work-life balance (WLB) for parents and carers,[8] adopted in June 2019 (hereinafter the WLB Directive), has been a milestone in the EU legislation about the reconciliation of work and family life. This Directive modernises some existing rights, namely parental leave and the right to request FWAs,

1 I would like to thank the members of the European network of legal experts in gender equality and non-discrimination, especially Susanne Burri, Linda Senden, Birte Böök and the 27 national experts, for their valuable input and help.

2 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 L 348, 28 November 1992, 1.

3 Council Directive 96/34/EC of 3 June 1996, on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, OJ L 145, 19 June 1996, 4.

4 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, OJ L 68, 18 March 2010, 13.

5 Economic and cultural reasons also explain why women continue to be the main takers of leave entitlements. From an economic point of view, given that in general family-related benefits do not fully replace previous income, the second earners in the family (mostly women) tend to take more leave than the first earners (typically men) in order to minimise the economic loss to the family (Thévenon O. and Solaz, A. (2013), 'Labour market effects of parental leave policies in OECD countries', *OECD Social, Employment, and Migration Working Papers* 141, p. 16). Culturally speaking, in many countries women continue to be expected to be the primary care-givers. Gender stereotyping also plays a role, such as assumptions about women being better carers than men.

6 Ruhm, C. J. (1998), 'The economic consequences of parental leave mandates: lessons from Europe', *The Quarterly Journal of Economics* 113(1), 285-317, p. 315; Akgunduz, Y. E. and Plantenga, J. (2013), 'Labour market effects of parental leave in Europe', *Cambridge Journal of Economics* 37(4), 845862, pp. 859-860; and Thévenon O. and Solaz, A. (2013), 'Labour market effects of parental leave policies in OECD countries', *OECD Social, Employment, and Migration Working Papers* 141, p. 40.

7 Bardasi, E. and GornicK, J. C. (2008), 'Working for less? Women's part-time wage penalties across countries', *Feminist Economics* 14(1), 37-72, pp. 51-52; and Matteazzi, E., Pailhé, A. and Solaz, A. (2018), 'Part-time employment, the gender wage gap and the role of wage-setting institutions: Evidence from 11 European countries', *European Journal of Industrial Relations* 24(3), 221-241, pp. 237-238.

8 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, OJ L 188, 12 July 2019, 79.

and creates new rights at European level, i.e. paternity leave and carers' leave. It establishes for the first time at EU level a right to paternity leave for fathers (10 working days paid at the national sick pay level) and a right to carers' leave (5 working days per year per worker). Parental leave is modernised. While its duration remains at four months, two of these months need to be adequately compensated and non-transferable between the parents. The right to request FWAs is also strengthened.

1.1.2 Aim and main lines of reform

The WLB Directive aims at a new distribution of the risks connected with care-giving. Its objective is to improve the situation of women in the labour market by creating better WLB measures and promoting a better sharing of caring responsibilities between women and men. This explains why its legal basis is Article 153(1)(i) of the Treaty on the Functioning of the EU (TFEU),[9] according to which, 'the Union shall support and complement the activities of the Member States' in the following field: 'equality between men and women with regard to labour market opportunities and treatment at work'. In addition, the first paragraph of Article 1 of the WLB Directive states that, 'This Directive lays down minimum requirements designed to achieve equality between men and women with regard to labour market opportunities and treatment at work, by facilitating the reconciliation of work and family life for workers who are parents, or carers'. The impetus of the Directive will surely contribute to fulfilling the prediction of O'Brien, who claims that the 'father's active participation in family life will likely be one of the most important social developments of the twenty-first century'.[10]

There are two strands of reform in the Directive.[11] The first one is the special focus on fathers. On the one hand, a specific right for fathers is created for the first time at EU level, i.e. the right to paternity leave. On the other hand, effective incentives for fathers to take parental leave are introduced, namely the combination of non-transferable and adequately paid periods of leave. This is part of the growing emphasis on fatherhood, which, according to Deven and Moss, is the most striking trend in statutory leave arrangements.[12] The two measures (a specific right and effective incentives) are expected to contribute to greater participation by fathers in childcare. In this sense, Huerta et al found evidence that fathers who took leave were more likely to be involved with their child on a regular basis than fathers who did not take leave.[13]

The second strand of reform is a life-cycle approach specifically addressed at WLB issues.[14] Unlike the previous legislative framework, which was focused on parents, a new life-cycle approach is adopted in the Directive because the caring needs of not only parents are acknowledged, but also those of other workers, i.e. carers. In other words, the need for workers to reconcile work and family may appear at any point during their working lives: not only when they have children, but also when they have a severely ill partner or a dependent parent. In concrete terms, this life-cycle approach is materialised through the new right to carers' leave and the extension to carers of the right to request FWAs.

9 In conjunction with point (b) of Article 153(2) TFEU, according to which the European Parliament and the Council 'may adopt, in the fields referred to in paragraph 1(a) to (i), by means of directives, minimum requirements for gradual implementation'.

10 O'Brien, M. (2013), 'Fitting fathers into work-family policies: international challenges in turbulent times', *International Journal of Sociology and Social Policy* 33(9/10), 542-564 p. 543.

11 De la Corte-Rodríguez, M. (2020), 'La Directiva relativa a la conciliación de la vida familiar y profesional y su repercusión en la legislación española' ('The Work-Life Balance Directive and its impact on Spanish legislation'), *Revista del Ministerio de Trabajo y Economía Social* 146, 69-96, pp. 76-77.

12 Deven, F. and Moss, P. (2002), 'Leave arrangements for parents: overview and future outlook', *Community, Work & Family* 5(3), 237-255, p. 240.

13 Huerta, M. C., Adema, W., Baxter, J. and Han, W-J. (2014), 'Father's leave and father's involvement: evidence from four OECD countries', *European Journal of Social Security* 16(4), 308-346, p. 328.

14 Directive 97/81 concerning the Framework Agreement on part-time work also adopts a life-cycle approach but it is not specifically aimed at WLB issues. According to recital 5 of the Agreement, 'the parties to this agreement attach importance to measures which would facilitate access to part-time work for men and women in order to prepare for retirement, reconcile professional and family life, and take up education and training opportunities to improve their skills and career opportunities for the mutual benefit of employers and workers and in a manner which would assist the development of enterprises'.

1.1.3 Personal and material scope

Following Article 2 and recital 17 of the WLB Directive, the personal scope of the Directive covers all workers, men and women, who have an employment contract or an employment relationship. This includes part-time workers, fixed-term contract workers or persons with a contract of employment or employment relationship with a temporary agency. Although it is for Member States to define employment contracts and employment relationships, according to the laws, collective agreements or practice in force in each Member State, the freedom of Member States to define such contracts and relationships is not unlimited, as the case law of the Court of Justice of the EU (CJEU) has to be taken into account. As explained by Caracciolo di Torella, the reference to the CJEU's case law is particularly important as it acknowledges the risk that, if Member States are left to determine the personal scope of the Directive, the latter may be interpreted restrictively which would run counter to its purpose.[15]

Generally speaking, settled case law of the Court defines a worker as a person who 'for a certain period of time performs services for and under the direction of another person in return for which he receives remuneration'.[16] The legal characterisation under national law and the form of that relationship, as well as the nature of the legal relationship between those two persons, are not decisive in that regard.[17] The CJEU has made clear that the EU definition of worker derived from its case law also applies to directives in which there is a reference to national definitions or national law and practice, which is the case for the WLB Directive. The argument used by the Court is that too restrictive a national definition of worker could jeopardise the attainment of the objectives of the directive and, therefore, undermine the effectiveness of that directive.[18] Provided that workers fulfil the criteria of the CJEU, domestic workers, on-demand workers, intermittent workers, voucher-based-workers, platform workers, trainees and apprentices could fall within the scope of the WLB Directive. In this sense, as pointed out by Chieregato, 'it seems that the new Work-Life Balance Directive acknowledges the need to ensure that non-standard workers have access to parental rights'.[19]

Moreover, with regard to the old Directive 96/34 on parental leave, which had the same personal scope of application as that of the WLB Directive, the Court clarified that Directive 96/34 also covered public officials and recalled that the principle of equal treatment for men and women is of general application and applies to employment in the public sector.[20] It appears that there is continuity between Directive 96/34 and the WLB Directive (Directive 96/34 was repealed by Directive 2010/18 and the latter has just been repealed by the WLB Directive). Consequently, it seems that the WLB Directive has to apply to all workers, regardless of whether their employer belongs to the public sector or the private sector. In other words, public servants, such as judges or teachers, cannot be excluded from the personal scope of the Directive.

Finally, it is important to recall that the WLB Directive applies to all workers, regardless of the size of the undertaking or organisation. In this sense, workers in SMEs are also included in the personal scope of the Directive, as can be clearly deducted from its Article 17 and recital 48.

The material scope of the WLB Directive is established in the second paragraph of its Article 1, which includes paternity leave (new right), parental leave (right strengthened), carers' leave (new right) and FWAs (the right to request FWAs is strengthened). In addition, the already existing right to time off

15 Caracciolo Di Torella, E. (2020), 'La directive de 2019 sur l'équilibre entre vie professionnelle et vie privée: une nouvelle étape franchie', in Lorber, P. and Santoro, G. (ed.) (2020), 'La Directive 2019/1158 du 20 juin 2019 concernant l'équilibre entre vie personnelle et vie privée des parents et des aidants' ('Directive 2019/1158 of 20 June 2019 on work-life balance for parents and carers'), *Revue de droit comparé du travail et de la sécurité sociale* 3, p. 11.
16 CJEU, Case C-216/15, *Betriebsrat der Ruhrlandklinik*, 17 November 2016, ECLI:EU:C:2010:534, paragraph 27.
17 *Betriebsrat der Ruhrlandklinik*, paragraph 27.
18 *Betriebsrat der Ruhrlandklinik*, paragraphs 30 to 36.
19 Chieregato, E. (2020), 'A Work-Life Balance for All? Assessing the inclusiveness of EU Directive 2019/1158', *International Journal of Comparative Labour Law and Industrial Relations* 36(1), 59-80, p. 73.
20 CJEU, Case C-149/10, *Chatzi*, 16 September 2010, ECLI:EU:C:2010:534, paragraphs 27 and 30.

from work on grounds of *force majeure* is maintained with no changes. A summary of the minimum requirements of each measure is presented below.

1.1.4 Paternity leave

A new EU right to at least 10 working days of paternity leave, equivalent to two calendar weeks, is created in Article 4 of the WLB Directive for fathers to be taken on the occasion of the birth of a child for the purposes of providing care. It aims to allow for the early creation of a bond between fathers and children and ultimately to encourage a more equal sharing of caring responsibilities between women and men. In this sense, paternity leave for fathers is the counterpart of maternity leave for delivering mothers. The right to paternity leave is extended to equivalent second parents where and insofar as they are recognised by national law, such as a co-mother in a lesbian relationship.

The right to paternity leave is a 'day-one right',[21] as it cannot be made subject to a period of work qualification or to a length of service qualification. Whereas a period of 'work qualification' refers to the period of time a person has been a worker (irrespective of the number of employers or the number of hours worked per week), a length of 'service qualification' refers to the length of employment with one employer (irrespective of the numbers of hours actually worked).[22] The leave has to be granted irrespective of the worker's marital or family status, as defined by national law, which means, following the explanatory memorandum of the original proposed Directive,[23] that there shall be no discrimination between married and unmarried couples and between heterosexual and homosexual couples. Finally, Member States may decide (it is up to them) whether and under which conditions to allow paternity leave to be taken in flexible ways, i.e. on a part-time basis, in alternating periods or in other flexible ways.

In accordance with Article 8, during the minimum period of paternity leave, the worker must receive a minimum payment (provided by the employer) or allowance (provided by the State) equivalent to the national sick pay level, i.e. what the worker concerned would receive in the event of a break in the worker's activities on grounds connected with the worker's state of health, subject to any ceiling laid down in national law. Unlike the right to the leave itself, Member States may make the right to the payment or allowance subject to a period of previous employment, which shall not exceed six months immediately prior to the expected date of the birth of the child. Periods of 'previous employment' should be interpreted in line with the case law relating to Article 11(4) of Directive 92/85, which also refers to periods of 'previous employment'. These periods cannot be limited solely to the employment ongoing prior to the presumed date of confinement (with the current employer). Those periods of employment must be understood as comprising the various successive posts occupied by the worker prior to that date, including for different employers and under various employment statuses.[24] In other words, a period of 'previous employment' is equivalent to a period of 'work qualification'.[25]

Finally, it is noteworthy to mention the exception of Article 20(7) of the WLB Directive, which allows Member States not to provide a payment or an allowance during paternity leave if they fulfil the following conditions: firstly, *each parent* has to be entitled to a payment or an allowance for at least six months of parental leave; secondly, the level of the payment or allowance has to be at least 65 % of the worker's net wage, which may be subject to a ceiling. This exception refers to the payment or allowance of paternity leave, not to the right to paternity leave itself.

21 Weldon-Johns, M. (2021), 'EU work-family policies revisited: Finally challenging caring roles?', *European Labour Law Journal* 12 (3), 301-321, p. 314.

22 See ETUC interpretation guide on Directive 2010/18, p. 24: https://www.etuc.org/sites/default/files/The_Revised_Parental_Leave_Framework_Agreement_EN_1.pdf.

23 Proposal for a Directive of the European Parliament and of the Council on work-life balance for parents and workers and repealing Council Directive 2010/18/UE, Brussels, 26.04.2017, COM(2017) 253 final.

24 CJEU, Case C-65/14, *Roselle*, 21 May 2015, ECLI:EU:C:2015:339, paragraph 41.

25 The period of time a person has been a worker (irrespective of the number of employers or the number of hours worked per week).

1.1.5 Parental leave

The EU right to parental leave was created in 1996 (with Directive 96/34) and consisted of at least three months of unpaid leave for each biological or adoptive parent, which could be wholly transferred between parents. This right was strengthened in 2010 (with Directive 2010/18) when the minimum period of leave was increased from three to four months, one of which had to be designed on a non-transferable basis.[26]

The EU right to parental leave is reinforced in the WLB Directive, mainly with the increase of the minimum non-transferable period between parents from one to two months and the introduction of a requirement to provide for a payment or an allowance during the two non-transferable months. These changes aim to encourage the take-up of parental leave by fathers, as 'the evidence shows a reasonably high take-up of parental leave only in countries where there is a combination of fathers' quota and high level of benefit. There is no evidence that any other combination would lead to high take-up by fathers'.[27] Therefore, the main novelty of the WLB is the creation of two paid non-transferable months of parental leave for each parent. In contrast, the total duration of parental leave remains the same as in Directive 2010/18 (4 months for each parent). Other novelties of the WLB Directive are explicitly mentioned below. It should be noted that, although parental leave is expressed in months at EU level, in some countries this leave is expressed in weeks. In this sense, four months generally correspond to 18 weeks and two months to nine weeks.

Each biological or adoptive parent, male or female, is entitled to a minimum of four calendar months of leave from work, two of which cannot be transferred between the parents, in order to take care of their child until a given age (up to 8) to be determined by Member States, after the initial period of maternity and paternity leave (or adoption leave if available at national level in the case of adoptive parents). Although eight years old seems to be the maximum age of the child by which parents must take parental leave, it should be regarded as a mere recommendation. In line with the minimum standards nature of the WLB Directive, Member States are free to set a higher age, such as 12 or 18 years old. In contrast, as pointed out by Weldon-Johns when referring to Directive 96/34 on parental leave, Member States may also 'set an earlier age if they wish, meaning that this could be applied much more narrowly by Member States implementing a very short utilisation period'.[28] However, there is now a caveat, which did not exist in the 1996 and 2010 Directives on parental leave. Pursuant to Article 5(1) and recital 24 of the WLB Directive, the age of the child should be set in such a way as to enable both parents to effectively take up their full entitlement to parental leave under the Directive. The aim of this new obligation is to avoid the age limit being set so low that *de facto* the leave would be available to women only who would benefit from a potentially long maternity leave first, then continue with parental leave. This could mean that by the time a mother had exhausted all available kinds of leave, there would be no 'space' anymore for a father to take parental leave.

Unlike paternity leave, the right to parental leave (the leave itself) can be made subject to a period of work qualification (the period of time a person has been a worker, irrespective of the number of employers) or to a length of service qualification (the length of employment with one employer). However, none of these periods shall exceed one year. Furthermore, it is clarified that the sum of successive fixed-term contracts with the same employer shall be taken into account for the purpose of calculating the qualifying period.

Other aspects regulated by the Directive are the period of notice, the possibility of postponing parental leave, the right to a flexible take-up, and the assessment of special needs.

26 The implementation of Directive 2010/18 in EU Member States and other European countries is analysed in Palma Ramalho, M. do R., Foubert, P. and Burri, S. (2015), *The implementation of parental leave Directive 2010/18 in 33 European countries,* European Commission. This report is available at: https://www.equalitylaw.eu/downloads/2723-parental-leave-en.

27 Karu, M., and Tremblay, D. (2018), 'Fathers on parental leave: an analysis of rights and take-up in 29 countries', *Community, Work & Family* 21(3), 344-362, p. 356.

28 Weldon-Johns, M. (2013), 'EU work-family policies: challenging parental roles or reinforcing gendered stereotypes?', *European Law Journal* 19(5), 662-681, p. 669.

Firstly, in accordance with Article 5(3), Member States shall establish a reasonable period of notice that is to be given by workers to employers where they exercise their right to parental leave. In doing so, Member States shall take into account the needs of both the employers and the workers. Therefore, the establishment of a period of notice is compulsory for Member States. Moreover, Member States shall ensure that the worker's request for parental leave specifies the intended start and end of the period of leave.

Secondly, the right to parental leave is an absolute right of the worker. This means that the worker's request for parental leave cannot be refused by the employer. In other words, workers will always be able to exercise their right to parental leave. Yet Member States may decide (not an obligation) that the granting of parental leave can be postponed by the employer if they establish the circumstances in which this is possible. In concrete terms, Member States may establish the circumstances in which an employer, following consultation in accordance with national law, collective agreements or practice, is allowed to postpone the granting of parental leave for a reasonable period of time on the grounds that the taking of parental leave at the time requested would seriously disrupt the good functioning of the employer (Article 5(5)). If those circumstances are established, when considering requests for full-time parental leave, employers shall, prior to any postponement, offer, to the extent possible, flexible ways of taking parental leave (Article 5(7)). If parental leave is finally postponed, employers shall provide reasons for such a postponement in writing (Article 5(5)).

Thirdly, the WLB Directive entitles workers to request a flexible take-up of parental leave. This right is a novelty of the WLB Directive. Member States shall take the necessary measures to ensure that workers have the right to request that they take parental leave in flexible ways (Article 5(6)). Recital 23 clarifies that workers should be able to request that parental leave be granted on a full-time or a part-time basis, in alternating periods, such as for a number of consecutive weeks of leave separated by periods of work, or in other flexible ways. Consequently, workers have a right to request that parental leave be granted on a part-time basis (for instance, eight months at 50 %) and in different blocks (for instance, two months at 100 % this year and two months at 100 % next year). Workers could also ask to take up the leave in other flexible ways (if foreseen at national level). At least the possibility of part-time and different blocks should be offered to workers. The employer shall consider and respond to flexible take-up requests, taking into account the needs of both the employer and the worker, and shall provide reasons for any refusal to accede to such a request in writing within a reasonable period after the request (Article 5(6)). Recital 23 further explains that the employer should be able to accept or refuse such a request for parental leave in ways other than on a full-time basis. All things considered, workers are always entitled to take parental leave in one go and on a full-time basis (4 months at 100 %). This way of taking the leave cannot be refused by the employer, only potentially postponed as previously commented.

The possibility of taking parental leave on a part-time basis and in different blocks is independent of the right to request FWAs, as the latter is an autonomous right (see below). This means that a part-time take-up of parental leave (e.g. leave at 50 % and work at 50 %) could be combined with a flexible schedule or a remote working arrangement during the 50 % of working time. Likewise, if parental leave is interrupted by a period of work, it should be possible for the worker to request a reduction of working hours during this period (also a flexible schedule or teleworking).

Fourthly, following Article 5(8), Member States shall assess the need for the conditions of access to and the detailed arrangements for the application of parental leave to be adapted to the specific needs of parents in particularly disadvantaged situations, namely adoptive parents, parents with a disability and parents with children with a disability or a long-term illness. There is an obligation of assessment for Member States, the fulfilment of which will have to be proved by national governments and evaluated by the European Commission.

Leaving aside the leave itself, pursuant to Article 8(3) and recital 31, during the two non-transferable months of parental leave for each parent, an adequate payment or allowance has to be provided, the level of which is to be defined at national level. Article 8(3) states that the payment or allowance 'shall be set in such a way as to facilitate the take-up of parental leave by both parents'. In addition, recital 31

offers some guidance as to what is considered 'adequate': when setting the level of the payment or allowance, 'Member States should take into account that the take-up of parental leave often results in a loss of income for the family and that first earners in a family are able to make use of their right to parental leave only if it is sufficiently well remunerated, with a view to allowing for a decent living standard'. According to Oliveira, De la Corte-Rodríguez and Lütz, 'the litmus test to define what is payment at an "adequate level", as defined by the Directive, is whether it is sufficient for enabling both parents (also fathers, who tend to be higher earners than mothers) to take parental leave'.[29]

1.1.6 Carers' leave

Carers' leave is a new right at EU level and is defined in Article 3(1)(c) as 'leave from work for carers in order to provide personal care or support to a relative, or to a person who lives in the same household as the worker, and 'who is in need of significant care or support for a serious medical reason, as defined by each Member State'. In turn, carers are defined in Article 3(1)(d) as a worker providing personal care or support to a relative, or to a person who lives in the same household as the worker, and who is in need of significant care or support for a serious medical reason, as defined by each Member State. As Weldon-Johns warns, 'these requirements may be interpreted narrowly and exclude a wide range of carers. For instance, eldercare may not necessarily fall within this definition and it would not extend to the regular care of grandchildren, thus potentially limiting the categories of care situations included here'.[30]

Taking into account the definitions of carers' leave and carers, it could be said that there are two kinds of beneficiaries of this leave: relatives, regardless of whether they live in the same household as the worker or not, and persons who live in the same household as the worker, regardless of whether they are relatives or not. Member States need to provide carers' leave for the two categories of beneficiaries. Regarding the first category, a relative is defined in Article 3(1)(e) as the worker's son, daughter, mother, father, spouse or, where such partnerships are recognised by national law, partner in a civil partnership. This is, of course, a minimum standard, and Member States may include other relatives (such as grandparents or siblings).

In principle, the duration of carers' leave is at least five working days per year per worker ('by default' system), pursuant to Article 6(1). However, there are three alternative ways of designing the leave at national level (Article 6(2)). In order to take account of divergent national systems, Member States should be able to allocate carers' leave on the basis of a period other than a year, by reference to the beneficiary (person in need of care or support), or per case. Examples of the three alternative systems would be: for the first system (on the basis of a period other than a year) to grant 25 working days every five years; for the second system (per person in need of care or support) to grant two working days per relative in need of care or support; and for the third alternative system (per case) to grant two working days per episode of need or support. Even if this is not explicitly mentioned in the WLB Directive, in any event, these alternative systems should be at least as generous as the 'by default' system. For example, in the case of two working days per episode of need or support it should be possible for workers to take the leave at least three times per year.[31]

The WLB Directive does not mention whether Member States can make the right to carers' leave subject to a period of work qualification or to a length of service qualification. However, it could be understood that such qualification periods cannot be required, for several reasons. Firstly, unlike parental leave, where the Directive explicitly allows a period of work qualification or of service qualification, the Directive remains silent for carers' leave. Secondly, the right to carers' leave is relatively short, like paternity leave, where the Directive does not allow a requirement of a period of work qualification or of service

29 Oliveira, A., De la Corte-Rodríguez, M., and Lütz, F. (2020), 'The new Directive on Work-Life Balance: towards a new paradigm of family care and equality?' *European Law Review* 45(3), 295-323, p. 305.

30 Weldon-Johns, M. (2021), 'EU work-family policies revisited: Finally challenging caring roles?', *European Labour Law Journal* 12 (3), 301-321, p. 318.

31 This would be make a total of 6 working days per year.

qualification. What the WLB Directive does regulate is the use of the right to carers' leave, which may be subject to appropriate substantiation, in accordance with national law or practice (Article 6(1)). This is further explained in recital 27, which explains that Member States can require prior medical certification of the need for significant care or support for a serious medical reason.

Finally, the WLB Directive does not require a payment or an allowance during carers' leave. However, Member States are encouraged to introduce such a payment or an allowance in order to guarantee the effective take-up of the right by carers, in particular by men (recital 32).

Legal scholars have welcomed the right to carers' leave, which is a novelty at EU level and a reflection of a life-cycle approach which moves away from the former approach focused on the caring needs of parents. However, they also underline the deficiencies of the newly created right, given its short duration, the lack of minimum requirements about a payment or an allowance during the leave and the narrowly constructed scope of situations covered and beneficiaries.[32]

1.1.7 The 'passerelle' clause

According to Article 20(6) and recital 49 of the WLB Directive, in order to comply with the new provisions of the WLB Directive on paternity, parental and carers' leave and the compensation during these types of leave, Member States may take into account any family-related leave and payment that is available at national level, including maternity leave. The idea is not to impose an additional burden on countries with a system of family-related leave that, taken as a whole, goes beyond what EU law requires in the WLB Directive and Directive 92/85. For example, a country with a maternity leave of 30 weeks, non-transferable and adequately remunerated (16 weeks more than the European minimum of 14 weeks of maternity leave) does not have to create two months of non-transferable and paid parental leave for mothers, as they can be considered as already included within the extra 16 weeks. In this way, that country is allowed to make a 'transfer' between maternity leave and parental leave.

There are two conditions for the application of the 'passerelle' clause: firstly, all the minimum requirements of the WLB Directive and Directive 92/85 have to be fulfilled; secondly, the general level of protection provided to workers in the areas covered by them cannot be reduced. Concerning the first condition, and following with the same example, in order to count as non-transferable and paid parental leave for mothers, the extra period of maternity leave should fulfil all the minimum requirements of the WLB Directive for parental leave; for instance, the right to request a flexible take-up should be provided. Regarding the second condition, it is just a reminder of the non-regression clause of Article 16(2).[33]

1.1.8 Force majeure *leave*

The right to time off from work on grounds of *force majeure* (hereinafter *force majeure* leave) is not new. In fact, the WLB Directive replicates the wording of Directive 2010/18 on parental leave[34] and its predecessor Directive 96/34.

32 Caracciolo di Torella, E. (2020), 'La directive de 2019 sur l'équilibre entre vie professionnelle et vie privée: une nouvelle étape franchie', in Lorber, P. and Santoro, G. (ed.) (2020), 'La Directive 2019/1158 du 20 juin 2019 concernant l'équilibre entre vie personnelle et vie privée des parents et des aidants' ('Directive 2019/1158 of 20 June 2019 on work-life balance for parents and carers'), *Revue de droit comparé du travail et de la sécurité sociale* 3, pp. 316-18.

33 'The implementation of this Directive shall not constitute grounds for justifying a reduction in the general level of protection of workers in the areas covered by this Directive. The prohibition of such a reduction in the level of protection shall be without prejudice to the right of Member States and the social partners to lay down, in light of changing circumstances, legislative, regulatory or contractual arrangements other than those in force on 1 August 2019, provided that the minimum requirements laid down in this Directive are complied with'.

34 See a summary of the implementation of the clause on *force majeure* leave of Directive 2010/18 in Member States in 2014 in Palma Ramalho, M. do R., Foubert, P. and Burri, S. (2015), *The implementation of parental leave Directive 2010/18 in 33 European countries*, European Commission. This report is available at: https://www.equalitylaw.eu/downloads/2723-parental-leave-en, pp. 21-22.

According to Article 7 of the WLB Directive, Member States shall ensure that each worker has the right to *force majeure* leave for urgent family reasons in the case of illness or accident making the immediate attendance of the worker indispensable.

There is no EU minimum duration in the Directive. Moreover, the Directive makes clear that Member States may limit the right of each worker to *force majeure* leave to a certain amount of time each year (e.g. four working days per year) or per case (e.g. two working days per episode of *force majeure*), or both (e.g. two working days per episode of *force majeure* with a maximum of four working days per year).

As with carers' leave, the WLB Directive does not specify whether Member States can make the right to *force majeure* leave subject to a period of work qualification or to a length of service qualification. However, for reasons which are, mutatis mutandis, identical to those mentioned previously about carers' leave, it could be understood that such qualification periods cannot be required.

Finally, the WLB Directive does not require a payment or an allowance during force majeure leave.

1.1.9 Flexible working arrangements

Although not specifically focused on WLB matters, there is a rather weak right to request a transfer from full-time to part-time work, which is available for all workers under the Framework Agreement on part-time work annexed to Directive 97/81.[35] Its clause 5(3)(a) establishes that 'as far as possible, employers should give consideration to requests by workers to transfer from full-time to part-time work that becomes available in the establishment'.

Leaving Directive 97/81 aside, the right to request FWAs in Directive 2010/18 is strongly reinforced, going from a limited right (only available for parents when returning from parental leave) to a fully-fledged right (an autonomous right for parents and carers). However, unlike paternity, parental and carers' leave, which are absolute rights or rights to obtain (the employer cannot refuse the request from the worker), the right here is only a relative one, i.e. the right to make a request to the employer (the employer can refuse the request). As explained by Bell and Waddington, 'the duty found in the Work-life Balance Directive can be regarded as a procedural duty, since it involves a duty to consider a request seriously and to grant the request in the absence of a good reason for refusal, but it is not a duty to grant the request'.[36] The fact that the right is only relative is one of the weaknesses of this right, according to legal scholars.[37]

Under the WLB Directive, the right to request FWAs is extended to include parents with children up to a certain age which shall be at least eight years old, regardless of whether or not they have taken parental leave, and all carers, as defined in Article 3(1)(d).[38] Member States shall ensure that such workers have the right to request FWAs for caring purposes (Article 9(1)). In this case, unlike in the case of parental leave, eight years old is a true minimum standard. Of course, Member States can always go beyond and set a higher age, such as 12 or 18 years old. Concerning the material scope of this right, Member States should ensure that the three kinds of FWA cited in the definition of Article 3(1)(f) (the use of remote working arrangements, flexible working schedules and reduced working hours) are available to workers.

35 Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC, OJ L 014, 20 January 1998, 9.

36 Bell, M. and Waddington, L. (2021), 'Similar, yet different: the Work-Life Balance Directive and the expanding frontiers of EU non-discrimination law', *Common Market Law Review* 58, 1401-1432, p. 1421.

37 Caracciolo di Torella, E. (2020), 'La directive de 2019 sur l'équilibre entre vie professionnelle et vie privée: une nouvelle étape franchie', in Lorber, P. and Santoro, G. (ed.) (2020), 'La Directive 2019/1158 du 20 juin 2019 concernant l'équilibre entre vie personnelle et vie privée des parents et des aidants' ('Directive 2019/1158 of 20 June 2019 on work-life balance for parents and carers'), *Revue de droit comparé du travail et de la sécurité sociale* 3, p. 317.

38 '"Carer" means a worker providing personal care or support to a relative, or to a person who lives in the same household as the worker, and who is in need of significant care or support for a serious medical reason, as defined by each Member State.'

The use of the word 'including' appears to oblige Member States to include at least the three types of FWAs among the possibilities offered at national level to adjust working patterns.[39]

Despite being a relative right, there are some guarantees for this right to be balanced between the interests of the worker and the employer (Article 9(2)). Employers shall consider and respond to requests for FWAs within a reasonable period of time, taking into account the needs of both the employer and the worker. According to recital 36, when considering requests for FWAs, employers should be able to take into account, inter alia, the duration of the FWA requested and the employers' resources and operational capacity to offer such arrangements. For instance, an employer may be able to grant a part-time arrangement for some months but not for the full year (due to a particular busy period of the year). Another example could be an employer who may not be able to allow teleworking due to the nature of the work. If the request for FWAs is finally refused or postponed, employers shall provide reasons for the refusal or for the postponement of such arrangements.

The duration of FWAs may be subject to a reasonable limitation (Article 9(1) and recital 35). This is for Member States to decide (a possibility). Article 9(3) adds that when FWAs are limited in duration, the worker shall have the right to return to the original working pattern at the end of the agreed period. Moreover, the worker shall also have the right to request to return to the original working pattern before the end of the agreed period where justified on the basis of a change of circumstances (e.g. an elderly relative who required care has passed away). The employer shall consider and respond to a request for an early return to the original working pattern, taking into account the needs of both the employer and the worker.

Like parental leave, the right to request FWAs can be made subject to a period of work qualification or to a length of service qualification, according to Article 9(4). However, none of these periods shall exceed six months (instead of one year for parental leave). Again, it is clarified that the sum of successive fixed-term contracts with the same employer shall be taken into account for the purpose of calculating the qualifying period.

1.1.10 Legal protection

Workers who request or take family leave and FWAs are legally protected through the maintenance of the job and previous employment rights and the protection against discrimination and dismissal. Member States shall ensure that rights acquired or in the process of being acquired by workers on the date on which a period of leave starts are maintained until the end of the leave and that workers are entitled to return to their jobs at the end of the leave (Article 10). They shall also prohibit less favourable treatment (Article 11) and the dismissal of workers (Article 12) on the ground that they have applied for, or have taken, a period of leave or an FWA. Further legal protection is granted by means of penalties (Article 13), protection against retaliation (Article 14) and equality bodies (Article 15).

Article 10 of the WLB Directive builds on the existing rights in Directive 2010/18 on parental leave and equally foresees the rights to maintain the rights acquired or in the process of being acquired and to return to the previous job, but extends it to paternity leave and carers' leave, and also to the *force majeure* leave but only for the maintenance of rights (Article 10(1) and (2)). The CJEU held that *rights acquired or in the process of being acquired* cover all the rights and benefits, whether in cash or in kind, derived directly or indirectly from the employment relationship (as it stands on the date that the leave starts).[40] On the basis of CJEU case law, the maintenance of rights is intended to avoid the loss of entitlements derived from an employment relationship, acquired or being acquired, which the employee already has when they start

39 '"Flexible working arrangements" means the possibility for workers to adjust their working patterns, including through the use of remote working arrangements, flexible working schedules, or reduced working hours.'

40 CJEU, Case C-116/08, *Meerts*, 22 October 2009, ECLI:EU:C:2009:645, paragraph 43; and CJEU, Case C174/16, *H.*, 7 September 2017, ECLI:EU:C:2017:637, paragraph 51.

parental leave, and to ensure that, at the end of that leave, with regard to those entitlements, they will find themselves in the same situation as that in which they were before that leave. Those entitlements derived from an employment relationship are those which the employee had on the date when the leave commenced.[41] An example could be the annual leave entitlements accrued before parental leave.

As a novelty with respect to Directive 2010/18, the WLB Directive states that, at the end of paternity leave, parental leave and carers' leave, workers shall benefit from any improvement in working conditions to which they would have been entitled had they not taken the leave (Article 10(2)). *Working conditions* relate more to the conditions under which workers work and include elements such as working hours, work schedules, conditions in the workplace or remuneration. This provision has its origin in the Recast Directive 2006/54.[42] This has been interpreted in case law. For example, a course intended to prepare a woman for an examination which, should she be successful in it, would allow her access to a higher grade must be regarded as forming a part of her working conditions.[43]

Moreover, in the WLB Directive it is made clear that the employment relationship between the worker and the employer is maintained during the period of leave for all kinds of leave, including *force majeure* leave (Article 10(3) and recital 39) and, as a result, the beneficiary of such leave remains, during that period, a worker for the purposes of Union law (this is a codification of the case law of the CJEU). The CJEU pointed out that this implies that during parental leave the working relationship between the worker and their employer continues. As a result, the beneficiary of such leave remains, during that period, a worker for the purposes of Community law.[44] During the period of leave, it is for Member States to define the status of the employment contract or employment relationship, including as regards entitlements to social security. For instance, they will decide whether workers keep on accruing right to pensions during the leave.

Article 11 is a standard provision prohibiting discrimination based on the fact that a worker applied for or made use of any leave, including *force majeure* leave, or on the fact that 'they have exercised the rights provided for in Article 9' (FWAs). Directive 2010/18 on parental leave already protected workers against less favourable treatment on the grounds of an application for, or the taking of, parental leave. This protection is maintained and extended to all kinds of leave in the WLB Directive, including *force majeure* leave and FWAs. The *exercise of the rights to FWA* seems to cover not only the request for FWAs, but also the actual use of them.

Concerning the protection against dismissal in Article 12, Directive 2010/18 on parental leave already provided protection against dismissal on the grounds of an application for, or the taking of, parental leave. Article 12 of the WLB Directive maintains the existing protection of workers[45] and extends it to paternity leave, carers' leave and the right to request FWAs (Article 12(1)). If, in spite of this protection, a worker considers that he or she has been dismissed on the grounds of applying for or enjoying parental leave, paternity leave and carers' leave or of exercising the right to request FWAs, they may request the employer to provide duly substantiated reasons for their dismissal. For the leave mentioned only (not for the right to request FWAs), the employer shall provide reasons for the dismissal in writing (Article 12(2)). Also for the leave mentioned only, when workers establish, before a court or other competent authority, facts capable of giving rise to a presumption that they have been dismissed on the grounds of an application for, or the taking of leave, it shall be for the employer to prove that the dismissal was based on other grounds (Article 12(3) to (6)).

41 CJEU, Case C-537/07, *Gómez-Limón Sánchez-Camacho*, 16 July 2009, ECLI:EU:C:2009:462, paragraph 39.
42 Articles 15 and 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 L 204, 26 July 2006, 23.
43 CJEU, Case C-595/12, *Napoli*, 6 March 2014, ECLI:EU:C:2014:128, paragraph 28.
44 CJEU, Case C-116/06, *Kiiski*, 20 September 2007, ECLI:EU:C:2007:536, paragraph 32.
45 It is clarified that the protection against dismissal includes all preparations for the dismissal of workers.

Article 13 requires Member States to provide for effective, proportionate and dissuasive penalties for breaches of national provisions adopted pursuant to the WLB Directive, or the relevant provisions already in force concerning the rights which are within its scope, and to make sure that they are applied. Such penalties can include administrative and financial penalties, such as fines or the payment of compensation, as well as other types of penalties (recital 43).

The protection against adverse treatment or consequences is regulated in Article 14. The idea of this provision is for Member States to provide workers complaining about breaches of national provisions adopted pursuant to the WLB Directive with adequate protection against any adverse treatment or consequences by the employer, without which the effective implementation of the principle of equal treatment would be undermined. Without this protection it is possible that victims would be deterred from exercising their rights on account of the risk of retaliation. Such protection is particularly relevant as regards workers who are employees' representatives in the exercise of their functions.

Finally, national equality bodies should be competent in regard to issues relating to discrimination that fall within the scope of the WLB Directive, including the task of providing independent assistance to victims of discrimination in pursuing their complaints (Article 15 and recital 45).

1.2 Objective of this thematic report

The WLB Directive should have been transposed in Member States by 2 August 2022, except for the payment or allowance for the last two weeks of parental leave, for which the implementation period was extended until 2 August 2024. The main objective of this report is to gain insight into the most important aspects of the implementation of the WLB Directive in the EU Member States. Special consideration will be given to some sensitive aspects, such as the inclusiveness of the national measures implementing the Directive (i.e. which workers are covered and the eligibility conditions for each measure and the compensation that may come with it) and the gender equality dimensions related to the possibility of sharing or transferring rights between parents or carers (which goes against the aim for better sharing of caring responsibilities between men and women) and to the payment or allowance for the different kinds of leave (as an adequate compensation encourages men to take leave).

1.3 Scope of this thematic report

The personal scope of the report is limited to workers, thereby excluding self-employed workers, as only workers fall under the personal scope of the WLB Directive. Moreover, as indicated in its Article 18, the future Commission report on the implementation of the WLB Directive will be accompanied by a specific study dedicated to the rights to family-related leave that are granted to self-employed persons.

The material scope only covers the measures included in the WLB Directive (paternity leave, parental leave, carers' leave, *force majeure* leave and FWAs), therefore excluding other family-related measures. In this respect, the future Commission report on the implementation of the WLB Directive will also be accompanied by a study about the interaction between the different types of leave provided for in this Directive as well as other types of family-related leave, such as adoption leave. However, as explained in the methodology (below), other child-related leave not included in the WLB Directive, such as maternity leave, could also be taken into consideration, especially for the purposes of applying the so-called 'passerelle' clause.

Thirdly, the geographical scope covers the current 27 EU Member States. Finally, with regard to the temporal scope, the cut-off date is 31 August 2022.

1.4 Methodology

This report relies mainly on data gathered from a questionnaire (see Annex I) that was sent out to the gender equality experts of the European network of legal experts in gender equality and non-discrimination (EELN) in the 27 Member States. In addition, other sources were consulted, such as the 2021 country reports of the EELN, the 2021 review of the International Network on Leave Policies and Research, the EU's Mutual Information System on Social Protection (MISSOC) database, the relevant European Commission reports and academic literature[46] and, when needed, the primary sources of law and other official documents. When monetary sums are expressed, they are gross amounts unless otherwise indicated.

A broad understanding of the different kinds of child-related leave at national level and how they fit into the WLB Directive is necessary, as the terminology used at EU level (maternity leave, paternity leave and parental leave) and that used at national level is not always the same. Furthermore, Member States may have a different typology of leave. As commented by Moss and Deven, there is a 'growing tendency to blur the differences between the three main types of leave: maternity, paternity and parental'.[47] In the same vein, Koslowski et al explain that at the present moment the distinction between maternity leave, paternity leave and parental leave 'is beginning to blur in some countries, leading to the emergence of a single, generic parental leave entitlement'.[48]

An overview of the national systems of child-related leave becomes even more needed in the light of the so-called 'passerelle' clause (Article 20(6) of the Directive), which allows Member States to take any national family-related leave and compensation exceeding the EU minimum standards into account in order to comply with the provisions of the WLB Directive on paternity leave and parental leave.

The difference between carers' leave and *force majeure* leave is also often blurred at national level. Thus, attention will be paid to whether the two kinds of leave are clearly distinguished at national level and, where this is not the case, to the degree in which they overlap.

46 Among this literature, the following references can be used as background information about WLB in EU countries: Koslowski, A., Blum, S., Dobrotić, I., Kaufman, G. and Moss, P. (eds.) (2021), *17th International Review of Leave Policies and Related Research 2021*, International Network of Leave Policies and Research. This report is available at: https://www.leavenetwork.org/fileadmin/user_upload/k_leavenetwork/annual_reviews/2021/002_Koslowski_et_al_Leave_Review_2021_full.pdf; Lorber, P. and Santoro, G. (ed.) (2020), 'La Directive 2019/1158 du 20 juin 2019 concernant l'équilibre entre vie personnelle et vie privée des parents et des aidants' ('Directive 2019/1158 of 20 June 2019 on work-life balance for parents and carers'), *Revue de droit comparé du travail et de la sécurité sociale* 3; Oliveira, A., De la Corte-Rodríguez, M., and Lütz, F. (2020), 'The new Directive on Work-Life Balance: towards a new paradigm of family care and equality?' *European Law Review* 45(3), 295-323; De la Corte-Rodríguez, M. (2019), *EU law on maternity and other child-related leaves: Impact on gender equality'*, Wolters Kluwer, Alphen aan den Rijn; Karu, M., and Tremblay, D. (2018), 'Fathers on parental leave: an analysis of rights and take-up in 29 countries', *Community, Work & Family* 21(3), 344-362; Masselot, A. (2018), *Family leave: enforcement of the protection against dismissal and unfavourable treatment*, European Commission. This report is available at: https://www.equalitylaw.eu/downloads/4808-family-leave-enforcement-of-the-protection-against-dismissal-and-unfavourable-treatment-pdf-962-kb; McColgan, A. (2015), *Measures to address the challenges of work-life balance in the EU Member States, Iceland, Liechtenstein and Norway*, European Commission. This report is available at: https://www.equalitylaw.eu/downloads/3631-reconciliation; Palma Ramalho, M. do R., Foubert, P. and Burri, S. (2015), *The implementation of parental leave Directive 2010/18 in 33 European countries*, European Commission. This report is available at: https://www.equalitylaw.eu/downloads/2723-parental-leave-en; Robila, M. (ed.) (2014), *Handbook of family policies across the globe*, Springer Science+Business Media, New York; Ray, R., Gornick, J. C. and Schmitt, J. (2010), 'Who cares? Assessing generosity and gender equality in parental leave policy designs in 21 countries', *Journal of European Social Policy* 20(3), 196-216; and Kamerman, S. B. and Moss, P. (eds.) (2009), *The politics of parental leave policies: children, parenting, gender and the labour market*, Policy Press, Bristol.

47 Moss, P. and Deven, F. (2015), 'Leave policies in challenging times: reviewing the decade 2004-2014', *Community, Work and Family* 18(2) 137-144, p. 139.

48 Koslowski, A., Blum, S., Dobrotić, I., Kaufman, G. and Moss, P. (eds.) (2021), *17th International Review of Leave Policies and Related Research 2021*, International Network of Leave Policies and Research. This report is available at: https://www.leavenetwork.org/fileadmin/user_upload/k_leavenetwork/annual_reviews/2021/002_Koslowski_et_al_Leave_Review_2021_full.pdf, p. 3.

2 General implementation issues

The WLB Directive should have been transposed in Member States by 2 August 2022, except for the payment or allowance for the last two weeks of parental leave, for which the implementation period was extended until 2 August 2024. Although all EU countries needed some implementing measures to meet the requirements of the Directive, by the cut-off date for this thematic report (31 August 2022) only 15 countries had adopted any new legislation in order to transpose the Directive or some parts of it (BG, CZ, DK, EE, EL, FI, HR, HU, IT, LT, LV, MT, NL, RO and SE), while the other 12 had adopted no new legislation at all in this respect (AT, BE, CY, DE, ES, FR, IE, LU, PL, PT, SI and SK). This means that almost half of EU countries are behind with the implementation of the WLB Directive, despite the relatively long transposition period of three years.

Furthermore, if national rules in force by 31 August 2022 (the cut-off date for this thematic report) are considered, the transposition of the WLB Directive is generally satisfactory in just one Member State (DK), leaving 26 countries with important implementation gaps. However, even in the case of DK, there is a problem with the way new legislation has entered into force: the two Acts transposing the Directive[49] only apply to children born on or after 2 August 2022, which goes against the CJEU's case law in *Commission v. Luxembourg*,[50] in which the Court explained, referring to Directive 96/34 on parental leave, that the wording 'on the grounds of the birth or adoption of a child' reflects only the fact that the granting of parental leave is subject to the condition that a child has been born or adopted, and that this does not imply that the birth or adoption of the child must have occurred after Directive 96/34 has come into force in the Member State concerned.[51] Put another way, DK should grant the new rights to parents, irrespective of whether children are born as of 2 August 2022 or not.

If we take into account the main problematic areas in the 26 countries with an unsatisfactory transposition, it is possible to observe the total number of countries with important gaps in the different areas of the Directive:

- Parental leave or allowance: 20 countries.
- FWAs: 19 countries.
- Legal protection: 17 countries.
- Carers' leave: 12 countries.
- *Force majeure* leave: seven countries.
- Personal scope: six countries.
- Paternity leave or allowance: four countries.

The data shows that the main problems occur in relation to parental leave or allowance, FWAs and legal protection. There are fewer gaps in the case of paternity leave or allowance, *force majeure* leave and the personal scope. Carers' leave can be found somewhere in an intermediate position.

Finally, with regard to the possibility of delaying the obligation to provide for a payment or an allowance for the last two weeks of parental leave, most Member States (all but three) do already provide at least two months of paid parental leave per parent, thus not making use of such possibility. The three countries that do not provide a parental allowance for two months per parent are CY, ES and IE: in CY there is no compensation whatsoever during the 18 weeks of parental leave per parent; in ES there are seven paid

49 The Amendment Act no 343 entered into force on 1 July 2022 but only applies to children born on or after 2 August 2022. The Amendment Act no 879 is applicable to children born on or after 2 August 2022.

50 CJEU, Case C-519/03, *Commission v. Luxembourg*, 14 April 2005, ECLI:EU:C:2005:234, paragraph 47.

51 Luxembourg limited the granting of the right to parental leave to parents of children born after 31 December 1998, or in respect of whom adoption proceedings were initiated after that date. The Court concluded that by doing so Luxembourg had failed to fulfil its obligations under Directive 96/34.

weeks missing, but only for biological mothers;[52] in IE there are two paid weeks missing for each biological and adoptive parent.[53] It should be noted that this analysis refers only to whether a payment or allowance is paid during at least two months per parent and not to whether compensation is provided during the two non-transferable months of parental leave or the level of compensation is high enough. In this way, it is possible to get an idea of the number of issues connected with the period of compensation, which is rather low (only three countries affected). The problems related to non-transferability or the level of compensation is reflected in the 20 countries above-mentioned (with gaps in parental leave or allowance).

Table 1 below provides a summary of the implementation of the WLB Directive (the shortcomings in each Member State are shown in grey).

TABLE 1: SUMMARY TABLE FOR IMPLEMENTATION

EU country	New legislation adopted	Satisfactory transposition	Main problematic areas	Payment or allowance for the last two weeks of parental leave
AT	No	No	- Paternity allowance - FWAs - Legal protection	Yes
BE	No	No	- Personal scope - Parental allowance - Carers' leave - FWAs - Legal protection	Yes
BG	Yes	No	- Personal scope - Parental allowance - Legal protection	Yes
CY	No	No	- Parental allowance - Carers' leave - FWAs - Legal protection	No
CZ	Yes	No	- Parental leave and allowance - Carers' leave - FWAs - Legal protection	Yes
DE	No	No	- Personal scope - Paternity leave and allowance - Carers' leave - FWAs - Legal protection	Yes
DK	Yes	Yes	Not applicable	Yes
EE	Yes	No	- Parental leave and allowance - Carers' leave	Yes
EL	Yes	No	- Parental allowance	Yes
ES	No	No	- Parental allowance - FWAs - Legal protection	No
FI	Yes	No	- Carers' leave - FWAs	Yes

52 ES, via the 'passerelle' clause of Article 20(6) of the WLB Directive, uses the 16 weeks of paid 'birth leave' and 'adoption leave' granted to each biological and adoptive parent on a non-transferable basis to comply with the EU provisions on parental leave. These 16 weeks are enough for a biological father (longer than the two weeks of paternity leave and the two months of paid parental leave for the biological father: roughly 11 weeks) and for an adoptive parent (longer than the two months of paid parental leave for each adoptive parent: nine weeks approx.), but not sufficient for biological mothers (shorter than 14 weeks of maternity leave plus the two months of paid parental leave for the biological mother: around 23 weeks), lacking seven paid weeks (23 minus 16).

53 In IE, only the seven weeks of 'parent's leave' are paid per parent, two weeks below the EU minimum standard.

EU country	New legislation adopted	Satisfactory transposition	Main problematic areas	Payment or allowance for the last two weeks of parental leave
FR	No	No	- Parental allowance - *Force majeure* leave - FWAs - Legal protection	Yes
HR	Yes	No	- Parental allowance - FWAs - Legal protection	Yes
HU	Yes	No	- Paternity leave - Parental leave and allowance - FWAs - Legal protection	Yes
IE	No	No	- Personal scope - Parental allowance - Carers' leave - FWAs	No
IT	Yes	No	- Parental allowance - *Force majeure* leave - FWAs - Legal protection	Yes
LT	Yes	No	- Parental leave and allowance - *Force majeure* leave	Yes
LU	No	No	- Personal scope - Parental allowance - Carers' leave - *Force majeure* leave - FWAs - Legal protection	Yes
LV	Yes	No	- Parental allowance - Legal protection	Yes
MT	Yes	No	- Parental allowance	Yes
NL	Yes	No	- Personal scope	Yes
PL	No	No	- Parental leave and allowance - *Force majeure* leave - FWAs - Legal protection	Yes
PT	No	No	- Parental allowance - Carers' leave - FWAs	Yes
RO	Yes	No	- Parental leave and allowance - Carers' leave - *Force majeure* leave - FWAs - Legal protection	Yes
SE	Yes	No	- Carers' leave - FWAs	Yes
SI	No	No	- Parental leave and allowance - Carers' leave - *Force majeure* leave - FWAs - Legal protection	Yes
SK	No	No	- Paternity leave and allowance - FWAs - Legal protection	Yes

3 Personal scope of the Work-Life Balance Directive

According to the national experts, the personal scope of the WLB is generally well implemented, except for a few exceptions that will be commented on below. However, it is important to note that the personal scope refers here only to existing national measures implementing the Directive and not necessarily to the whole material scope covered by the WLB Directive. As most EU countries have not fully implemented the measures included in the Directive, the correct transposition of the personal scope will need to be assessed again in the future once the material scope is wholly transposed.

All workers in the private and public sectors, regardless of the size of the company or organisation, are covered by the national measures implementing the WLB Directive, with the exception of five countries:

- DE in the private sector: the German right to carers' leave does not exist in enterprises with up to 15 employees. Moreover, the German rights to request FWAs are not available for companies with up to 15 employees if the Act on Carers' Leave applies and up to 25 employees if the Act on Family Care Leave applies.
- BE, BG, IE and LU in the public sector: in BE, due to the multiplicity of regulations in the public sector, it may occur that certain institutions or categories of workers are excluded from certain measures such as parental leave or carers' leave. For example, it was discovered that the situation of Bozar (the Palace of Fine Arts in Brussels, which is a federal public body) is unclear concerning parental leave. As to the judiciary (judges and public prosecutors), the Belgian Judicial Code contains no provision in that respect. In BG male workers in the armed forces are not entitled to some WLB rights, such as the two-month paid parental leave for fathers. In IE, politicians and judges are not entitled to paid paternity leave and parental leave. In LU, it appears that MPs are not entitled to parental leave[54].

In contrast, in all EU Member States part-time workers, fixed-term contract workers and persons with a contract of employment or employment relationship with a temporary agency (referred to in the table below as 'special categories of workers') are covered by the national measures implementing the WLB Directive, with no exceptions.

Finally, the most problematic point seems to be the lack of coverage by the national measures implementing the WLB Directive of persons who would fit the EU definition of worker. National experts report issues in seven Member States (AT, EL, FR, HR, HU, LT and NL):

- The most common problem is 'false' self-employed workers (AT, EL, FR, LT and NL): in AT freelance workers only enjoy part of the protection for parents that other workers enjoy, especially with regard to parental leave. According to Austrian law, it is not immediately clear whether a freelancer is qualified (for the purposes of Labour Law) as an independent contractor or, due to the level of dependency on their employer, rather as an employee. Similar concerns exist in EL, where there are workers who appear to be self-employed but in practice are employed under conditions similar to those of dependent employment. This is especially the case for a significant proportion of those employed by digital platforms. The same issue arises in FR. There is a debate on the consideration of gig workers as salaried workers, which has been the basis of recent case law (on Uber drivers considered as workers[55]). This way, by court decision on a case by case basis, self-employed workers can be considered as subordinate workers, regardless of their status in the contract.[56] The situation in LT is also problematic, as online platform workers are deemed as self-employed workers under

54 https://www.lessentiel.lu/fr/story/etre-deputee-et-enceinte-ce-n-est-pas-evident-575561647343.
55 French Court of Cassation, 4 March 2020, n°19-13316.
56 The same reasoning is used by the CJEU. For example, in *Allonby* the Court explained that the formal classification of a self-employed person under national law does not exclude the possibility that a person must be classified as a worker if their independence is merely notional, thereby disguising an employment relationship (CJEU, Case C-256/01, *Allonby*, 13 January 2004, ECLI:EU:C:2004:18, paragraph 71).

Lithuanian law. Finally, in NL the use of 'false' self-employed workers is a salient issue. This is particularly the case in the context of platform work.

- Student work (HR): student work under the Croatian Act on Student Jobs is not considered to be an employment relationship.
- 'Simplified employment' (HU): workers who perform occasional work or seasonal work (in the fields of tourism or agriculture) within the framework of 'simplified employment' are virtually not covered by measures aimed at promoting WLB.
- Household workers (NL): they are considered to be employees under Dutch law, but are traditionally exempted from social security and large parts of employment law on the basis of the Regulation on domestic services. They have recently been given the right to a social security benefit for five weeks of paternity leave and nine weeks of parental leave.

Table 2 provides a summary of the personal scope of the WLB Directive (the shortcomings in each Member State are shown in grey).

TABLE 2: SUMMARY TABLE FOR PERSONAL SCOPE

EU country	All workers in the private sector covered	All workers in the public sector covered	Special categories of workers covered	Workers under EU definition not covered
AT	Yes	Yes	Yes	'False' self-employed workers
BE	Yes	No	Yes	No
BG	Yes	No	Yes	No
CY	Yes	Yes	Yes	No
CZ	Yes	Yes	Yes	No
DE	No	Yes	Yes	No
DK	Yes	Yes	Yes	No
EE	Yes	Yes	Yes	No
EL	Yes	Yes	Yes	'False' self-employed workers
ES	Yes	Yes	Yes	No
FI	Yes	Yes	Yes	No
FR	Yes	Yes	Yes	'False' self-employed workers
HR	Yes	Yes	Yes	Student work
HU	Yes	Yes	Yes	'Simplified employment'
IE	Yes	No	Yes	No
IT	Yes	Yes	Yes	No
LT	Yes	Yes	Yes	'False' self-employed workers
LU	Yes	No	Yes	No
LV	Yes	Yes	Yes	No
MT	Yes	Yes	Yes	No
NL	Yes	Yes	Yes	- 'False' self-employed workers - Household workers
PL	Yes	Yes	Yes	No
PT	Yes	Yes	Yes	No
RO	Yes	Yes	Yes	No
SE	Yes	Yes	Yes	No
SI	Yes	Yes	Yes	No
SK	Yes	Yes	Yes	No

4 Paternity leave

4.1 The right to paternity leave itself

All Member States but two (DE and SK) have implemented, at least partially, the EU right to paternity leave. However, the way in which this right has been transposed differs from country to country. In FI there is no specific right for fathers to take care of their new-born but instead a generic parental leave for mothers and fathers (160 working days[57] for each parent), with a part reserved for each parent (97 days) and a part transferable to the other parent (63 days). This generic parental leave comprises the traditional rights to maternity, paternity and parental leave. In this way, FI makes use of the 'passerelle' clause (Article 20(6) of the WLB Directive), by using the Finnish generic parental leave to comply with the EU right to paternity leave. The remaining EU countries (24) provide for a specific right for fathers, but with different denominations. The majority of countries (14) utilise the EU denomination 'paternity leave'. However, the more gender-neutral 'birth leave' is gaining momentum and is currently present in quite a few Member States (six). As an exception, in DK the term used is simply 'leave', in LU the right is under the heading of 'extraordinary leave for personal reasons', in HU it is called 'additional leave for the father upon the birth of his child' and in PT 'initial parental leave for the father'.

4.1.1 Duration of paternity leave

In the 25 countries with paternity leave, the duration of paternity leave is generally equal to or higher than the EU minimum standard of 10 working days or two weeks:

- Duration below the minimum standard: there are only two countries which do not fulfil the EU requirement as regards duration, namely HU (five working days) and LV (10 calendar days).
- Duration equal to the minimum standard: 11 Member States offer either 10 working days (HR, IT, LU, MT, RO[58] and SE[59]) or two weeks of paternity leave (CY, CZ, DK, IE and PL).
- Duration above the minimum standard: there are 12 countries with a length of paternity leave beyond 10 working days or two weeks, with great disparities among them: 14 working days in EL, 15 working days in BE[60] and BG, 25 calendar days in FR,[61] one month in AT, 30 calendar days in EE, LT and SI, 25 working days in PT, six weeks in NL and 16 weeks in ES. The situation of FI is also included in this group, as fathers are entitled to 160 working days of generic parental leave (for a six-day week), 97 of which are on a non-transferable basis, which is equivalent to approximately 26.5 weeks and 16 weeks respectively. This seems to beyond the EU minimum standard, as 26.5 weeks is longer than the required 20 weeks – two weeks of paternity leave plus four months (18 weeks) of parental leave for fathers – and 16 non-transferable weeks is longer than the required 11 non-transferable weeks – two weeks of paternity leave plus two months (nine weeks) of non-transferable parental leave for fathers.

4.1.2 Workers entitled to paternity leave and type of entitlement

Fathers are always entitled to this right. The situation for equivalent second parents, such as co-mothers in a lesbian relationship, is quite evenly balanced, since of the 25 countries with paternity leave, 15 grant

57 The right is 160 working days on the basis of a six-day week, so it is equivalent to approximately 26.5 weeks.
58 If the father completes a parenting class, this period can be extended to 15 working days. This extension applies for every child born.
59 The right to leave is connected to the right to benefit. The benefit is paid for 10 calendar days. The parent may choose to take the benefit on working days only (the benefit can also be taken during the weekend if the employee chooses to do so). This is why it is considered that the right is 10 working days.
60 It will be extended to 20 working days on 1 January 2023.
61 There are also three days of birth leave paid by the employer.

this right to an equivalent second parent (AT, BE, CY, DK, EE, ES, FI, FR, IE, LV,[62] MT, NL, PT, SE and SI) while the other 10 do not (BG, CZ, EL, HR, HU, IT, LT, LU, PL and RO).

Paternity leave is an individual and non-transferable right of the father (or the equivalent second parent) in all EU Member States.

4.1.3 Period during which paternity leave can be taken

The period during which paternity leave can be taken varies considerably between Member States, from the requirement to use the leave immediately after the birth to the possibility of taking the leave up until the child turns three years old. The 25 countries with paternity leave may be grouped as follows:

- Immediately after the birth: this is the case in three countries (BG, ES and MT). ES is also included in this group because the first 6 weeks of paternity leave must be taken right after birth (compulsory weeks). The remaining 10 weeks are voluntary and can be taken until the child is 12 months old.
- Until the child turns six months old (at least the minimum period of 10 working days): the majority of Member States (16) belong to this category. Some of them (14) provide for a single period during which paternity leave may be taken. Among them, most countries (11) simply do it with reference to childbirth – two days before the birth and 30 days after the birth (EL), eight weeks after the birth (RO), two months after the birth (HU and LU), 60 days after the birth (SE), 10 weeks after the birth (DK), four months after the birth (BE), five months after the birth (IT), six months after the birth (HR and LV) and 26 weeks after the birth (IE). Other countries (three) do it with reference to other leave or the starting date of paternity leave: until the end of the mother's maternity leave in AT (eight weeks after the birth); during the mother's maternity leave (up to 18 weeks after the birth) and two weeks thereafter in CY; and in CZ the start of the leave must be within the six weeks after the birth. Two other countries have several periods during which paternity leave may be taken: in NL one week to be taken four weeks after the birth and five weeks to be taken six months after the birth; and in PT five working days right after the birth, 15 working days during the six weeks after the birth and five working days while the mother is on maternity leave (up to 150 calendar days after the birth). Among the 16 countries belonging to this group, there is a problematic issue in IT because paternity leave can be taken from two months before the birth until five months after the birth. This seems to be contrary to the second sentence of Article 4(1) of the WLB Directive, according to which 'Member States may determine whether to allow paternity leave to be taken partly before or only after the birth of the child'. As in IT the duration of paternity leave is 10 working days, this means that the whole duration could be taken before the birth, which appears to go against the WLB Directive since the Directive only allows the leave to be taken partly (and not wholly) before the birth of the child.
- After the child turns six months old: this is the situation in six Member States, which seems problematic as the leave (at least 10 working days) is 'to be taken on the occasion of the birth of the worker's child' (first sentence of Article 4(1) of the WLB Directive), and 'around the time of the birth of the child with the aim of allowing the early creation of a bond between fathers and children' (Recital 19 of the WLB Directive). In FR, four calendar days must be taken right after the birth of the child. The remaining period (21 calendar days) must start at the latest on the day before the child turns six months old: this means that it is possible that a father only takes five calendar days[63] within the first six months of the child's life. In SI, 15 calendar days can be used until one month after the end of parental leave (so until the child is approximately one year old), whereas the remaining 15 calendar days can be taken before the child finishes the first year of primary school (the child is between 6.5 to 7.5 years old). Paternity leave can be taken until the child reaches the age of one year old in LT and during the 24 months after the birth in PL. In FI the generic parental leave can be taken until the child is two years old. It is important to bear in mind that the 'passerelle' clause does not exempt FI

62 Under current Latvian law a person who is legally recognised as a father is entitled to paternity leave. However, if a child does not have a legally recognised father, then on the request of the mother, any other person may use the right to paternity leave.

63 Four calendar days used right after the birth, plus one day taken on the day before the child turns six months old.

from meeting all the minimum requirements for paternity leave, among which the period to take the leave is found. Lastly, in EE the leave can be taken from 30 days before the estimated date of the birth of the child until the child turns three years old. This appears to be contrary, not only to the first sentence of Article 4(1) of the WLB Directive, but also to its second sentence. Given that in EE the duration of paternity leave is 30 calendar days, the full duration could potentially be taken before the child's birth.

4.1.4 Qualifying conditions for paternity leave

Concerning the qualifying conditions for the leave itself (not for the compensation attached to it), of the 25 EU countries with paternity leave, there are no qualifying conditions in the vast majority of them (21). These Member States seem to make a proper interpretation of the WLB Directive, which would allow no qualifying condition whatsoever. Following Article 4(2) of the Directive, 'the right to paternity leave shall not be made subject to a period of work qualification or to a length of service qualification'. This clarification does not mean that Member States may limit the access to paternity leave by introducing other qualifying conditions, following the CJEU's interpretation about Directive 2010/18 on parental leave in the *Maïstrellis*[64] and *Caisse pour l'avenir des enfants*[65] cases, which would not allow Member States to introduce qualifying conditions other than the ones mentioned in the Directive. This is why the conditions of eligibility established by the remaining four Member States appear to go against the WLB Directive:

- In AT the worker must live in the same household as the child: this tends to exclude separated and divorced fathers who might very well be willing and able to take care of their child.
- In BG the worker must be married to the mother or cohabiting with her and in CY and EE the worker must be married or in a civil partnership with the mother: not only could these requirements be considered as an unlawful qualifying condition, but they also seem to go against Article 4(3) of the WLB Directive, under which 'the right to paternity leave shall be granted irrespective of the worker's marital or family status'.

4.1.5 EU countries with no paternity leave

To finish with, concerning the two countries with no paternity leave (DE and SK), one of them plans to transpose this right in the near future (SK[66]). The situation of DE is more complex, as this country intends to apply the 'passerelle' clause when it comes to the right to the leave itself, by using its right to parental leave to comply with the EU right to paternity leave.[67] The right to parental leave in DE (only the right to the leave itself) is individual and non-transferable and lasts until the child is three years old. Although the duration goes far beyond the EU rights to paternity leave and parental leave combined, DE does not meet the minimum requirement of paternity leave in relation to the period during which paternity leave can be taken. The period to take the leave should be 'around the time of the birth of the child' and the period of three years after the birth does not comply with this standard. As previously commented in the case of FI, the 'passerelle' clause does not exempt a country from meeting all the minimum requirements for paternity leave.

64 CJEU, Case C-222/14, *Maïstrellis*, 16 July 2015, ECLI:EU:C:2015:473.
65 CJEU, Case C-129/20, *Caisse pour l'avenir des enfants*, 25 February 2021, ECLI:EU:C:2021:140. See a detailed analysis of the case in De la Corte-Rodríguez, M. (2021). 'The conditions of access to parental leave in the EU: An adequate delimitation of qualifying periods by the Court of Justice?', *European Labour Law Journal* 12(4), 564-568.
66 Paternity leave is expected to be introduced in SK with new legislation which should come into force on 1 November 2022.
67 The German Government considers the current rules on parental leave to be sufficient. However, the lack of paternity leave has been criticised by trade unions, the Women Lawyers Association, family organisations, the National Council of Women's Organisations and many more.

4.1.6 Summary table for paternity leave

Table 3 provides a summary of the right to paternity leave (the unsatisfactory transpositions in each Member State are shown in grey).

TABLE 3: SUMMARY TABLE FOR PATERNITY LEAVE

EU country	Duration	Equivalent second parent	Individual and non-transferable	Period to take the leave	Qualifying conditions for the leave
AT	1 month	Yes	Yes	Until the end of maternity leave (eight weeks after the birth)	- The worker must live in the same household as the child
BE	15 working days	Yes	Yes	Within four months after the birth	No
BG	15 working days	No	Yes	Immediately after the birth	- The worker must be married to the mother or cohabiting with her
CY	2 weeks	Yes	Yes	During maternity leave (up to 18 weeks after the birth) and two weeks thereafter	- The worker must be married or in a civil partnership with the mother
CZ	2 weeks	No	Yes	The start of the leave must be within six weeks after the birth	No
DE	-	-	-	-	-
DK	2 weeks	Yes	Yes	Within 10 weeks after the birth	No
EE	30 calendar days	Yes	Yes	From 30 days before the expected date of birth until the child turns three years old	The worker must be married or in a civil partnership with the mother
EL	14 working days	No	Yes	From two days before the expected date of birth until 30 days after the birth	No
ES	16 weeks	Yes	Yes	- six compulsory weeks: right after the birth - 10 voluntary weeks: until the child is 12 months old	No
FI	Generic parental leave: 160 working days for each parent (six-day week) = 26.5 weeks approx.	Yes	Yes, for 97 working days (six-day week) = 16 weeks approx.	From birth until the child is two years old	No
FR	25 calendar days	Yes	Yes	- four days right after the birth - 21 days: they must start before the child is six months old	No
HR	10 working days	No	Yes	Within six months after the birth	No
HU	5 working days	No	Yes	Within two months after the birth	No

EU country	Duration	Equivalent second parent	Individual and non-transferable	Period to take the leave	Qualifying conditions for the leave
IE	2 weeks	Yes	Yes	Within 26 weeks after the birth	No
IT	10 working days	No	Yes	From two months before the expected date of birth until five months after the birth	No
LT	30 calendar days	No	Yes	Until the child reaches the age of one	No
LU	10 working days	No	Yes	Within two months after the birth	No
LV	10 calendar days	Yes	Yes	Within six months after the birth	No
MT	10 working days	Yes	Yes	Immediately after the birth	No
NL	6 weeks	Yes	Yes	- Initial birth leave (one week): within four weeks after the birth - Additional birth leave (five weeks): within six months after the birth	No
PL	2 weeks	No	Yes	Within 24 months after the birth	No
PT	25 working days	Yes	Yes	- 20 compulsory days: five days right after the birth and 15 days within six weeks after the birth - five voluntary days: during maternity leave (up to 150 calendar days after the birth)	No
RO	10 working days	No	Yes	Within eight weeks after the birth	No
SE	10 working days	Yes	Yes	Within 60 days after the birth	No
SI	30 calendar days	Yes	Yes	- 15 days: until one month after the end of parental leave (within one year after the birth approx.) - 15 days: before the child finishes the first year of primary school (from 6.5 to 7.5 years old)	No
SK	-	-	-	-	-

4.2 Payment or allowance during paternity leave

4.2.1 Level of payment or allowance during paternity leave

The 25 Member States where paternity leave exists provide compensation during the whole period of leave.[68] Most countries (20) grant a social security allowance (provided by the State), although in two of them (HU and RO) the allowance has to be advanced by the employer. In the rest of the countries (five), during paternity leave a payment is provided by the employer (EL and MT) or there is a combination of a payment and an allowance (BE, LU and NL): three working days of payment and 12 working days of allowance in BE; two working days of payment and eight working days of allowance (but advanced by the employer) in LU; and one week of payment and five weeks of allowance in NL.

The payment or allowance is generally calculated as a percentage of the worker's previous wage (in 23 out of 25 Member States with paternity leave), which is quite high in most of them (21), ranging from 70 % to 100 %. The two exceptions from this relatively high level of income replacement are CZ and FI, in which the real percentages are normally lower than 70 %. In CZ the percentage of 70 % is applied, not to the actual worker's previous wage but to the so-called 'daily assessment base', which is a proportion of the previous wage that decreases from 100 % to 0 % as the different wage segments become higher.[69] As a result, the real percentage applied to the previous wage is in most cases much lower than 70 %.[70] In FI the system is also detrimental to high-income workers since there are different percentages applied to the worker's previous wage, which decrease as the different wage segments become higher: from 90 % to 32.5 % for the first 16 working days of generic parental leave and from 70 % to 25 % for the remaining 144 working days.[71] Once again, the real percentage applied to the previous wage may be lower than 90 % and 70 % respectively.[72] The level of income replacement could be even lower in the two countries offering a flat-rate allowance: EUR 22.60 per calendar day in AT (around EUR 678 per month)[73] and EUR 250 per week in IE (around EUR 1 070 per month).

Of the 23 Member States with a payment or an allowance based on a percentage of the worker's previous wage, the majority (14) have an upper ceiling, which means that compensation cannot exceed a certain amount. In two of them (BE and NL) only the allowance (not the payment) is capped. In all cases the ceilings seem reasonable and range from EUR 1 700 per month in BG[74] to EUR 11 566.90 per month in LU. The rest of the countries (nine) have no ceiling at all (EL, FI, HR, HU, IT, MT, PL, PT and RO).

The value judgment about the higher or lower level of income replacement (or about the ceilings) is irrelevant as the EU minimum standard for the payment or allowance during paternity leave is construed with reference to another payment or allowance, which is the national sick pay level. In all Member States but 3 (AT, SE and SI) the payment or allowance for paternity leave is always equal to or higher than the national sick pay level:

68 In AT the paternity allowance is granted for a period of 28, 29, 30 or 31 days within 91 days after a child's birth. These rules regarding the allowance slightly differ from the rules for the leave itself – one month of leave to be taken until the end of maternity leave (eight weeks after the birth). In any case, the paternity allowance can only be received while on leave, so it is up to the worker to make sure their applications for paternity leave and allowance overlap.

69 The 'daily assessment base' is calculated using gross monthly earnings over the last 12 months preceding the leave taken into account as follows: up to CZK 1 298 per day: 100 %; from CZK 1 298 to CZK 1 946 per day: 60 %; from CZK 1 946 to CZK 3 892 per day: 30 %; earnings over CZK 3 892 per day are not taken into account.

70 For example, if the gross monthly earnings are CZK 3 892 per day, the 'daily assessment base' will be: (1 298 x 100 %) + (647 x 60 %) + (1 945 x 30 %) = CZK 2 269.70. The percentage of 70 % is applied to 2 269.70, which gives a total of CZK 1 588.79. However, the real percentage is 1 588.79/3 892 = 40.82 %.

71 For the first 16 working days of generic parental leave, the percentage is 90 % for income up to EUR 50 606 and 32.5 % for higher income; for the remaining 144 working days, the percentage is 70 % for income up to EUR 26 898, 40 % for income between EUR 26 898 and EUR 50 606 and 25 % for higher income.

72 For example, if the income is EUR 50 606, the percentages will be: for the first 16 working days 90 %; for the remaining 144 working days: (26 898 x 70 %) + (23 707 x 40 %) = EUR 28 311.40. Therefore, the real percentage for the remaining 144 working days is 28 311.40/50 606= 55.95 %.

73 Moreover, the amount received will be detracted from parental benefits if the worker decides to take parental leave later on.

74 BGN 3 400 per month.

– In AT there is a flat-rate allowance of EUR 22.60 per calendar day, which is lower than sick pay level because in the first 6 to 12 weeks[75] of illness the employer continues to pay the full salary.[76] However, it seems that AT is making use of the exception of Article 20(7) of the WLB Directive, which allows Member States not to provide a payment or an allowance during paternity leave if they meet two conditions: firstly, *each parent* has to be entitled to a payment or an allowance for at least six months of parental leave; secondly, the level of the payment or allowance has to be at least 65 % of the worker's net wage, which may be subject to a ceiling. If the exception is applied, AT would not be obliged to reach the national sick pay level since it would be exempted from providing a payment or an allowance during paternity leave altogether. However, if we take a closer look at the parental leave system in AT, the first condition of Article 20(7) seems not to be actually met as *each parent* is not entitled to a payment or an allowance for at least six months of parental leave. In reality there is a family entitlement to a payment or an allowance for 12 months of parental leave, but not an individual right for each parent to six months of compensation. In this sense, it is important to recall that, according to settled case law of the CJEU, exceptions must be interpreted in a restrictive way.
– In SE the paternity allowance is 77.6 % of the previous wage, with a ceiling of SEK 362 200 per year. Although the percentage of earnings is the same for sick pay (77.6 %), the ceiling is higher. The earnings ceiling for the paternity allowance is SEK 362 200 per year, whereas the earnings ceiling applicable to sick pay is SEK 483 000 per year.[77] Therefore, when the ceiling of SEK 362 200 per year applies, the paternity allowance is lower than the sick pay level.
– In SI the paternity allowance is 100 % of the previous wage, with a ceiling of EUR 3 664.30 per month. In contrast, percentages for sick pay go from 70 % to 100 %, depending on the illness, with no ceiling. Thus, depending on the previous wage and the percentage applicable to sick pay, the paternity benefit may be lower than the amount of sick pay.[78]

4.2.2 Qualifying conditions for the payment or allowance

Of the 25 Member States with paternity leave, most of them (14) do not make the right to compensation subject to any conditions. The remaining countries (11) have availed themselves of the possibility to make the right to a payment or an allowance during paternity leave subject to a period of previous employment, which shall not exceed six months immediately prior to the expected date of birth of the child (Article 8(2) of the WLB Directive). However, five of these countries require a period of previous employment that goes beyond what is permitted by the Directive (three) or may be discriminatory against part-time workers (two):

– In HR nine months of consecutive insurance or 12 months with interruptions in the last two years are required.
– In IE the requirement is at least 39 weeks of contributions in the 12-month period before the first day of paternity leave; or at least 39 weeks of contributions since first starting work and at least 39 weeks of contributions paid or credited in the relevant tax year[79] or in the tax year immediately

75 Depending mostly on the length of the employment relationship.
76 Afterwards, the employer reduces the salary to 50 % for another four weeks; during this time, the health care provider starts paying the illness allowance. While the employee still receives 50 % of their salary, the health care provider also pays 50 % of the illness allowance. After the employer stops paying, the entitlement to illness allowance arises in full. It amounts to about 50-60 % of the worker's previous salary and is capped at a gross salary of about EUR 3 400 per month.
77 According to the national expert, in the preparatory works for the implementation of the WLB Directive, the Swedish Government stated that albeit Article 8(2) of the Directive requires a payment or an allowance at least equivalent to the national sick pay level, the Article also acknowledges that the compensation may be subject to any ceiling laid down in national law. The Government interpretation of this provision was that a Member State may maintain an existing national scheme even if the ceiling for the income used to calculate paternity benefit is different from that used to calculate sickness benefit.
78 For example, if the wage is EUR 4 000 per month, when the percentage applicable to sick pay is 100 %, the sickness benefit (4 000 x 100 % = EUR 4 000) will be higher than the paternity benefit (4 000 x 100 % = EUR 4 000, but the ceiling of EUR 3 664.30 applies). However, when the percentage applicable to sick pay is 70 %, the sickness benefit (4 000 x 70 % = EUR 2 800) will be lower than the paternity benefit (4 000 x 100 % = EUR 4 000, but the ceiling of EUR 3 664.30 applies).
79 Two years before the year when the leave starts.

following the relevant tax year;[80] or at least 26 weeks of contributions paid in the relevant tax year[81] and at least 26 weeks of contributions paid in the tax year immediately before the relevant tax year.[82]
- In LT 12 months of contributions during the previous 24 months are required.[83]
- In DK and FR the periods required could be considered discriminatory against part-time workers: in DK it is necessary to have been employed for at least 160 working hours within the last four calendar months before the leave and to have been employed for a minimum of 40 hours per month in at least three of these months; in FR the worker must have worked 150 hours in the last three months preceding the leave or have contributed on the basis of a salary of EUR 11 236.05 in the six months before the leave.

Moreover, there is one country (AT) that has established additional qualifying conditions, besides a period of previous employment. This appears to be contrary to the case law of the CJEU in *Maïstrellis* and *Caisse pour l'avenir des enfants*, which would not allow Member States to introduce qualifying conditions other than the ones mentioned in the Directive. Among the additional conditions in AT, the problematic ones are the following:[84]

- The father has to live together with the child and the other parent in the same household.
- Both parents and the child need not only to reside in AT, but AT also has to be the centre of their lives.
- Both parents need to be either Austrians or legally resident in AT.

4.2.3 EU countries with no paternity leave

Lastly, regarding the two countries with no paternity leave (DE and SK), one of them plans to transpose this right, together with a payment or an allowance, in the near future (SK). In the case of DE, the German Government considers that it can make use of the exception of Article 20(7) of the WLB Directive which allows Member States not to provide a payment or an allowance during paternity leave if two conditions are fulfilled: firstly, *each parent* has to be entitled to a payment or an allowance for at least six months of parental leave; secondly, the level of the payment or allowance has to be at least 65 % of the worker's net wage, which may be subject to a ceiling. However, like in AT, DE does not seem to meet the first condition since there is a family entitlement to a payment or an allowance for 12 months of parental leave, but not an individual right of *each parent* to six months of compensation.

4.2.4 Summary table for the payment or allowance during paternity leave

Table 4 provides a summary of the payment or allowance during paternity leave (the shortcomings in each Member State are shown in grey).

80 One year before the year when the leave starts.
81 Two years before the year when the leave starts.
82 Three years before the year when the leave starts.
83 Six months of contributions during the period of the previous 24 months after the entry into force of transposition legislation on 1 January 2023.
84 Other conditions are: the father has to be on paternity leave; the child must receive a family allowance, an allowance payable by the tax authority, for the whole time. The conditions for receiving family allowance are similar to the ones for the paternity allowance (to have been employed consecutively for 182 days before receipt of the allowance).

TABLE 4: SUMMARY TABLE FOR THE PAYMENT OR ALLOWANCE DURING PATERNITY LEAVE

EU country	Payment or allowance	% of previous wage or flat-rate	Concrete % or amount	Ceiling	At least national sick pay level	Qualifying conditions for the payment or allowance
AT	Allowance	Flat-rate	EUR 22.60 per calendar day	Not applicable	No	- Employed consecutively for 182 days before receipt of the allowance - Other conditions
BE	- Payment for three first working days - Allowance for 12 working days	% of previous wage	- 100 % for three working days - 82 % for 12 working days	Only for the allowance: EUR 134.53 per working day (six-day week)	Yes	No
BG	Allowance	% of previous wage	90 %	BGN 3 400 per month	Yes	Insured for the risk of illness and maternity for six months
CY	Allowance	% of previous wage	72 %	EUR 4 840 per month	Yes	Insured for 26 weeks before the beginning of the leave
CZ	Allowance	% of previous wage	Up to 70 %	CZK 1 590 per calendar day	Yes	No
DE	-	-	-	-	-	-
DK	Allowance	% of previous wage	100 %	DKK 4 465 per week	Yes	Employed for 160 working hours within the last four calendar months before the leave and employed for 40 hours per month in at least three of these months
EE	Allowance	% of previous wage	100 %	EUR 4 043.07 per month	Yes	No
EL	Payment	% of previous wage	100 %	No	Yes	No
ES	Allowance	% of previous wage	100 %	EUR 4 139.40 per month	Yes	For workers under 21 years: no minimum contribution period; for workers between 21 and 26 years: 90 days within the seven years prior to the start of the leave or, alternatively, 180 days of contributions throughout their working life; for workers over 26 years: 180 days within the seven years prior to the start of the leave or, alternatively, 360 days throughout their working life.

EU country	Payment or allowance	% of previous wage or flat-rate	Concrete % or amount	Ceiling	At least national sick pay level	Qualifying conditions for the payment or allowance
FI	Allowance	% of previous wage	- Up to 90 % for 16 working days - Up to 70 % for 144 working days	No	Yes	No
FR	Allowance	% of previous wage	100 %	EUR 3 428 per month	Yes	To have worked 150 hours in the last three months preceding the leave or to have contributed on the basis of a salary of EUR 11 236.05 in the six months before the leave
HR	Allowance	% of previous wage	100 %	No	Yes	Nine months of consecutive insurance or 12 months with interruptions in the last two years
HU	Allowance (but advanced by the employer)	% of previous wage	100 %	No	Yes	No
IE	Allowance	Flat-rate	EUR 250 per week	Not applicable	Yes	At least 39 weeks of contributions in the 12-month period before the first day of paternity leave; or at least 39 weeks of contributions since first starting work and at least 39 weeks of contributions paid or credited in the relevant tax year (two years before the year when the leave starts) or in the tax year immediately following the relevant tax year (one year before the year when the leave starts); or at least 26 weeks of contributions paid in the relevant tax year (two years before the year when the leave starts) and at least 26 weeks of contributions paid in the tax year immediately before the relevant tax year (three years before the year when the leave starts).

EU country	Payment or allowance	% of previous wage or flat-rate	Concrete % or amount	Ceiling	At least national sick pay level	Qualifying conditions for the payment or allowance
IT	Allowance	% of previous wage	100 %	No	Yes	No
LT	Allowance	% of previous wage	77.58 %	EUR 3 152 per month	Yes	12 months of contributions during the previous 24 months
LU	- Payment for two working days - Allowance for eight working days (but advanced by the employer)	% of previous wage	100 %	EUR 11 566.90 per month	Yes	No
LV	Allowance	% of previous wage	80 %	EUR 78 100 per year	Yes	Three months of contributions during the six months preceding paternity leave or six months of contributions during the 24 months preceding paternity leave
MT	Payment	% of previous wage	100 %	No	Yes	No
NL	- Payment for one week - Allowance for five weeks	% of previous wage	- 100 % for one week - 70 % for five weeks	Only for the allowance: EUR 3 545.91 per month	Yes	No
PL	Allowance	% of previous wage	100 %	No	Yes	No
PT	Allowance	% of previous wage	100 %	No	Yes	One month of contributions during the six months prior to the date of childbirth
RO	Allowance (but advanced by the employer)	% of previous wage	100 %	No	Yes	No
SE	Allowance	% of previous wage	77.6 %	SEK 362 200 per year	Not always	No
SI	Allowance	% of previous wage	100 %	EUR 3 664.30 per month	Not always	No
SK	-	-	-	-	-	-

5 Parental leave

5.1 The right to parental leave itself

All Member States offer periods of parental leave for biological and adoptive parents, albeit under different denominations: most countries (17) use the EU term 'parental leave', while other countries (five) utilise the expressions 'childcare leave' (HU and RO), 'parent's time' (DE), 'educational parental leave' (FR) or simply 'leave' (DK). In five EU countries there is a combination of two systems of parental leave: 'childcare leave' and 'childcare leave for fathers' in BG; 'birth leave'/'adoption leave' and 'childcare leave' in ES; 'parental leave' and 'parent's leave' in IE; 'parental leave' and 'childcare leave' in PL; and 'additional parental leave' and 'childcare leave' in PT.

5.1.1 Duration of parental leave

The duration of parental leave varies substantially from one country to another, ranging from the minimum of four months per parent established in the WLB Directive to up to three years per parent:

- Duration below the minimum standard: no country.
- Duration equal to the minimum standard: four Member States offer four months (BE, EL and HR) or 18 weeks (CY) of parental leave for each parent.
- Duration above the minimum standard: the duration of parental leave in the rest of the EU countries (23) goes beyond the EU minimum requirements. In the majority of cases (16) the duration is determined per parent: 130 calendar days (SI), six months (BG[85] and LU[86]), 26 weeks (NL), 160 working days for a six-day week[87] (FI), 32 weeks (DK), 26 weeks of 'parental leave' and seven weeks of 'parent's leave' (IE), 240 calendar days (SE), 18 months (LV), up to two years (AT), up to three years (CZ, DE, FR, LT and SK) and 16 weeks of 'birth leave'/'adoption leave' and up to three years of 'childcare leave' (ES). In a few countries (five), however, the duration is per family: 10 months[88] (IT), up to two years (RO), up to three years (EE and HU), 32 weeks of 'parental leave' and 36 months of 'childcare leave' (PL). In two countries (MT and PT), there is a combination of the two systems: in MT four months per parent in the private sector and 12 months per family in the public sector; and in PT three months per parent of 'additional parental leave' and two years per family of 'childcare leave'.

Finally, the duration in LT could be problematic because the situation of biological parents is more favourable than that of adoptive parents. In the case of birth parents, the right to parental leave is up to three years per parent, whereas in the case of adoption the right is only 24 months per parent. This seems to be discriminatory against adoptive parents. In the opinion of Mačernytė-Panomariovienė and Krasauskas, 'adoptive parents should also have the right to parental leave of up to three years as of the date of adoption, as with biological parents who have three years as of the date of birth of the child'.[89]

5.1.2 Workers entitled to parental leave and type of entitlement

Biological and adoptive mothers and fathers are always entitled to parental leave. The situation for co-parents, defined as a co-mother in a lesbian relationship and a co-father in a male homosexual

85 Six months per parent in the case of 'childcare leave' and two months per father in the case of 'childcare leave for fathers'. However, the biological or adoptive father will only be entitled to 'childcare leave for fathers' for two months if he has not taken other child-related leave. If the biological or adoptive father has taken other child-related leave for a period of less than two months, he will be entitled to 'childcare leave for fathers' for two months minus the other child-related leave taken.

86 There is an option between four or six months.

87 160/6 = 26.67 weeks.

88 Eleven months if one parents takes three months of parental leave.

89 Mačernytė-Panomariovienė, I. and Krasauskas, R (2021), 'A father's entitlement to paternity and parental leave in Lithuania: Necessary legislative changes following the adoption of the Directive on Work-Life Balance', *Review of Central and East European law* 46 (2), 179-202, p. 189.

relationship if they are not regarded as adoptive parents, is mixed, as 15 countries grant this right to co-parents (AT, BE, DE, DK, EE, ES, FI, FR, HR,[90] HU, IE, MT, NL, PT and SE) whereas the other 12 do not (BG, CY, CZ, EL, IT, LT, LU, LV, PL, RO, SI and SK).

The requirement for two individual and non-transferable months of parental leave for each parent is fulfilled by the majority of Member States (19). Moreover, in 11 of them the entire right is individual and non-transferable (BE, CZ, DE, DK, EL, ES, FR, LU, LV, NL and SK). In the other eight only part of the right is of that nature (equal to or greater than two months): two months in HR and MT, but only in the private sector in MT; three months of 'additional parental leave' in PT; 90 calendar days in SE; at least 16 weeks[91] in CY; 97 working days (six-day week)[92] in FI; 4 months in IT and MT, but only in the public sector in MT[93]; and at least 12 weeks for 'parental leave'[94] and the whole seven weeks of 'parent's leave' in IE. As can be seen, 17 countries (19 minus HR and MT in the private sector) go beyond the EU minimum requirement of two individual and non-transferable months.

The remaining EU countries (eight) have gaps with regard to the required two non-transferable months per parent:

– In four of them the individual and non-transferable period is shorter than two months: one month in PL[95] and RO; in BG and SI there is differential treatment between mothers and fathers: in BG there are six months of 'childcare leave' per parent, one of which is non-transferable between parents, and two months of 'childcare leave for fathers' per father, which cannot be transferred to the mother; in SI for the mother 30 days are non-transferable to the father (100 days are transferable), whereas for the father the whole period of 130 days can be transferred to the mother. Bagari reveals that 'in practice, fathers generally transfer the total amount of their parental leave to mothers'.[96]
– In two countries the whole leave is designed as a family right to be shared between parents, namely EE and HU.[97] In these countries, the full period of parental leave could be used by one parent, usually the mother, at the discretion of the parents.
– In two countries (AT and LT), the whole period of parental leave is formally individual and non-transferable. However, the singular characteristics of the system transform the leave into a family right. Firstly, the leave cannot be taken by the two parents simultaneously: only one parent at a time can take the leave.[98] Secondly, the length of the leave (in AT two years; in LT three years in the case of a birth child and 24 months in the case of adoption) covers the whole period during which the

90 A same-sex partner (in a formal or informal same-sex life partnership) can be appointed by a court as a 'partner-custodian' of their same-sex partner's under-age child, thus acquiring parental care with all the rights and duties pertaining thereto, but only in very limited circumstances: after the death of a same-sex partner (child's parent), if the other parent is dead or deprived of parental rights; or exceptionally, if the same-sex partner (child's parent) is alive and the other parent is unknown or deprived of parental rights.

91 Parental leave in CY is 18 weeks per parent. When one parent has taken parental leave for at least two weeks, they can transfer two weeks of the rest of their leave to the other parent.

92 97/6 = 16.17 weeks.

93 Although the right to parental leave is quantified per family (12 months per family), it seems to work as a right per parent (6 months per parent). From the 6 months, only 2 may be transferred to the other parent, which means that there are 4 non-transferable months per parent.

94 When parents are employed by the same employer they can transfer a maximum of 14 weeks of their 'parental leave' entitlement (26 weeks) to the other parent, subject to the employer's agreement.

95 The Polish 'parental leave' is entirely a family right, whereas the Polish 'childcare leave' is a family right, except for one non-transferable month.

96 Bagari, S. (2020), 'L'équilibre entre vie professionnelle et vie privée en Slovénie à la lumière de la nouvelle directive européenne 2019/1158' ('Work-life balance in Slovenia in the light of the new European Directive 2019/1158'), in Lorber, P. and Santoro, G. (ed.) (2020), 'La Directive 2019/1158 du 20 juin 2019 concernant l'équilibre entre vie personnelle et vie privée des parents et des aidants' ('Directive 2019/1158 of 20 June 2019 on work-life balance for parents and carers'), *Revue de droit comparé du travail et de la sécurité sociale* 3, p. 75.

97 The leave cannot be taken simultaneously by parents. It is possible that one parent (typically the mother) takes the whole period of leave.

98 In AT parents cannot take the leave simultaneously, with one exception: when the parents first switch (meaning one of them is finishing parental leave and the other one is starting it), they may take one month of parental leave at the same time, which shortens the overall duration by one month (meaning until the child is 23 months old). Thus, in reality there is right of up to 24 months per family.

leave can be taken (in AT until the child is two years old; in LT until the child is three years old (in the case of a birth child) and 24 months after adoption (in the case of adoption)). As a result, once again, it is exclusively up to parents to decide how to distribute the full period of leave, in the same way as a family entitlement works. In turn, the full period of parental leave could be used by one parent, generally the mother. As expressed by Mačernytė-Panomariovienė and Krasauskas in the case of LT, 'under Lithuanian law, who will work and who will take care of children is up to a family to decide'. These authors also indicate that 'in practice, parental leave is most often taken by one of the parents (typically the mother) without dividing the leave'.[99]

5.1.3 Period during which parental leave can be taken

The period during which parental leave can be taken is varied. EU countries may be grouped into two categories:

- A relatively short period: up to three years. Half of Member States (12) belong to this category, in which parents can take the full period of parental leave or the greatest part of it during three years after the birth or adoption: immediately after maternity leave/adoption or the parental leave of the other parent (SI), one year after the birth/adoption (DK[100]), until the child is two (AT[101] and RO), two years after the birth/adoption (FI), until the child is three (CZ, EE, LT[102] and SK) and three years after the birth/adoption (ES,[103] FR[104] and HU).
- A relatively long period: more than three years. In the rest of the countries (15) there is more time to take the whole period of parental leave or at least half of it: four years after the birth/adoption (SE[105]); until the child is six (LU,[106] PL and PT); until the child is eight (BG, DE,[107] HR, LV, MT in the private sector and NL); eight years after the birth/adoption (CY and EL), until the child is 10 (MT in the public sector); until the child is 12 (BE and IE[108]); and 12 years after the birth/adoption (IT).

Member States are not completely free when setting the period during which parental leave can be taken. When setting this period, they must do it in a way that ensures that 'each parent is able to exercise their right to parental leave effectively and on an equal basis', according to Article 5(1) of the WLB Directive. Each parent, mother and father, should have their own 'space' to take their four months of parental leave guaranteed by the Directive. The period recommended to take the leave in the Directive (until the child is eight years old) is a good example of this as it gives each parent plenty of 'space' to take their four months of leave. In other words, Member States should avoid a situation where one parent, usually the

99 Mačernytė-Panomariovienė, I. and Krasauskas, R (2021), 'A father's entitlement to paternity and parental leave in Lithuania: Necessary legislative changes following the adoption of the Directive on Work-Life Balance', *Review of Central and East European law* 46 (2), 179-202, pp. 191 and 202.

100 27 weeks from the 11th week after the birth/adoption until one year after the birth/adoption and five weeks until the child is nine. However, the father/co-mother may begin the leave before the first 10 weeks after the birth of the child.

101 However, if parents reach an agreement with their employer they can defer up to three months of their parental leave to a later date, which they must then use by the seventh birthday of the child in question or by the time the child enters compulsory schooling.

102 In the case of birth, parental leave can be taken until the child is three years old. In the case of adoption, the leave can be used up to 24 months after adoption.

103 In the case of 'birth leave' and 'adoption leave', the first six weeks are compulsory and must be taken right after the birth/adoption and the remaining 10 weeks can be taken during 12 months after the birth/adoption. In the case of 'childcare leave', it can be used during three years after the birth/adoption.

104 In the case of birth, parental leave can be taken until the child is three. In the case of adoption, if the child is under three at the moment of adoption, the leave can be used during three years after adoption, but if the child is over three and under 16 the leave can be taken during one year after adoption.

105 The 240 calendar days of parental leave per parent can be taken until the child is four years old, with the exception of a total of 96 days per family, which can be used until the child is 12.

106 In the case of '1st parental leave" for one parent (up to 6 months), the leave can only be taken right after maternity leave or adoption leave, whereas in the case of '2nd parental leave" for the other parent (up to 6 months), the leave can be taken until the child is 6 years old.

107 24 months of leave can be taken between the child's third and eighth birthday (if 12 months were taken before the child turned three).

108 In the case of 'parental leave' (26 weeks), parents can use the leave until the child is 12. However, in the case of 'parent's leave' (seven weeks) they can only take it within two years after the birth/adoption.

mother, takes leave during the whole period that is given to enjoy the leave, making sure that at least four months are 'free' for the other parent, typically the father, to exercise their right to parental leave. Most Member States (18) fulfil this requirement and only a few (nine) have systems that might be problematic. In these nine countries the length of parental leave covers (almost) the whole period during which the leave can be taken, leaving no (complete) 'space' of four months for the other parent. The way in which this feature hinders an *effective* exercise of the right to parental leave needs to be assessed on a case-by-case basis:

- In two countries (EE and HU) the length of parental leave (three years per family) equals the period during which the leave can be taken (until the child is three in EE and three years after the birth/adoption in HU). Moreover, parental leave is designed as a family entitlement to be shared between parents and cannot be taken simultaneously by the two parents.[109]
- In one country (RO) the length of parental leave (two years per family[110]) is the same as the period during which the leave can be taken (until the child is two). Parental leave is a family right (except for one month) and the leave cannot be taken by the two parents at the same time.[111] This means that one parent could take one year and 11 months, leaving only one month of 'space' available for the other parent.
- In two countries (AT and LT) the length of parental leave (in AT two years and in LT three years in the case of a birth child and 24 months in the case of adoption) covers the whole period during which the leave can be taken (in AT until the child is two years old and in LT until the child is three years old (in the case of a birth child) and 24 months after adoption (in the case of adoption)). Although parental leave is designed as an individual and non-transferable entitlement, the leave cannot be taken by the two parents simultaneously. However, in AT, there are some incentives for fathers to take parental leave via the 'sharing bonuses' related to the parental allowance (two months or 20 % of the time, depending on the kind of allowance).
- In two Member States (CZ and SK) the duration of parental leave (three years per parent) also covers the whole period during which the leave can be taken (until the child is three). The right is individual and non-transferable and both parents can take the leave simultaneously. But, as will be shown below, the parental allowance can only be granted to one parent at a time.[112] Nonetheless, in SK there is a notable incentive for fathers to take parental leave: a 'maternity allowance' at 75 % of earnings is paid to fathers during 28 weeks of parental leave,[113] while mothers only receive a flat-rate allowance during parental leave.[114]
- In two Member State (ES and FR) the duration of parental leave (three years per parent) equals the period during which the leave can be used (three years after the birth/adoption). The leave is individual and non-transferable and can be taken at the same time by both parents. It might happen that one parent exhausts the whole period of three years, leaving no 'space' for the other parent. However, this is unlikely because in both countries there is a paid 'sub-system' of parental leave, which, if considered separately, gives some 'space' for both parents. In ES, there are 16 weeks at 100 % of earnings for each parent, six compulsory weeks to be used right after the birth/adoption

109 In EE parental leave can only be taken by one parent at a time, except for 60 calendar days. In HU the entire leave cannot be taken simultaneously by both parents.

110 According to the national expert, the length of the period of parental leave and the possibility of taking two years of parental leave were established as a public policy in connection to breastfeeding and to the first years in the child's life where it is assumed that the mother deals with childcare. The practice is to take the leave in one block (two years or less) and return to work for the rest of the period of time. This is because parental leave is not viewed as a way to balance work and family life for parents, but as a public policy to support women to fulfil their family obligations. Therefore, the arrangement is strongly feminised and it is mainly women who take parental leave.

111 The period of two years (minus two months) can be shared between the parents, one parent at a time, if each of them qualifies for parental leave.

112 As only one parent can take the leave and the corresponding allowance at a time, it is not likely that the other parent will take the leave at the same time and stay at home with no parental allowance.

113 A flat-rate of EUR 275.90 per month is paid for the remaining period of parental leave (EUR 378.10 per month if fathers previously received a 'maternity allowance').

114 A 34-week maternity leave with a maternity allowance of 75 % of earnings is available for mothers, with a post-birth period of up to 28 weeks. However, only a flat-rate allowance of EUR 275.90 per month is paid during the whole period of parental leave (EUR 378.10 per month if mothers previously received a 'maternity allowance').

and 10 voluntary weeks to be taken within 12 months after the birth/adoption. In FR there are six months at a flat-rate per parent, to be taken within one year after the birth/adoption.

5.1.4 Period of notice

The majority of Member States (23) have established periods of notice that are to be given by workers to employers where they exercise their right to parental leave, as required by the WLB Directive. The countries that have not fully implemented such periods (four) are CZ, ES for 'childcare leave',[115] HR for the initial period of parental leave[116] and RO. The 23 Member States that have actually set a period of notice may be grouped into two types:

- Those with a reasonable period of notice of up to two months (20): five days (IT) 10 days (BG), two weeks (MT) 14 days (LT), 15 days (HU), three weeks (CY), 21 days (PL), one month (EL, LV and SK), 30 days (EE, PT and SI), six weeks (IE) and two months (BE, FI,[117] FR,[118] NL and SE). In DK the notice to use the right to leave from the 11th week after the birth/adoption should be given six weeks after the birth/adoption.
- Those with at least one period of notice that could be considered excessive (three): in AT there are two periods of notice, one for mothers (the notice can be given up to the end of maternity leave) and one for fathers (three-month period of notice); in DE the period of notice is seven weeks, excluding when the leave is used between the child's third and eighth birthday (13-week period of notice); in LU for the 'first parental leave' (meant to be used by one parent) the notice must be given two months before the beginning of maternity leave/adoption leave, whereas the period of notice for the 'second parental leave' (meant to be used by the other parent) is four months.

5.1.5 Qualifying conditions for parental leave

Most Member States (14) do not make the right to parental leave subject to any qualifying conditions. The remaining countries (13) could be analysed as follows:

- There are seven countries which make the right subject to a qualifying period not exceeding one year, as allowed by the WLB Directive. Two of them require a period of work qualification:[119] in PL six months for 'childcare leave';[120] and in RO contributions for 12 months in the previous two years prior to the birth of the child. The other five request a length of service qualification:[121] in CY six months; in MT 12 months in the private sector and from 6 to 12 months (to complete the probationary period) in the public sector; one year in FR and IE for 'parental leave';[122] and in BE 12 months in the 15-month period preceding the notice. In the case of successive fixed-term contracts with the same employer, the sum of those contracts is taken into account for the purpose of calculating the qualifying period. Despite the judgment in the *Caisse pour l'avenir des enfants* case about Directive 2010/18, which validated a length of service qualification of 12 months *immediately prior to the start of parental leave*, the WLB Directive simply states that the qualifying period used (be it a period of work qualification or a length of service qualification) *shall not exceed one year*, without further restrictions. In this sense, the required periods in RO (12 months *in the previous two years prior to the birth of the child*) and BE (12 months *in the 15-month period preceding the notice*) may turn out

115 For 'birth leave' and 'adoption leave' (16 weeks for each parent), the period of notice is 15 days for the block of 10 weeks when this block is not taken right after the block of six weeks which must be taken obligatorily after the birth or adoption.
116 For successive blocks, if the leave is divided into several blocks, or whenever there is a change of working time regime (from full-time to part-time or vice versa), the period of notice is 30 days.
117 One month period of notice if a block has no more than 12 working days (six-day week).
118 One month period of notice if parental leave starts right after maternity leave or adoption leave.
119 The period of time a person has been a worker, irrespective of the number of employers.
120 There is no qualifying period for the Polish 'parental leave'.
121 The length of employment with one employer.
122 There is no qualifying period for the Irish 'parent's leave'.

to be longer than *one year*. For example, if an employee has been employed at a certain company for a period of five years and, after two years without working, returns to work for the same company, he or she will not be immediately entitled to parental leave, but only when they have completed an extra year (six years in total!).[123]

- There is one country (EL) with an excessive lenwgth of service qualification: one year is required, not in general but for each child. This means that an additional year of service with the employer is required for the second (and each subsequent) child after the end of the parental leave with the previous child.
- There are five countries which set conditions other than qualifying periods, which goes against the case law of the CJEU in the *Maïstrellis* and *Caisse pour l'avenir des enfants* cases, which would not allow Member States to introduce qualifying conditions other than the ones mentioned in the Directive. In AT and DE the worker must live in the same household as the child. Krüger, referring to DE, considers that this condition 'unduly restrict[s] the right to leave'.[124] In HR, for the father to be entitled to parental leave, the mother must be employed or self-employed at the time of the birth. This condition is not only discriminatory on the grounds of sex, but also visibly goes against the case law in *Maïstrellis*, in which the CJEU declared that one of the parents cannot be denied the right to parental leave because of the employment status of their spouse.[125] In LU, besides a period of work qualification of 12 continuous months *immediately preceding the beginning of the parental leave* (which could be problematic, as explained above), there are three extra conditions: the parent must have the status of a worker at the time of the birth or adoption of their child (in the process of being abolished following the *Caisse pour l'avenir des enfants* case[126]); the parent must have worked at least 10 hours per week on one or more contracts during the 12 months prior to parental leave, which may be discriminatory against part-time workers; and the parent must raise the child in their household. Finally, in PT 'childcare leave'[127] can only be taken by one parent who must prove that the other parent is employed or incapable of working. This condition also goes against current CJEU case law in *Maïstrellis*.

5.1.6 Postponement of parental leave

The majority of Member States (18) do not make use of the possibility given by Article 5(5) of the WLB Directive (to establish circumstances in which an employer is allowed to postpone the granting of parental leave for a reasonable period of time on the grounds that the taking of parental leave at the time requested would seriously disrupt the good functioning of the employer) and thus do not allow employers to postpone the granting of parental leave.[128] The remaining countries (nine) do permit the employer to

123 For further analysis, see De la Corte-Rodríguez, M. (2021), 'The conditions of access to parental leave in the EU: An adequate delimitation of qualifying periods by the Court of Justice?', *European Labour Law Journal* 12(4), 564-568.

124 Krüger, L. (2020), 'La directive 2019/1158 du 20 juin 2019 concernant l'équilibre entre vie professionnelle et vie privée des parents et des aidants dans une perspective allemande' ('Directive 2019/1158 of 20 June 2019 on work-life balance for parents and carers from the German perspective'), in Lorber, P. and Santoro, G. (ed.) (2020), 'La Directive 2019/1158 du 20 juin 2019 concernant l'équilibre entre vie personnelle et vie privée des parents et des aidants' ('Directive 2019/1158 of 20 June 2019 on work-life balance for parents and carers'), *Revue de droit comparé du travail et de la sécurité sociale* 3, p. 47.

125 CJEU, Case C-222/14, *Maïstrellis*, 16 July 2015, ECLI:EU:C:2015:473, paragraph 36.

126 The CJEU stated that Directive 2010/18 precludes 'national legislation which makes the grant of a right to parental leave subject to the condition that the parent has the status of a worker at the time of the birth or adoption of his or her child' (CJEU, Case C-129/20, *Caisse pour l'avenir des enfants*, 25 February 2021, ECLI:EU:C:2021:140, paragraph 51). Consequently, on 1 June 2021, the Luxembourg Government introduced into Parliament a bill with the aim of abolishing the compulsory affiliation period with the Luxembourg social security system at the time of the birth or adoption of the child. This bill is part of a contested reform regarding family benefits, which has been stuck in Parliament since the Council of State issued a very negative opinion in February 2022.

127 There are no qualifying conditions for the Portuguese 'additional parental leave'.

128 In IT parental leave cannot be postponed. However, for the security/defence sector and the fire service, special arrangements for the application of parental leave, including the possibility of postponing the granting of the leave by the employer, can be stipulated by collective agreements.

postpone parental leave. However, only eight of them (all but HR[129]) have established the circumstances in which the employer is allowed to postpone the granting of the leave, as required by the WLB Directive. These eight Member States can be divided into two groups:

- Those with circumstances that refer to a serious disruption of the good functioning of the employer, as allowed by the WLB Directive (one): in EL in case of serious disruption of the good functioning of the employer (maximum postponement of 1 month[130]).
- Those with more lenient circumstances (seven): in BE for reasons related to business needs (maximum six months); in CY for reasons related to the smooth functioning of the business (maximum six months); in ES[131] and PT for reasons related to the operation of the organisation when both parents work for the same employer and they both wish to enjoy the leave simultaneously (no maximum period in the law); in IE in the following cases (maximum six months for 'parental leave' and 12 weeks for 'parent's leave'): seasonal variations in the volume of work; no replacement to carry out your work; the nature of the employee's duties; the number of other employees taking leave; and any other relevant matters; in LU in the following cases for the 'second parental leave'[132] (maximum two months): a severe disruption of work organisation due to a simultaneous demand for parental leave by a significant proportion of workers at the company or within a department of the company; the impossibility of organising a replacement for the worker during the period requested due to the specific nature of the work performed by the applicant or a labour shortage in the industry; regarding seasonal work, if the request concerns a period of time affected by seasonal variations in workload; if the applicant is an executive who participates in the effective management of the company; and if the company regularly employs fewer than five employees under a labour contract; in MT for justifiable reasons related to the operation of the place of work (no maximum period in the law), which include: where the work carried out at the place of business is of a seasonal nature; where a replacement cannot be found within the notice period given by the worker; where the specific employment of the worker who requests parental leave is of strategic importance to the undertaking or place of business; where the place of business is a small enterprise employing not more than 10 people, provided that the employer consults with the worker in order to establish alternative dates when such leave may be availed of, in such a way as to avoid the indefinite postponement of the requested parental leave; and where a significant proportion of the workforce applies for parental leave at the same time.

All things considered, there are eight countries with transposition issues. Firstly, HR has to establish the circumstances in which the employer is allowed to postpone the granting of the leave. Secondly, the other seven (BE, CY, ES, IE, LU, MT and PT) have established such circumstances but they are more lenient than those allowed by the WLB Directive (they should be related to a serious disruption of the good functioning of the employer).

5.1.7 Flexible take-up of parental leave

As explained in the Introduction,[133] the WLB Directive obliges Member States to ensure that workers have the right to request the option to take parental leave on a part-time basis and for alternating periods. However, only 15 countries fulfil this EU requirement, although some of them provide more favourable provisions than required by the Directive: some countries (10) recognise an absolute right (a right to

129 The initial period of parental leave cannot be postponed. For successive blocks, if the leave is divided into several blocks, or whenever there is a change of working time regime (from full-time to part-time or vice versa), the employer can postpone the granting of the leave for up to 30 days. Nevertheless, the circumstances which allow the employer to postpone the leave are not defined in Croatian law.

130 Maximum postponement of 2 months after the submission of the petition, i.e. 1 month from the requested beginning of the leave.

131 In ES for the 10 voluntary weeks of 'birth leave' and 'adoption leave' and for the whole period of 'childcare leave'.

132 The 'first parental leave' for one parent, to be taken right after maternity leave or adoption leave, cannot be postponed. The 'second parental leave' for the other parent, which can be used until the child is six years old, can be postponed.

133 See section 1.1.5.

obtain) rather than a relative right (a right to request the employer), at least for one of the two kinds of flexible take-up (BE, DK, ES, FI, HR, IE, IT, PL, PT and SE). The rest of the Member States (12) offer only one of the two forms of flexible take-up or none at all:

- There are four countries (CZ, LT, RO and SK) that offer no possibility whatsoever to take parental leave on a part-time basis or in different blocks.
- The other eight Member States offer either a part-time take-up of parental leave or the possibility to take the leave in different blocks, but not the two, as a relative right or an absolute right: only part-time in two countries (FR and SI) and only alternating periods in six countries (AT, BG, CY, EE[134], HU and LV). In SI, strangely enough, if taken part-time the period of the leave is not extended proportionately (e.g. if taken half-time the period is not twice as long). In CY, rather than a right, there is an obligation for the worker to take parental leave in blocks of a minimum of one week and a maximum of five weeks per calendar year. This obligation has to be respected unless the employer agrees otherwise. This means that a worker could only take their 18 weeks of parental leave continuously if the employer so agrees. This Cypriot rule does not respect the WLB Directive, which guarantees that workers are always entitled to take parental leave in one go and on a full-time basis (four months at 100 %).

As pointed out by Article 5(6) of the WLB Directive, Member States may specify the modalities of the application of the right to request flexible uptake of parental leave. In this sense, the detailed arrangements to make use of this right (e.g. the concrete percentages of part-time work or the number of blocks available and the minimum duration of each block) vary from country to country.

5.1.8 Specific measures for certain groups of parents

As clarified in the Introduction,[135] following Article 5(8), Member States shall assess the need for specific measures adapted to the specific needs of parents in particularly disadvantaged situations, namely adoptive parents, parents with a disability and parents with children with a disability or a long-term illness. This is just an obligation for Member States to make an assessment, the fulfilment of which will have to be proved by national Governments and evaluated by the European Commission. Beyond this assessment obligation, Member States are not obliged to adopt specific measures for the parents previously mentioned.

Most EU countries (19) have adopted specific measures for parental leave for at least one of the following groups of parents: adoptive parents, parents with a disability and parents with children with a disability or a long-term illness. The other eight Member States (BG, CZ, EE, HR, LT, LV, MT[136] and NL) have adopted no specific measures for such parents within the framework of parental leave. The specific measures adopted by 19 countries could be summarised as follows:

- For adoptive parents: particular measures are present in 13 Member States (AT, CY, DE, DK, ES, FI, FR, HU, IE, IT, LU, PL and RO). The most common measures are: an extension of the age of the child until which parental leave can be used;[137] a special right to leave when the child is a certain age at

134 In EE there is an absolute right for blocks of at least 7 calendar days and a relative right for blocks of less time.
135 See section 1.1.5.
136 In MT the Minister may issue regulations to provide for conditions of access to and detailed arrangements for the application of parental leave adapted to the needs of adoptive parents, parents with a disability and parents with children with a disability or a long-term illness.
137 For instance, in PL for adoptive parents the maximum age of the child until which leave can be taken is seven years old (instead of six).

the moment of adoption;[138] a maximum age of the child until which adoptive parents can take the leave;[139] and flexibility to comply with the period of notice required at national level.[140]

– For parents with a disability: only three countries contemplate special measures for these parents (DE, EL and SE). These measures are: in DE more favourable conditions in case of an early return to work,[141] and making other relatives entitled to parental leave if parents cannot take care of their children because of illness or disability;[142] in EL priority among similar petitions from other employees; and in SE, in cases where one parent is unable to care for the child due to sickness or disability, making the other parent entitled to the entire period of parental leave.
– For parents with children with a disability or a long-term illness: special measures exist in as many as 15 countries (BE, CY, DE, EL, ES, FR, HU, IE, IT, LU, PL, PT, RO, SI and SK). The most frequent measures are: increase of the duration of parental leave;[143] extension of the period within which to take the leave;[144] or a combination of the two.[145]

5.1.9 Summary table for parental leave

Table 5 provides a table of the right to parental leave (the shortcomings in each Member State are shown in grey).

138 For example, in AT parental leave can be taken from the moment the adoption proceedings have reached the stage where the child is officially included in the adoptive parents' household up to the child's second birthday. If the child is between two and eight years of age at the time of the adoption, adoptive parents are entitled to six months of parental leave in total for the two parents (parents can only take one month simultaneously).

139 For instance, in CY adoptive parents can take parental leave up to eight years following the adoption of their child, provided that the child is not older than 12 years old.

140 As an example, in FI adoptive parents should give notice in due time 'if possible'. The requirement that adoptive parents give notice 'if possible' relates to situations where the timing of the adoption procedure unexpectedly changes.

141 An early return depends on the employer's consent. However, an early return is possible because of the birth of another child or in case of special seriousness. The latter specifically refers to serious illnesses, disability or the death of a parent. In that case, employers can refuse an early return only for serious operational reasons. The refusal must be given in writing within four weeks.

142 If parents cannot take care of their children because of illness, disability or death, relatives up to the third degree and their spouses are entitled to parental leave.

143 For instance, in FR parental leave is extended by one year maximum in the case of illness, serious accident or disability of the child.

144 For example, in IE 'parental leave' can be taken until the child is 16 years old (instead of 12) if the child has an illness or disability.

145 For instance, in PT for parents of children with a disability or a long-term illness, 'childcare leave' can go up to four years per family (instead of two) and the age limit of the child until which the leave can be taken is increased to 12 years old (instead of six).

TABLE 5: SUMMARY TABLE FOR PARENTAL LEAVE

EU country	Duration	Co-parents	Individual and non-transferable	Period to take the leave	Effective use by both parents	Period of notice	Qualifying conditions	Postponement of the leave	Flexible take-up
AT	Up to two years per parent	Yes	Yes formally, but in reality a family right	Until the child is two years old	No	- Mothers: until the end of maternity leave - Fathers: three months	The worker must live in the same household as the child	No	In blocks (absolute right)
BE	Four months per parent	Yes	Yes	Until the child is 12 years old	Yes	Two months	12 months with the employer in the 15-month period preceding the notice	For reasons related to business needs (maximum six months)	- Part-time (absolute or relative right) - In blocks (absolute right)
BG	- System 1 (childcare leave): six months per parent - System 2 (childcare leave for fathers): two months per father	No	- System 1: yes, for one month - System 2: yes for the father	Until the child is eight years old	Yes	10 days	No	No	In blocks (absolute right)
CY	18 weeks per parent	No	Yes, for at least 16 weeks	Eight years after birth/adoption	Yes	Three weeks	Six months with the employer	For reasons related to the smooth functioning of the business (maximum six months)	In blocks (as an obligation for the worker)
CZ	Up to three years per parent	No	Yes	Until the child is three years old	No	No	No	No	No
DE	Up to three years per parent	Yes	Yes	Until the child is eight years old	Yes	7 weeks or 13 weeks	The worker must live in the same household as the child	No	- Part-time (relative right) - In blocks (absolute or relative right)

EU country	Duration	Co-parents	Individual and non-transferable	Period to take the leave	Effective use by both parents	Period of notice	Qualifying conditions	Postponement of the leave	Flexible take-up
DK	32 weeks per parent	Yes	Yes	- 27 weeks: from the 11th week after birth/ adoption until one year after birth/adoption - five weeks: until the child is nine years old	Yes	During six weeks after birth/ adoption	No	No	- Part-time (relative right) - In blocks (absolute right)
EE	Up to three years per family	Yes	No (family right)	Until the child is three years old	No	30 calendar days	No	No	In blocks (absolute or relative right)
EL	Four months per parent	No	Yes	Eight years after birth/adoption	Yes	One month	One year with the employer for each child	In case of serious disruption of the good functioning of the employer (maximum one month)	- Part-time (relative right) - In blocks (relative right)
ES	- System 1 (birth leave and adoption leave): 16 weeks per parent - System 2 (childcare leave): up to 3 years per parent	Yes	Yes	- System 1: six weeks after birth/adoption; 10 weeks during 12 months after birth/adoption - System 2: three years after birth/ adoption	No	- System 1: 15 days - System 2: no	No	For reasons related to the operation of the organisation when both parents work for the same employer and they both wish to enjoy the leave at the same time	- Part-time (relative right) - In blocks (absolute right)
FI	160 working days (six-day week) per parent	Yes	Yes, for 97 working days (six-day week)	Two years after birth/adoption	Yes	Two months in general	No	No	- Part-time basis (relative right) - In blocks (absolute right)

EU country	Duration	Co-parents	Individual and non-transferable	Period to take the leave	Effective use by both parents	Period of notice	Qualifying conditions	Postponement of the leave	Flexible take-up
FR	Up to three years per parent	Yes	Yes	Three years after birth/adoption	No	Two months in general	One year with the employer	No	Part-time (absolute right)
HR	Four months per parent	Yes	Yes, for two months	Until the child is 8 years old years old	Yes	- Initial period taken: no - Successive blocks or change of working time regime: 30 days	For the father: the mother must be employed or self-employed at the time of the birth	- Initial period taken: no - Successive blocks or change of working time regime: circumstances not defined (maximum 30 days)	- Part-time (absolute right) - In blocks (absolute right)
HU	Up to three years per family	Yes	No (family right)	Three years after birth/ adoption	No	15 days	No	No	In blocks (absolute right)
IE	- System 1 (parental leave): 26 weeks per parent - System 2 (parent's leave): seven weeks per parent	Yes	- System 1: yes, for at least 12 weeks - System 2: yes	- System 1: until the child is 12 years old - System 2: two years after birth/adoption	Yes	Six weeks	- System 1: one year with the employer - System 2: no	- System 1: in five cases (maximum six months) - System 2: in the same five cases (maximum 12 weeks)	- Part-time (relative right) - In blocks (absolute right)
IT	10 months per family (11 if one parents takes 3 months)	No	Yes, for four months	12 years after birth/adoption	Yes	Five days	No	No	- Part-time (absolute right) - In blocks (absolute right)
LT	- In the case of birth: up to three years per parent - In the case of adoption: 24 months per parent	No	Yes formally, but in reality a family right	- In the case of birth: until the child is three years old - In the case of adoption: 24 months after adoption	No	14 days	No	No	No

EU country	Duration	Co-parents	Individual and non-transferable	Period to take the leave	Effective use by both parents	Period of notice	Qualifying conditions	Postponement of the leave	Flexible take-up
LU	Up to six months per parent	No	Yes	- 'First parental leave' for one parent: right after maternity leave or adoption leave - 'Second parental leave' for the other parent: until the child is six years old	Yes	- 'First parental leave': during two months before the beginning of maternity leave/ adoption leave - 'Second parental leave': four months	- 12 continuous months of employment immediately preceding the beginning of the parental leave - Others conditions	- 'First parental leave': no - 'Second parental leave': in five cases (maximum two months)	- Part-time (relative right) - In blocks (relative right)
LV	18 months per parent	No	Yes	Until the child is eight years old	Yes	One month	No	No	In blocks (absolute right)
MT	- In the private sector: four months per parent - In the public sector: 12 months per family	Yes	- Private sector: yes, for two months - Public sector: yes, for four months per parent	- Private sector: until the child is eight years old - Public sector: until the child is 10 years old	Yes	Two weeks	- Private sector: 12 months with the employer - Public sector: to have completed the probationary period (from six to 12 months)	For justifiable reasons related to the operation of the place of work	- Part-time (relative right) - In blocks (relative right)
NL	26 weeks per parent	Yes	Yes	Until the child is eight years old	Yes	Two months	No	No	- Part-time (relative right) - In blocks (relative right)
PL	- System 1 (parental leave): 32 weeks per family - System 2 (childcare leave): 36 months per family	No	- System 1: no (family right) - System 2: yes, for one month	Until the child is six years old	Yes	21 days	- System 1: no - System 2: six months of employment	No	- Part-time (absolute right) - In blocks (absolute right)

EU country	Duration	Co-parents	Individual and non-transferable	Period to take the leave	Effective use by both parents	Period of notice	Qualifying conditions	Postponement of the leave	Flexible take-up
PT	- System 1 (additional parental leave): three months per parent - System 2 (childcare leave): two years per family	Yes	- System 1: yes - System 2: no	Until the child is six years old	Yes	30 days	- System 1: no - System 2: this leave can only be taken by one parent who must prove that the other parent is employed or incapable of working	For reasons related to the operation of the organisation when both parents work for the same employer and they both wish to take the leave at the same time	- Part-time (absolute right) - In blocks (absolute right)
RO	Up to two years per family	No	Yes, for one month	Until the child is two years old	No	No	Contributions for 12 months in the last two years prior to the birth of the child.	No	No
SE	240 calendar days per parent	Yes	Yes, for 90 calendar days	Four years after birth/adoption	Yes	Two months	No	No	- Part-time (absolute right) - In blocks (absolute right)
SI	130 calendar days per parent	No	- For the mother: yes, for 30 calendar days - For the father: no	Immediately after maternity leave/ adoption or the parental leave of the other parent	Yes	30 days	No	No	Part-time (relative right)
SK	Up to three years per parent	No	Yes	Until the child is three years old	No	One month	No	No	No

5.2 Payment or allowance during parental leave

5.2.1 Period of parental leave with a payment or allowance

Parental leave is compensated with a payment or an allowance in the majority of Member States (all but CY). All of the 26 countries that offer compensation do so in the form of an allowance (provided by the State). In 12 of them the allowance is provided for the whole period of parental leave (AT, BE, CZ,[146] FI, HR, HU, LU, LV,[147] RO, SE, SI and SK), while in the other 14 only part of parental leave is paid (BG,[148] DE, DK, EE, EL, ES,[149] FR, IE,[150] IT, LT, MT, NL, PL[151] and PT[152]). Disregarding the question of non-transferability, the period of parental allowance is usually longer than the two months per parent required by the WLB Directive (four months in total). This is actually the case in 20 EU countries (all countries with compensation but BG, EL, ES, IE, MT and NL). Apart from that, in some countries (seven) the period during which the parental allowance may be paid is shorter than the period during which the leave itself can be used and is closer to the date of birth or adoption (DK,[153] FR,[154] LT,[155] LV,[156] NL[157] and PT[158]) or is divided into segments (MT[159]).

The 27 Member States may be classified as follows, taking into consideration the EU requirement for two non-transferable months with a payment or an allowance:

– Period of allowance below the minimum standard (in 11 countries): apart from the Member State mentioned (CY), where no compensation is granted, 10 do not reach the minimum standard, but for different reasons. In two of them (ES and IE) this is because the period of paid leave, albeit individual and non-transferable, is not long enough. ES, via the 'passerelle' clause in Article 20(6) of the WLB Directive, uses the 16 weeks of paid 'birth leave' and 'adoption leave' granted to each biological and adoptive parent on a non-transferable basis to comply with the EU provisions on parental leave. These 16 weeks are enough for a biological father (longer than the two weeks of paternity leave and the two months of paid parental leave for the biological father: roughly 11 weeks) and for an adoptive parent (longer than the two months of paid parental leave for each adoptive parent: nine weeks approximately), but not sufficient for biological mothers (shorter than 14 weeks of maternity leave plus the two months of paid parental leave for the biological mother: around 23 weeks); seven paid weeks are lacking (23 minus 16). In the case of IE, only the seven weeks of 'parent's leave' per parent are paid, two weeks below the EU minimum standard. However,

146 In CZ, the parental allowance (four years per family, until the child is four years old) can even be used once the period of parental leave has been exhausted (three years per parent, until the child is three years old). This is because the parental allowance can only be received by one parent at a time.
147 As it will be explained below, the whole period of parental leave is paid, but only to a parent at a time.
148 The Bulgarian 'childcare leave' is unpaid.
149 The Spanish 'childcare leave' is unpaid.
150 The Irish 'parental leave' is unpaid.
151 The Polish 'childcare leave' is unpaid.
152 The Portuguese 'childcare leave' is unpaid.
153 In DK in the case of a birth child, the allowance is for 14 weeks for the mother (there is also a post-birth period of 10 weeks of maternity leave) and 22 weeks for the father/co-mother (there are also two weeks of paternity leave after the birth), and it can be received until the child is one year old. In the case of adoption, there are 18 weeks of allowance for each parent (besides six weeks of adoption leave right after the adoption), which can be taken within one year after the adoption. The idea is that each parent has a total of 24 paid weeks.
154 In FR the six months of allowance per parent have to be taken within one year after the birth/adoption.
155 In LT there are two options for the worker: the first option is 77.58 % of earnings for one year per parent, to be taken during one year after the birth/adoption; the other is 54.31 % of earnings for one year per parent and 31.03 % of earnings for one year per parent, to be taken during the first year and the second year after the birth/adoption respectively.
156 In LV there are two options for the worker: one option is up to 12 months per parent at 60 % of earnings, to be taken during 12 months after birth/adoption; the other option is up to 18 months per parent at 43.75 % of earnings, to be taken during 18 months after birth/adoption.
157 In NL the nine paid weeks for each parent can be taken during one year after the birth/adoption.
158 In PT only the 'additional parental leave' (three months per parent) is paid and has to be taken on a full-time basis and immediately after the 'initial parental leave' (maternity leave)/adoption leave or the additional parental leave of the other parent, and by one parent at a time.
159 50 % of the period with compensation until the child is four, 25 % when the child is between four and six, and 25 % when the child is between six and eight.

IE may be making use of Article 20(2) of the WLB Directive,[160] which allows Member States not to provide a payment or allowance for the last two weeks of parental leave until 2 August 2024. In the other eight countries, the EU minimum standard is not complied with, not because of the duration of the allowance (which is even longer than two months), but because the allowance is not paid during the two non-transferable months of parental leave per parent: in two countries (RO and SI) the non-transferable parental leave is less than two months: in RO one month and in SI 30 calendar days for the mother and none for the father; in three countries (EE, HU and PL) the right to the allowance is a family entitlement to be shared between parents; in three countries (CZ, LT and LV), the right to the allowance is formally individual and non-transferable, but in reality it could be regarded as a family right. This is because, firstly, only one parent at a time can receive the allowance and, secondly, the duration of the allowance (four years in CZ, one or two years in LT[161] and 12 or 18 months in LV[162]) covers the whole period during which the allowance can be received (until the child is four in CZ, during one or two years after the birth/adoption in LT and during 12 or 18 months after the birth/adoption in LV). Consequently, it is entirely up to parents to decide how to share the full period of allowance, in the same way as a family entitlement works. In turn, the full period of allowance could be used by one parent, generally the mother.

– Period of allowance equal to the minimum standard (in eight countries): two months per parent in EL, HR and MT and nine weeks per parent in DK and NL; in DE 12 months per family (14 if one parent takes at least two months), with two months as a 'sharing bonus'; in AT 12 months per family (14 if one parent takes at least two months) or from 365 to 851 calendar days per family (456 and 1 063 days respectively if one parent takes at least 20 %),[163] with two months or 20 % of time as 'sharing bonuses'. BG could also be included in this group, despite offering only two paid non-transferable months per father within the framework of the Bulgarian 'childcare leave for fathers'.[164] It seems that the 'passerelle' clause of Article 20(6) of the WLB Directive could be applied to mothers: in BG there is a long maternity leave for biological mothers and a long adoption leave for adoptive mothers[165] (410[166] and 365 calendar days respectively) compensated at 90 % of earnings, most of this on a non-transferable basis,[167] within which the 14 paid weeks of maternity leave for biological mothers and the two paid non-transferable months of parental leave for biological and adoptive mothers could be included.
– Period of allowance above the minimum standard (in eight countries), with more than two paid non-transferable months for each parent: in IT[168] and PT three months; in SE 90 calendar days; in FI 97 working days (six-day week); in BE four months; and in FR and LU six months. SK could also be included in this group. In principle, the situation is the same as in CZ, LT and LV (the right to allowance is formally individual and non-transferable, but in reality it could be regarded as a

160 'Notwithstanding paragraph 1 of this Article, for the payment or allowance corresponding to the last two weeks of parental leave as provided for in Article 8(3), Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 2 August 2024. They shall immediately inform the Commission thereof.'

161 In LT there are two options for the worker: the first option is 77.58 % of earnings for one year per parent, to be taken during the first year after the birth/adoption; the other is 54.31 % of earnings for one year per parent and 31.03 % of earnings for one year per parent, to be taken during the first year and the second year after the birth/adoption respectively.

162 In LV there are two options for the worker: one option is up to 12 months per parent at 60 % of earnings, to be taken during 12 months after birth/adoption; the other option is up to 18 months per parent at 43.75 % of earnings, to be taken during 18 months after birth/adoption.

163 In AT there are two options for the worker: the first one is 12 months per family at 80 % of earnings (14 if one parent takes 2 months); the second option is 365 calendar days at EUR 33.88 or up to 851 calendar days at EUR 14.53 per family (456 and up to 1 063 days respectively if one parent takes 20 %). In addition, for both options, each parent is entitled to a bonus of EUR 500 if parents share the parental benefit equally (at a minimum ratio of 40:60). Thus, together they receive a total of EUR 1 000.

164 The Bulgarian 'childcare leave', consisting of six months per parent, one of which cannot be transferred to the other parent, is fully unpaid.

165 Moreover, they are followed by an extra leave for mothers until the child is 2 years old, which is compensated at a flat-rate allowance of BGN 650 per month (around EUR 325). The mother can fully transfer this extra leave to the father.

166 45 calendar days must be taken before the expected date of birth.

167 With the agreement of the mother, once the child reaches six months old, maternity leave can be transferred to the father. Likewise, adoptive fathers may use the adoption leave of the adoptive mother with her consent, beginning no earlier than six months after the child's arrival.

168 The parental allowance is nine months per family: three months for each parent, plus three months to be shared between parents.

family right) because the parental allowance cannot be taken simultaneously by parents and the duration of the allowance (three years) equals the period during which it can be received (until the child is three). However, in SK there is an important incentive for fathers to take parental leave: a 'maternity allowance' at 75 % of earnings is paid to biological and adoptive fathers during 28 weeks of parental leave,[169] which cannot be transferred to mothers, while mothers only receive a flat-rate allowance during parental leave.[170] This 'maternity allowance' could be taken into account to comply with the two paid non-transferable months of parental leave for fathers. In the case of mothers, the 'passerelle' clause may be applied. In SK there is a long non-transferable maternity leave for biological mothers and a long non-transferable adoption leave for adoptive mothers (34 weeks[171] and 28 weeks respectively) compensated at 75 % of earnings, within which the 14 paid weeks of maternity leave for biological mothers and the two paid non-transferable months of parental leave for biological and adoptive mothers could be included.

5.2.2 Level of payment or allowance during parental leave

Of the 26 EU countries with compensation, the allowance is designed as a percentage of the worker's previous wage in most of them (15), as a flat-rate in seven Member States (BE, BG, CZ, EL, FR, IE and MT) and as a combination of the two in three countries (HU, SE and SK). In AT there are two options for the worker, one with a percentage of the worker's previous wage and another one with a flat-rate.[172] Of the 15 countries with a percentage of the worker's previous wage, in three of them (LT, LV and PL) there are also two options for the worker.[173]

The 26 countries may be grouped in the following way, paying attention to the adequacy of the level of allowance, following Article 8(3) and recital 31 of the WLB Directive:[174]

– In nine Member States the allowance seems to be inadequate: among these, seven (BE, BG, CZ, EL, FR, IE and MT) provide a flat-rate allowance that appears to be rather low: EUR 921.83 per month in BE; about EUR 360[175] per month in BG; a lump-sum of around EUR 13 500[176] to be distributed monthly for up to four years (in accordance with the period chosen by the worker) in CZ; EUR 713 per month in EL; EUR 422.21 per month in FR;[177] EUR 250 per week in IE; and EUR 14.01 per working

169 A flat-rate of EUR 275.90 per month is paid for the remaining period of parental leave (EUR 378.10 per month if fathers previously received a 'maternity allowance').
170 Only a flat-rate allowance of EUR 275.90 per month is paid during the whole period of parental leave (EUR 378.10 per month if mothers previously received a 'maternity allowance').
171 From six to eight weeks before the birth.
172 Twelve months at 80 % of earnings per family (14 if one parent takes two months); or, alternatively, 365 calendar days at EUR 33.88 or 851 calendar days at EUR 14.53 per family (456 and 1 063 respectively if one parent takes 20 %).
173 In LT 77.58 % for one year or 54.31 % for the first year and 31.03 % for the second year; in LV 60 % for up to 12 months or 43.75 % for up to 18 months; and in PL 100% for 6 weeks and 60% for 26 weeks or 80 % for 32 weeks.
174 Article 8(3) states that the payment or allowance 'shall be set in such a way as to facilitate the take-up of parental leave by both parents'. In addition, recital 31 offers some guidance as to what is considered 'adequate': when setting the level of the payment or allowance, 'Member States should take into account that the take-up of parental leave often results in a loss of income for the family and that first earners in a family are able to make use of their right to parental leave only if it is sufficiently well remunerated, with a view to allowing for a decent living standard'.
175 BGN 710.
176 CZK 330 000.
177 Santoro explains that 'the low level of the benefit has not encouraged fathers to take their part of leave' (Santoro, G. (2020), 'L'équilibre entre vie professionnelle et vie privée des parents et des aidants en droit français au regard de la directive 2019/1158 du 20 juin 2019' ('Work-life balance for parents and carers in French law in relation to Directive 2019/1158 of 20 June 2019'), in Lorber, P. and Santoro, G. (ed.) (2020), 'La Directive 2019/1158 du 20 juin 2019 concernant l'équilibre entre vie personnelle et vie privée des parents et des aidants' ('Directive 2019/1158 of 20 June 2019 on work-life balance for parents and carers'), *Revue de droit comparé du travail et de la sécurité sociale* 3, p. 38.

day[178] in MT. In the other two countries (IT and PT), the percentage of income replacement is too low: 30 % in IT and 25 % in PT.[179]

– In three countries (HR, HU and LU) the percentage applied to the worker's previous wage is quite high, but the upper ceiling of the allowance may be too low: in HR a percentage of 100 %, but with a ceiling of around EUR 1 000[180] per month; in HU until the child is 2 years old[181] a percentage of 70 % of earnings is paid, but with an upper limit of about EUR 650[182] per month; and in LU a percentage of 100 %, but with a ceiling of EUR 3 855.68 per month.
– In the remaining 14 Member States (AT, DE, DK, EE, ES, FI, LT, LV, NL, PL, RO, SE, SI and SK) the allowance could be considered as adequate, at least for the most favourable option (in AT, LT, LV and PL) or during the period paid at a percentage of previous earnings (in SE and SK). The percentages of income replacement go from 60 % to 100 %, excepting FI. As commented above, in FI there are different percentages applied to the worker's previous wage, which decrease as the different wage segments become higher: from 90 % to 32.5 % for the first 16 working days of leave and from 70 % to 25 % for the remaining 144 working days.[183] As a result, the real percentage applied to the previous wage may be lower than 90 % and 70 % respectively.[184] In 12 countries (all but FI and PL) an upper limit to the allowance exists, which seems reasonable.

The categorisation made above responds to an attempt to identify potential problematic situations. However, the question of whether the payment or allowance is adequate or not will have to be answered on a case-by-case basis, taking into account the living standards in each country and the uptake rates for parental leave by parents, especially by fathers. With regard to the latter, according to Article 18(1) of the WLB Directive, by 2 August 2027 Member States shall communicate to the Commission all information concerning the implementation of this Directive, which shall include available aggregated data on the take-up of different types of leave and FWA, by men and women.

All things considered, there are only seven countries (AT, DE, DK, FI, NL, SE and SK) with two non-transferable months of parental leave that are in principle compensated at an adequate level.

5.2.3 Working while on parental leave or receiving parental allowance

The WLB Directive obliges Member States to make workers entitled to at least two months of non-transferable parental leave during which an adequate payment or allowance has to be provided. Therefore, the parental payment or allowance cannot be granted irrespective of whether a parent makes use of parental leave. If a worker does not take the leave, they should not receive the compensation foreseen during the leave. Put another way, Member States should only grant the payment or allowance foreseen for parental leave if a parent is actually on leave. However, in LV it is possible to decouple parental leave

178 EUR 21.64 per working day in the case of a single parent or a married person whose partner is not employed on a full-time basis and EUR 14.01 per working day in the case of any other person. These amounts are the ones paid during sickness leave.

179 De Oliveira Carvalho believes that the low level of the benefit 'prevents a good number of parents from enjoying leave in practice' (de Oliveira Carvalho, C. (2020), 'Concilier vie professionnelle et vie familiale pour promouvoir l'égalité entre les femmes et les hommes au Portugal: considérations et perspectives à la lumière de la directive 2019/1158 sur l'équilibre entre vie professionnelle et vie privée des parents et des aidants' ('Reconciling work and family life to promote equality between women and men in Portugal: considerations and perspectives in the light of Directive 2019/1158 on work-life balance for parents and carers'), in Lorber, P. and Santoro, G. (ed.) (2020), 'La Directive 2019/1158 du 20 juin 2019 concernant l'équilibre entre vie personnelle et vie privée des parents et des aidants' ('Directive 2019/1158 of 20 June 2019 on work-life balance for parents and carers'), *Revue de droit comparé du travail et de la sécurité sociale* 3, p. 93.

180 HRK 7 500.13.

181 In HU the allowance is 70 % of the worker's previous wage until the child is 2 years old, and after that, a flat-rate of HUF 28 500 (less than EUR 70) per month until the child is 3 years old.

182 HUF 280 000.

183 For the first 16 working days of generic parental leave, the percentage is 90 % for income up to EUR 50 606 and 32.5 % for higher income; for the remaining 144 working days, the percentage is 70 % for income up to EUR 26 898, 40 % for income between EUR 26 898 and EUR 50 606 and 25 % for higher income.

184 For example, if the income is EUR 50 606, the percentages will be: for the first 16 working days 90 %; for the remaining 144 working days: (26 898 x 70 %) + (23 707 x 40 %) = EUR 28 311.40. Therefore, the real percentage for the remaining 144 working days is 28 311.40/50 606= 55.95 %.

from the parental allowance. A worker could remain working and receive the parental allowance, albeit only 30 % of the amount they would have received had they been on parental leave.[185]

Furthermore, in other Member States (AT, CZ, EE, HU and SK), it is possible to work while being on full-time parental leave and receiving the full parental allowance. In two of them (EE[186] and SK), it is possible to work with no limitations, while in the other three there are some restrictions: in AT it is possible to work earning up to a certain amount per year, which is EUR 7 300 if the option with a percentage of the worker's previous wage was chosen and EUR 16 200 if the option with a flat-rate was chosen; in CZ it is possible to work provided a child under the age of two[187] attends a crèche or other facility for pre-school children (private or public) for no more than 92 hours per month; and in HU it is possible to work, but only after the child is 6 months old. Being on parental leave an allowance and working is detrimental to the very aim of parental leave, which is to have time off work in order to take care of a child, as established in Article 3(1)(b) of the WLB Directive. In order to fulfil this purpose, it should be forbidden or extremely limited to work during parental leave, unless the leave is taken part-time (e.g. 50%), in which case the leave should be extended (e.g. by double) and the payment or allowance reduced proportionally (e.g. by half).

5.2.4 Additional qualifying conditions for the payment or allowance

Besides the qualifying conditions for parental leave itself, only 12 Member States (out of the 26 which provide an allowance) require additional conditions for workers to be entitled to the parental allowance:

– There are six countries which require a qualifying period not exceeding one year, which in all cases is a period of work qualification:[188] in SK (only for the part of the allowance with a percentage of the worker's previous wage) 270 days of contributions in the two years before submitting an application; in IE, among other possibilities,[189] 39 weeks of contributions in the 12-month period before the first day of 'parent's leave'; in HR nine months of consecutive insurance or 12 months with interruptions

185 According to the national expert, the right to remain in employment and receive parental allowance is 'abused'. Some fathers apply for parental allowance while remaining in active employment and are therefore entitled to only 30 % of the parental allowance they could have received had they not worked. This may be convenient in families where the income of the father is considerably higher than that of the mother. For example, if a mother earns the minimum salary of EUR 500 and applies for parental allowance without working, the amount of parental allowance would be EUR 300 (EUR 500 multiplied by 60 %), while if a father has a monthly salary of EUR 2 500 and applies for parental allowance while working, the allowance would be EUR 450 (EUR 2 500 multiplied by 60 % and by 30 %). In such cases, the mother could remain at home and perform childcare while the father applies for parental allowance and continues working full-time. Such a situation is especially serious taking into account that the mother who does not receive the parental allowance and stays at home with childcare obligations loses all social insurance rights during that period.

186 According to the national expert, the system is perverse because in some cases fathers take parental leave, get the parental allowance and go to work, while mothers stay at home without being officially on parental leave (they are out of work) and lose their health insurance.

187 As explained by Stangova, for children over two years old, the time spent by them in a pre-school facility is not taken into consideration anymore (Stangova, V. (2020), 'Transposition de la directive (UE) 2019/1158 du Parlement européen et du Conseil du 20 juin 2019 concernant l´équilibre entre vie professionnelle et vie privée des parents et des aidants dans le droit du travail tchèque' ('Transposition of the (EU) Directive 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers in Czech labour law') in Lorber, P. and Santoro, G. (ed.) (2020), 'La Directive 2019/1158 du 20 juin 2019 concernant l'équilibre entre vie personnelle et vie privée des parents et des aidants' ('Directive 2019/1158 of 20 June 2019 on work-life balance for parents and carers'), *Revue de droit comparé du travail et de la sécurité sociale* 3, pp. 115-116.

188 The period of time a person has been a worker, irrespective of the number of employers.

189 At least 39 weeks of contributions in the 12-month period before the first day of parent's leave; or at least 39 weeks of contributions since first starting work and at least 39 weeks of contributions paid or credited in the relevant tax year (two years before the year when the leave starts) or in the tax year immediately following the relevant tax year (one year before the year when the leave starts); or at least 26 weeks of contributions paid in the relevant tax year (two years before the year when the leave starts) and at least 26 weeks of contributions paid in the tax year immediately before the relevant tax year (three years before the year when the leave starts).

in the last two years;[190] in ES up to 360 days of contributions;[191] in BG 12 months of contributions; and in LT 12 months of contributions during the previous 24 months. As previously explained, despite the judgment in *Caisse pour l'avenir des enfants* about Directive 2010/18, which validated a length of service qualification of 12 months *immediately prior to the start of parental leave*, the WLB Directive simply states that the qualifying period used (be it a period of work qualification or a length of service qualification) *shall not exceed one year*, without further restrictions. In this sense, the required periods in SK (270 days of contributions *in the two years before submitting an application*), IE (39 weeks of contributions *in the 12 month period before the first day of 'parent's leave'*), HR (9 months of consecutive insurance or 12 months with interruptions *in the last two years*) and LT (12 months of contributions *during the previous 24 months*) may turn out to be longer than *one year*. For example, if an employee has been employed at a given company for a period of five years and, after two years without working, returns to work for the same company, they will not be immediately entitled to parental leave, but only when they have completed an extra period of up to one year (up to six years in total!).

- There is one country (FR) with an excessive period of work qualification: workers are required to have worked during the two years preceding birth.
- In two countries (DK and HU) the period required seems to be discriminatory: in DK it is necessary to have been employed for at least 160 working hours within the last four calendar months before the leave and to have been employed for a minimum of 40 hours per month in at least three of these months, which may be discriminatory against part-time workers; in HU an insurance cover for 365 days over a period of 2 years prior to the birth or adoption of the child is required, but only when the allowance is calculated as percentage of the worker's previous wage (not when it is a flat-rate). However, mothers who have graduated from higher education recently are exempted from this requirement,[192] which could be considered discriminatory on the grounds of sex.
- There are three countries which set conditions other than qualifying periods, which goes against the case law of the CJEU in *Maïstrellis* and *Caisse pour l'avenir des enfants*, which would not allow Member States to introduce qualifying conditions other than the ones mentioned in the Directive. In AT, besides being employed consecutively for 182 days before receipt of the allowance (only for the option with a percentage of the worker's previous wage), there are some extra conditions (for the two options of allowance): the applicant needs to reside legally in AT, in a household together with the child, and be entitled to family allowance. In DE the person's previous year's income cannot be higher than EUR 250 000 or, if both parents are entitled to the allowance, their joint income cannot be higher than EUR 300 000. In PT the allowance during the 'additional parental leave' is granted only if three conditions are met: it has to be taken on a full-time basis, immediately after the 'initial parental leave' (maternity leave)/adoption leave or the additional parental leave of the other parent, and by one parent at a time. The first condition seems problematic, as the exercise of an EU right to take parental leave on a part-time basis, which is implemented in PT as an absolute right, should not penalise the worker.

5.2.5 Summary table for the payment or allowance during parental leave

Table 6 provides a summary of the payment or allowance during parental leave (the shortcomings in each Member State are shown in grey).

190 If this condition is not fulfilled, the insured person is entitled to a flat-rate parental allowance amounting to HRK 2 328.20 per month (around EUR 312).

191 For workers under 21 years: no minimum contribution period; for workers between 21 and 26 years: 90 days within the seven years prior to the start of the leave or, alternatively, 180 days of contributions throughout their working life; for workers over 26 years: 180 days within the seven years prior to the start of the leave or, alternatively, 360 days throughout their working life.

192 Fathers may be entitled to this exemption only in exceptional cases, such as the death of the mother.

TABLE 6: SUMMARY TABLE FOR THE PAYMENT OR ALLOWANCE DURING PARENTAL LEAVE

EU country	Period of compensation	Individual and non-transferable	% of previous wage or flat-rate	Concrete % or amount	Ceiling	Adequate compensation	Additional qualifying conditions
AT	- Option 1: 12 months per family (14 if one parent takes two months) - Option 2: 365 calendar days at EUR 33.88 or up to 851 calendar days at EUR 14.53 per family (456 and up to 1,063 respectively if one parent takes 20 %)	- Option 1: yes, for two months (as a 'sharing bonus') - Option 2: yes, for 20 % of the time (as a 'sharing bonus')	- Option 1: % of previous wage - Option 2: flat-rate	- Option 1: 80 % - Option 2: between EUR 33.88 and EUR 14.53 per calendar day	EUR 66 per calendar day (if % of previous wage)	- Option 1: yes - Option 2: no	- Option 1: employed consecutively for 182 days before receipt of the allowance, plus other conditions - Option 1: others conditions
BE	Four months per parent	Yes	Flat-rate	EUR 921.83 per month	Not applicable	No	No
BG	- Childcare leave: unpaid - Childcare leave for fathers: two months per father	Yes (for the father)	Flat-rate	BGN 710 per month	Not applicable	No	12 months of contributions
CY	None	-	-	-	-	-	-
CZ	Up to four years per parent (until the child is four years old)	Yes formally, but in reality it is a family right	Flat-rate	CZK 330 000 as a lump-sum to be distributed monthly (according to the period chosen)	Not applicable	No	No
DE	12 months per family (14 if one parent takes two months)	Yes, for two months (as a 'sharing bonus')	% of previous wage	65 %	EUR 1 800 per month	Yes	The person's previous year's income cannot be higher than EUR 250 000 (if both parents are entitled their joint income cannot be higher than EUR 300 000)

EU country	Period of compensation	Individual and non-transferable	% of previous wage or flat-rate	Concrete % or amount	Ceiling	Adequate compensation	Additional qualifying conditions
DK	- Birth: 14 weeks for the mother and 22 weeks for the father/ co-mother - Adoption: 18 weeks per parent	Yes, for nine weeks	% of previous wage	100 %	DKK 4 465 per week	Yes	Employed for 160 working hours within the last four calendar months before the leave and employed for 40 hours per month in at least three of these months
EE	475 calendar days per family	No (family right)	% of previous wage	100 %	EUR 4 043.07 per month	Yes	No
EL	Two months per parent	Yes	Flat-rate	EUR 713 per month	Not applicable	No	No
ES	- Birth leave and adoption leave: 16 weeks per parent (seven weeks missing for biological mothers) - Childcare leave: unpaid	Yes	% of previous wage	100 %	EUR 4 139.40 per month	Yes	For workers under 21 years: no minimum contribution period; for workers between 21 and 26 years: 90 days within the seven years prior to the start of the leave or, alternatively, 180 days of contributions throughout their working life; for workers over 26 years: 180 days within the seven years prior to the start of the leave or, alternatively, 360 days throughout their working life.
FI	160 working days (six-day week) per parent	Yes, for 97 working days (six-day week)	% of previous wage	- Up to 90 % for 16 working days - Up to 70 % for 144 working days	No	Yes	No
FR	Six months per parent (to be enjoyed during one year after birth/ adoption)	Yes	Flat-rate	EUR 422.21 per month	Not applicable	No	To have worked during the two years preceding birth
HR	Four months per parent	Yes, for two months	% of previous wage	100 %	HRK 7 500.13 per month	Ceiling may be too low	Nine months of consecutive insurance or 12 months with interruptions in the last 2 years

EU country	Period of compensation	Individual and non-transferable	% of previous wage or flat-rate	Concrete % or amount	Ceiling	Adequate compensation	Additional qualifying conditions
HU	Up to three years per family	No (family right)	% of previous wage and flat-rate	- 70 % for the first two years - HUF 28,500 per month for the third year	HUF 280,000 per month (if % of previous wage)	Ceiling may be too low	Insurance cover for 365 days over a period of two years prior to the birth or adoption of the child (if % of previous wage), but mothers who have graduated from higher education recently are exempted
IE	- Parental leave: unpaid - Parent's leave: seven weeks per parent (two weeks missing)	Yes	Flat-rate	EUR 250 per week	Not applicable	No	At least 39 weeks of contributions in the 12-month period before the first day of parent's leave; or at least 39 weeks of contributions since first starting work and at least 39 weeks of contributions paid or credited in the relevant tax year (two years before the year when the leave starts) or in the tax year immediately following the relevant tax year (one year before the year when the leave starts); or at least 26 weeks of contributions paid in the relevant tax year (two years before the year when the leave starts) and at least 26 weeks of contributions paid in the tax year immediately before the relevant tax year (three years before the year when the leave starts).
IT	Nine months per family	Yes, three months	% of previous wage	30 %	No	No	No
LT	- Option 1: one year per parent (to be taken during the 1st year after birth/adoption) - Option 2: two years per parent (to be taken during the two years after birth/adoption)	Yes formally, but in reality it is a family right	% of previous wage	- Option 1: 77.58 % for one year - Option 2: 54.31 % for the 1st year and 31.03 % for the 2nd year	The corresponding % of EUR 3 172 per month	Yes	12 months of contributions during the previous 24 months
LU	Up to six months per parent	Yes	% of previous wage	100 %	EUR 3 855.68 per month	Ceiling may be too low	No

EU country	Period of compensation	Individual and non-transferable	% of previous wage or flat-rate	Concrete % or amount	Ceiling	Adequate compensation	Additional qualifying conditions
LV	- Option 1: up to 12 months per parent (to be enjoyed during 12 months after birth/ adoption) - Option 2: up to 18 months per parent (to be enjoyed during 18 months after birth/ adoption)	Yes formally, but in reality it is a family right	% of previous wage	- Option 1: 60% for up to 12 months - Option 2: 43.75% for up to 18 months	EUR 78 100 per year	Yes	No
MT	Two months per parent	Yes	Flat-rate	EUR 14.01 per working day	Not applicable	No	No
NL	Nine weeks per parent (to be enjoyed during one year after birth/ adoption)	Yes	% of previous wage	70 %	EUR 3 545.91 per month	Yes	No
PL	- Parental leave: 32 weeks per family - Childcare leave: unpaid	No (family right)	% of previous wage	- Option 1: 100 % for six weeks and 60 % for 26 weeks - Option 2: 80 % for 32 weeks	No	Yes	No
PT	- Additional parental leave: three months per parent (to be taken immediately after the 'initial parental leave'/ adoption leave or the additional parental leave of the other parent) - Childcare leave: unpaid	Yes	% of previous wage	25 %	No	No	- Six months of contributions - Other conditions
RO	Up to two years per family	Yes, one month	% of previous wage	85 %	EUR 1 700 per month	Yes	No

EU country	Period of compensation	Individual and non-transferable	% of previous wage or flat-rate	Concrete % or amount	Ceiling	Adequate compensation	Additional qualifying conditions
SE	240 calendar days per parent	Yes, 90 calendar days	% of previous wage and flat-rate	- 77.6 % for 195 days - EUR 18 per calendar day for 45 days	SEK 483 000 per year (if % of previous wage)	- % of previous wage: yes - Flat-rate: no	No
SI	130 calendar days per parent	- For the mother: yes, 30 calendar days - For the father: no	% of previous wage	100 %	EUR 3 664.30 per month	Yes	No
SK	Up to three years per parent	Yes formally, but in reality it is a family right (but 'maternity allowance' for fathers and 'passerelle' clause for mothers)	% of previous wage and flat-rate	- For the father: 75 % for 28 weeks ('maternity allowance') and EUR 275.90 per month for the remaining period - For the mother: EUR 275.90 per month	EUR 1 732.10 per month (if % of previous wage)	- % of previous wage: yes - Flat-rate: no	270 days of contributions in the two years before submitting an application (if % of previous wage)

6 Carers' leave

All EU Member States (except CY) offer carers' leave, with eight countries offering not only one kind of leave but several (AT, ES, FR, HR, IT, NL, PT and RO). The terminology used to refer to this leave is diverse: 19 countries use the same term as in the WLB Directive (carers' leave) or a relatively similar term; in three countries sickness leave (or a relatively similar term) is used to take care of a family member (BG, HR[193] and LT); the rest of the countries (four) use other names, namely 'leave for family reasons' (LU), '*force majeure* leave' (PT), 'leave due to substantive personal obstacles to work' (SK) or simply 'leave' (ES).

Apart from CY, where carers' leave is not provided for, there is one country with problems of personal scope: in DE enterprises with up to 15 employees are excluded from the right to carers' leave.

Thirdly, there is overlapping between carers' leave and *force majeure* leave in 10 EU countries, which is complete in six of them (BG, HR, LT, LU, PT and SI), meaning that the same national system or systems are used to comply with both carers' leave and *force majeure* leave, and partial in the other four (ES, FR, PL and SK), meaning that only part of the national system or systems overlap.

Finally, it should be emphasised that many of the gaps identified below derive from the fact that the right to carers' leave, as designed in the WLB Directive (short leave of five working days per year), has not been implemented yet in many Member States. For this reason, the existing national systems of carers' leave may be more generous as regards some EU requirements (e.g. in terms of duration) while not fitting other EU standards (e.g. the situations covered may be more restrictive or qualifying conditions may be imposed).

6.1 System to allocate the leave, duration and type of entitlement

The system to allocate carers' leave varies considerably from country to country. Of the 26 EU countries that offer this leave, only 12 follow the general system of the WLB Directive (duration per year), while nine adopt a different approach: duration per episode of need or support (per case) in four countries (CZ, HU, LT and SI) and duration per person in need of care or support (per beneficiary) in five countries (BE, DE, IE, LU and SE). The other five Member States adopt several approaches, depending on the national system (ES, FR, HR and IT) or on the beneficiary (EE[194]). When the duration is allocated per case and per beneficiary, the number of cases and beneficiaries is not limited,[195] excepting the number of beneficiaries in BE[196] and FR.[197]

Taking into account the EU minimum duration of five working days per year, the 26 Member States may be grouped as follows:

- Duration below the minimum standard: no country.[198]
- Duration equal to the minimum standard: six countries have either five working days per year (DK, EL, LV, FI and MT) or one week per year (AT).

193 In HR there are two systems of carers' leave: one is a sickness leave to care for a family member and the other one is called 'leave for personal reasons'.
194 In EE carers' leave is one working day per month in the case of a child and five working days per year in the case of an adult.
195 However, in IE the employee must wait six months before they can commence new carer's leave for another beneficiary.
196 The Belgian carers' leave (thematic leave for informal carers) has a duration of three months per beneficiary, with a maximum of six months per career (over the entire professional career).
197 One of the French systems of carers' leave, i.e. the long carers' leave in the case of significant loss of autonomy, has a duration of three months per beneficiary, with a maximum of one year per career.
198 The Belgian carers' leave, namely the thematic leave for informal carers, has a duration of three months per beneficiary, with a maximum of six months per career. Six months would be shorter than five working days per year multiplied by a maximum career of 45 years (5 x 45 = 225 working days). However, in BE there are other kinds of leave that could be regarded as carers' leave: other thematic leaves (leave for medical assistance and leave for palliative care) and time credit leave (which includes as situations covered the provision of palliative care and care for a severely ill household or family member).

– Duration above the minimum standard: 20 countries have more generous systems of carers' leave, ranging from seven working days per year in HR[199] to two years per case in HU. [200] However, in two of these countries (BE and IE), which have quite long carers' leave, there may be a clash with the system designed by the WLB Directive, which seems to guarantee a piecemeal use of the leave of five working days per year or less.[201] But in BE the thematic leave for informal carer, despite being three months long per beneficiary, must be taken in periods of at least one month. Likewise, in IE the right to carers' leave is 104 weeks per beneficiary, but the minimum period that can be taken is 13 weeks (unless the employer agrees otherwise).

Concerning the type of entitlement, the right to carers' leave is per worker only in 15 Member States, whereas the other 11 have at least one system which is a family right, meaning that the right could be shared between different workers, e.g. two parents to take care of a child or two spouses/partners to look after an elderly relative. Family rights exist typically when the duration is allocated per beneficiary (BE, DE, FR, IE and SE), but also when it comes to taking care of children (BG, EE, PL, PT, RO and SI). This is problematic from a gender perspective, as family rights are mostly used by women, which does not contribute to a more equal sharing of caring responsibilities between men and women. In this sense, an individual and non-transferable right for each worker is better from a gender equality point of view.

6.2 Beneficiaries and situations covered

The beneficiaries of carers' leave (the persons receiving care or support) are very different at national level. Of the 26 Member States with carers' leave, in 12 of them (AT, BG, DE, EE, ES, HR, HU, IT, LT, LU, PL and SI) only relatives can be beneficiaries of carers' leave. In nine countries (CZ, DK, EL, FI, LV, MT, NL, PT and SK), workers can be entitled to carers' leave not only to look after relatives, but also to care for persons who live in the same household as the worker. Three countries (BE,[202] IE and SE) are even more flexible because any individual can be a beneficiary. Finally, two countries (FR[203] and RO[204]) have blended systems. In all, only 12 EU countries seem to be in conformity with the minimum standards of the WLB Directive, meaning that they include the two categories of beneficiaries: relatives (at least children, parents and spouse, regardless of whether they live in the same household as the worker or not) and persons living in the same household as the worker (regardless of whether they are relatives or not). There are then 14 problematic Member States, mainly because persons living in the same household as the worker are not included among the beneficiaries of carers' leave, which is actually the case in 13 countries (BG, DE, EE, ES, FR[205], HR, HU, IT, LT, LU, PL, RO and SI). In the two systems available in AT the two categories of beneficiaries are mixed: in the case of 'carers' leave to care', many relatives are included[206] but all except children need to be living in the same household as the worker; in the case of 'carers' leave to supervise',

199 In HR the 'leave for personal reasons' is seven working days, whereas the sickness leave to care for a family member has different durations: 60 working days per case for a child younger than seven; 40 working days per case for a child between seven and 18; and 20 working days per case for a child older than 18 and for a spouse.

200 According to the national expert, the WLB Directive reflects a Western European approach in carers' leave. In HU the State-run elderly care system is scarce and is of poor quality, and even the private nursing homes are overwhelmed (there are long waiting lists, etc.), so an average family can hardly afford professional home care. In this situation, if not opting to hire foreign (typically Romanian) domestic helpers from the grey/black market, family members themselves (typically women) are supposed to provide care for sick/elderly relatives. This reality is behind the feature of an extended, although not annually allocated, carers' leave.

201 This requirement could be inferred from recital 27 of the WLB Directive, which establishes that Member States may decide that the carers' leave of five working days per year *can be taken in periods of one or more working days per case*. In contrast, it would not be allowed to oblige workers to take the leave in periods of more than five working days.

202 In BE any individual, as long as the worker has a relationship of trust or a close, affective or geographical relationship with them, can be a beneficiary of the thematic leave for informal carers.

203 In some French systems only children can be beneficiaries, while in others both relatives and persons living in the same household can be beneficiaries.

204 In one Romanian system only children can be beneficiaries, while in the other system any individual can be a beneficiary.

205 Only for two French systems: 'short carers' leave in case of sickness of children' and 'long carers' leave in case of serious sickness, disability or accident of children'.

206 All descendants, all ascendants, spouse or long-term partner and children-in-law.

only children and children-in-law are covered and the latter have to live in the same household as the worker. Besides this, in some countries there are also gaps in the relatives covered:

- In LU the only relatives covered are children under 18 (and over 18 in the case of disabled children), so older children, parents and the spouse are not covered.
- In RO in one of the national systems, i.e. the leave to care for a sick child, the only relatives covered are children under 18, so older children, parents and the spouse are not covered.
- In SI the only relatives covered are children and the spouse or partner in civil partnership, so parents are not covered.

The situations covered under carers' leave at national level are very varied. Of the 26 Member States with carers' leave, 16 (AT, BG, CZ, EL, HR, HU, LT, LV, LU, MT, NL, PL, PT, SE, SI and SK) include sickness, illness or a medical reason among the protected situations, three (BE, DE and FI) only cover dependency[207], two (EE and IE) only disability, and one (DK) refer to the need for substantial care and support.[208] The four remaining countries (ES,[209] FR,[210] IT[211] and RO[212]) have provision for different situations, depending on the national system of carers' leave.

Member States have a great degree of freedom when defining the situations covered under carers' leave. Nevertheless, they have to fit in the EU definition of Article 3(1)(c) of the WLB Directive, according to which the purpose of carers' leave is 'to provide personal care or support to someone who is in need of significant care or support for a serious medical reason'. Bearing this in mind, there are 10 countries (BE, CZ, DE, EE, FI, HU, IE, PT, RO and SE) out of 26 which seem not to be in conformity with the WLB Directive:

- In eight countries (BE, DE, EE, FI, IE, PT, RO and SE) the material scope looks too restrictive: three countries (BE,[213] DE[214] and FI[215]) only include dependency as a protected ground. Two countries (EE and IE) only cover disability: profound disability in EE[216] and disability that requires full-time care and attention from another person[217] in IE. In PT there is a *force majeure* element[218] which is not present in carers' leave. In other words, only *urgent* family reasons in the case of sickness or accident are covered. In RO one of the two national systems, i.e. the leave to care for a patient with an oncological

207 This refers to situations in which a person is dependent upon another person to provide the basic necessities of life.
208 Some examples of the need for substantial care and support are: accompanying a seriously ill relative to the doctor; accompanying a relative to hear about a diagnosis for serious illness, e.g. cancer or Alzheimer's disease; accompanying relatives with physical or mental impairments to the dentist or for blood tests; providing support to a dying person; and providing support to a sick person who is hospitalised, or in a hospice or a nursing home or similar.
209 The Spanish short leave includes serious illness, among other situations, whereas the Spanish long leave covers only dependency.
210 In FR three national systems cover sickness, serious illness and terminal illness, respectively. The fourth system covers the need for long-term care or significant disability.
211 In IT one system covers sickness, two systems severe disability and the fourth system care or assistance for a person.
212 The Romanian leave to care for a sick child includes, among other situations, disability and serious illness, while the other Romanian leave protects a patient diagnosed with an oncological condition who undergoes surgery or a medical treatment abroad.
213 The Belgian thematic leave for informal carer has as purpose the support and assistance to the beneficiary with activities related to the preservation or restoration of autonomy in the exercise of activities of daily life and the maintenance and development of social activities and links with the family and friends. This includes, for example, the following assistance: feeding the person; washing and dressing the person; doing the shopping for the person; going to sleep at the home of the person; administering medication to the person; travel assistance; and supervision, accompaniment and psychological support.
214 The German carers' leave includes persons who have health-related impairments of independence or abilities and therefore need the help of others. These must be persons who are unable to independently compensate for or cope with physical, cognitive or psychological impairments or health-related stresses or demands.
215 In the case of the Finnish dependent carers' leave, the beneficiary requires significant assistance or support by the employee due to a serious illness or injury which reduces considerably the person's ability to act, or due to participation in palliative care.
216 However, besides the Estonian carers' leave covering profound disability, there are 14 calendar days per episode of illness that can be taken by either parent to care for a sick child under the age of 12 years.
217 Continual supervision and frequent assistance throughout the day in connection with normal bodily functions; or continual supervision in order to avoid danger to himself or herself.
218 The presumption that the absence of the worker is unavoidable, in the sense that they are essential for the purpose of taking care for the child or the family member in question.

condition, only applies when a patient diagnosed with such a condition undergoes surgery or a medical treatment abroad. In SE the situation covered is serious illness, but this only includes a medical condition which is life-threatening.[219]

– In four countries (CZ, DE, HU and RO) the national leave only appears to cover long-term care needs, which would not guarantee a piecemeal use of the leave of five working days per year or less. In CZ the leave during long-term care benefit only includes a serious health disorder which has necessitated hospitalisation[220] and it is expected that the state of health after discharge from hospital to a home environment will necessarily require the provision of long-term care for at least 30 calendar days. In DE the need for care must be permanent, probably for at least six months. In HU the beneficiary is supposed to be ill or disabled on a level that they needs care for a sustained period of time, prospectively at least 30 days. Finally, in RO one of the two national systems, i.e. the leave to care for a sick child, includes, among its protected grounds, serious illnesses which appear in a list adopted by the specialised medical commissions of the Ministry of Health. When drawing up the list, the commissions should take into account conditions for which the healthcare required for the main disorder should be more than 90 calendar days per year.

6.3 Qualifying conditions

As previously explained in the introductory section, it may be understood that Member States cannot make the right to carers' leave subject to a period of work qualification or to a length of service qualification. As a matter of fact, following the CJEU's interpretation about Directive 2010/18 on parental leave in the *Maïstrellis* and *Caisse pour l'avenir des enfants* cases, which would not allow Member States to introduce qualifying conditions other than the ones mentioned in the Directive, it could be argued that no qualifying condition whatsoever should be imposed on workers. This is the reason why the eligibility conditions established by six Member States (BE, EL, IE, NL, PL and RO) appear to go against the WLB Directive:

– Qualifying periods in three countries (EL, IE and RO): in EL and IE a length of service qualification of six months and 12 continuous months, respectively; and in RO the employee must have contributed for at least six months in the last 12 months before applying for leave.
– The worker as a 'last resort' in two countries (NL and PL): in NL, in the case of the Dutch short carers' leave, the employee needs to be reasonably considered the only available carer; in PL it is required that there are no other persons living with the beneficiary who could take care of them.[221]
– In BE several conditions must be met to be recognised as an informal carer, namely: have a relationship of trust or a close, affective or geographical relationship with the assisted person; have a permanent and actual residence in BE; be registered in the municipal register or the register of foreigners; the informal carer must provide the assistance and help on a non-professional basis, free of charge and in cooperation with at least one professional carer.

6.4 Summary table for carers' leave

Table 7 provides a summary of the right to carers' leave (the shortcomings in each Member State are shown in grey).

219 There must not be an acute threat against the patient's life; it is enough that the medical conditions can be expected to worsen later on, and then become acute (for instance in cases of cancer).
220 For people whose state of health is very serious and incurable or who are in palliative care, the condition of hospitalisation does not have to be met.
221 This requirement is not applicable to children under the age of two.

TABLE 7: SUMMARY TABLE FOR CARERS' LEAVE

EU country	National measure/s	Distinguished from force majeure leave	Duration and system	Type of entitlement	Beneficiaries	Situations covered	Qualifying conditions
AT	- System 1: carers' leave to care - System 2: carers' leave to supervise	Yes	- System 1: one week per year - System 2: one week per year	Per worker	- System 1: children; other relatives (parents, spouse, others) living in the same household - System 2: children; children-in-law living in the same household	- For children: sickness and others - For other relatives living in the same household: sickness and others	No
BE	Thematic leave for informal carer	Yes	Three months per beneficiary (minimum one month), with a maximum of six months per career	Per family (except for the maximum duration)	Any individual	Dependency	Some conditions must be met to be recognised as an informal carer
BG	Sickness leave	No (same leave)	- For a child: 60 calendar days per year in case of sickness; as long as necessary in case of medical examinations or other urgent family reasons related to a medical emergency - For an adult: 10 calendar days per year	- For a child: per family - For an adult: per worker	Relatives (children, parents, spouse, grandparents)	Sickness and medical examinations or other urgent family reasons related to a medical emergency	No
CY	None	-	-	-	-	-	-

EU country	National measure/s	Distinguished from force majeure leave	Duration and system	Type of entitlement	Beneficiaries	Situations covered	Qualifying conditions
CZ	Leave during long-term care benefit	Yes	90 calendar days per case	Per worker	- Relatives (children, parents, spouse, others) - Persons living in the same household	A serious health disorder which has necessitated hospitalisation and it is anticipated that the state of health after discharge from hospital to a home environment will necessarily require the provision of long-term care for at least 30 calendar days	No
DE	Carers' leave (enterprises with up to 15 employees excluded)	Yes	Six months per beneficiary	Per family	Relatives (children, parents, spouse, others)	Dependency and the need for care must be permanent, probably for at least six months.	
DK	Carers' leave	Yes	Five working days per year	Per worker	- Relatives (children, parents, spouse, others) - Persons living in the same household	Need for substantial care and support	No
EE	Carers' leave	Yes	- For a child: one working day per month - For an adult: five working days per year	- For a child: per family - For an adult: per worker	Relatives (children, parents, spouse, others)	Profound disability	No
EL	Carers' leave	Yes	Five working days per year	Per worker	- Relatives (children, parents, spouse, others) - Persons living in the same household	In need of significant care or support for a serious medical reason	A length of service qualification of six months
ES	- System 1: short leave - System 2: long leave	No (same leave as in system 1)	- System 1: two calendar days per case - System 2: two years per beneficiary	Per worker	Relatives (children, parents, spouse, others)	- System 1: serious illness and others - System 2: dependency	No
FI	Dependent carers' leave	Yes	Five working days per year	Per worker	- Relatives (children, parents, spouse, others) - Persons living in the same household	Dependency	No

EU country	National measure/s	Distinguished from force majeure leave	Duration and system	Type of entitlement	Beneficiaries	Situations covered	Qualifying conditions
FR	- System 1: short carers' leave in case of sickness of children - System 2: long carers' leave in case of serious sickness, disability or accident of children - System 3: long carers' leave at the end of life - System 4: long carers' leave in case of significant loss of autonomy	No (same leave as in system 2)	- System 1: three working days per child per year - System 2: 310 working days per child per case - System 3: three months per beneficiary - System 4: three months per beneficiary, with a maximum of one year per career	- System 1: per worker - Systems 2, 3 and 4: per family (except for the maximum duration)	- System 1: children under 16 - System 2: children under 20 - System 3: relatives (children, parents, others not including spouse) and persons living in the same household or designated in healthcare power of attorney - System 4: relatives (children, parents, spouse, others) and an elderly person or a person with a disability living in the same household	- System 1: sickness - System 2: serious illness and others - System 3: terminal illness - System 4: need for long-term care or significant disability	No
HR	- System 1: leave for personal reasons - System 2: sickness leave to care for a family member	No (same leave as in systems 1 and 2)	- System 1: seven working days per year - System 2: 60 working days per case for a child younger than seven; 40 working days per case for a child between seven and 18; and 20 working days per case for a child older than 18 and for a spouse	Per worker	- System 1: relatives (children, parents, spouse, others) - System 2: relatives (only children and spouse)	- System 1: severe illness and others - System 2: sickness for a child under 18; a serious health condition caused by illness or injury for a child over 18 or a spouse	No
HU	Carers' leave	Yes	Two years per case	Per worker	Relatives (children, parents, spouse, others)	Illness or disability that requires care for a sustained period of time, prospectively at least 30 days	No

EU country	National measure/s	Distinguished from force majeure leave	Duration and system	Type of entitlement	Beneficiaries	Situations covered	Qualifying conditions
IE	Carers' leave	Yes	104 weeks per beneficiary (minimum 13 weeks)	Per family	Any individual	Disability that requires full-time care and attention from another person	Length of service qualification of 12 continuous months
IT	- System 1: leave to care for a sick child - System 2: leave to care for a disabled spouse - System 3: leave to care for a disabled child or relative - System 4: leave for serious family reasons	Yes	- System 1: the time required for a child under three and five working days per year for a child between three and eight - System 2: two years per career - System 3: three workings days per month - System 4: two years per career	Per worker	- System 1: children under eight - System 2: spouse - System 3: relatives (children, parents, spouse, others) - System 4: relatives (children, parents, spouse, others)	- System 1: sickness - System 2: severe disability - System 3: severe disability - System 4: care or assistance for a person and others	No
LT	Sickness leave to care for a family member	No (same leave)	- For a child under 14: 14 calendar days per case - For other relatives: seven calendar days per case	Per worker	Relatives (children, parents, spouse)	Sickness and need for care	No
LU	Leave for family reasons	No (same leave)	- For a child under four: 12 working days per child - For a child between four and 13: 18 working days per child - For a child between 13 and 18 and hospitalised: five working days per child	Per worker	Children under 18	Serious illness, accident or other compelling health reason	No
LV	Carers' leave	Yes	Five working days per year	Per worker	- Relatives (children, parents, spouse, other close family members) - Persons living in the same household	Need for significant care or support for a serious medical reason	No

EU country	National measure/s	Distinguished from force majeure leave	Duration and system	Type of entitlement	Beneficiaries	Situations covered	Qualifying conditions
MT	Carers' leave	Yes	Five working days per year	Per worker	- Relatives (children, parents, spouse, partner in civil relationship) - Persons living in the same household	Need for care or support for a serious medical reason	No
NL	- System 1: short carers' leave - System 2: long carers' leave	Yes	- System 1: two weeks per year - System 2: six weeks per year	Per worker	- Relatives (children, parents, spouse, others) - Persons living in the same household - Persons with whom the employee maintains a social relationship	- System 1: sickness - System 2: life-threatening illness, illness or need for help	- System 1: the employee needs to be reasonably considered the only available carer
PL	Leave during care allowance	No (partly same leave)	- For a child under 14: 60 working days per year - For a severely disabled child between 14 and 18: 30 working days per year - For other relatives: 14 working days per year	- For a child: per family - For other relatives: per worker	Relatives (children, parents, spouse, others)	Sickness and others	There are no other persons living with the beneficiary who could take care of them (not applicable to children under the age of two)
PT	- System 1: *force majeure* leave for a child - System 2: *force majeure* leave for a spouse/partner or other relatives	No (same leave as in systems 1 and 2)	- System 1: for a child under 12 or a disabled child, 30 working days per year; for a child over 12, 15 working days per year - System 2: 15 working days per year in general; 30 working days per year in case of disability or chronic illness	- System 1: per family - System 2: per worker	- Relatives (children, parents, spouse, partner in civil partnership) - Persons living in the same household	Urgent family reasons in the case of sickness or accident	No

EU country	National measure/s	Distinguished from force majeure leave	Duration and system	Type of entitlement	Beneficiaries	Situations covered	Qualifying conditions
RO	- System 1: leave to care for a sick child - System 2: leave to care for a patient with an oncological condition	Yes	- System 1: 45 calendar days per year - System 2: 45 calendar days per year	- System 1: per family - System 2: per worker	- System 1: children under 18 - System 2: any individual	- System 1: disability and intercurrent medical disorders; serious illness in an official list (90/180 days of care foreseen per year); the child is in quarantine or isolation and the parent is not in quarantine or isolation; the child undergoes medical treatment abroad - System 2: a patient diagnosed with an oncological condition undergoes surgery or a medical treatment abroad	Contributions for at least six months in the last 12 months before applying for leave
SE	Carers' leave	Yes	100 calendar days per beneficiary	Per family	Any individual	Serious illness, which means that the impact of the medical condition must be life-threatening	No
SI	Carers' leave	No (same leave)	- For children under seven or for older moderately or seriously mentally or physically disabled children: 20 working days per case - For a spouse/partner: 10 working days per case	- For a child: per family - For a spouse/ partner: per worker	Relatives (children, spouse, partner in civil partnership)	Sickness	No
SK	Leave due to substantive personal obstacles to work	No (same leave but a second situation is covered under *force majeure* leave)	14 calendar days per year	Per worker	- Relatives (children, parents, spouse, others) - Persons living in the same household	Sickness	No

7 Force majeure leave

All EU countries (except RO) provide for *force majeure* leave, with six States offering several types of leave (DE, FR, HR, HU, PT and PT). The names given to this leave are diverse: only eight countries use the name given in the WLB Directive (*force majeure* leave); in nine countries it is called leave for important reasons (AT), compelling reasons (BE), personal reasons (HR[222]), family reasons (LU) or other fairly similar reasons (CZ,[223] FI,[224] HU,[225] SE[226] and SK[227]); in two countries sickness leave is used to take care of a family member (BG and LT); the remaining countries (seven) use other terms, namely 'leave to care for a child who requires help' and 'leave to organise care' (DE), 'long carers' leave in case of serious sickness, disability or accident of children' and 'leave in case of news about disability, chronic pathology or cancer in a child' (FR), 'calamity leave' (NL), 'leave during care allowance' and 'leave to care for a child under 14' (PL), 'carers' leave' (SI) or just 'time off' (EE) or 'leave' (ES).

In RO there is no statutory right to *force majeure* leave. The Romanian Labour Code provides for the possibility for an employer to offer both male and female employees a certain number of 'paid days off for exceptional family events' (e.g. births, marriages or deaths) if this is stipulated in the law, the internal regulations or a collective agreement. In addition, the Labour Code provides for the possibility for an employer to offer both male and female employees 'unpaid leave to resolve personal matters' if this is stipulated in the internal regulations or a collective agreement.

7.1 System to allocate the leave, duration and type of entitlement

The system to allocate *force majeure* leave is as varied as in the case of carers' leave. Out of the 26 EU countries that make this leave available, nine (BE, BG, CY, IE,[228] IT, MT, PL, PT and SK) offer a certain duration per year; eight (AT, CZ, DK, EE, FI, LV, NL and SE) do not specify a concrete duration, which means that the leave can be used during the time required; in four countries (EL, ES, LT and SI) the duration is set per episode of *force majeure* (per case); and in one country (LU) the duration is per person in need of care or support (per beneficiary). The other four Member States adopt several approaches, depending on the national system (DE, FR, HR and HU). When the duration is allocated per case and per beneficiary, the number of cases and beneficiaries is not limited, excepting the number of beneficiaries in DE[229] and the number of cases in EL.[230]

As there is no minimum standard regarding the duration of *force majeure* leave, there are no problems of compliance with the WLB Directive. The duration at national level is usually short and can be classified as follows:

– Duration unspecified: as aforementioned, eight countries (AT, CZ, DK, EE, FI, LV, NL and SE) do not specify a concrete duration, which means that the leave can be used during the time required.

222 In HR there are two systems of *force majeure* leave: one is a leave for personal reasons and the other one is a sickness leave to care for a family member.
223 Leave for an important personal obstacle on the part of the employee.
224 Leave for compelling family reasons.
225 In HU there are two systems of *force majeure* leave: first, time off for a personal or family reason that deserves special concern or for an unavoidable reason; second, time off upon the death of a relative.
226 Leave for urgent family reasons.
227 Leave due to substantive personal obstacles to work.
228 Three working days per year or five working days per three years.
229 In DE there are two systems of *force majeure* leave: first, the leave to care for a child who requires help, which consists of 10 working days per child per year, with a maximum of 25 working days per calendar year; second, the leave to organise care, which is 10 working days per case.
230 One working day per case, with a maximum of two working days per year. This means that there is a maximum of two cases per year.

– Duration specified: this is the case in the remaining 18 Member States. The duration ranges from one working day per case in EL to 310 working days per child per case in FR.[231]

Regarding the type of entitlement, the right to *force majeure* leave is per worker in 21 Member States, whereas the other five have at least one system which is a family right, meaning that the right could be shared between different workers, for example two parents in the case of a child or two spouses/partners in the case of an elderly relative. Family rights exist typically when the duration is allocated per beneficiary (FR), but also when it comes to taking care of children (BG, PL, PT and SI). As previously explained, this is problematic from a gender perspective, as family rights are mostly used by women.

7.2 Situations covered

As with carers' leave, Member States have some freedom to define the situations covered under *force majeure* leave as long as they respect the wording of Article 7 of the WLB Directive, which refers to 'time off from work on grounds of *force majeure for urgent family reasons in the case of illness or accident making the immediate attendance of the worker indispensable*'. Having this in mind, there are eight countries (DE, EL, FR, IT, LT, LU, PL and SI) out of 26 which seem not to be in line with the WLB Directive:

– In four countries (EL, IT, LT and SI) the material scope looks too restrictive: in EL *force majeure* leave is for urgent family reasons in the case of illness or accident making the immediate attendance of the worker indispensable, which is in line with the Directive. Nonetheless, the scope of the leave covers only working parents and carers, which in fact creates a double material requirement in the case of carers: the one just mentioned for *force majeure* leave (urgent family reasons in the case of illness or accident making the immediate attendance of the worker indispensable) and the one mentioned in the definition of carer[232] (to be in need of significant care or support for a serious medical reason). In IT *force majeure* leave only includes the situations of death or serious illness of a spouse or another relative in the second degree, excluding accidents. The same goes for LT, where the sickness leave to care for a family member only covers sickness and the need for care of close relatives, and SI, where 'carers' leave' only includes sickness of children and a spouse/partner.
– In two Member States (FR and LU) the personal scope appears too limited: in FR the two national systems only cover children,[233] thereby excluding other relatives. The same can be said about the leave for family reasons in LU, which includes serious illness, accident or other compelling health reason of a child under 18 (or over 18 in case of a disabled child).
– In two countries (DE and PL) both the material and personal scope seem too narrow: in DE the 'leave to care for a child who requires help' covers the supervision or care of a sick child under 12 years old or a disabled child who requires help, thus excluding accidents and relatives other than children, whereas the 'leave to organise care' covers the organisation of care in an acute care situation of a close relative, which would exclude acute situations which do not involve the need to organise care but to provide temporary care[234]. In PL the 'leave during care allowance' covers the sickness of relatives and, in the case of children under eight, unforeseen closure of a nursery, kindergarten or school, as well as sickness of a contracted nanny or family member who normally takes care of a child, therefore excluding accidents, while the 'leave to care for a child under 14' covers *force*

231 310 working days per child per case for the 'long carers' leave in case of serious sickness, disability or accident of children' and two working days per case for the 'leave in case of news about disability, chronic pathology or cancer in a child'.
232 In EL a carer is defined as a person who provides personal care or support to a relative, or to a person who lives in the same household as the worker and who is in need of significant care or support for a serious medical reason.
233 The French 'long carers' leave in case of serious sickness, disability or accident of children' covers serious illness, disability or accident of children under 20, whereas the French 'leave in case of news about disability, chronic pathology or cancer in a child' covers news about disability, chronic pathology or cancer in a child.
234 According to the national expert, when the two German kinds of leave cannot be used, there is a possibility to refuse performance under the German Civil Code: the debtor may refuse the service if he has to provide the service personally and it cannot be expected of him after weighing up the obstacle to his performance.

majeure or urgent family reasons for children under 14, excluding relatives other than children under 14.[235]

7.3 Qualifying conditions

For reasons which are, mutatis mutandis, identical to those mentioned previously about carers' leave, it could be argued that Member States cannot make the right to *force majeure* leave subject to any qualifying conditions. This is actually the case in the 26 Member States that offer *force majeure* leave, except for PL. For the Polish 'leave during care allowance' it is required that there are no other persons living with the beneficiary who could take care of them,[236] which represents an implementation problem as no qualifying conditions are in principle permitted.

7.4 Summary table for *force majeure* leave

Table 8 provides a summary of the right to *force majeure* leave (the shortcomings in each Member State are shown in grey).

TABLE 8: SUMMARY TABLE FOR *FORCE MAJEURE* LEAVE

EU country	National measure/s	Duration and system	Type of entitlement	Situations covered	Qualifying conditions
AT	Leave for important reasons	The time required	Per worker	'Important reasons' include, inter alia, funerals, public duties such as jury duty, but also important family-related duties that might not be covered by carers' leave or other provisions.	No
BE	Leave for compelling reasons	- Private sector: 10 working days per year - Public sector: four working days per year	Per worker	Any unforeseeable event, independent of the work, which requires the urgent and indispensable intervention of the worker, in so far as the performance of the contract makes such intervention impossible	No
BG	Sickness leave	- For a child: 60 calendar days per year in case of sickness; the time required in the case of medical examinations or other urgent family reasons related to a medical emergency - For an adult: 10 calendar days per year	- For a child: per family - For an adult: per worker	Sickness of relatives and medical examinations or other urgent family reasons related to a medical emergency	No

235 According to the national expert, the law creates a peculiar privilege for parents of children under 14. The employee does not have to explain to the employer in any way the reasons why they need to take time off. Moreover, during the period of leave (16 hours or two working days per year) the employee retains the right to remuneration, the amount of which is determined in accordance with the principles provided for determining remuneration for annual leave. Hence, the solution in question is sometimes treated as an additional two days of annual leave for parents of children under 14.

236 This requirement is not applicable to children under the age of two.

EU country	National measure/s	Duration and system	Type of entitlement	Situations covered	Qualifying conditions
CY	*Force majeure* leave	Seven days per year	Per worker	Urgent family reasons in the case of illness or accident making the immediate attendance of the worker indispensable	No
CZ	Leave for an important personal obstacle on the part of the employee	The time required	Per worker	Illness and accidents of family members which require care	No
DE	- System 1: leave to care for a child who requires help - System 2: leave to organise care	- System 1: 10 working days per child per year, with a maximum of 25 working days per calendar year - System 2: 10 working days per case	Per worker	- System 1: supervision or care of a sick child under 12 or a disabled child who requires help - System 2: organisation of care in an acute care situation of a close relative	No
DK	*Force majeure* leave	The time required	Per worker	Compelling family circumstances due to sickness or accident that make the presence of the employee urgently necessary	No
EE	Time off	The time required	Per worker	The employee cannot perform work due to a reason arising from the employee but not caused intentionally or due to severe negligence, or if the employee cannot be expected to perform work for another reason not attributable to the employee	No
EL	*Force majeure* leave	One working day per case, with a maximum of two working days per year	Per worker	Urgent family reasons in the case of illness or accident making the immediate attendance of the worker indispensable, but applicable only to working parents and carers	No
ES	Short leave	Two calendar days per case	Per worker	Death, serious illness or accident, hospitalisation or surgery without hospitalisation requiring home rest, of close relatives	No
FI	Leave for compelling family reasons	The time required	Per worker	Whenever the immediate presence of the employee is required due to an unpredictable and compelling reason caused by sickness or accident in the family	No

EU country	National measure/s	Duration and system	Type of entitlement	Situations covered	Qualifying conditions
FR	- System 1: long carers' leave in case of serious sickness, disability or accident of children - System 2: leave in case of news about disability, chronic pathology or cancer in a child	- System 1: 310 working days per child per case - System 2: two working days per case	- System 1: per family - System 2: per worker	- System 1: serious illness, disability or accident of children under 20 - System 2: news about disability, chronic pathology or cancer in children	No
HR	- System 1: leave for personal reasons - System 2: sickness leave to care for a family member	- System 1: seven working days per year - System 2: 60 working days per case for a child younger than seven; 40 working days per case for a child between seven and 18; and 20 working days per case for a child older than 18 and for a spouse	Per worker	- System 1: personal reasons, especially in relation to a wedding, birth of a child, or severe illness or death of a member of the immediate family - System 2: sickness for a child under 18; a serious health condition caused by illness or injury for a child over 18 or a spouse	No
HU	- System 1: time off for a personal or family reason that deserves special concern or for an unavoidable reason - System 2: time off upon the death of a relative	- System 1: the time required - System 2: two working days per case	Per worker	- System 1: personal or family reason that deserves special concern or for an unavoidable reason - System 2: death of a relative	No
IE	*Force majeure* leave	Three working days per year or five working days per three years	Per worker	Urgent family reasons owing to injury or illness of a specified person, the immediate presence of the employee being indispensable at the place where the person is	No
IT	*Force majeure* leave	Three working days per year	Per worker	Death or serious illness of a spouse or another relative in the second degree	No
LT	Sickness leave to care for a family member	- For a child under 14: 14 calendar days per case - For other relatives: seven calendar days per case	Per worker	Sickness and need for care of close relatives	No

EU country	National measure/s	Duration and system	Type of entitlement	Situations covered	Qualifying conditions
LU	Leave for family reasons	- For a child under four: 12 working days per child - For a child between four and 13: 18 working days per child - For a child between 13 and 18 and hospitalised: five working days per child	Per worker	Serious illness, accident or other compelling health reason of children	No
LV	*Force majeure* leave	The time required	Per worker	An unexpected event or other exceptional circumstances, including a child's sickness or accident and a child's visit to the doctor if such a visit is impossible outside working hours	No
MT	*Force majeure* leave	- Private sector: 15 hours per year - Public sector: 16 hours per year	Per worker	Accidents to members of the immediate family of the employee; the sudden illness or sickness of any member of the immediate family of the employee requiring the assistance or the presence of the employee; the presence during births and deaths of members of the immediate family of the employee	No
NL	Calamity leave	The time required	Per worker	Unforeseen circumstances that justify the immediate cessation of work; and special personal circumstances	No
PL	- System 1: leave during care allowance - System 2: leave to care for a child under 14	- System 1: for a child under 14, 60 working days per year; for a severely disabled child between 14 and 18, 30 working days per year; for other relatives, 14 working days per year - System 2: 16 hours or two working days per year	- System 1: for a child, per family; for other relatives, per worker - System 2: per family	- System 1: sickness of relatives and, in the case of children under eight, unforeseen closure of a nursery, kindergarten or school, as well as sickness of a contracted nanny or family member who normally takes care of a child - System 2: *force majeure* or urgent family reasons for children under 14	- System 1: there are no other persons living with the beneficiary who could take care of them (not applicable to children under the age of two) - System 2: no

EU country	National measure/s	Duration and system	Type of entitlement	Situations covered	Qualifying conditions
PT	- System 1: *force majeure* leave for a child - System 2: *force majeure* leave for a spouse/partner and other relatives	- System 1: for a child under 12 or a disabled child, 30 working days per year; for a child over 12, 15 working days per year - System 2: 15 working days per year in general; 30 working days per year in case of disability or chronic illness	- System 1: per family - System 2: per worker	Urgent family reasons in the case of sickness or accident	No
RO	None	-	-	-	-
SE	Leave for urgent family reasons	The time required	Per worker	Urgent family reasons related to severe illness or injury of a close family member, making the employee's presence absolutely necessary	No
SI	Carers' leave	- For children under seven or for older moderately or seriously mentally or physically disabled children: 20 working days per case - For a spouse/partner: 10 working days per case	- For a child: per family - For a spouse/ partner: per worker	Sickness of relatives	No
SK	Leave due to substantive personal obstacles to work	- Situation 1: 14 calendar days per year - Situation 2: seven working days per year in general; 10 working days per year in the case of a disabled child	Per worker	- Situation 1: sickness of relatives and persons living in the same household as the worker - Situation 2: accompanying relatives to a healthcare facility due to illness or injury	No

8 Flexible working arrangements

Before analysing the situation in the 27 EU Member States, it is important to make clear some methodological points. Firstly, there are some national FWA systems that are going to be disregarded in this analysis:

- The right to request changes to working hours and/or patterns when returning from parental leave, guaranteed by clause 6(1)[237] of the revised Framework Agreement on parental leave annexed to Directive 2010/18.
- The right to request a transfer from full-time to part-time work, established for all workers in the Framework Agreement on part-time work annexed to Directive 97/81.
- The right to request that parental leave is taken on a part-time basis, according to Article 5(6) of the WLB Directive.
- Mere individual agreements between the employer and the worker on FWAs, with no procedure based on a workers' request and a response by the employer.

Secondly, the only limitations to the duration of FWAs that are going to be considered are those that are set out in national law, excluding the limited duration that can be individually agreed between the employer and the worker. Moreover, the implicit limitations of duration in the law, such as the maximum age of the child in relation to whom a parent can request an FWA, will not be taken into consideration either.

8.1 Nature of the rights and limited duration

Bearing in mind the methodological aspects just noted, 21 Member States offer FWAs to workers, with nine countries not offering a single national system of FWAs[238] but several (AT, BE, DE, ES, IT, LV, PL, PT and SE). The six countries which did not offer any of the FWAs required by the WLB Directive by the cut-off date for this thematic report (31 August 2022) are CY, FR, HR, IE, LU and RO. Of the 21 with FWAs, the majority of them (12) provide for a relative right, i.e. a mere right to request an FWA from the employer (the employer can refuse the worker's request), while there is an absolute right, namely a right to obtain an FWA (the employer cannot refuse the worker's request) in only three countries (AT, HU and SI). The remaining six countries (BE, ES, LV, PL, PT and SE) combine relative and absolute rights. The nine countries which partly or wholly recognise absolute rights go beyond the EU minimum standard of the WLB Directive, which is just a relative right.

Of the 18 Member States with at least a relative right, most of them (14) establish a procedure by which the employer has to consider and respond to the worker's request and, if the request is refused, the employer has to provide reasons for the refusal, as required by the WLB Directive. The other four countries do not provide such a procedure:

- In BE, DE and IT the employer has to consider and respond to the worker's request, but does not have to provide reasons in case of refusal.
- In PL in one of the FWA systems,[239] which entitles all workers to request flexitime and teleworking, the employer has to consider and respond to the worker's request, but only has to provide reasons in case of refusal in the case of children with disabilities.

237 'In order to promote better reconciliation, Member States and/or social partners shall take the necessary measures to ensure that workers, when returning from parental leave, may request changes to their working hours and/or patterns for a set period of time. Employers shall consider and respond to such requests, taking into account both employers' and workers' needs.'

238 A national system of FWAs means a system with singular characteristics differentiated from other systems, such as the FWAs covered or the workers entitled. For example, in PL there is a system of part-time working for parents with children under six years old and another system of flexitime and teleworking for all workers.

239 The other Polish system is an absolute right to part-time working for parents with children under six.

Finally, with the above-mentioned methodological considerations in mind, the possibility of limiting the duration of FWAs is rarely used. Of the 21 EU countries with FWAs, 15 do not contemplate such a possibility, whereas the other six do so for at least one national system: in AT one national system, consisting of an absolute right to part-time working for carers, is limited to two weeks per year; in BE one national system, i.e. part-time working for parents of children under eight and carers (available only in the private sector),[240] has a maximum of 51 months per career; in DE the relative right to part-time working for carers is limited to six months and 24 months per beneficiary, depending on the applicable law (Act on Carer's Leave and Act on Family Care Leave respectively); in PT two national systems have limitations, which are two years per beneficiary in the case of the relative right to part-time and flexible schedules for parents with children under 12, and four years per beneficiary in the case of the relative right to teleworking for workers with dependent persons living in the same household. The other two countries limit the duration of the relative right to FWAs for parents and carers but without specifying a concrete period: an FWA can be granted for 'a certain time' in BG and for 'a specified period of time' in DK. The six countries that limit the duration of FWAs entitle workers to return to the original working pattern at the end of the FWAs.

8.2 Flexible working arrangements covered and workers entitled

The WLB Directive creates an autonomous right to request FWAs, which must include reduced working hours (part-time), flexible working schedules (flexi-time) and the use of remote working arrangements (teleworking), for parents with children up to a certain age which shall be at least eight years old and for all carers as defined in Article 3(1)(d) of the Directive.[241] With this material and personal scope in mind, EU countries may be classified in the following way:

- Material and personal scope below the minimum standards: apart from the six countries with no FWAs (CY, FR, HR, IE, LU and RO), there are 13 (AT, BE, CZ, DE, ES, FI, HU, IT, PL, PT, SE, SI and SK) with gaps in this respect. Considering the national system or systems of FWAs, they do not offer the three types of FWAs (part-time working, flexitime and teleworking) or they do offer them but not to all parents with children under eight and carers. Moreover, in some countries the problems of personal scope are connected with certain exclusions: workers in the public sector (ES) or employers with few employees (AT, DE and PT).
- Material and personal scope equal to the minimum standards: there are three countries in this group (BG, LT and MT). They provide for a relative right to part-time working, flexitime and teleworking for parents with children under eight and carers.
- Material and personal scope above the minimum standards: five countries belong to this third group (DK, EE, EL, LV and NL). In DK and EL the maximum age of the child in relation to whom an FWA can be requested by parents is extended to 9 and 12 years old respectively. In EE and NL the personal scope is somehow wider: all workers with WLB needs in EE; and all workers in NL if the employer has at least 10 employees (otherwise the right is only for parents with children under eight and carers). Finally, in LV, besides a relative right to part-time working, flexitime and teleworking for parents with children under eight and carers, there is an absolute right to part-time working for parents with children under 14 and with disabled children under 18.

8.3 Qualifying conditions

Of the 21 Member States with FWAs, more than half (11) do not make the absolute or relative right to FWAs subject to any qualifying conditions. The remaining countries (10) may be presented as follows:

240 It is an absolute right for parents of children under eight and a relative right for carers.

241 '"Carer" means a worker providing personal care or support to a relative, or to a person who lives in the same household as the worker, and who is in need of significant care or support for a serious medical reason, as defined by each Member State.'

- There are seven countries which make the right subject to a qualifying period not exceeding six months, as allowed by the WLB Directive. One of them requires a period of work qualification:[242] in PL six months (only for the absolute right to part-time working for parents with children under six).[243] The other six Member States require a length of service qualification:[244] four months in BG and six months in DK (only in the case of carers[245]), EL and SE (only for the relative right to flexitime and teleworking for parents with children under 8 and carers); six months within the previous 12 months in FI; and 26 weeks before the requested start of the FWAs[246] in NL. However, Article 9(4) of the WLB Directive establishes that, in the case of successive fixed-term contracts with the same employer, the sum of those contracts shall be taken into account for the purpose of calculating the qualifying period. This is not fulfilled in two countries (FI and NL): in the case of FI because this requirement is not specified in the law; in the case of NL because the working time is added together unless the contracts are interrupted by a period longer than six months. What is more, as already mentioned above, despite the judgment about Directive 2010/18 in *Caisse pour l'avenir des enfants*, which validated a length of service qualification of 12 months *immediately prior to the start of parental leave*, the WLB Directive simply states in the case of FWAs that the qualifying period used (be it a period of work qualification or a length of service qualification) *shall not exceed six months*, without further restrictions. However, the required period in FI (six months *within the previous 12 months*) and NL (26 weeks *before the requested start of the FWAs*) may turn out to be longer than *six months*. For instance, if an employee has been employed at a given company for a period of five years and, after one year without working, returns to work for the same company, they will not be immediately entitled to FWAs, but only when they have completed an extra six months (five years and six months in total!).
- There are two countries (AT and BE) with an excessive length of service qualification: in AT a length of service qualification of three years in the case of the absolute right to part-time working and flexitime for parents of children under seven (available only for employers with more than 20 employees);[247] and in BE a length of service qualification of 24 months for the right to part-time working for parents of children under eight and carers (available only in the private sector).[248]
- There is one country (HU) which sets conditions other than qualifying periods, which seems to go against the case law of the CJEU in *Maïstrellis* and *Caisse pour l'avenir des enfants*, according to which it would not possible to introduce qualifying conditions other than the ones mentioned in the Directive. In HU the absolute right to part-time (half-time) for parents with children under four working in the public sector[249] is subject to the condition of them requesting part-time working while on child-related leave and that they do not hold management positions.

8.4 Summary table for flexible working arrangements

Table 9 provides a summary of the right to FWAs (the shortcomings in each Member State are shown in grey).

242 The period of time a person has been a worker, irrespective of the number of employers.
243 There is no qualifying period for the Polish relative right to flexitime and teleworking for all workers.
244 The length of employment with one employer.
245 There is no qualifying period if the relative right to part-time working, flexitime and teleworking is used by parents with children under nine.
246 This length of service qualification is not required in the case of unforeseen circumstances. This might be the case, for example, when a family member unexpectedly requires care.
247 A length of service qualification of three months is required for the Austrian absolute right to part-time working for carers.
248 There is no qualifying period for the Belgian absolute right to part-time working (four-day week) for all workers (available only in the public sector).
249 This refers to public servants, civil servants, judges, judicial employees, prosecutors and tax and customs administration personnel. There are no qualifying conditions for workers in the private sector.

TABLE 9: SUMMARY TABLE FOR FLEXIBLE WORKING ARRANGEMENTS

EU country	National measure/s	Absolute or relative right	Design of relative right	FWAs covered and workers entitled	Limited duration (and right to return to the original pattern)	Qualifying conditions
AT	- System 1: part-time and flexitime for parents - System 2: part-time for carers	Absolute rights	Not applicable	- System 1: part-time and flexitime for parents of children under seven (only for employers with more than 20 employees) - System 2: part-time for carers	- System 1: no - System 2: two weeks per year (right to return)	- System 1: three years with the employer - System 2: three months with the employer
BE	- System 1: part-time in the private sector - System 2: part-time in the public sector	- System 1: absolute right for parents of children under 8; relative right for carers - System 2: absolute right	- System 1: the employer has to consider and respond to the worker's request, but does not have to provide reasons in case of refusal	- System 1: part-time for parents of children under eight and carers (only in the private sector) - System 2: part-time (four-day week) for all workers (only in the public sector)	- System 1: 51 months per career (right to return) - System 2: no	- System 1: 24 months with the employer - System 2: no
BG	FWAs for parents and carers	Relative right	The employer has to consider and respond to the worker's request and to provide reasons in case of refusal	Part-time, flexitime and teleworking for parents with children under eight and carers	'A certain time' (right to return)	Four months with the employer
CY	None	-	-	-	-	-
CZ	Part-time and flexitime for parents and carers	Relative right	The employer has to consider and respond to the worker's request and to provide reasons in case of refusal	Part-time and flexitime for parents with children under 15 and carers in the case of dependency	No	No
DE	- System 1: part-time under the Act on Carer's Leave - System 2: part-time under the Act on Family Care Leave	Relative rights	The employer has to consider and respond to the worker's request, but does not have to provide reasons in case of refusal	- System 1: part-time for carers (only for employers with more than 15 employees) - System 2: part-time for carers (only for employers with more than 25 employees)	- System 1: six months per beneficiary (right to return) - System 2: 24 months per beneficiary (right to return)	No

EU country	National measure/s	Absolute or relative right	Design of relative right	FWAs covered and workers entitled	Limited duration (and right to return to the original pattern)	Qualifying conditions
DK	FWAs for parents and carers	Relative right	The employer has to consider and respond to the worker's request and to provide reasons in case of refusal	Part-time, flexitime and teleworking for parents with children under nine and carers	'A specified period of time' (right to return)	- For parents: no - For carers: six months with the employer
EE	FWAs for workers with WLB needs	Relative right	The employer has to consider and respond to the worker's request and to provide reasons in case of refusal	Part-time, flexitime and teleworking for workers with WLB needs	No	No
EL	FWAs for parents and carers	Relative right	The employer has to consider and respond to the worker's request and to provide reasons in case of refusal	Part-time, flexitime and teleworking for parents with children under 12 and carers	No	Six months with the employer
ES	- System 1: absolute right to part-time - System 2: relative right to FWAs in the private sector	- System 1: absolute right - System 2: relative right	- System 2: the employer has to consider and respond to the worker's request and to provide reasons in case of refusal	- System 1: part-time for parents with children under 12 and carers in the case of disability and dependency - System 2: part-time, flexitime and teleworking for workers with WLB needs (only in the private sector)	No	No
FI	Part-time for parents	Relative right	The employer has to consider and respond to the worker's request and to provide reasons in case of refusal	Part-time for parents with children under eight and with children under 18 in need of special care due to disability or long-term illness	No	Six months with the employer within the previous 12 months, but no sum of fixed-term contracts
FR	None	-	-	-	-	-
HR	None	-	-	-	-	-
HU	Part-time for parents	Absolute right	Not applicable	Part-time (half-time) for parents with children under four	No	- In the private sector: no - In the public sector: to request part-time working while on child-related leave and not to hold management positions

EU country	National measure/s	Absolute or relative right	Design of relative right	FWAs covered and workers entitled	Limited duration (and right to return to the original pattern)	Qualifying conditions
IE	None	-	-	-	-	-
IT	- System 1: part-time in the case of oncological diseases - System 2: FWA for carers	Relative rights	The employer has to consider and respond to the worker's request, but does not have to provide reasons in case of refusal	- System 1: part-time for carers in the case of oncological diseases - System 2: part-time, flexitime and teleworking for carers	No	No
LT	FWAs for parents and carers	Relative right	The employer has to consider and respond to the worker's request and to provide reasons in case of refusal	Part-time, flexitime and teleworking for parents with children under eight and carers	No	No
LU	None	-	-	-	-	-
LV	- System 1: part-time for parents - System 2: FWA for parents and carers	- System 1: absolute right - System 2: relative right	- System 2: the employer has to consider and respond to the worker's request and to provide reasons in case of refusal	- System 1: part-time for parents with children under 14 and with disabled children under 18 - System 2: part-time, flexitime and teleworking for parents with children under eight and carers	No	No
MT	FWAs for parents and carers	Relative right	The employer has to consider and respond to the worker's request and to provide reasons in case of refusal	Part-time, flexitime and teleworking for parents with children under eight and carers	No	No
NL	FWAs for all workers	Relative right	The employer has to consider and respond to the worker's request and to provide reasons in case of refusal	Part-time, flexitime and teleworking for all workers if the employer has at least 10 employees and only for parents with children under eight and carers otherwise	No	- 26 weeks with the employer before the requested start of the FWAs, but no sum of fixed-term contracts
PL	- System 1: part-time for parents - System 2: flexitime and teleworking for all workers	- System 1: absolute right - System 2: relative right	System 2: the employer has to consider and respond to the worker's request, but only has to provide reasons in case of refusal in the case of children with disabilities	- System 1: part-time for parents with children under 6 - System 2: flexitime and teleworking for all workers	No	- System 1: period of work qualification of six months - System 2: no

EU country	National measure/s	Absolute or relative right	Design of relative right	FWAs covered and workers entitled	Limited duration (and right to return to the original pattern)	Qualifying conditions
PT	- System 1: part-time and flexible schedules for parents - System 2: teleworking for parents - System 3: teleworking in case of dependency	- System 1 and 3: relative rights - System 2: absolute right	- System 1 and 3: the employer has to consider and respond to the worker's request and to provide reasons in case of refusal	- System 1: part-time and flexible schedules for parents with children under 12 - System 2: teleworking for parents with children under three (only for employers with at least 10 employees) - System 3: teleworking for workers with dependent persons living in the same household	- System 1: two years per beneficiary (right to return) - System 2: no - System 3: four years per beneficiary (right to return)	No
RO	None	-	-	-	-	-
SE	- System 1: part-time for parents - System 2: flexitime and teleworking for parents and carers	- System 1: absolute right - System 2: relative right	The employer has to consider and respond to the worker's request and to provide reasons in case of refusal	- System 1: part-time working for parents with children under 8 - System 2: flexitime and teleworking for parents with children under 8 and carers	No	- System 1: no - System 2: 6 months with the employer
SI	Part-time for parents	Absolute right	Not applicable	Part-time working for parents with children under 3 and with children between 3 and 18 if the child has a disability affecting their mobility or a disturbance in mental development	No	No
SK	Part-time for parents	Relative right	The employer has to consider and respond to the worker's request and to provide reasons in case of refusal	Part-time working for parents with children under 15	No	No

9 Legal protection

This section refers only to the specific legal protection provided for in the WLB Directive, excluding other legal protection based on different grounds of discrimination, such as sex or family situation.

As a preliminary comment, it should be noted that the legal protection described in this section is the protection established in relation to the current national measures implementing the Directive and not for the full material scope covered by the WLB Directive. As the majority of Member States have not fully transposed the measures included in the Directive, the correct implementation of the legal protection will need to be evaluated again in the future once the material scope has been fully transposed. For example, in the case of the prohibition of dismissal on the grounds that workers have applied for, or have taken, paternity leave, parental leave, carers' leave or FWAs, if a country does not provide for carers' leave and FWAs but offers such legal protection for paternity leave and parental leave (the measures that have actually been implemented at national level), it will be mentioned that this country provides for the prohibition of dismissal.

9.1 Maintenance of previous employment rights and job

In the first place, for paternity leave, parental leave, carers' leave and *force majeure* leave, Member States have to guarantee that rights that have been acquired or that are in the process of being acquired by workers on the date on which the leave starts are maintained until the end of the leave, and that at the end of the leave those rights apply, including any changes arising from national law, collective agreements or practice. However, only 17 EU countries provide for this legal protection for all kinds of national leave, leaving 10 countries with gaps in this respect:

- In three countries (BE, HU and PL[250]), this protection is not granted for any type of national leave.
- In the other seven countries some kinds of national leave are excluded from this protection: carers' leave and *force majeure* leave in BG; *force majeure* leave in CY and DK; paternity leave in HR; paternity leave, parental leave and two national systems of carers' leave[251] in IT; paternity leave, carers' leave and *force majeure* leave in LU and SI.

In the second place, for paternity leave, parental leave and carers' leave, Member States need to guarantee that at the end of the leave workers are entitled to return to their jobs or to equivalent posts on terms and conditions which are no less favourable to them. Yet just 16 countries provide for this legal protection for all types of national leave. This leaves 11 countries with problems in the transposition of this legal protection:

- In three countries (BE, DE and HU), there is no protection for any type of national leave.
- Of the remaining eight countries, seven exclude some types of national leave from this protection: carers' leave in BG and PL; paternity leave and carers' leave in HR, LU, SI and SK; and paternity leave and two national systems of carers' leave[252] in IT. Finally, in ES this legal protection is granted but only for part of the leave in two cases: there is protection only during the first year in the case of the Spanish 'childcare leave' (out of three years) and only during the first year in the case of the Spanish long carers' leave (out of two years). This is contrary to the case law of the CJEU in the *H.* case, in which the Court interpreted Directive 2010/18 and clarified that the right to return to the same job must benefit the worker even where the parental leave taken under the applicable national provisions exceeds the minimum period of months referred to in the Directive.[253]

250 There is protection for paternity leave, parental leave and childcare leave (no protection for *force majeure* leave), but only under Polish case law.
251 Leave to care for a disabled spouse and leave for serious family reasons.
252 Leave to care for a disabled spouse and leave for serious family reasons.
253 CJEU, case C-174/16, *H.*, 7 September 2017, ECLI:EU:C:2017:637, paragraph 39.

9.2 Protection against discrimination and dismissal[254]

Firstly, for all measures in the WLB Directive (paternity leave, parental leave, carers' leave, *force majeure* leave and FWAs) Member States must prohibit less favourable treatment of workers on the ground that they have applied for, or have taken, leave or an FWA. But only 14 of them offer this legal protection, leaving as many as 13 countries with implementation issues:

- 10 countries (BE, BG, CY, CZ, DE, FR, HR, LU, LV and PL) do not offer protection for any national measure.
- The other three countries exclude some national measures from this protection: paternity leave, carers' leave, *force majeure* leave and FWAs in HU and SI; and FWAs in SK.

Nevertheless, some national experts point out that, while national systems may not provide specific protection for workers who have applied for, or have taken, leave or an FWA, these systems could protect such workers if a connection can be established with other grounds of discrimination, such as sex or family situation, or more generally when there is protection at national level against any less favourable treatment due to the fact that a worker requests or makes use of their legitimate rights.

Secondly, for paternity leave, parental leave, carers' leave and FWAs, Member States need to prohibit the dismissal of workers on the grounds that they have applied for, or have taken, leave or an FWA. This legal protection is more widespread as it is offered by 19 EU countries. The other eight countries (DE, FR,[255] HR, HU, LU, PL, RO and SI) do not provide this specific protection for any of their national measures. However, most of these countries (DE, HR, HU,[256] LU, PL, RO and SI) do prohibit the dismissal of workers during parental leave or other kinds of leave or while a FWA is being used. This protection could appear stronger than that required by the WLB Directive, because the dismissal is plainly forbidden during the period of leave or FWAs, but it can also be regarded as weaker because workers may be dismissed before the actual use of the right and also when they return from leave or come back to the original working pattern after making use of an FWA. In addition, in FR there is a general prohibition of dismissal on the ground of family situation, which could cover all the measures in the WLB Directive if a connection can be established with such a ground.

Thirdly, for paternity leave, parental leave and carers' leave, Member States must guarantee the reversal of the burden of proof, i.e. where workers who consider that they have been dismissed on the grounds that they have applied for, or have taken, leave establish, before a court or other competent authority, facts capable of giving rise to a presumption that they have been dismissed on such grounds, it is for the employer to prove that the dismissal was based on other grounds. This legal mechanism is available in 11 EU countries. The remaining 16 countries do not provide for the reversal of the burden of proof specifically designed by the WLB Directive in case of dismissal related to paternity leave, parental leave and carers' leave:

- However, seven of them (DE, FI, HR, IE, LT, LU and NL) go beyond the EU minimum standard because the employer always carries the burden of proof in the case of dismissal.
- There is an implementation gap in the other nine countries (AT, BG, CY, CZ, ES, FR, LV, PL and SI), although only for paternity leave in the case of CY. Yet some national experts indicate that the reversal of the burden of proof is available when a prima facie case of dismissal on other grounds, such as sex or family situation, can be established.

254 For more information on this topic, see: Masselot, A. (2018), *Family leave: enforcement of the protection against dismissal and unfavourable treatment*, European Commission. This report is available at: https://www.equalitylaw.eu/downloads/4808-family-leave-enforcement-of-the-protection-against-dismissal-and-unfavourable-treatment-pdf-962-kb.

255 There is protection for parental leave, but only under French case law.

256 Besides the protection during parental leave, in HU mothers and single fathers with children under the age of 3, who are not on parental leave, enjoy some legal protection against dismissal (both those who have returned from parental leave and those who never took parental leave).

9.3 Penalties, protection against retaliation and equality bodies

Member States have to provide for penalties applicable to infringements of national provisions adopted pursuant to the WLB Directive, or the relevant provisions already in force concerning the rights which are within the scope of this Directive, namely paternity leave, parental leave, carers' leave, *force majeure* leave and FWAs. However, penalties are only available in 21 Member States, which leaves six countries with transposition gaps, namely AT, BG, DE, ES, IT and LV. The lack of penalties is for all measures in the Directive, excepting AT and IT: no penalties for paternity leave, carers' leave, *force majeure* leave and FWAs in AT and no penalties for two national systems of carers' leave,[257] *force majeure* leave and FWAs in IT. Here again, some national experts point out that, despite not providing for the specific penalties required by the WLB Directive, other penalties exist when a link can be established with other grounds of discrimination, such as sex or family situation. As for the different types of penalties, they are very varied:

- Traditional penalties: compensation for damages; reinstatement in the job; and administrative fines. These are the most widespread penalties.
- Naming and shaming: the perpetrator provides adequate redress and makes this fact public at their own expense; publication of the decision of the equality body; and publication of the judgment in the media.
- Other penalties: the revocation of public benefits or even the exclusion, for a certain period, from any further awarding of financial or credit incentives or from any public tender; and no release of a Gender Equality certification when it is ascertained that during the two years preceding the application for the Gender Equality Certification the employer refused, opposed or obstructed the exercise of different rights to assure the reconciliation of working and care duties.

The penalties provided for shall be effective, proportionate and dissuasive. Yet, of the 21 Member States with penalties, national experts consider that they are not effective, proportionate and dissuasive in 14 Member States (BE, CZ, DK, EE, EL, FI, FR, IE, LT, LU, MT, NL, PL and RO).

Regarding the protection against retaliation, Member States have to introduce measures to protect workers, including workers who are employees' representatives, from any adverse treatment by the employer or adverse consequences resulting from a complaint lodged within the undertaking or any legal proceedings for the purpose of enforcing compliance with the requirements laid down in the WLB Directive. But only 15 countries make this legal protection available to workers. Of the other 12, 11 do not offer this protection at all (BG, CY, DE, ES, FR, HR, IT, LT, LU, PL and RO), while one country (PT) offers it but only to employees' representatives. Some national experts indicate that protection against retaliation exists, but only in the case of discrimination on other grounds, such as sex or family situation.

Finally, regarding national equality bodies, Member States have to make the national equality body or bodies competent with regard to all the issues relating to discrimination falling within the scope of the WLB Directive. This is actually the case in 17 Member States. The other 10 have not made them competent in this area (CY, DE, FI, IE, MT, PL and RO) or at least not formally (AT,[258] ES[259] and LU[260]).

257 Leave to care for a disabled child or relative and leave for serious family reasons.

258 According to the Austrian expert, *de facto*, the equality bodies already advise victims of discrimination based on sex, including parental status, on infringements of all relevant laws, even though formally they are mainly competent in the realm of the equal treatment acts.

259 The law that governs the Spanish equality body, i.e. the Women's Institute (Act 16/1983), establishes a very wide definition of the aim and functions *ratione materiae*. Yet the law refers explicitly only to Directives 2006/54, 2004/113 and 2010/41. It was last modified in 2020 but the WLB Directive was not included. According to the Spanish expert, the subject matter of the WLB Directive is covered by the aims of the Women's Institute, although its mandate has not been updated with an explicit reference to this Directive.

260 The Act on Equal Treatment, which created the Centre for Equal Treatment (CET), lists the following grounds covered by its mandate: 'race, ethnic origin, sex, religion or belief, disability and age' and reference is made to the field of 'employment and work'. The expert from LU explains that the CET argues that its mandate is a very large one.

9.4 Summary table for legal protection

Table 10 provides a summary of legal protection (the shortcomings in each Member State are shown in grey).

TABLE 10: SUMMARY TABLE FOR LEGAL PROTECTION

EU country	Maintenance of previous rights/job	Protection against discrimination	Prohibition of dismissal	Reversal of the burden of proof in case of dismissal	Penalties/effective, proportionate and dissuasive	Protection against retaliation	Equality bodies competent
AT	- Yes - Yes	Yes	Yes	No	No (no penalties for paternity leave, carers' leave, *force majeure* leave and FWA)	Yes	Not formally
BE	- No - No	No	Yes	Yes	- Yes - No	Yes	Yes
BG	- No (no protection for carers' leave and *force majeure* leave) - No (no protection for carers' leave)	No	Yes	No	No	No	Yes
CY	- No (no protection for *force majeure* leave) - Yes	No	Yes	No (no protection for paternity leave)	- Yes - Yes	No	No
CZ	- Yes - Yes	No	Yes	No	- Yes - No	Yes	Yes
DE	- Yes - No	No	No	No, but the employer carries the burden of proof	No	No	No
DK	- No (no protection for *force majeure* leave) - Yes	Yes	Yes	Yes	- Yes - No	Yes	Yes
EE	- Yes - Yes	Yes	Yes	Yes	- Yes - No	Yes	Yes
EL	- Yes - Yes	Yes	Yes	Yes	- Yes - No	Yes	Yes
ES	- Yes - No (no protection for part of 'childcare leave' and the long carers' leave)	Yes	Yes	No	No	No	Not formally
FI	- Yes - Yes	Yes	Yes	No, but the employer carries the burden of proof	- Yes - No	Yes	No
FR	- Yes - Yes	No	No	No	- Yes - No	No	Yes

EU country	Maintenance of previous rights/job	Protection against discrimination	Prohibition of dismissal	Reversal of the burden of proof in case of dismissal	Penalties/effective, proportionate and dissuasive	Protection against retaliation	Equality bodies competent
HR	- No (no protection for paternity leave) - No (no protection for paternity leave and carers' leave)	No	No	No, but the employer carries the burden of proof	- Yes - Yes	No	Yes
HU	- No - No	No (no protection for paternity leave, carers' leave, *force majeure* leave and FWAs)	No	Yes	- Yes - Yes	Yes	Yes
IE	- Yes - Yes	Yes	Yes	No, but the employer carries the burden of proof	- Yes - No	Yes	No
IT	- No (no protection for paternity leave, parental leave, leave to care for a disabled spouse and leave for serious family reasons) - No (no protection for paternity leave, leave to care for a disabled spouse and leave for serious family reasons)	Yes	Yes	Yes	No (no penalties for leave to care for a disabled child or relative, leave for serious family reasons, *force majeure* leave and FWAs)	No	Yes
LT	- Yes - Yes	Yes	Yes	No, but the employer carries the burden of proof	- Yes - No	No	Yes
LU	- No (no protection for paternity leave, carers' leave and *force majeure* leave) - No (no protection for paternity leave and carers' leave)	No	No	No, but the employer carries the burden of proof	- Yes - No	No	Not formally
LV	- Yes - Yes	No	Yes	No	No	Yes	Yes
MT	- Yes - Yes	Yes	Yes	Yes	- Yes - No	Yes	No
NL	- Yes - Yes	Yes	Yes	No, but the employer carries the burden of proof	- Yes - No	Yes	Yes
PL	- No - No (no protection for carers' leave)	No	No	No	- Yes - No	No	No

EU country	Maintenance of previous rights/job	Protection against discrimination	Prohibition of dismissal	Reversal of the burden of proof in case of dismissal	Penalties/effective, proportionate and dissuasive	Protection against retaliation	Equality bodies competent
PT	- Yes - Yes	Yes	Yes	Yes	- Yes - Yes	No (no protection for workers other than workers' representatives)	Yes
RO	-Yes - Yes	Yes	No	Yes	- Yes - No	No	No
SE	- Yes - Yes	Yes	Yes	Yes	- Yes - Yes	Yes	Yes
SI	- No (no protection for paternity leave, carers' leave and *force majeure* leave) - No (no protection for paternity leave and carers' leave)	No (no protection for paternity leave, carers' leave, *force majeure* leave and FWAs)	No	No	- Yes - Yes	Yes	Yes
SK	- Yes - No (no protection for paternity leave and carers' leave)	No (no protection for FWAs)	Yes	Yes	- Yes - Yes	Yes	Yes

10 Overall assessment and conclusions

The objective of this thematic report was to gain insight into the most important aspects about the implementation of the WLB Directive in the EU Member States. However, given the late implementation in most countries, the report has mainly become an analysis of the gaps that national systems have to close to reach the minimum standards of the Directive when the transposition takes place. In this sense, it is quite telling that only one country has transposed the Directive in a more or less satisfactory way. The other countries (26) have important gaps in one or several areas. The areas with the most gaps are parental leave or allowance (present in 20 countries), FWAs (19 countries) and legal protection (17 countries).

Despite the apparent dark picture, there are also positive aspects in the implementation process. Paternity leave is generally well implemented and as many as 12 Member States have a duration that goes beyond 10 working days or two weeks. As for parental leave, despite the generalised problems of non-transferability and adequate allowance, several countries have generous national systems of parental leave, going well beyond the minimum standards of the Directive in terms of the duration of the leave (in 23 countries) and the period of parental allowance (in 20 countries). As regards carers' leave, most Member States (20) have more generous systems in terms of duration. Finally, there are nine EU countries that recognise some absolute rights to FWAs, going further than the right to request required by the WLB Directive.

The inclusiveness of the national measures implementing the WLB Directive is far from being ideal, as there are a few problems of personal scope and above all several unlawful eligibility conditions for all specific measures in the Directive. Regarding the personal scope of the WLB Directive, it is generally well implemented, apart from a few exceptions. In seven Member States there is a lack of coverage by the national measures implementing the WLB Directive of persons who would fit the EU definition of worker – mainly associated with 'false' self-employed workers. In addition, enterprises with few employees in one country and certain categories of public employees or institutions in four countries are excluded from some national measures. Furthermore, there are unlawful qualifying conditions for each and every particular measure of the WLB Directive: in four countries for paternity leave itself; in six countries for the paternity payment or allowance; in six countries for parental leave itself; in six countries for the parental allowance; in six countries for carers' leave; in one country for *force majeure* leave; and in five countries for FWAs.

There is both light and shade in relation to the gender equality dimensions regarding the possibility of sharing or transferring rights between parents or carers (which goes against the aim of better sharing of caring responsibilities between men and women) and the payment or allowance for the different kinds of leave (since adequate compensation encourages men to take leave). On the one hand, paternity leave is an individual and non-transferable right of the father (or the equivalent second parent) in all EU Member States and the payment or allowance is generally calculated as a percentage of the worker's previous wage, which ranges from 70 % to 100 %. On the other hand, there are only seven countries with two non-transferable months of parental leave per parent that are compensated at an adequate level. This means that 20 Member States have problems of non-transferability, the level of parental allowance or both. This is worrisome, as only a combination of the father's quota and a high level of benefit leads to a high take-up of parental leave by fathers.

Furthermore, it has been revealed that in some countries some rights to carers' leave and *force majeure* leave are a family right, meaning that the right could be shared between different workers, for example two parents in the case of a child or two spouses/partners in the case of an elderly relative. This is the case in 11 Member States for carers' leave and five countries for *force majeure* leave. This is problematic from a gender perspective, as family rights are mostly used by women.

All in all, it may be concluded that there is plenty of work to do at national level to achieve a proper implementation of the WLB Directive. Special attention should be paid to the inclusiveness of the national measures implementing the WLB Directive and to gender equality dimensions related to non-transferability and the level of payment and allowance. This will be the only way to ensure that WLB is accessible to all workers, including non-standard workers, and that caring responsibilities are fairly distributed between men and women.

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Annex I: Questionnaire

Transposition in general

According to Article 20 of Directive 2019/1158, this Directive has to be transposed by 2 August 2022, except for the payment or allowance for the last 2 weeks of parental leave, in which case the implementation period is extended until 2 August 2024.

1. How has Directive 2019/1158 been transposed in your Member State?

   - With new legislation ('express transposition'): in this case, which new legislation (including amendment of existing laws) has been adopted to implement it and when has this legislation entered into force/will this legislation enter into force? In your view, has the transposition in national law been satisfactory? (Yes/No). If no, enumerate the main problems that have been identified and indicate the answer of the questionnaire in which they are explained.
   - Without new legislation ('implicit transposition'): in this case, is it because the national law of your Member State was already in line with the Directive? (Yes/No). If no, enumerate the main problems that have been identified and indicate the answer of the questionnaire in which they are explained.

2. Has your Member State implemented the obligation to provide for a payment or an allowance for the last 2 weeks of parental leave? (Yes/No). If yes, mention if:

   - With new legislation ('express transposition').
   - Or without new legislation ('implicit transposition').

Personal scope of Directive 2019/1158 (Article 2 and recital 17)

Following Article 2 and recital 17 of Directive 2019/1158, its personal scope covers all workers, men and women, who have an employment contract or an employment relationship, including part-time workers, fixed-term contract workers or persons with a contract of employment or employment relationship with a temporary agency.

3. Are all workers in the private sector, regardless of the size of the company or organisation, covered by the national measures implementing the Directive? (Yes/No). If no, explain why.

4. Are all workers in the public sector (judges, teachers…), regardless of the size of the organisation, covered by the national measures implementing the Directive? (Yes/No). If no, explain why.

5. Are part-time workers, fixed-term contract workers or persons with a contract of employment or employment relationship with a temporary agency covered by the national measures implementing the Directive? (Yes/No). If no, explain why.

6. In your view, are there any categories of persons that would fit in the EU definition of worker (i.e., a person who for a certain period of time performs services for and under the direction of another person in return for which he/she receives remuneration) but that are not covered by the national measures implementing the Directive? (Yes/No). If yes, explain which ones.

7. In your view, has Article 2 been satisfactorily transposed in national Law? (Yes/No). If no, explain why.

National system of child-related leave

EU Law has set minimum standards for workers about the duration and payment of different kinds of child-related leave, namely 'maternity leave', 'paternity leave' and 'parental leave'. According to Directive 92/85[1] and the latest case law of the Court of Justice of the EU[2], maternity leave is the period off work granted to a delivering mother around the time of childbirth mainly aimed at the protection of her biological condition during pregnancy and after giving birth. Following Directive 2019/1158, paternity leave applies also in the case of birth and is the period off work for the biological father (or the equivalent second parent) designed to provide care to their child during the first weeks or months of the child's life; and parental leave is the period off work granted to both parents, not only in the case of birth but also in the case of adoption, to take care of their child until a given age (at least up to the age of eight) to be defined at national level. However, Member States may have a different typology of leaves (for instance, in a few countries a single 'generic parental leave' has replaced 'maternity leave', 'paternity leave' and 'parental leave') or, having the same typology, may use a different terminology than that used at EU level (for example, 'childcare leave' instead of 'parental leave').

8. Could you briefly describe the system of child-related leave (including also maternity leave) in your Member State?

   - Mention whether the same typology of leave and whether the same terminology of leave used at EU level are followed or not.
   - Indicate, for each leave, the workers entitled, the duration and the payment or allowance provided during the leave (if any).
   - Explain, for each leave, the period during which the leave can be used by the worker.

Paternity leave (Articles 3, 4, 8, 20(6), 20(7) and recitals 18, 19, 26, 29, 30, 37 and 49)

Paternity leave applies in the case of childbirth and is the period off work for the biological father (or the equivalent second parent) designed to provide care to their child during the first weeks or months of the child's life. Member States shall ensure a right to paternity leave of at least 10 working days (Article 4) during which a payment or an allowance at least equivalent to the national sick pay level must be received (Article 8(2)).

9. Is the terminology used at national level the same as in the Directive ('paternity leave') (Yes/No). If no, explain the terminology used at national level.

10. What is the duration of paternity leave in your Member State? Explain whether the duration is expressed in working days, in calendar weeks or in other time units.

11. Which workers are entitled to paternity leave? Mention whether, besides the biological father, the equivalent second parent (e.g., a co-mother in a lesbian relationship) is also entitled to paternity leave.

12. Is the right to paternity leave an individual and non-transferable right, for its whole duration? (Yes/No). If no, explain which part is individual and transferable or a family right.

13. During which period can paternity leave be taken by the worker (e.g. until the child is 6 months old)?

1 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 L 348, 28 November 1992, 1.

2 CJEU, 18 November 2020, *Syndicat CFTC*, case C-463/19, ECLI:EU:C:2020:932.

14. Qualifying conditions for the leave:

    – Is the right to paternity leave subject to a period of work qualification (the period of time a person has been a worker, irrespective of the number of employers) or to a length of service qualification (the length of employment with one employer)? (Yes/No). If yes, explain which qualifying periods and how long they are.
    – Is the right to paternity leave subject to other qualifying conditions? (Yes/No). If yes, explain which ones.

15. Is it possible in your Member State for the worker to take paternity leave in flexible ways (on a part-time basis, in alternating periods or in other flexible ways)? (Yes/No). If yes:

    – Explain in which ways
    – Is the flexible take-up an absolute right of the worker (a right to obtain)[3] or a relative right (a right to request the employer)?

16. In your view, has Article 4 of Directive 2019/1158 been satisfactorily transposed in national Law? (Yes/No). If no, explain why.

17. What is the payment or allowance provided during paternity leave? Mention:

    – Whether it is a payment (provided by the employer) or an allowance (provided by the State)
    – Is the compensation a flat-rate, a percentage of the previous worker's wage or a combination of the two? Explain the concrete level of compensation.
    – Is the compensation subject to a ceiling? (Yes/No). If yes, explain which one and whether it is different from the one applicable to the sick pay level.
    – Is the compensation equal to or higher than the national sick pay level? (Yes/No). If no, explain why.
    – Is the compensation provided during the whole period of paternity leave? (Yes/No). If no, explain the period during which the compensation is provided.

18. Qualifying conditions for the payment or allowance:

    – Is the right to the payment or allowance provided subject to periods of previous employment (the period of time a person has been a worker, irrespective of the number of employers)?[4] (Yes/No). If yes, explain how long the period is and when it must be fulfilled (e.g. 3 months immediately prior to the expected date of childbirth)
    – Is the payment or allowance provided subject to other qualifying conditions? (Yes/No). If yes, explain which ones.

19. In your view, has Article 8(2) of Directive 2019/1158 been satisfactorily transposed in national Law? (Yes/No). If no, explain why.

20. Article 20(6) of Directive 2019/1158 allows Member States to take any national family-related leave and compensation exceeding the EU minimum standards (in Directive 92/85 and Directive 2019/1158) into account in order to comply with the provisions of Directive 2019/1158 on paternity leave (e.g. part of parental leave is used to comply with the provisions on paternity leave). Has your Member State made use of this possibility, for the leave itself or for the compensation? (Yes/No). If

3 The employer cannot refuse the request from the worker.

4 These periods cannot be limited solely to the employment ongoing prior to the presumed date of confinement (with the current employer). Those periods of employment must be understood as comprising the various successive posts occupied by the worker prior to that date, including for different employers and under various employment statuses (CJEU, 21 May 2015, *Roselle*, case C-65/14, ECLI:EU:C:2015:339, paragraph 41).

yes, explain the details and whether the use of this possibility has been explicit (in legislation, in a political document or somewhere else) or not.

21. Has your Member State made use of the exception provided for in Article 20(7) of Directive 2019/1158, which allows Member States not to provide a payment or an allowance during paternity leave if they fulfil certain conditions?[5] (Yes/No). If yes, explain whether the use of the exception has been explicit (in legislation, in a political document or somewhere else) or not.

Parental leave (Articles 3, 5, 8, 20(6) and recitals 20-25, 31, 37 and 49)

Parental leave applies in the cases of childbirth and adoption and is the period off work granted to both parents to take care of their child until a given age (up to the age of eight)[6] to be defined at national level. Member States shall ensure a right to parental leave of at least 4 months for each parent, 2 of which cannot be transferred between the parents (Article 5). At least during the 2 non-transferable months for each parent an adequate payment or an allowance must be received (Article 8(3) and recital 31).

22. Is the terminology used at national level the same as in the Directive ('parental leave') (Yes/No). If no, explain the terminology used at national level.

23. What is the duration of parental leave in your Member State? Explain whether the duration is expressed in working days, in calendar weeks or in other time units.

24. Which workers are entitled to parental leave? Mention whether, besides biological and adoptive mothers and fathers, co-parents[7] are also entitled to parental leave.

25. Individual right (transferable or not) or family right:

    – Is parental leave an individual right of each parent, for its whole duration? (Yes/No). If no, explain which part is an individual right and which part is a family right (that can be shared between the parents).
    – If parental leave is an individual right wholly or partly, is the whole of this individual right non-transferable between the parents? (Yes/No). If no, explain which part is non-transferable and which part can be transferred to the other parent.

26. During which period can parental leave be taken by the worker (e.g. until the child is 6 years old)? In your view, is this period long enough to ensure that each parent is able to effectively take up their full entitlement to parental leave? (Yes/No). If no, explain why. When replying consider, inter alia, the duration of the leave, the period during which the leave can be taken and whether the simultaneous uptake by the two parents is forbidden or somehow penalised.[8]

27. Has your Member State established a period of notice that is to be given by workers to employers where they exercise their right to parental leave? (Yes/No). If yes, explain how long the period of notice is (e.g. 1 month) and whether the worker's request for parental leave has to specify the intended beginning and end of the period of leave.

5 Where Member States ensure a payment or an allowance of at least 65 % of the worker's net wage, which may be subject to a ceiling, for at least 6 months of parental leave for each parent.
6 The expression 'up to the age of 8' does not seem to set a maximum age of the child for Member States. On the contrary, in line with the minimum standards nature of the Directive, Member States seem to be free to set a higher age, such as 12 or 18 years old. In this case, 8 years old would be a mere recommendation.
7 A co-mother in a lesbian relationship and co-father in a homosexual relationship if they are not regarded as adoptive parents.
8 For example, if when taking the leave simultaneously only one parent receives the corresponding payment or allowance (instead of the two parents).

28. Qualifying conditions for the leave:

    - Is the right to parental leave subject to a period of work qualification (the period of time a person has been a worker, irrespective of the number of employers) or to a length of service qualification (the length of employment with one employer)? (Yes/No). If yes, explain which qualifying periods, how long they are and whether, in the case of successive fixed-term contracts with the same employer, the sum of those contracts are taken into account for the purpose of calculating the qualifying period.
    - Is the right to parental leave subject to other qualifying conditions? (Yes/No). If yes, explain which ones.

29. In your Member State, is it possible for the employer to postpone the granting of parental leave? (Yes/No). If yes:

    - Has your Member State established the circumstances in which the employer is allowed to postpone the granting of parental leave? (Yes/No). If yes, what are those circumstances?
    - For how long can the employer postpone the granting of parental leave?
    - Does the employer need to provide reasons for the postponement in writing? (Yes/No).
    - When considering requests for full-time parental leave, are employers obliged to, prior to any postponement, offer, to the extent possible, flexible ways of taking parental leave (e.g., on a part-time basis)? (Yes/No). If yes, explain the details.

30. Is it possible in your Member State for the worker to take parental leave in flexible ways (on a part-time basis, in alternating periods or in other flexible ways)? (Yes/No). If yes:

    - Explain in which ways.
    - For each of the ways mentioned, is it an absolute right of the worker (a right to obtain)[9] or a relative right (a right to request the employer)?
    - If it is a relative right, does the employer need to consider and respond to the request, taking into account the needs of both the employer and the worker? (Yes/No).
    - If it is a relative right and the request is refused, does the employer need to provide reasons for the refusal in writing? (Yes/No). If yes, within which period after the request?

31. Has your Member State assessed the need to adopt specific measures on parental leave for adoptive parents, parents with a disability and parents of children with a disability or a long-term illness? (Yes/No). If yes, explain which measures.

32. In your view, has Article 5 of Directive 2019/1158 been satisfactorily transposed in national Law? (Yes/No). If no, explain why.

33. What is the payment or allowance provided during parental leave? Mention:

    - Whether it is a payment (provided by the employer) or an allowance (provided by the State).
    - Is the compensation a flat-rate, a percentage of the previous worker's wage or a combination of the two? Explain the concrete level of compensation.
    - Is the level of compensation subject to a ceiling? (Yes/No). If yes, explain which one.
    - In your view, is the compensation high enough to enable first earners in a family to make use of their right to parental leave? (Yes/No). If no, explain why.
    - In your view, does the compensation allow for a decent living standard? (Yes/No). If no, explain why.
    - In the light of recital 31 of Directive 2019/1158, is in your view the level of compensation 'adequate'? (Yes/No). If no, explain why.

9 The employer cannot refuse the request from the worker.

- Is the compensation provided during the whole period of parental leave? (Yes/No). If no, explain the period during which the compensation is provided.
- Is the compensation provided during the two individual and non-transferable months for each parent required by Article 5(2) of Directive 2019/1158? (Yes/No). If no, explain why.
- Is the compensation attached to parental leave so that compensation is only granted if and to the extent that the leave is taken? (Yes/No). If no, explain the details.
- Is the compensation an individual and non-transferable right of each parent, for its whole duration? (Yes/No). If no, explain which part is individual and transferable or a family right.[10]

34. Is the payment or allowance provided subject to any qualifying conditions different from the ones mentioned for the leave itself in the replies to question 28? (Yes/No). If yes, explain which ones.

35. In your view, has Article 8(3) of Directive 2019/1158 (read in conjunction with recital 31) been satisfactorily transposed in national Law? (Yes/No). If no, explain why.

36. Article 20(6) of Directive 2019/1158 allows Member States to take any national family-related leave and compensation exceeding the EU minimum standards (in Directive 92/85 and Directive 2019/1158) into account in order to comply with the provisions of Directive 2019/1158 on parental leave (e.g. part of paternity leave or maternity leave is used to comply with the provisions on parental leave). Has your Member State made use of this possibility, for the leave itself or for the compensation? (Yes/No). If yes, explain the details and whether the use of this possibility has been explicit (in legislation, in a political document or somewhere else) or not.

Carers' leave (Articles 3, 6 and 20(6) and recitals 27, 32, 37 and 49)

Carers' leave is a leave from work for carers, men or women, in order to provide personal care or support to a relative, or to a person who lives in the same household as the worker, and who is in need of significant care or support for a serious medical reason. Member States shall ensure a right to carers' leave of at least 5 working days per year per worker (Article 6).

37. Terminology and national measure/s:

- Is the terminology used at national level the same as in the Directive ('carers' leave') (Yes/No) If no, explain the terminology used at national level.
- What are in you view the national measure/s that could be considered as 'carers' leave' under Directive 2019/1158? (e.g. at national level there may be a short-term carers' leave and long-term carers' leave)
- Is the right to 'carers' leave' and the right to 'time off from work on grounds of *force majeure*' (see below) clearly distinguished at national level? (Yes/No). If no, please explain how they overlap.

38. What is the duration of carers' leave in your Member State? Explain whether the duration is expressed in working days, in calendar weeks or in other time units.

39. The 'by default' system in Directive 2019/1158 is at least five working days per year per worker. However, the Directive allows alternative systems to allocate carers' leave. In your Member State, is the right to carers' leave allocated per year? (Yes/No). If no:

- Explain the alternative system used at national level. Is it the leave allocated on the basis of a period other than a year (e.g. 25 working days every 5 years), by reference to the person in

10 Nowadays in some countries the right to leave is an individual and non-transferable right (e.g. 12 months for each parent, that is to say 24 months in total) but the right to compensation is a family entitlement (e.g. only 12 months of compensation to be shared between parents).

need of care or support (e.g. 2 working days per year per relative in need of care or support), or by case (e.g. 2 working days per episode of need or support)?
- In you view, does the alternative national system guarantee at least the equivalent of 5 working days per year (e.g. in the case of 2 working days per episode of need or support, the leave can be taken at least three times per year)? (Yes/No). In both cases (yes or no), explain why.

40. In your Member State, for which 'beneficiaries' (persons taken care of) are workers entitled to carer's leave?

    - Mention whether relatives (regardless of whether they live in the same household as the worker or not), persons who live in the same household as the worker (regardless of whether they are relatives or not), or both categories are beneficiaries of carers' leave.
    - If relatives are beneficiaries of carers' leave, are the worker's sons, daughters, mother, father and spouse included? (Yes/No). Is the worker's partner in civil partnership included? (Yes/No). Are there other relatives included (e.g. the worker's grandparents, siblings or partner without a civil partnership)? (Yes/No). If yes, explain which ones.
    - If persons who live in the same household as the worker are beneficiaries of carers' leave, are there any conditions to consider that two persons live in the same household? (Yes/No). If yes, explain which conditions (e.g. the two persons must be registered at the same address for a certain period of time).

41. According to Directive 2019/1158, the 'beneficiary' (person taken care of) is in need of significant care or support for a serious medical reason. In your Member State, in what circumstances must the beneficiary be for the worker to be entitled to carers' leave? Has your country defined 'significant care or support' and/or 'a serious medical reason'? (Yes/No). If yes, explain the details.

42. Does your Member State require prior medical certification of the need for significant care or support for a serious medical reason? (Yes/No). If yes, explain the details.

43. Is the right to carers' leave an individual and non-transferable right of each worker, for its whole duration? (Yes/No). If no, explain which part is individual and transferable or a family right.

44. Is the right to carers' leave subject to any qualifying conditions (e.g. a minimum period of previous employment)?[11] (Yes/No). If yes, explain which ones.

45. In your view, has Article 6 of Directive 2019/1158 been satisfactorily transposed in national Law? (Yes/No). If no, explain why.

Time off from work on grounds of force majeure (Article 7 and recitals 28)

The 'time off from work on grounds of *force majeure*' is the leave granted on grounds of *force majeur*e for urgent family reasons in the case of illness or accident making the immediate attendance of the worker indispensable. Member States shall ensure that each worker is entitled to *force majeure* leave (Article 7).

46. Is the terminology used at national level the same as in the Directive ('time off from work on grounds of *force majeure*') (Yes/No). If no, explain the terminology used at national level.

47. What is the duration of 'time off from work on grounds of *force majeure*' (hereafter '*force majeure* leave') in your Member State? Explain whether the duration is expressed in working days, in calendar weeks, in other time units or in any other way (e.g. a short reasonable time).

11 The period of time a person has been a worker, irrespective of the number of employers.

48. Has your Member State limited the right to *force majeure* leave to a certain amount of time each year (e.g. two working days per year), by case (e.g. two working days per episode of *force majeure*), or both (e.g. two working days per episode of *force majeure* with a maximum of two episodes per year? (Yes/No). If yes, explain the details.

49. According to Directive 2019/1158, *force majeure* leave is designed for urgent family reasons in the case of illness or accident making the immediate attendance of the worker indispensable. In your Member State, what are the circumstances which entitle the worker to *force majeure* leave? Has your country defined 'urgent family reasons' and/or 'illness or accident making the immediate attendance of the worker indispensable'? (Yes/No). If yes, explain the details.

50. Is the right to *force majeure* leave an individual and non-transferable right of each worker, for its whole duration? (Yes/No). If no, explain which part is individual and transferable or a family right.

51. Is the right to *force majeure* leave subject to any qualifying conditions (e.g. a minimum period of previous employment)?[12] (Yes/No). If yes, explain which ones.

52. In your view, has Article 7 of Directive 2019/1158 been satisfactorily transposed in national Law? (Yes/No). If no, explain why.

Flexible working arrangements (Articles 3 and 9 and recitals 34-37)

Flexible working arrangements (hereinafter FWA) means the possibility for workers to adjust their working patterns, including through the use of remote working arrangements, flexible working schedules, or reduced working hours. Member States shall ensure that workers with children up to a specified age, which shall be at least 8 years, and carers, have the right to request FWA for caring purposes (Article 9).

53. In your Member State, is the right to FWA for caring purposes an absolute right of the worker (a right to obtain),[13] or just a relative right (a right to request the employer) as required by Directive 2019/1158?

54. Workers entitled:

    - Are all workers entitled to FWA (regardless of whether they are parents or carers)? (Yes/No). If yes, explain shortly such general right.
    - If no to previous question, are workers with children entitled? (Yes/No). If yes, explain until which age of the child (e.g. until the child is 10 years old).
    - If no to the first question, are carers, as defined in Article 3(1)(d),[14] entitled? (Yes/No). If yes, explain how 'carer' has been defined at national level for the purposes of the right to FWA.

55. To which FWA are workers entitled in your Member State?

    - Are they entitled to the use of remote working arrangements (telework)? (Yes/No)
    - Are they entitled to flexible working schedules (flexitime)? (Yes/No)
    - Are they entitled to reduced working hours (part-time)? (Yes/No)

12 The period of time a person has been a worker, irrespective of the number of employers.
13 The employer cannot refuse the request from the worker.
14 'Carer' means a worker providing personal care or support to a relative, or to a person who lives in the same household as the worker, and who is in need of significant care or support for a serious medical reason, as defined by each Member State.

56. If the right to FWA is a relative right (a right to request the employer):

    – Does the employer need to consider and respond to the request, taking into account the needs of both the employer and the worker? (Yes/No).
    – If the request is refused, does the employer need to provide reasons for the refusal or for any postponement of the FWA requested? (Yes/No). If yes, does the employer need to do it in writing? (Yes/No).

57. Is the duration of any kind of the FWA subject to a reasonable limitation? (Yes/No). If yes:

    – Explain which kinds of FWA and for each kind which limitation.
    – Is the worker entitled to return to the original working pattern at the end of the agreed period? (Yes/No). If no, explain why.
    – Is the worker entitled to request to return to the original working pattern before the end of the agreed period where justified on the basis of a change of circumstances? (Yes/No). If yes, does the employer need to consider and respond to the request for an early return to the original working pattern, taking into account the needs of both the employer and the worker? (Yes/No).

58. Qualifying conditions:

    – Is the right to FWA subject to a period of work qualification (the period of time a person has been a worker, irrespective of the number of employers) or to a length of service qualification (the length of employment with one employer)? (Yes/No). If yes, explain which qualifying periods and how long they are and whether, in the case of successive fixed-term contracts with the same employer, the sum of those contracts are taken into account for the purpose of calculating the qualifying period.
    – Is the right to FWA subject to other qualifying conditions? (Yes/No). If yes, explain which ones.

59. In your view, has Article 9 of Directive 2019/1158 been satisfactorily transposed in national Law? (Yes/No). If no, explain why.

Legal protection (Articles 10-15 and recitals 38-45)

The workers who request or take family leave and FWA are legally protected through the maintenance of the job and previous employment rights and the protection against discrimination and dismissal. Member States shall ensure that rights acquired or in the process of being acquired by workers on the date on which a leave starts are maintained until the end of the leave and that workers are entitled to return to their jobs at the end of the leave (Article 10). They shall also prohibit less favourable treatment (Article 11) and the dismissal of workers (Article 12) on the ground that they have applied for, or have taken, a leave or a FWA. Further legal protection is granted by means of penalties (Article 13), protection against retaliation (Article 14) and Equality bodies (Article 15).

60. For paternity leave, parental leave, carers' leave and *force majeure* leave, does your Member State guarantee that rights that have been acquired or that are in the process of being acquired by workers on the date on which the leave starts are maintained until the end of the leave, and that at the end of the leave those rights, including any changes arising from national law, collective agreements or practice, apply? (Yes/No). If no, explain why.

61. For paternity leave, parental leave and carers' leave, does your Member State guarantee that at the end of the leave workers are entitled to return to their jobs or to equivalent posts on terms and conditions which are no less favourable to them? (Yes/No). If no, explain why.

62. For paternity leave, parental leave and carers' leave, does your Member State guarantee that at the end of the leave workers are entitled to benefit from any improvement in working conditions to which they would have been entitled had they not taken the leave? (Yes/No). If no, explain why.

63. For paternity leave, parental leave, carers' leave and *force majeure* leave, does your Member State guarantee that the employment relationship is maintained during the period of leave? (Yes/No). If no, explain why.

64. For paternity leave, parental leave, carers' leave and *force majeure* leave, has your Member State defined the status of the employment contract or employment relationship for the period of leave, including as regards entitlements to social security, including pension contributions? (Yes/No). If yes, explain the details.

65. In your view, has Article 10 of Directive 2019/1158 been satisfactorily transposed in national Law? (Yes/No). If no, explain why.

66. For paternity leave, parental leave, carers' leave, *force majeure* leave and FWA, does your Member State prohibit less favourable treatment of workers on the ground that they have applied for, or have taken, a leave or a FWA, as required by Article 11 of Directive 2019/1158? (Yes/No). If no, explain why.

67. For paternity leave, parental leave, carers' leave and FWA, does your Member State prohibit the dismissal and all preparations for the dismissal of workers, on the grounds that they have applied for, or have taken, a leave or a FWA? (Yes/No). If no, explain why.

68. For paternity leave, parental leave, carers' leave and FWA, if workers consider that they have been dismissed on the grounds that they have applied for, or have taken, a leave or a FWA, does your Member State guarantee that workers can request the employer to provide duly substantiated reasons for their dismissal? (Yes/No).

    - If no, explain why.
    - If yes, for paternity leave, parental leave and carers' leave, does the employer need to provide reasons for the dismissal in writing? (Yes/No).

69. For paternity leave, parental leave and carers' leave, does your Member State guarantee the reversal of the burden of proof (i.e. where workers who consider that they have been dismissed on the grounds that they have applied for, or have taken, a leave establish, before a court or other competent authority, facts capable of giving rise to a presumption that they have been dismissed on such grounds, it is for the employer to prove that the dismissal was based on other grounds)? (Yes/No). If no, explain why.

70. In your view, has Article 12 of Directive 2019/1158 been satisfactorily transposed in national Law? (Yes/No). If no, explain why.

71. Does your Member State provide for penalties applicable to infringements of national provisions adopted pursuant to Directive 1158/2019, or the relevant provisions already in force concerning the rights which are within the scope of this Directive? (Yes/No).

    - If no, explain why.
    - If yes, explain which penalties (e.g. fines or the payment of compensation)
    - If yes, in your view, are the penalties effective, proportionate and dissuasive? (Yes/No). If no, explain why.
    - If yes, are there enough measures at national level to ensure that penalties are implemented? (Yes/No). If no, explain why. If yes, explain which ones.

72. All things considered, in your view, has Article 13 of Directive 1158/2019 been satisfactorily transposed in national Law? (Yes/No). If no, explain why.

73. Has your Member State introduced enough measures to protect workers, including workers who are employees' representatives, from any adverse treatment by the employer or adverse consequences resulting from a complaint lodged within the undertaking or any legal proceedings for the purpose of enforcing compliance with the requirements laid down in Directive 1158/2019? (Yes/No)

    – If no, explain why.
    – If yes, explain which measures.

74. All things considered, in your view, has Article 14 of Directive 1158/2019 been satisfactorily transposed in national Law? (Yes/No). If no, explain why.

75. Has your Member State made the national Equality body or bodies[15] competent with regard to all the issues relating to discrimination falling within the scope of Directive 2019/1158, as required by its Article 15? (Yes/No). If no, explain why.

Overall assessment

76. What is your overall assessment about the implementation of Directive 2019/1158 in your country? Please mention the most important gaps and also the most significant situations in which national law exceeds the requirements of the Directive.

Relevant national literature

77. Provide a list of what you consider the most relevant recent bibliographic sources in your country that sheds any new academic or policy insight on (the scope of) Directive 2019/1158 and/or its implementation (limit your list to a maximum of 5 references).

15 The body or bodies designated, pursuant to Article 20 of Directive 2006/54/EC, for the promotion, analysis, monitoring and support of equal treatment of all persons without discrimination on grounds of sex.

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