Introduction

This article primarily focuses on parental leave and the transposition of the European Union (Parental Leave) Regulations 2013 into Irish law. First, the background to Council Directive 2010/18/EU¹ (the 2010 Directive), the most recent Directive concerning parental leave, will be explored, with a particular emphasis on the lacunas it was intended to fill. Secondly, the European Union (Parental Leave) Regulations 2013² (the 2013 Regulations), which intended to transpose the 2010 Directive into Irish law, will be examined, and any ambiguities will be identified and critically analysed. This essay will conclude with an examination of how the 2013 Regulations have been applied in practice and a comparative study with the UK will be undertaken in order to highlight how variations in transposition can yield different results in terms of policies and attitudes generally. A number of distinctive methodological approaches will be employed, including engagement with academic literature, a detailed parsing of the relevant EU Directives, an examination of non-academic papers and a comprehensive comparative study.

Each Member State in the European Union has a multitude of ethnic, cultural, religious and social backgrounds, which merge to shape the prevailing perceptions of fatherhood in that state. The complex relationship between these perceptions and the policies in place in a Member State is challenging to untangle. Additionally, there are numerous other competing factors, such as a country’s history, culture, government policy and prevailing legislation. The task of analysing these factors will be left in the hands of other capable authorities.³ Instead, emphasis will be placed on the case law of European Court of Justice (ECJ), the Treaty of Amsterdam, the Parental Leave Directive 96/34/EC⁴ (the 1996 Directive) and the 2010 Directive. Whilst culture and prevailing attitudes will not be omitted from this assessment, it is important to note from the outset that the primary focus will be on case law, Directives, Regulations and Acts of the Oireachtas.

² SI 81/2013 European Union (Parental Leave) Regulations 2013.
⁴ Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC.
Community law was of course created in response to an economic imperative and was marketing creating rather than market correcting. Issues relating to gender equality, such as the role of parents, and how these roles impact on their opportunities for employment, were thus ancillary to broader economic goals. Gender equality has only really attracted attention in the last two decades. Ireland, in particular, has historically been a society with a strong emphasis on separate roles for men and women. It has been faced with mass unemployment, a poor economy and as recently as 1997, only 43% of women with children under the age of 16 were employed. It attaching value to a woman’s contribution in the workplace is an obvious step towards achieving gender equality and heightened productivity. It is equally important to recognise the contribution of fathers to the home. Achieving gender equality necessitates the facilitation of dual roles and the elimination of stigmas surrounding the taking of leave by either parent. Gender neutral language and shared parental leave are two methods of achieving this ideal. Thus the developments that have taken place in the sphere of parental leave are crucial to the elimination of engendered stereotypes and this article will provide a basis for analysing these developments and the challenges that doubtlessly will arise.

EU law has, until recently, addressed issues concerning fathers primarily through the use of soft law instruments. As the case law of the ECJ will demonstrate, the law needed to be binding in order to support policy development, meet men’s growing expectations, reinforce the position of fathers as caregivers and ensure that gender equality progressed from an ideology into a reality. Ireland’s transposition of the parental leave Directives has been described as evidence of a nation “intent on convincing employers to become more actively involved in helping employees combine work and family roles”. Whether Ireland is “intent” on convincing employers to assist employees in the carrying out of dual functions as breadwinners and homemakers will become clear as this article progresses.

Whilst the developments in relation to parental leave are to be welcomed from an employee perspective, it is questionable whether these developments are entirely positive from the perspective of small and medium sized enterprises (SMEs), particularly in the current economic climate. SMEs employed seven in every ten people engaged in the Irish

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8 Ibid.
9 A detailed analysis of the relevant case law of the ECJ is provided in chapter three.
workforce in 2011. The effects of extended parental leave are diluted in firms where there is a large number of staff and similar functions can be carried out by multiple persons. However, in smaller firms, the loss of a member of staff can have significant repercussions. There are several costs to the firm, for example, the time spent on the recruitment of a temporary replacement, administration costs and the erosion of relationships between the employee in question and clients of the firm. Andrew Yates, the founder of software company Artesian Solutions, concurs with this opinion, pointing out that smaller businesses now need to “up staffing estimates significantly to cover possible leave.” A survey of almost 100 SMEs found that almost 70% were opposed to shared parental leave and were concerned that the changes outlined below could have a negative impact on the general running and administration of SMEs.

The topicality of this issue thus justifies the importance of this subject matter in labour law research in 2014. There will be a responsibility on employers to facilitate the two roles many employees will now endeavour to fulfil – the caregiver and the breadwinner. This responsibility will result in increased costs for SMEs which could potentially hinder their growth. However, these changes are necessary to combat gender inequality and bridge the pay gap that still subsists. As Ireland has only recently transposed the 2010 Directive, the effects of the 2013 Regulations have not yet become clear, and research carried out in this specific area is minimal to date. This essay will clarify the current position in relation to parental leave, reveal any ambiguities arising from the 2013 Regulations and reflect upon the potential repercussions for the stakeholders affected.

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14 European Commission statistics show that the gender pay gap for Irish women is approximately 25% in relation to the top ten per cent of earners, <ec.europa.eu/ireland/ireland_in_the_eu/impact_of_eu_on_irish_women/index_en.htm> (visited 16 December 2013).
Chapter 1

The Swedish Model

The Gender Model in Sweden

Sweden has long recognised the social importance of giving care and has strived towards offering transferability, flexibility, financial incentives and subsidised day-care. It is instructive to briefly outline the model that has been established in Sweden as it embodies a “gender neutral ideal”. As early as 1968, Sweden set itself apart from other nations when policymakers began advocating a new gender model, where “equality means that women and men have the same rights, obligations, and opportunities to have a job that gives them economic independence to care for home and children.” Equal opportunity legislation was introduced in the 1980s which supported women’s entry into non-traditional occupations and equal pay for comparable work. There was an increase in the supply of heavily subsidised public child care throughout the 1990s. Furthermore, Sweden was the first country to mandate paid parental leave for mothers and fathers in 1974. Financial compensation was one of the main drawbacks of the 1996 Parental Leave Directive thus it is significant that it was recognised as an important component of parental leave in Sweden as early as the 1970s.

The participation rate of Swedish mothers with preschool-aged children in the labour force reached 75% by 1995. Scandinavian literature has essentially hypothesised the “shared roles model” as entailing both parents having an equal capacity as workers and carers. This Swedish model appears to be permeating the caring responsibilities discourse across Europe. Torella concurs that we are witnessing a cultural shift in the perception of fatherhood across Member States. It certainly appears that Europe is departing from the equality-sameness quandary. The recent European Commission report into The Role of Men in Gender Equality – European Strategies and Insights found evidence of a “remarkable change in men’s participation in care” but only in “certain parts of Europe”. This cultural

15 Haas, note 10, at 105.
17 Ibid., at 32.
18 Haas, note 10, at 106.
20 Torella, note 7, at 90.
22 Ibid., at 11.
shift is desirable considering relatively recent statistics in relation to employment and equality in the EU. For example, Irish women comprise just 8.7% of board members, which is significantly below the EU average of 16%. This is concerning particularly when one considers the ambitious proposals made by the European Commission (EC) of late. In October 2013, MEPs backed an EC proposal to ensure gender balance on boards for publicly-listed companies, calling on Europe’s top firms to ensure at least 40% of non-executive board members are female. Gradual changes have made progress thus far but the rate of change certainly needs to increase if Ireland is going to reach the target for 2020 which has recently set by the EC.

Growing Acceptance of the Swedish Model in Other Jurisdictions

It is not just Scandinavian countries and European academics, such as Torella, that promote changes in attitudes and the model of the family. It has been argued that equality legislation, particularly in the UK, now favours gender neutral language and old-fashioned distinctions have been challenged. Moreover, the outdated stereotypes of male and female carers have been replaced by a modern gender neutral ideal: the individual with the work/life balance. Chapter ten will concentrate on developments in the UK and the recent changes aimed at injecting more flexibility into the parental leave system. Martha Fineman, an American jurist and legal theorist, has argued that society needs to back away from the equality-sameness quandary in which we have become entrenched and instead we need to make a collective societal decision about what we are willing to do to support caregiving dyads. More recently, the American Policy Institute has developed a gender neutral ideology of care. Thus the gender neutral ideal and its derivatives have infiltrated the parental leave discourse in Scandinavian countries, the UK and America.

Growing acceptance of this ideal is important in the context of understanding the background and context of the body of law surrounding parental leave. It is apt to now briefly outline the case law of the ECJ in order to ascertain whether or not support has been expressed for the gender neutral ideal. This will contextualise the Parental Leave Directive

26 Martha Fineman, The Neutered Mother, the Sexual Family and other Twentieth Century Tragedies (Routledge, 1995), at 235.
27 Eileen Applebaum, Thomas Bailey, Peter Berg and Arne Kalleberg, Shared Work – Valued Care (Economic Policy Institute, 2002).
with a view to determining whether it was a consequence of societal developments or whether it was borne out of a failure by the ECJ to adequately recognise the family as a “bundle”\textsuperscript{28} of caring relationships. This will facilitate an examination into the Irish transposition of the 1996 Directive and the 2010 Directive to ascertain whether there has been this “remarkable” shift in the perception of care and determine whether gender neutral language and policies are permeating this jurisdiction.

\textsuperscript{28} Fineman, note 26.
Chapter 2  The Case Law of the European Court of Justice

Equal opportunities between men and women have always been at the forefront of European Community social policy. Parental leave, the subject of this article, is relevant in facilitating equal access to employment opportunities. The absence of an employee due to caring responsibilities carries a certain stigma and an assumption that their role in the workplace in somehow diminished by choosing to stay at home and care for a child. It is this assumption that causes discrimination, leads to inequalities in terms of access to opportunities and pay and moreover, acts as a hindrance to the aforementioned gender neutral ideal. The level of legislation and ECJ Decisions in this area exceeds that of any other social policy. In order to assimilate the importance of Council Directive 96/34/EC this article will first examine the case law of the ECJ and whether the Court applies a traditional two sphere dichotomy in its decisions in relation to leave. The Treaty of Amsterdam, Council Directive 96/34/EC and Council Directive 2010/18/EU will subsequently be explored as these are the most significant instruments in relation to parental leave in the context of European social policy.

The Two-Sphere Dichotomy in the ECJ

The current author endeavours to illuminate the two-sphere dichotomy that appears to have permeated the reasoning of the ECJ in its decisions relating to parental leave over the past three decades. A critical examination will be undertaken as to whether it can be said that the ECJ supports a dual breadwinner model and has progressed to viewing the family as a bundle of caring relationships. Certain other commentators have expressed scepticism whether this support exists. For example, Claire McGlynn has described the attitude of the ECJ as representative of the “traditional ideology of motherhood”. This two-sphere dichotomy envisages the mother as the caregiver and the father as the breadwinner. This

departs from the model promulgated by academics such as Fineman and Haas. Feminist socio-legal academics have challenged the dichotomy that features in the case law of the ECJ and have argued that women, especially when they become mothers, have a right to participate in the public sphere by having access to paid employment. This right of access to paid employment is a cornerstone of equality law and, in the context of this article, a fundamental component of the 1996 Directive. The ECJ has hence been at the frontline of fielding questions in this area. Its approach to equal treatment in terms of caring responsibilities will be revealed in the following sections.

Two early cases, Commission v Italy and Hofmann v Barmer Ersatzkasse, saw the ECJ reject the arguments of the male applicant and instead reinforce a maternal concept of care. In Commission v Italy, Advocate General Rozès offered the possibility of recognising a right to care for working fathers. However, it was held that the legislation in question fell within the exception provided for in Article 2(3) of the Equal Treatment Directive 1976, which allowed Member States to adopt measures to protect women, “particularly as regards pregnancy and maternity”. It is respectfully submitted that this decision relies on an exception to justify reinforcing a maternal concept of care and thus demonstrates the Court’s support for the two-sphere dichotomy. McGlynn has also argued that this decision reinforced the importance of a mother’s caring role and went beyond the previous focus on biological links. Dr. Weldon-Johns concurs and argues that by extending Article 2(3) to reinforcing the mother’s responsibility to undertake care post-birth, the ECJ in Commission v Italy fortified the maternity to motherhood typology. Dr. Weldon-Johns argues that the established focus was on mothers as caregivers and working fathers continued to be denied a defined right to care for their children in the EU work-family context. This does not align with Fineman’s theory of the family as a bundle of caring relationships nor does it align with Dr Haas’s similar model of “valued care”. Instead the reinforcement of a mother’s role post-birth strengthens individual roles and does little to overcome engendered stereotypes. Consequently, the gender neutral ideal was merely that—an ideal—in these two early cases.

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10 The theories of Martha Fineman and Linda Haas were sketched in chapter two (see notes 10, 16 and 26).
30 Parental Leave Directive 96/34/EC, clause 2(2).
34 McGlynn, note 39, at 35–36.
36 Fineman, note 26.
37 Haas, note 10.
This support for the two sphere dichotomy can further be seen in *Hoffman v Barmer Ersatzkasse* 40. *Hoffmann* afforded the ECJ the opportunity to consider the distinction between maternity and childcare leave and the importance of the father’s role at this time. The ECJ accepted that the additional period of leave in question also fell within the exception provided in Article 2(3) so far as it attempted to “protect a woman in connection with the effects of pregnancy and motherhood.” 41 This decision extended the exception provided in the Equal Treatment Directive 1976 to encompass not only pregnancy and maternity but also the wider concept of motherhood and consequently reinforced the maternity to motherhood typology entrenched in European law. Weldon-Johns agrees that by failing to recognise the limits of maternity the legislation reinforced mothers as primary caregivers. 42 The cases of *Commission v Italy* and *Hofmann v Barmer Ersatzkasse* are useful in that they reveal a missed opportunity for the Court to influence work-family engagement. The two cases shed light on the significance of the Parental Leave Directive that emerged in 1996 in that its timing was apt to cease the reinforcement of traditional parenting roles. It will be discussed further in chapter five whether the 1996 Directive provided a foundation for the emergence of a new model, comprising valued care, the gender neutral ideal and the family as a bundle of caring relationships.

*Abatement of the Two-Sphere Dichotomy*

It is submitted that in the relatively recent case of *Griesmar v Ministre de l’Economie, des Finances et de l’Industrie* 43, a degree of flexibility was introduced, and the rigid distinction between a father’s role and a mother’s role was tempered. In this case, the court asserted that where a benefit was designed to offset the occupational disadvantages which arise as a result of having brought up children, it was necessary to examine whether the situations of a male worker and a female worker were comparable. 44 In contrast, where a benefit arises as a result of an absence during the period following childbirth, male workers and female workers were not in comparable situations. 45 This represents a significant step for the ECJ in that a distinction was made between childbirth, which necessitates a period of absence, and caring for the child, which is the function of parental leave. The limitless

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42 Weldon-Johns, note 37, at 667.
44 Ibid.
45 Ibid.
concept of maternity leave in *Hofmann*\(^{46}\) reinforced mothers as primary caregivers. However, at the turn of the millennium, and after the introduction of Council Directive 96/34/EC, the court seems to have progressed to an approach which does not view caregiving roles as distinct and absolute. It thus appears that the 1996 Parental Leave Directive was instrumental in the shared roles movement and had a catalytic effect on the ECJ. The timing of the original Parental Leave Directive was therefore apt in that it influenced the ECJ to acknowledge the gender neutral ideal at perhaps a faster pace than it would have done if it had been left to do so organically.

\(^{46}\) Case 184/83 *Hofmann v Barmer Ersatzkasse* [1984] ECR 3047.
Chapter 3  

Background to European Social Policy

The purpose of this essay is to examine the status of parental leave entitlements in Ireland, comparative entitlements in other jurisdictions and the various models that have emerged on a wider European scale. In order to achieve this, it is necessary to chart European developments in relation to parental leave, whilst simultaneously narrowing this analysis to focus on the developments that have taken place in this jurisdiction in recent decades. A discussion of parental leave necessitates charting the original Social Policy Agreement which was included in the Maastricht Treaty and outlining the policies contained in the Amsterdam Treaty. This brief outline will provide the context and background necessary for a discussion of the 1996 Directive and the 2010 Directive to subsequently ensue.

The Original Social Policy Agreement

The 1957 Treaty of Rome established the European Economic Community (EEC). The EEC’s main goal was the creation of a common market. Whilst the 1957 mandated some workers’ rights, including equal pay for men and women for equal work, labour market concerns took precedence over any particular gender equality agenda. It was not until the 1970s that equal opportunities for women in employment became a more serious objective for the EC. This was largely due to the substantial increase in the numbers of women in the paid labour force. The Community set up an Advisory Committee on Equal Opportunities for Men and Women to work with the Equal Opportunities Unit and subsequently developed two action programmes to redress the “weak” EC record of equality legislation. New proposals for parental leave were drafted to help mothers and fathers reconcile work and

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family responsibilities. The first Social Policy Agreement included a parental leave Directive and this agreement was included in the Maastricht treaty. This Directive mandated leave for all male and female workers who had an employment contract. It is significant that the UK did not sign this agreement as it disapproved of a policy that would support married mothers’ employment.\textsuperscript{50} It was thus not bound to adopt a parental leave policy. This is interesting considering the rapid advances made by the UK in relation to parental leave in the last decade. These advances are explored further in chapter ten.

\textit{The Amsterdam Treaty}

In 1997, all EU Member States signed the Amsterdam Treaty, which included a social policy agreement with a specific Directive on parental leave. The Treaty of Amsterdam introduced a new Article 117 into the EC Treaty which sets the policy objectives of the Community and Member States. This Article refers to “fundamental” social rights and sets out that

Member States shall have as their objective the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combatting of exclusion.

There is an extensive body of law on the implementation of the principle of equal treatment for women and men as regards access to employment, vocational training and promotion. Time constraints prevent a detailed analysis of all of the legislative and academic commentary surrounding these areas.\textsuperscript{51} Instead this article will now turn to examine the Parental Leave Directives, the 1996 Directive and the 2010 Directive, with a view to identifying any lacunas filled in by the latter.


Chapter 4  The Parental Leave Directive 96/34/EC

Background of Institutional Failure?

In this chapter, attention will first be drawn to the purported institutional failure that took place prior to the introduction of the Directive and the potential implications of this will be revealed. The background, purpose and text of Directive 96/34/EC will then be examined. Finally, potential areas for reform will be identified, which will herald a discussion of whether Directive 2010/18/EU fulfilled its intended purpose.

The Framework Agreement was agreed by the European cross-industry social partner organisations (UNICE\(^{52}\), CEEP and the ETUC) on 14 December 1995 and it was endowed with legal effect by the 1996 Directive on 3 June 1996. The purported deficiencies in this initial framework agreement are noteworthy. Barnard has submitted that the Parental Leave agreement was reached against a “background of institutional failure”\(^{53}\). The primary concern surrounding the framework agreement was that small and medium-sized undertakings were not adequately represented. This concern becomes even more pressing in light of recent developments, particularly section 15A of the 2013 Regulations, which could have a significant impact on the operation of SMEs.\(^{54}\) The UEAPME\(^{55}\) case is enlightening in this regard. The body representing small and medium-sized undertakings (UEAPME) argued that it should have participated more in the negotiation of the parental leave agreement. Ultimately it was held that just because UEAPME represented a greater number of smaller and medium sized undertakings did not mean that UNICE was insufficient.\(^{56}\) It is respectfully submitted that this reasoning does not align with other relevant and applicable authorities. For

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\(^{52}\) UNICE is now referred to as BusinessEurope.


\(^{54}\) SI 81/2013 European Union (Parental Leave) Regulations 2013, section 15A, outlined in greater detail in chapter eight.


\(^{56}\) Ibid, paragraph 90.
example, the Social Partners’ Study of 1993 classified UNICE and CEEP as the most representative, but still regarded UEAPME as being “very representative” for specific categories of enterprises. The UEAPME judgment also implies that a lack of representativity only occurs when an entire category of enterprises is omitted from the negotiations. This can be inferred from the Court’s assumption that had CEEP not participated in the negotiation, this alone would have affected the representativity of the agreement, “because then one particular category of undertakings…would have been wholly without representation.” Perhaps the Court ought to have also monitored the substance of the agreement by ascertaining whether it conforms to the EC Treaty and the general principles of Community law? This would have ensured that the views of UEAPME, a “very representative” employer’s federation, were taken into account.

Certain suggestions put forward by Professor Adinolfi carry weight in the current author’s opinion. She suggests that the Commission ought to have established a second round of consultations on the substance of the agreement will all the representative social partners that did not participate in the agreement. This would have bolstered the actual representativeness of the agreement. Barnard has also argued to this effect. She suggested that the General Court did not take the opportunity to undertake a wider consideration of the representativity of the established Social Partners especially in relation to those that are not members of a trade union. She further highlights that the representativity of the established Social Partners is likely to become more problematic as law-making in the social field expands. Whilst collective bargaining is outside the scope of this article it is interesting to note, even in its infancy, the parental leave agreement was not without controversy and there were assertions that certain representations were not taken into account at these early stages.

*Purpose of Directive 96/34/EC*

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57 See the Social Partners’ Study of 1993, Doc No V/6141/93/E. The main findings of this study can be found in COM (93) 600, Annex 3. The European Foundation conducts studies on the representativeness of the European Social Partner organisations. <www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/representativeness.html> (visited 17 December 2013).


60 In particular Article 137 EC (ex Article 118).

61 Ibid.

62 Barnard, note 53, at 83.

63 Barnard, note 53, at 84.
The purpose of this Directive was to set down the minimum requirements to facilitate the reconciliation of parental responsibilities for working parents.\(^{64}\) It was designed to apply to all workers, male and female, who have an employment contract or an employment relationship.\(^{65}\) The Directive granted men and women an individual right to parental leave, for at least three months, until the child reaches an age of up to eight years.\(^{66}\) Clause 2(2) considered that the right to parental leave be provided on a non-transferable basis in order to promote equal opportunities and equal treatment between men and women. Parameters were essentially sketched for the Member States so that the scope for autonomy over the conditions attached to parental leave was clear.\(^{67}\) Clause 2(5) enabled workers to return to the same job or, if that is not possible, to an “equivalent or similar job consistent with their employment contract or employment relationship”. Rights acquired or in the process of being acquired by the worker on the date at which leave starts shall be maintained as they stand until the end of leave.\(^{68}\) This list was not intended as exhaustive and Member States were entitled to introduce more favourable provisions than those set out in the Directive.\(^{69}\)

**Critical Analysis of the 1996 Directive**

At this stage it is relevant to disclose some of the criticisms levelled at the 1996 Directive. This will enable the current author to assess whether the Directive was revolutionary or rather a stepping stone in the right direction. In turn the purpose intended to be fulfilled by the 2010 Directive will be clarified. The first and most obvious weak point of the Parental Leave Directive is the fact that there is no mention of any provision concerning financial compensation. Undoubtedly this would be a deterrent for many working parents, particularly fathers, the traditional breadwinners.\(^{70}\) Hardy and Adnett have pointed out that parental leave measures will only promote gender equality if “those taking leave are highly compensated”\(^{71}\). Other academics with a background in sociology concur and have pointed out that “unless men are taking parental leave there is no hope for a more equal division of childcare labour between men and women”\(^{72}\).

\(^{64}\) Parental Leave Directive 96/34/EC, clause 1(1).
\(^{65}\) Parental Leave Directive 96/34/EC, clause 1(2).
\(^{66}\) Parental Leave Directive 96/34/EC, clause 2(1).
\(^{67}\) Parental Leave Directive 96/34/EC, clause 3(a)-(f).
\(^{68}\) Parental Leave Directive 96/34/EC, clause 2(6).
\(^{69}\) Parental Leave Directive 96/34/EC, clause 4(1).
\(^{71}\) Ibid.
It is further submitted that there is no incentive for Member States to introduce more favourable provisions than those set out in the agreement. Member States still retained the right to alter legislative and contractual provisions provided the minimum standards of the Directive were not interfered with. Whilst Member States were allowed to introduce more favourable provisions this practice was neither endorsed nor encouraged in the text of the Directive itself. Hardy and Adnett agree with this submission and posit that the Directive is inadequate for meeting its objective of a work/life balance and equality between men and women. Caracciolo has also stated that the Directive is rooted in the idea that mothers still have the main responsibility for child-care. Whilst it is clear that the Directive is not flawless and has evidently faced considerable criticism, it can also be argued that it represented a valuable step towards the creation of a family friendly workplace, in that it signalled a willingness to embark on a “redesign” of the European social model. Progress is only ever attained by slow degrees and in this sense perhaps the 1996 Directive was less of a conclusion but rather a starting point for “enabling a better equilibrium between work and family as well as between modern motherhood and fatherhood.” This article will next examine whether the transposition of the 1996 Directive into Irish law enabled a better equilibrium between work and family and whether the lack of provision for financial compensation was detrimental to the objective of achieving equality in the sphere of parental leave.

73 Hardy and Adnett, note 70.
75 Moss and Deven, note 5.
76 Moss and Deven, note 5.
Chapter 5 The Transposition of Directive 96/34/EC in Ireland

It is now pertinent to examine the transposition of the 1996 Directive into Irish law. This transposition will then be compared with the most recent approach to the 2010 Directive via the European Union (Parental Leave) Regulations 2013. There is an abundance of literature regarding paternity leave and the rights of fathers in Ireland.77 Under Irish law, employers are not obliged to grant male employees special paternity leave following the birth of their child.78 Thus if an employer agrees to grant paternity leave to an employee it is entirely discretionary. Leave following the birth of a child is treated the same way as leave taken at any other time of the year and it is at the discretion of the employer to decide who can take annual leave at any given time. There is no obligation on employers to grant a male employee paternity leave following the birth of his child. Parental leave remains the only option for fathers wishing to take leave to care for a child.

The Irish Parental Leave Act 1998 came into force in December 1998 and sought to transpose the provisions of the 1996 Directive. The Parental Leave (Amendment) Act 2006 made several alterations to the 1998 Act, most notably, raising the maximum age of an eligible child from 5 to 8 years, and in the case of a child with a disability, up to 16 years.79 The available 14 weeks of leave could also now be taken in separate blocks of six continuous weeks.80 Either parent can also take the leave of another parent when they are employed by the same employer.81 If an employer was satisfied that the taking of parental leave would

79 Parental Leave (Amendment) Act, 2006, s.2.
80 Parental Leave (Amendment) Act, 2006, s.4.
81 Civil Law (Miscellaneous Provisions) Act, 2008, s.72.
have a substantial adverse impact on the operation of his business he was entitled to postpone the commencement of the leave without the agreement of the employee for up to six months.  

Criticisms of the Parental Leave Act 1998

A significant drawback of the Parental Leave Act 1998, which was not abridged by the 2006 Amendment Act, relates to the absence of provision for financial compensation. However, this cannot technically be described as a flaw, as the 1996 Directive did not oblige Member States to provide financial compensation for working parents when they take parental leave. Thus whilst the Irish transposition of the Directive abided by the terms in relation to compensation, or lack thereof, the consequences of this omission can be seen from research compiled during this period. For example, review research carried out by MORI MRC showed that 84% of those taking Parental Leave were women. Newmarket Consulting Ltd. also carried out an attitudinal survey of employers, employees and unions, and unsurprisingly, 63% of employees stated that the absence of payment was the biggest drawback to availing of this leave.

It is notable that the Working Group on the Review of the Parental Leave Act 1998 could not reach a consensus on the provision of payment for parental leave. The subject of payment essentially divided the members of the Working Group. However, the majority did consider payment to be crucial to encouraging a greater uptake of parental leave. This highlights a significant problem with the Irish Parental Leave Acts and thus in Directive 96/34/EC. I wish to draw particular attention to the view of one member of the Working Group in the Review on Parental Leave. The Equality Authority pointed out that

If the provision of parental leave is to be based on the principle of a child centred approach, which wishes to encourage the taking of parental leave and family friendly policies in the workplace, then the failure to produce a payment is counter-

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82 Parental Leave (Amendment) Act, 2006, s.11(1).
84 Ibid.
86 Ibid., at 63.
productive…priority should be given to addressing this issue, otherwise any other changes will not realise the improvements desired.\textsuperscript{87}

The overriding aim of parental leave is the promotion of equal opportunities in the workplace hence it is submitted that the views of the Equality Authority ought to be considered essential in making recommendations. It is also notable that the Equality Authority deems any other changes, in the absence of resolving the issue of financial compensation, inadequate to achieve the progress desired. Changes arising from the 2010 Directive will be considered in chapter seven, and emphasis will be placed on the issue of financial compensation, and whether its continued absence from legislation has hindered progress in relation to parental leave and equality.

Chapter 6  Council Directive 2010/18/EU

The revised Framework Agreement on parental leave was signed in June 2009. The 2010 Directive was introduced in order to facilitate the Union in reconciling professional and family responsibilities and promoting equal opportunities between men and women.\textsuperscript{88} The Preamble also referred to the original Framework Agreement as being a “catalyst for positive change”\textsuperscript{89} and this notion of the 1996 Directive as a “catalyst” or “stepping stone” was delineated in chapter five. Certain aspects needed to be adapted in order to better achieve the aims set out. Paragraph twelve of the Preamble noted that whilst many Member States have encouraged the concept of a gender neutral ideal, this has not led to sufficient results, and more effective measures should be taken to encourage a more equal sharing of family responsibilities.\textsuperscript{90}

The main amendments to the 1996 Directive can be found in Clause 2(2) and Clause 6 of the 2010 Directive. Clause 2(2) entitles men and women to an individual right to parental leave to take care of a child up until the age of eight. This leave shall be granted for at least four months (an increase of 4 weeks) and, in order to promote equal opportunities and equal treatment between men and women, at least one of the four months shall be provided on a non-transferable basis. Secondly, Clause 6 contains an interesting new development in relation to employees and their return to work. Clause 6(1) stipulates that Member States shall ensure, upon return to the workplace, an employee “may request changes to their

working hours and/or patterns for a set period of time”\textsuperscript{91}. An employer shall “consider and respond” to such requests, taking into account both employers’ and workers’ needs.\textsuperscript{92} The following chapter will provide a detailed analysis of the transposition of the 2010 Directive into Irish law with particular attention being paid to the increase in the length of leave and the right to request flexible working hours. This will illustrate the evolution of parental leave and the real and potential consequences for employees, employers and society in general.

Chapter 7 The European Union (Parental Leave) Regulations 2013

The European Union (Parental Leave) Regulations 2013 gave effect to Council Directive 2010/18/EU and have introduced two key changes to this jurisdiction. First, the amount of parental leave available to each parent per child has increased from 14 weeks to 18 weeks.\textsuperscript{93} Secondly, the Regulations provide that a parent returning to work following parental leave has the right to request a change in their work pattern or hours for a set period.\textsuperscript{94} The Regulations also clarify the Irish position in relation to the transferability of leave from one parent to another. The previous position was that leave could not be transferred unless both parents worked for the same employer.\textsuperscript{95} The new Regulations provide that 14 of the 18 weeks may be transferred between parents but only where they work for the same employer.\textsuperscript{96} The remaining 4 weeks of parental leave is to be non-transferable. Thus Ireland has largely maintained its position in relation to transferability of leave.

Potential Implications

This essay will now focus on two of these key changes and the potential related implications. The extension of leave from 14 weeks to 18 weeks will undoubtedly be welcomed by the majority as it might facilitate working parents spending more time with

\textsuperscript{91} Council Directive 2010/18/EU, clause 6(1).
\textsuperscript{92} Ibid.
\textsuperscript{93} SI 81/2013 European Union (Parental Leave) Regulations 2013, s.4(a).
\textsuperscript{94} SI 81/2013 European Union (Parental Leave) Regulations 2013, s.6.
\textsuperscript{95} Supra, at 17.
their children. However, the lack of financial incentives for the taking of leave remains an issue, and there is no indication it will be resolved. Sinead Grace, a solicitor with particular expertise in this field, has also emphasised that the current economic climate does not facilitate an increased uptake in either parent taking parental leave.\(^97\) It is submitted that labour market inequalities will also continue to bear on decisions to take parental leave. In these difficult times a father who earns considerably more than a mother is not going to forego remuneration and opt to stay at home in her place. It is appropriate, at this stage, to recall the words of the Equality Authority\(^98\), expressed in detail in chapter five, where it cautioned that failure to produce a payment is counter-productive and any other changes will not achieve the improvements desired. Thus whilst the increase in leave symbolises support for the dual breadwinner model, in the absence of ancillary financial incentives, it is unlikely that this extension will lead to a significantly increased uptake in either parent taking this type of leave. Hence it is unlikely that the extension of leave from 14 weeks to 18 weeks will achieve the improvements intended, most notably, the facilitation of a better work-life balance for working parents.

Secondly, the new section 15A is ambiguous in nature, and this may have repercussions for employers and working parents alike. Section 15A of the 2013 Regulations entitles an employee to request changes to working hours or patterns for a set period of time following his/her return to work. The employer must consider that request “having regard to his or her needs and the employee’s needs”.\(^99\) There is a clear lack of an obligation to accede to this request. This lack of an obligation could prove problematic in the future if an employee wishes to avail of this section but cannot because an employer deems his/her immediate needs as warranting a refusal to grant leave for the period specified. The new section is also silent as to whether the employer is required to provide a reason for refusing a request. The importance of open communication between employers and employees cannot be understated as it is crucial to the maintenance of good relations and the development of human resources. Article 117 of the EC Treaty expressly refers to the objective of developing human resources “with a view to lasting high employment and the combatting of exclusion”.\(^100\) In practice will this section result in an absence of communication between employees and employers as to the reasons behind a refusal to grant the leave? It is


\(^{99}\) SI 81/2013 European Union (Parental Leave) Regulations 2013, s.6(3).

\(^{100}\) Article 117 EC (ex Article 136).
respectfully submitted that the lack of an obligation to disclose these reasons could result in a divergence from widely accepted principles of human resource management.

Furthermore, section 15A does not provide any guidance to an employer in relation to the criteria to be considered when “having regard” to his/her needs and the needs of an employee. In the absence of such clarification this provision is left somewhat open to interpretation. Undoubtedly the Irish courts will be called upon to determine whether an employer has fulfilled his obligation under section 15A. There are cases in the planning law context which are instructive in this regard. In *Keane and Naughton v An Bord Pleanála*¹⁰², Murphy J held that that the duty to “have regard” to Ministerial policies means to “take account of these matters, not necessarily to regard them as crucial”. In *McEvoy v Meath County Council*¹⁰³, Quirke J found that the requirement to “have regard” to particular concerns meant “informing oneself fully of and giving reasonable consideration to such concerns”. Dr Yvonne Scannell has summarised that the duty to “have regard” necessitates deferring to relevant concerns but does not entail being bound by them “because rigid or slavish adherence is not required”.¹⁰⁴ It is submitted that, if these principles were applied by the Irish courts in assessing whether an employer has had sufficient regard in the context of section 15A of the 2013 Regulations, it is doubtful that an employee would garner support if an employer is deemed to have afforded the employee’s request “reasonable consideration”. Moreover, if an employee’s concerns are not considered “crucial” (as per *Keane*)¹⁰⁵ in the decision-making process, it follows that an employer’s concerns will be considered paramount in determining whether a request for a flexible working pattern has been afforded reasonable consideration. It remains to be seen whether this approach will transpire in practice. However, if this path is followed in the context of parental leave, the onus will be on an employee to prove that their concerns are of crucial importance, resulting in further imbalances and an undoubtedly pro-employer stance in the context of section 15A.

At this juncture it is useful to provide an example of how the entitlement to parental leave has transpired in practice. To this end I propose to examine the entitlements afforded to a particularly class of workers, namely primary and post-primary teachers, with a view to ascertaining the actual consequences of the 2013 Regulations. Teachers are in the public sector and protected by unions hence the following examination merely functions to highlight

¹⁰² *Keane and Naughton v An Bord Pleanála* 20 June 1995 (HC).
¹⁰⁵ *Keane and Naughton v An Bord Pleanála* 20 June 1995 (HC).
how the Regulations can be applied in practice. This article will then study the transposition of the 2010 Directive in the United Kingdom which will serve a comparative and enlightening purpose.

Chapter 8 Application of the 2013 Regulations to the Education Sector

The recent Communication delivered by the Department of Education and Skills to all Registered Teachers and Post-Primary Teachers explicitly set out the leave entitlements for this class of workers pursuant to the 2013 Regulations. The Communication clarified the entitlements to teachers and resolved some ambiguities inherent in the Regulations. Several sections are worthy of note. First, section 1.2 ensures that a teacher’s employment status and the rights accruing to them on the date at which leave is taken, remain wholly intact. It sets out that absence due to leave does not affect “seniority, access to the redeployment panel, progression on the incremental salary scale and notification regarding posts of responsibility.” This express statement protects the rights of the employee whilst availing of leave. The Communication also states that applicants who have already taken 14 weeks may now apply for an additional 4 weeks provided they still meet the entitlement criteria. This solves a dilemma that was potentially faced by many parents who had already taken 14 weeks of leave upon introduction of the 2013 Regulations. If this approach is applied to other sectors, it appears that rights accruing to an employee will be expressly protected and furthermore, an employee who has taken 14 weeks of leave will be entitled to a further four weeks.

It is important to acknowledge the degree of flexibility inherent in the Communication as perhaps this is reflective of the widespread approach that will be adopted in relation to the

107 Ibid., para. 1(2).
2013 Regulations. Section 6.1 states that in certain circumstances a teacher may avail of parental leave in the form of individual days where a child has particular medical problems that require the attendance of a parent with the child at a “hospital, clinic or therapeutic appointment on a regular basis”. This segmentation of parental leave into individual days is a positive step for family units as it suggests that the 2013 Regulations will be applied with flexibility and an understanding of the unrelenting demands associated with rearing a family.

In relation to requests for changes in working hours/patterns, the Communication does offer some guidance, albeit still quite minimal. The Communication repeats that an employer “shall consider” the request having regard to both the teacher’s needs and the school’s. However, it goes one small step further in requiring the employer to have regard to the teacher’s “terms and conditions in relation to the leave and remuneration”. An employer can at least glean that it is his duty to examine why the employee needs the leave at this point in time. An examination of an employee’s terms and conditions would certainly facilitate upward communication, enabling employees to express their needs, opinions and feelings, leading to a better understanding of what can be done to assist an employee in reconciling their duties at work with those at home. In addition to being constructive from a human resources perspective, improvements in the flow of communication in an organisation are also relevant in relation to the Treaty of Amsterdam, as outlined further in chapter four.


111 Article 117 EC (ex Article 136).
Chapter 9  The Transposition of the 2010 Directive in the UK

The purpose of this section is to compare the transposition of the Parental Leave Directive in this jurisdiction with the equivalent transposition in the United Kingdom and to unearth any divergences between the two approaches to the 2010 Directive. This comparative study will shed light on certain elements of the Irish transposition of the Directive and highlight areas which potentially could have been transposed in a more effective manner. I will disclose the law pertaining to parental leave prior to the introduction of the UK’s Parental Leave (EU Directive) Regulations 2013\(^{112}\) and then examine the changes introduced via these Regulations.

*The Maternity and Parental Leave Regulations 1999*

The Maternity and Parental Leave Regulations 1999 gave employees thirteen weeks’ unpaid leave in respect of any individual child born or adopted after the employee has completed one year’s service.\(^{113}\) A notice period is required which specifies the date on which the period of leave is going to begin and end and this ought to be given to the employer at last 21 days before the period of leave is to begin.\(^{114}\) Section 6 of the 1999 Regulations sets out how and why an employer can postpone a period of parental leave. If the employer considers that the operation of his business would be unduly disrupted if the

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\(^{113}\) SI 3312/1999 Maternity and Parental Leave Regulations 1999, s.14(1).

\(^{114}\) SI 3312/1999 Maternity and Parental Leave Regulations 1999, s.3.
employee took the leave in the period identified the leave may be postponed. However, this is accompanied by the stipulation that the employer must agree to permit the employee to take leave of the same duration as the period indicated in the original notice, and the employer must give the employee notice in writing which states the reasons for postponement and the conditions of leave.

The Parental Leave (EU Directive) Regulations 2013

Two main changes were introduced in the 2013 Regulations. The period of leave was extended from 13 weeks to 18 weeks in respect of any individual child up until the age of 18 years. A “review” section was also inserted into Regulation 16. Section 16A stipulates that the Secretary of State must “from time to time” carry out a review of Schedule 2 and set out these conclusions of the review in a report. This review must, so far as is reasonable, have regard to how the 2010 Directive is implemented in other Member States. It must set out the objectives established by the Regulations, assess the extent to which they are achieved and whether those objectives remain appropriate and, if so, the extent to which they could be achieved with a system that imposes less regulation. It is notable that considerable reform is already intended in the sphere of parental leave in the UK over the next five years. Perhaps the review section has been instrumental in this regard and this has had a catalytic effect on the rate of developments in the law relating to parental leave. As the next section will demonstrate, the impending changes are both liberal and quite radical, and are unlike anything intended for this jurisdiction.

Intended Reform of Parental Leave in the UK

Considerable reform is intended in the sphere of parental leave in the UK over the next five years according to BBC News. Deputy Prime Minister Nick Clegg recently announced reforms that will allow parents to share up to one year of parental leave after the birth of their child. The Government will legislate on this next year and will introduce the

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115 SI 3312/1999 Maternity and Parental Leave Regulations 1999, s.6(b).
116 SI 3312/1999 Maternity and Parental Leave Regulations 1999, s.6(c) and (d).
117 SI 283/2013 Parental Leave (EU Directive) Regulations 2013, s.3(1).
118 SI 283/2013 Parental Leave (EU Directive) Regulations 2013, s.3(2).
119 SI 283/2013 Parental Leave (EU Directive) Regulations 2013, s.3(3)(a)-(c).
120 SI 283/2013 Parental Leave (EU Directive) Regulations 2013, s.4.
changes to flexible parental leave in 2015. Additionally, the Children and Families Bill, which is currently at the committee, will result in working parents having increased autonomy over how they share care of their child in the first year after birth. Employed mothers will still be entitled to 52 weeks of maternity leave, however, working parents will be able to opt to share this leave. Leave can be taken in turns or in different “blocks”. Mr Clegg has also promised that the government will extend the legal right to request flexible hours to all employers. This extension aims to eliminate the stigma attached to requesting flexible working hours. The UK Government pointed out that flexible leave “builds on…more and more men taking on childcare duties” and that it is sensible to implement reforms incrementally rather than in “one giant leap”.\footnote{122} According to the Deputy Prime Minister, these reforms will address “old-fashioned assumption”\footnote{123} that women have to be primary care-givers.\footnote{124}

It is clear from these recent developments that the law relating to parental leave in the UK is in a state of flux. It is submitted that whilst the UK transposition of the Directive does not differ drastically from the respective Irish transposition, the impending changes to UK law demonstrate a liberal attitude, combined with a willingness to make the appropriate alterations in quick succession. It could be argued that the UK’s progress, from initially refusing to sign the Social Policy Agreement included in the Maastricht Treaty\footnote{125} to actively challenging “old-fashioned” assumptions, is both radical and commendable. There are complex social and political reasons as to why the UK has essentially overhauled its approach to parental leave which are outside the scope of this article. Nevertheless it is notable that whilst the UK’s progress is quite radical, the same cannot be said of this jurisdiction, where changes have been incremental in nature and ambiguities still persist.

\footnote{123} George Parker and Brian Groom, UK Business Split over Reform of Rules on Parental Leave <www.ft.com/intl/cms/s/0/1b8b26f4-585b-11e3-985e-00144feabdc0.html#axzz2m24aWc8a> (visited 29 November 2013).
\footnote{125} Stratigaki, note 50, at 2748.
\footnote{126} Parker and Groom, note 123.
Chapter 10  Conclusion

In this article I explored the transposition of the 2013 Regulations into Irish law and the potential consequences of this transposition for employees, employers and several other stakeholders. In order to do this I employed an interlocking array of sources and methodological approaches. First I outlined the model of the family that has emerged in Sweden, that of a gender neutral caregiver, and I demonstrated how this model has diffused the parental leave discourse in other European countries and the United States. Analysis then shifted to the ECJ and the two-sphere dichotomy that dictated the Court’s reasoning in Commission v Italy127 and Hofmann128 was illuminated. It seems that the Court was distracted from the developments that were taking place in the sphere of academia and in wider society. This changed upon introduction of the 1996 Directive and the Court began to acknowledge the new model of the family and the implications of this model on issues such as equality and parental leave. Following this discussion of the case law of the ECJ, a brief overview of European social policy ensued, which highlighted the relevant policies contained in the Amsterdam Treaty. This served to contextualise the 1996 and 2010 Directives on parental leave.


I continued with an analysis of the 2010 Directive and the resultant transposition into Irish law. Two main changes were introduced, the extension of leave from 14 to 18 weeks, and a new right for an employee to request changes to their working hours upon return to the workplace. This extension certainly supports the dual breadwinner model, however, it is submitted that it is unlikely that the current economic climate will facilitate an increased uptake in this extended leave. The new right to request changes to working hours is also ambiguous in nature and this could pose problems for employers and employees. Whilst certain interpretations of to “have regard” can be gleaned from cases in the planning law context, it is suggested that the current approach to the meaning of to “have regard” could result in a pro-employer stance, and an onus on an employee to demonstrate that their request for changes in working hours is both critical and reasonable.

The penultimate chapter focused on how the entitlement to parental leave has developed in the education sector. This approach could reflect how other sectors and industries will view their obligations under the 2013 Regulations. The steadfast commitment to protecting the rights of teachers, combined with the segmentation of leave into individual days, demonstrate a discernibly flexible approach taken by the education sector. Finally, chapter ten compared the transposition of the Parental Leave Directive in this jurisdiction with the corresponding transposition in the UK. It is notable that whilst the two approaches were vastly similar, the UK can expect significant changes over the next decade, changes which reflect a much more liberal attitude to the family unit and a willingness to challenge old-fashioned stereotypes. This contrasts with the equivalent Irish Regulations, in which the proposed changes are predominantly incremental, and ambiguities are still apparent.
It is clear from the foregoing research that significant challenges will attend employers, employees and the small business sector, particularly as the 2013 Regulations are interpreted and employed. The courts will doubtlessly be called upon to answer questions that arise and resolve certain ambiguities. It is the modest aim of this author that the analysis contained herein will provide a basis to analyse the challenges that are likely to become apparent in the not too distant future.