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# Towards Equal Sharing of Care? A Review of the Influence of the European Pillar of Social Rights on Work-Life Balance Policy

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Leiden University

International Relations:

European Union Studies

MA thesis

12 904 words

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**July 3, 2020**

## Acknowledgements

*When I started working on this thesis in the fall of 2019, I could not have foreseen that it would be finished under the circumstances of a global pandemic that would disrupt every aspect of our daily life as we knew it. It is now in particular that I have learned the value of support both in academia and outside.*

*I am thankful for having had Dr. Shaev as my supervisor. Having been guided through this project with patience and admirable amounts of knowledge has been key for bringing it to a conclusion. I am also grateful for the feedback I have received from my second reader Dr. Oster at the thesis seminars.*

*During the course of a year at Leiden University in the European Union Studies track I have met the most versatile group of students from all corners of the world and from all academic backgrounds. Thank you for all the interesting conversations. It is regretful that our time together in the classroom came to a premature halt. Nonetheless, I am confident that each of you will excel at your future ventures.*

*I am thankful for my friends and family who, despite being entirely unfamiliar with the topic of my study and this thesis, always continue to enquire about it and contribute with well-intended insights. Your curiosity is what fuels my motivation. Thank you Sjoerd for reading the entire thing and for sacrificing our dinner table for my workstation for the better part of the spring.*

*It has been a privilege to bring this project to an end with all of your support!*

~

# Abstract

In 2017, the European Commission, the Council of the EU and the European Parliament came together to agree upon the introduction of a “European Pillar of Social Rights” - the EPSR. It entails a set of 20 social principles already recognized as binding in the EU social *acquis*, or that are yet to be implemented at EU or the domestic level. A recent deliverable thereof includes the Work-Life Balance Directive adopted in 2019. This thesis seeks to determine whether the EPSR can facilitate equal sharing of care within families and explores alternative approaches to that effect. The thesis argues that whereas the EPSR may have been criticized for merely paying lip service to social Europe, its strengths lie in its flexibility. A non-rigid approach to advancing social rights accommodates a wide diversity of preferences and facilitates enhanced cooperation as well as coordination of policy which both on the long term as well as on the short term may contribute to the advancement of social rights on an EU level, in particular in the field of care sharing in the family.

**Keywords:** work-life balance, European Pillar of Social Rights, gender equality, European social policy

# List of abbreviations

CJEU	Court of Justice of the European Union
CSR	country specific recommendations
EES	European Employment Strategy
EPSR	European Pillar of Social Rights
EU	European Union
OMC	Open Method of Coordination
QMV	qualified majority voting
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

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# Introduction<sup>1</sup>

## **1.1. Problem definition: Sharing of care and the EPSR**

In 2019, the gap between female employment rates in the EU Member States ranged from 47% in Greece to 75% in Sweden.<sup>2</sup> In 2018, the ratio of employed women in part-time employment ranged from 2% in Bulgaria to 58% in the Netherlands.<sup>3</sup> The large differences can to the most part be explained by varying cultural norms on family duties, and partially by a heterogeneous landscape of social policy arrangements facilitating female employment to a varying degree, the factors which often reinforce each other.

An expectation that women are to run a household whereas men earn the family-wage creates social and financial disadvantages for women regardless of whether they independently would opt for employment or for the unpaid care work in the family. For example, the inability to work as much over a lifetime as a male counterpart due to the expectation to carry the burden

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<sup>1</sup> Disclaimer: Certain sentences in the introductory chapter remain unchanged from the original research proposal submitted to Turnitin in December 2019. Hence, borrowed sentences are those of the author.

<sup>2</sup> OECD, “Employment rate,” accessed June 19, 2020, <https://data.oecd.org/emp/employment-rate.htm>.

<sup>3</sup> OECD, “Part-time employment rate,” accessed June 19, 2020, <https://data.oecd.org/emp/part-time-employment-rate.htm#indicator-chart>.

of care duties usually results in reduced pensions (in a contributions based pension system), difficulty of advancing on the pay scale due to periods of absence from work, and increased costs for employers to hire women over men resulting in women being regarded as less attractive employees (if employer is obligated to cover maternity and parental leaves), to mention a few.<sup>4</sup> The consequence is often co-dependence on a partner. All these hold true regardless of whether part-time employment is facilitated for mothers as an alternative to full-time employment, though potentially to a lesser degree.

Furthermore, work-life balance is not a women's issue. Equal sharing of care facilitated by policy allows also the secondary parent (often a father) to bond with their child without a loss of income, which means that work-life balance policy does not address the balancing of family and work for women only, but for all parents. Abandoning the male breadwinner model also allows for more inclusive policy that accommodates 'non-traditional' families such as single-parents or same-sex parents.<sup>5</sup> Hence, abolishing the male breadwinner model has socio-economic benefits beyond the increased equality between the genders.

Art. 9 of the Treaty on the Functioning of the European Union (TFEU) obliges the EU to take social issues into account when adopting policy, constitutionalizing social mainstreaming in EU policy-making.<sup>6</sup> Nonetheless, internal market interests reign supreme over social policy at EU level.<sup>7</sup> In November 2017 at the Summit for Fair Jobs and Growth, in Gothenburg, Sweden, the Commission, the European Parliament, and the Council of the EU (the Council), came together to endorse the introduction of a 'European Pillar of Social Rights' (EPSR).<sup>8</sup> The EPSR constitutes a reignited effort on behalf of the Juncker Commission to address the imbalance between the economic and social dimensions of EU integration, in order to strengthen the latter.<sup>9</sup>

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<sup>4</sup> Eugenia Caracciolo di Torella, "An emerging right to care in the EU: a "New Start to Support Work-Life Balance for parents and carers," *ERA Forum* 18 (2017): 188.

<sup>5</sup> Stephen Hardy and Nick Adnett, "The Parental Leave Directive: Towards a 'Family-Friendly' Social Europe?" *European Journal of Industrial Relations* 8 no. 2 (2002): 160.

<sup>6</sup> Sacha Garben, Claire Kilpatrick and Elise Muir, "Towards a European Pillar of Social Rights: upgrading the EU social acquis," *College of Europe Policy Brief* 1 no. 7 (2017): 2.

<sup>7</sup> Ane Aranguiz, "Social mainstreaming through the European pillar of social rights: Shielding the 'social' from the 'economic' in EU policymaking," *European Journal of Social Security* 20 no. 4 (2019): 242.

<sup>8</sup> European Parliament, The Council and the Commission, "Proclamation of the European Pillar of Social Rights, signed in Gothenburg, 16.11.2017.

<sup>9</sup> Jean-Claude Juncker, "Time of Honesty, Unity and Solidarity," *State of the Union Speech*, delivered in Strasbourg, 9.9.2015.

It consists of 20 rights, or social principles, which read as self-standing, legally enforceable rights.<sup>10</sup> Nonetheless, by virtue of the EPSR being laid down in a recommendation, it lacks legally binding force.<sup>11</sup>

On a European level there is a growing consensus that female employment ought to be facilitated through equality in the sharing of care duties between parents, suggesting an abandonment of the normative male breadwinner model towards a more individualistic approach to employment and other social rights.<sup>12</sup> In August 2019 the European Parliament and Council Directive (2019/1158) on work-life balance for parents and carers came into force (hereinafter referred to as the Work-Life Balance Directive).<sup>13</sup> The Directive introduces *inter alia* the guarantee of a ten day paternity leave which the second parent may make use of on a voluntary basis at the minimum pay level of sick leave, a parental leave of four months per parent, two of which cannot be transferred between the parents, and the right to request flexible working arrangements in order to combine care duties in the home with work.<sup>14</sup> Furthermore, workers making use of the leaves provided for by the Directive may not be treated less favourably by their employer.<sup>15</sup> Nonetheless, the provisions laid down by the Directive constitute minimum standards which are considerably lower than some of the levels of protection already present in some Member States. For example Sweden employs a care sharing model at the early stages of parenthood which is mostly focused on the sharing of parental leave than the separate identification of maternity leaves vis-à-vis paternity leaves.<sup>16</sup> Such an approach already facilitates an individualistic approach to care sharing from the outset. Furthermore, by virtue of Directives being binding only to the objective to be achieved, Member States enjoy a wide margin of discretion when enforcing the relevant rights.<sup>17</sup> The Directive grants the Member States a three year transposition period.

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<sup>10</sup> Frank Hendrickx, “Editorial: The European Pillar of Social Rights: Interesting times ahead,” *European Labour Law Journal* 8, no. 3 (2017): 191.

<sup>11</sup> Art. 288 TFEU.

<sup>12</sup> See Hardy and Adnett, “The Parental Leave Directive,” 157.

<sup>13</sup> European Parliament and the Council, “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,” *OJL 118* (12.7.2019): 79-93.

<sup>14</sup> *Id.* Para. 4-5.

<sup>15</sup> *Id.* Para. 11.

<sup>16</sup> Martina Prpic, “Maternity, paternity and parental leave in the EU,” a European Parliament briefing (2015): 5.

<sup>17</sup> Art. 288 TFEU.



## **1.2. Research question**

The EPSR contains Principle 9, a provision on the reconciliation of work and family life which reads: “Parents with caring responsibilities have the right to suitable leave, flexible working arrangements and access to care services. Women and men shall have equal access to special leaves of absence in order to fulfill their caring responsibilities and be encouraged to use them in a balanced way.”<sup>18</sup> The Work-life Balance Directive arguably constitutes an expression of Principle 9 and gives effect thereof. On the other hand, the Directive can also be argued to constitute a missed opportunity for the advancement of policy on the facilitation of flexible working arrangements to aid female labour participation due to its failure to address maternity leaves.<sup>19</sup> In fact, in that regard it would appear that it constitutes a political compromise in place of the Maternity Leave Directive which failed to pass the legislative pipeline of the EU law-making procedure, suggesting that the positive integration of work-life balance policy at EU level is a challenging task and remains therefore subject primarily to a downward convergence through ‘floor’ standards and negative integration.<sup>20</sup> Then why is it assumed that the EPSR can address social issues in this institutional, legal and political landscape unless it can alter it? Assuming that the Work-Life Balance Directive constitutes a deliverable of the EPSR, it provides insights into the work-life balance policy harmonizing/sharing of care facilitating power of the EPSR. Hence, this thesis seeks to determine whether the EPSR can facilitate the equal sharing of care within families, and if so, how?

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<sup>18</sup> European Parliament, The Council and the Commission, “Proclamation of the European Pillar of Social Rights, signed in Gothenburg, 16.11.2017, p. 16.

<sup>19</sup> European Parliament, “Legislative Train Schedule: Maternity Leave Directive,” accessed June 7, 2020, <https://www.europarl.europa.eu/legislative-train/theme-deeper-and-fairer-internal-market-with-a-strengthened-industrial-base-labour/file-maternity-leave-directive#:~:text=The%201992%20directive%20set%20the,allowance%20subject%20to%20national%20legislation.>

<sup>20</sup> European Commission, “Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on work-life balance for parents and carers and repealing Council Directive 2010/18/EU,” *COM(2017) 253 Final* (26.4.2017).

## **2. Literature review**

The present chapter will introduce the state of the art of the debate on the advancement of social policy and the EPSR and latter's effect on the former. The chapter commences with an overview of relevant literature on the development of work-life balance policy, for the purposes of demonstrating explanations for how such policies have materialized in the EU. Secondly, the chapter will engage with literature on the making of work-life balance policies in today's EU, including the advantages and obstacles that come with it.

The literature review allows for insights into how work-life balance rights have been advanced in the EU, and rival theories on the institutional, legal, political and other conditions upon which it rests. The sections differentiate between three avenues of how work-life balance has been facilitated in the past and the risk and opportunities that have followed as well as how they relate to the equal sharing of care in families. These are through 1) the adoption of hard law; 2) the introduction of new, non-binding modes of social governance; and 3) indirectly through social/gender mainstreaming. The aim is to identify the evaluative criteria against which the

EPSR can be tested for the purpose of identifying whether the EPSR can influence the sharing of care in the EU, and what the relation between care sharing and work-life balance actually is.

## **2.1. The adoption of hard law: How policy framing matters**

This section evaluates some of the key literature on the state of legally binding policy on work-life balance in the EU, and on how such policy has materialized over time. The focus lies primarily with the challenges that are faced upon trying to adopt hard law in the field of work-life balance, and what the adoption thereof entails in practice. The evaluation of literature on social policy-making is differentiated between considerations on challenges to input and output efficiency of adopting relevant policy. EU level hard law for the purpose of the thesis entails instruments which are binding within the meaning of Art. 288 TFEU: regulation, directives and decision.

### *2.1.1. Policy input: Facilitating intergovernmental consensus*

Policy input refers to the conditions which define what goes into the policy-making process and thereby include considerations on the players in the negotiation process as well as the competing interests at stake.<sup>21</sup> In order for binding policy to materialize at EU level, a high threshold of intergovernmental consensus is posed upon the Member States of the EU in the Council.<sup>22</sup> Therefore, social policy advancement at EU level appears to hinge largely on domestic agendas. This feature of the law-making process combined with the large diversity of preferences dominating the social policy landscape across the Member States, creates what Scharpf calls the joint-decision trap.<sup>23</sup> And the more “veto-players”, the more difficult it is to arrive at consensus.<sup>24</sup> The trap entails that the bare minimum becomes the only available option to be agreed upon on

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<sup>21</sup> Vivien A. Schmidt, “Democracy and Legitimacy in the European Union,” in *The Oxford Handbook of the European Union*, ed. Erik Jones, Anand Menon and Stephen Weatherill (Oxford: Oxford University Press, 2018): 662-663.

<sup>22</sup> Adrienne Héritier, “Fritz W. Schopf, ‘The Joint-Decision Trap: Lessons from German Federalism and European Integration’,” in *The Oxford Handbook of Classics in Public Policy and Administration*, ed. Martin Lodge, Edward C. Page and Steven J. Balla (Oxford: Oxford University Press, 2015): 499.

<sup>23</sup> Fritz Scharpf, “The Joint-Decision Trap: Lessons from German Federalism and European Integration,” *Public Administration Review* 66 (1988): 239-278.

<sup>24</sup> Fritz Scharpf, “The Joint-Decision Trap Revisited,” *Journal of Common Market Studies* 44 no. 4 (2006): 848.

an EU level.<sup>25</sup> Hence, the structuralist prediction of the future of social Europe is that it will fail to materialize all together since it is impossible to secure EU level positive integration of social policy beyond what the Member States can accomplish individually.<sup>26</sup> Consequently, it is already clear that a first rival answer to the research question is that the EPSR cannot facilitate the sharing of care in the EU.

Giubboni has subsequently argued that the nesting of competition interests in the European project has been to the detriment of social issues.<sup>27</sup> This conflict of interests results in a downward convergence of social protection through negative integration, which entails that the internal market freedoms weigh heavier over social rights. He therefore concludes that more stringent social policy at EU level is necessary for securing its role in European integration.<sup>28</sup> The role of the CJEU in this regard has been observed by Muir et.al. who have studied the relationship between the balancing of social rights and market freedoms by the Court.<sup>29</sup> They concluded that a broad interpretation and consequently far reaching freedom to conduct a business within the meaning of Art. 16 of the CFREU results in a weakened protection of individuals claiming social rights before a court.<sup>30</sup> Hence, the absence of EU-wide social guarantees as observed by Scharpf results in the lack of merits in upholding higher standards on behalf of the Member States individually insofar as such arrangements intervene with the internal market. Therefore, this strand of argumentation concludes that facilitating the sharing of care requires the adoption of hard law to that effect, which is unlikely to happen, if not impossible at EU level. This renders the protection thereof subject to the shielding of domestic social arrangements.<sup>31</sup> The ability of the EPSR to facilitate the sharing of care is thus nested in its ability to protect domestic policy from negative integration.

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<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*

<sup>27</sup> Stefano Giubboni, *Social rights and market freedoms in the European constitution* (New York: Cambridge University Press, 2005): 276.

<sup>28</sup> *Id.* 279-280.

<sup>29</sup> See: Sacha Garben, Claire Kilpatrick and Elise Muir, "Towards a European Pillar of Social Rights: upgrading the EU social acquis," *College of Europe Policy Brief* 1 no. 7 (2017).

<sup>30</sup> *Id.* 6.

<sup>31</sup> Jotte Mulder, "(Re) Conceptualising a Social Market Economy for the EU Internal Market," *Utrecht Law Review* 15 no. 2 (2019): 20.

Nonetheless, it should be kept in mind that binding social policy has been adopted at EU level, which shows that the joint-decision trap has been overcome several times.<sup>32</sup> Martinsen and Falkner have studied methods of exiting the joint-decision trap.<sup>33</sup> In their observation, key to overcoming it is by altering the negotiation arena for example by changing the negotiators or the focus of the negotiations. Their argument is that the conditions of intergovernmental consensus are not static, which allows for the opening of new avenues for its facilitation. One such consensus facilitation tool has been observed by Anderson who has discovered that the passing of policy on work-life balance has followed *inter alia* the overall creation of EU level social rights and the steered focus of EU policy towards employment.<sup>34</sup> The argument suggests that intergovernmental consensus on the advancement of social rights at EU level is most likely to be facilitated when proposed policy shares an element of gender equality advancement combined with the economic motive of increasing employment rates. This logic brings up the opportunity of policy for issue definition and the intended means of addressing such issues through policy matters for the purpose of intergovernmental consensus building. Hence, research on the role of policy framing as a consensus facilitating tool suggests that the ability of the EPSR to ensure equal sharing of care within families depends on its ability to address both gender equality and employment rates. It means that a rival theory to the structuralist one argues that the materialization of such policy may be possible but it rests on the policy framing opportunities provided by the EPSR.

### 2.1.2. Policy output: Equality vis-à-vis employment

Policy output refers to the outcome of the policy-making process and considerations thereof include *inter alia* the extent to which policy addresses issues as intended.<sup>35</sup> For the purpose of the thesis, reconciliation of work and family life and work-life balance are understood to be conceptually interchangeable. Most literature refers to reconciliation, whereas the EPSR refers to

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<sup>32</sup> Dorte Sindbjerg Martinsen, Gerda Falkner, "Problem-Solving Gaps, Partial Exits, and Court-Decision Traps," in *The EU's Decision Traps: Comparing Policies*, ed. Gerda Falkner (Oxford: Oxford University Press, 2011): 130.

<sup>33</sup> *Id.* 130-133.

<sup>34</sup> Anderson, "Social Policy," 128.

<sup>35</sup> Falk Davitier, "Policy framing in the European Union," *Journal of European Public Policy* 14 no. 4 (2007): 654-666.

work-life balance, which is the reason why this thesis also opts for the latter. However, care sharing facilitatory powers of the EPSR constitutes another arguably more central theme of the thesis. Sharing of care and the balancing of work and family life are not entirely interchangeable concepts. Daviter has discussed the importance of policy framing, arguing that the way issues are defined through policy is key for determining the problem solving abilities thereof.<sup>36</sup> Stratigaki has added the differentiation that sharing of care is a concept rooted in equality between the genders.<sup>37</sup> Meanwhile, reconciliation/balancing on the other hand has an employment increasing connotation which suggests that it has an economic motive.<sup>38</sup> Sharing of care and work-life balance therefore constitute two variations of policy framing interrelated issues.

Policy framing refers to the issues that policy aims at addressing and is therefore a tool of issue definition.<sup>39</sup> Hence, conceptualization through policy framing gives an impression of what the legislators have problematized and poses a limit to the problem solving capacity of the addressing measure. For instance, policies aimed at reconciling work and family life, such as the Work-life Balance Directive, do not address gender (in)equality per se. Facilitating the sharing of care is often understood to facilitate employment by extension. However, by moving away from concepts such as sharing to more natural and economically rooted concepts like reconciliation, the equality dimensions of female employment facilitating policy is lost.<sup>40</sup> Hence, the framing of policy matters for policy output.<sup>41</sup> Chapter 4 will analyse how policy on work-life balance/sharing of care has been framed in the EU and at what cost.

Sabato, Vanhercke and Spasova have observed that the EPSR is lacking in clear definition regarding its destination and ambitions.<sup>42</sup> They view this as a vice which has consequences for its ability to deliver on its promises due to the absence of impetus and means of ensuring its own efficiency.<sup>43</sup> However, tying in with some of the other perspectives already

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<sup>36</sup> See: *Ibid.*;

Maria Stratigaki, *The Cooptation of Gender Concepts in EU Policies: The Case of "Reconciliation of Work and Family,"* *Social Politics* 11 no. 1 (2004): 31-32.

<sup>37</sup> Stratigaki, "The Cooptation of Gender Concepts in EU Policies," 31-32.

<sup>38</sup> *Ibid.*

<sup>39</sup> See Falk Daviter, "Policy Framing," 654-666.

<sup>40</sup> Stratigaki, "The Cooptation of Gender Concept in EU Policies," 50.

<sup>41</sup> *Id.* 50.

<sup>42</sup> Sebastiano Sabato et. al. *Implementing the European Pillar of Social Rights: what is needed to guarantee a positive social impact.* A study for the European Economic and Social Committee (Brussels, 2018): 32.

<sup>43</sup> *Ibid.*

presented, the flexibility of the EPSR may be a virtue in regards to the flexibility it might give in regards to subsequent definition opportunities. Hence, the meaning of rights proclaimed by the EPSR may be interpreted in a way that facilitates intergovernmental consensus while advancing social and gender rights suggesting that the EPSR leaves room for some policy framing. This is relevant insofar as policy framing matters both for input and well as output efficiency of legally binding social policy. Hence, elaborating on the rival theory against the structuralist one, the room for adopting policy which strikes a fair balance between facilitating equality between parents as well as increasing employment rates is likely to be an efficient means of overcoming the joint-decision trap while also addressing the sharing of care. It is for the analysis section to evaluate to what extent the Work-Life Balance Directive and by extension the EPSR accomplishes this.

## **2.2. Move towards soft modes of governance**

The late 90s and early 00s saw the move from traditional policy-making in the field of social policy - hard law, to new modes of governance - soft law.<sup>44</sup> Soft law has enabled the EU to coordinate Member States' social policies in areas where it lacks formal competence to adopt hard law, or where the lack of intergovernmental consensus stands in the way of social policy advancement through hard law. This means that its demand has increased as intergovernmental consensus on the adoption of hard law has decreased. Hence, while it is not a new concept as such, the EU has seen a proliferation in its utilization for advancing the EU social *acquis*. Most notable developments for the purposes of this thesis have been the introduction of the European Employment Strategy (EES) governed by the Open Method of Coordination (OMC) in 1997.

The EES is a soft law initiative which aims at reaching full employment in Europe and according to the Commission it created 10 million jobs between 1997 and 2002.<sup>45</sup> The OMC entails that the Commission and the Council publish Country Specific Recommendations (CSRs)

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<sup>44</sup> Adrienne Héritier, "New Modes of Governance in Europe: Policy Making without Legislating," *Reihe Politikwissenschaft Political Science Series* 81 (March 2002): 3.

<sup>45</sup> Anderson, *Social Policy*, 117.

to the Member States on policies and practices related to their employment situations.<sup>46</sup> The recommendations are based on benchmarks and best practices of Member States that have been most successful at meeting EES objectives. Following the introduction of the European Semester (ES) in 2010 the OMC has become more structured and an iterative process.<sup>47</sup> Following the introduction of the EPSR, soft modes of governance now also include a social scoreboard based on performance indicators which visibly ranks the successful Member States and the laggards, a mechanism which holds Member States politically accountable through naming and shaming.

### 2.2.1. *The aim of soft law*

In view of work-life balance policy, soft modes of governance have given rise to initiatives like “flexicurity” - the promotion of a flexible labor market while maintaining employment security, which aims to serve *inter alia* the reconciliation of work and family life. The notion of equality in labor participation and sharing of care-duties has subsequently been emphasized most notably in the Commission Work-Life balance package of 2008. However, by virtue of their lack of bindingness, such measures have less teeth than any early day legislative instruments on equality between men and women. A main weakness of advancing the European social agenda through soft law is the relative inefficiency thereof.

The nature of soft law measures also illuminates the shift from the equality narrative to an employment increasing motive for the adoption thereof. Country-specific recommendations frequently address female employment rates for countries like Italy that fall well behind the EU average. However, equality motives behind soft measures tend to be secondary to employment, and hence by extension, economic interests.<sup>48</sup> As shown by the literature on the adoption of binding social policy, such a narrative may be for the benefit of consensus building while on the other hand it may be a false promise to the advancement of gender equality. English and Frederickson have observed that the EES has increasingly been addressing gender equality in

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<sup>46</sup> See: European Council, Council of the European Union, “How the European Semester Works,” last reviewed 13.1.2020, accessed 2.7.2020.

<https://www.consilium.europa.eu/en/policies/european-semester/how-european-semester-works/>.

<sup>47</sup> Paul Copeland, Mary Daly, “The European Semester and EU Social Policy,” *Journal of Common Market Studies* 56, no. 5 (2018): 1001.

<sup>48</sup> Beth English and Mary F. Frederickson, *Global Women’s Work: Perspectives on Gender and Work in the Global Economy* (Abingdon: Routledge, 2019): see section: the evolution of the EES and the visibility of gender equality.



country-specific recommendation, suggesting that the attention for gender issues in employment has dwindled over time.<sup>49</sup> Furthermore, gender equality issues in employment tend to be measured strictly through employment rates, which does not always paint the entire picture. It is for the analysis section to evaluate whether the EPSR is likely to facilitate soft law on the equal sharing of care insofar it addresses not only economic issues related to work-life balance but also the socio-economic implication deriving from the lack thereof, while accommodating domestic preferences.<sup>50</sup>

### 2.2.2. *Flexibility - an advantage or weakness?*

However, one may observe that one of the weaknesses besides arguably its lack of legal bindingness is in its flexibility.<sup>51</sup> The flexibility of soft law which manifests in the room of addressing the social issues identified in CSRs in any desired manner, combined with its lack of bindingness, has resulted in an uneven impact of soft modes of governance across the EU.<sup>52</sup> It is not for this thesis to identify patterns of European soft law implementation across the EU membership. It merely suffices to note that empirical studies conducted inter alia by Mailand on the influence of the EES on the EU Member States shows considerable variations in implementation amongst the Member States.<sup>53</sup> Hence, a weakness of soft modes of governance is that it is a means of policy coordination in a non-uniform fashion which cannot hold its addressees efficiently accountable for failure to implement the recommendations.

On the other hand, there is an argument to be made that the adoption of soft instruments allows for more enhanced coordination of social policies due to the removal of the legal bindingness looming over the process. Consequently, it may be a tool for advancing a flexible form of positive integration. Furthermore, due to the lack of legal bindingness, soft instruments are not strictly bound to the competences of the Union, though the democratic legitimacy thereof remains up for debate. This already suggests that the flexibility allowed by soft modes of

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<sup>49</sup> *Id.* See section: Country specific recommendations and their view on gender equality.

<sup>50</sup> See: Zane Rasnača, "Bridging the gaps or falling short? The European Pillar of Social Rights and what it can bring to EU-level policymaking," *European Trade Union Institute Working Paper 5* (2017): 38.

<sup>51</sup> Mikkel Mailand, "The uneven impact of the European Employment Strategy on member states' social policies: a comparative analysis," *Journal of European Social Policy* 18, no. 4 (October 2008): 362.

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*

governance may be a benefit to the European social project. By adopting CSRs which do not address the Union as a whole, but Member States individually, domestic sensitivities which could not be accommodated on a European level through the adoption of hard law, can be taken into account. It thereby ties in with the discussion on the adoption of hard law rooted in the arguments by stratigaki and Falkner et al. that the joint-decision trap can be circumvented at EU level when the threshold for policy implementation is lower due to the less intrusive nature thereof, which often can be ensured with directives over regulation or even soft law over hard law. Here, soft law takes the flexibility of directives to a new level.

### **2.3. Facilitating gender/social mainstreaming**

Finally, the social dimension of EU integration can be advanced not only directly through positive integration, as in by adopting more hard law, but also indirectly through the prevention of negative integration by giving economic rights a social reading. Social mainstreaming entails the concept of taking into account social implications in the adoption or interpretation of any policy, and gender mainstreaming refers to the same process for taking into account gendered ramifications of policy.<sup>54</sup> Thereby it addresses legislators and judiciaries in particular.

#### *2.3.1. Treaty-based obligations of gender/social mainstreaming*

Aranguiz has observed that gender mainstreaming enjoys a constitutionalized position in the EU *acquis* following the Lisbon Treaties.<sup>55</sup> Under Art. 9 TFEU the Union is under an obligation to “take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection” etc. in “defining and implementing its policies”. It is also relevant to observe the constitutionalized role of gender mainstreaming proclaimed by Art. 10 TFEU which maintains that “in defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex [...] or sexual orientation.” Furthermore, under Art. 3 TEU which enlists the aims of the EU it is mentioned that its aim is to “promote [...] the well being of its people”, and aim “at full employment and social progress” while combatting

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<sup>54</sup> Johanna Kantola, *Gender and the European Union* (London: Palgrave, 2010): 125.

<sup>55</sup> Ane Aranguiz, “Social mainstreaming through the European pillar of social rights: Shielding the ‘social’ from the ‘economic’ in EU policymaking,” *European Journal of Social Security* 20 no. 4 (2019): 242.

“social exclusion and discrimination” and promoting “equality between men and women”. However, the effects thereof lack evidence in practice, mostly due to the lack of direction and definition of social issues to be taken into account which results in a patchy application of mainstreaming tools.<sup>56</sup> Aranguiz therefore argues that the legal bindingness of Art. 9 TFEU combined with the political impetus and direction provided by the EPSR will contribute to more efficient social/gender mainstreaming in the EU.<sup>57</sup>

The role of social/gender mainstreaming also ties in with the debate on the de-regulatory effect of domestic social policy as discussed in relation to the adoption of hard law. Social mainstreaming by the CJEU constitutes a safeguard of domestic social arrangements against negative integration. Hence, mainstreaming can constitute a means of shielding the social policy from a downward convergence of social rights prompted by regulatory competition and judicial de-regulation.

### *2.3.2. Merely paying lip-service to the social project?*

However, gender/social mainstreaming poses its own risks for the social dimension of EU policy. Rees has argued that the concept of social and gender mainstreaming in the EU remains inefficient insofar as institutions remain under the impression that they are not legally bound by an obligation to take social and gendered implication into account when adapting and interpreting policy.<sup>58</sup> Whereas Member States can be held accountable towards the fulfilment of their obligations under hard law, how to hold EU institutions accountable for their obligation to take social ramifications into account in policy-making is less straightforward. She does however, conclude that mainstreaming is an efficient means of advancing the social dimension of EU integration insofar as it is given the necessary impetus to be abided by.<sup>59</sup> Furthermore, the constitutionalization of gender mainstreaming may lul the Member States into a false sense of confidence that the obligation to ensure the well-being of their citizens has been fulfilled automatically as soon as social or gendered ramification of policy have been considered rather

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<sup>56</sup> Teresa Rees, “Reflection on the uneven development of gender mainstreaming in Europe,” *International Feminist Journal of Politics* 7 no. 4 (2005): 569.

<sup>57</sup> Aranguiz, “Social mainstreaming,” 359.

<sup>58</sup> Rees, “Reflections on the uneven development,” 563.

<sup>59</sup> *Ibid.*

than addressed.<sup>60</sup> Hence, there is a risk of running a counterproductive effort which discourages the adoption of hard law. This links to the considerations of issue framing and one may also want to question the extent to which the adoption of hard law in the economic interests, despite social/gender mainstreaming, is able to accommodate social interests to the effect of efficiently addressing equality rather than employment rates.

Hence, mainstreaming lacks the epistemological advantage of binding (and to a certain extent non-binding) policy, which is normative clarity and legal certainty. Therefore, facilitating gender/social mainstreaming ought ideally to strike a fair balance between being a legal obligation to take social gender considerations into account in all policy-making and being a flexible means of shielding domestic arrangements from negative integration through the courts.

<sup>61</sup> It is for the analysis section to evaluate whether that is something which the EPSR may be able to accommodate.

### **2.3. Conclusions: Means of advancing EU social and employment rights**

As shown, work-life balance policy in the EU comprises a patchwork of policy approaches at EU and domestic level. The effect thereof may however vary between Member States. For the purpose of clarity, the schematization of policy advancement in the way above constitutes a simplification of how it happens in practice. In reality, these categories are not mutually exclusive and the analysis will illuminate the extent to which they tend to bleed into one another.

On the basis of the existing literature on the topic, one may differentiate a few rival theories on the work-life balance facilitating potential of the EPSR. Scharpf predicts that social Europe, and hence by extension policy that would facilitate equal sharing of care in the family, is impossible at EU level by virtue of the large discrepancy of preferences dominating the intergovernmental landscape.<sup>62</sup> However, this view may be dated in view of the fact that it is based upon the presumption that the diversity of preferences cannot be accommodated or narrowed down. On the other hand, another strand of thought predicts that policies which

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<sup>60</sup> Aranguiz, "Social mainstreaming," 360.

<sup>61</sup> Rees, "Reflections on the uneven development," 563.;

Václav Šmejkal, "The Social Market Economy Goal of Art. 3(3) TEU - A Task for EU Law?," *Prague Law Working Paper Series* 3 no. 1 (2015): 13.

<sup>62</sup> Scharpf, "The Joint-Decision Trap Revisited," 848.

advance social and employment rights at EU level can be adopted to the extent that they are not too invasive or interfering with the priorities and preferences of the Member States.<sup>63</sup> The Work-life balance Directive appears to constitute such an instrument since it leaves considerable room of maneuver for the Member States. The same logic includes the adoption of soft law which may allow for coordination and long term, intergovernmental consensus building. An alternative or perhaps complementary means of advancing work-life balance policy would be through the indirect method of social/gender mainstreaming. Hence, a patchwork of measures may be the optimal approach. The categories for social rights advancement henceforth constitutes the evaluative criteria of social policy advancement for the analysis. The literature review has illuminated the conditions which enable or distort the adoption of each alternative, allowing the EPSR to be tested against the conditions.

Hence, the ability of the EPSR to advance work-life balance policy rests on its ability to strengthen the social *acquis* while also accommodating the diversity of preferences amongst the Member States. Alternatives of doing so are through hard law, soft law or gender mainstreaming as identified above. Hence, these approaches will constitute the criteria for the evaluation in the analysis sanction.

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<sup>63</sup> Šmejkal, “The Social Market Economy,” 13.

## 3. Methodology

### **3.1. Research method**

The thesis aims at exploring avenues for facilitating sharing of care in families under the legal and institutional conditions of the contemporary EU, and how the EPSR may be able to navigate that landscape. Due to the interdisciplinary nature of the topic which falls at the intersection of law and social sciences, the research will be carried out on the basis of a socio-legal method. The thesis approaches law-making at EU level as a social process leading to binding (or occasionally non-binding social norms), addressed at EU Member States, which have varying socio-economic implications for private individuals.

The research method for the analysis is based on an evaluative framework. Volumes have been written about the asymmetry between ‘the economic’ and ‘the social’ dimensions of EU integration, and a proliferation of recent literature has analysed the role of the EPSR in the *acquis communautaire* and the legitimacy thereof. Hence, the literature review reveals the conditions for the evaluative analysis by defining the possible means of advancing European social rights and upon what those alternatives hinge. Therefore, it has laid down the conditions

which determine the ability of the EPSR to contribute to such advancement. The conditions identified in the literature review will then be tested against the EPSR and its deliverables in the work-life balance context in the analysis section. The analysis commences with an assessment of the context in which the EPSR exists in the legal and institutional landscape of the EU, revealing any potential limitations to the ability of the EPSR to address the issues it claims to tackle. Then any potential avenues of policy advancement are evaluated in view of the EPSR in the context that has previously been identified. For the purpose of this thesis, the Work-Life Balance Directive and also the Social Scoreboard are understood to constitute a deliverable of the EPSR and therefore by extension a display of the efficiency of the EPSR on the sharing of care in the EU so far.

The research approach is entirely qualitative in nature. The thesis is based on a combination of academic literature on the advancement of social policy in the EU and primary sources on the EPSR and the Work-Life Balance Directive. It has therefore not proven necessary for the author to produce any new data in the process of conducting the research for the purposes of the thesis. Furthermore, the research takes an empirical approach by testing the social policy advancing conditions against the EPSR and the Work-Life Balance Directive. The research is carried out primarily from an intergovernmental lens fixed at EU level governance. Hence, it is not for this thesis to determine the landscape of various domestic policy arrangements in the EU, though it would be relevant for the purpose of defining the concept of diverse preferences on social policy amongst the Member States. However, for the purposes of this thesis it merely suffices to conclude that there are considerable divergences to the extent that the individual Member States address the sharing of care in families. The level of abstraction is therefore maintained relatively high for the purpose of this study. Subsequent research on the other hand could investigate how the Work-Life Balance Directive influences Member States' policies through a comparative analysis which would reveal its ability to accommodate domestic preferences vis-à-vis harmonizing power.

Though the thesis may shed light to the overall social and employment policy advancing potential of the EPSR, one should be careful not to generalize the outcome of this research beyond the scope it is limited to. Though the literature review has provided an overview on the

advancing of EU social and gender rights in general, the analysis focuses more specifically on the sharing of care in families, which means that the conclusions apply to the sharing of care in particular. The choice of focusing on sharing of care and Principle 9 of the EPSR over other alternatives is based on the fact that in this field, the EPSR has arguably already produced some results, which makes the influence thereof more measurable. Furthermore, it is not the intention of the thesis to predict the future but merely observe the limits of the potential of the EPSR under the existing conditions within which social policy advancement takes place, which is possible when utilizing a socio-legal method.

### **3.2. Conceptualization**

For the purposes of the thesis, the right to family life is defined as child-rearing in particular. In reality, family life may constitute relations beyond the one between a young child and a parent (and between the parents). Furthermore, the literature review already touched upon the differentiation between work-life balance and the sharing of care which is rooted in that the concepts address different issues respectively, employment rates vis-à-vis equality. However, both remain important concepts throughout the thesis.

Seeing as the research seeks to determine sharing of care facilitating powers of the EPSR, it is relevant to define the facilitation of the sharing of care for the purpose of the thesis. Care sharing between parents entails that it is possible to opt for a desired balance of care duties vis-à-vis employment between the parents. In that regard, unpaid paternity leave for example does not facilitate care sharing insofar as the maternity leave is paid for. Hence, truly equal care sharing is rooted in that the opted balancing of unpaid care duties between parents constitutes an expression of will independently of financial or other employment related factors.

It is also relevant to define some of the central concepts used for the analysis of the thesis. Firstly, since the analysis of the EPSR is centred around principle 9 which refers to special leaves of absence for parents. EU policy and most Member States to varying degrees recognize the differentiation between maternity leaves, paternity leaves and parental leaves. Maternity leave constitutes a leave of absence secured for the mother, usually for a period before



and after birth.<sup>64</sup> Paternity leave (the terminology may vary depending on which Member States is discussed) constitutes the comparable variation reserved for the second parents, usually for a period after birth.<sup>65</sup> Parental leave is generally understood to constitute a leave taken after maternity and paternity leaves, which can (to a varying degree depending on the Member State) be divided between the parents.<sup>66</sup>

A textual interpretation of Principle 9 of the EPSR suggests that ‘equal access’ to special leaves of absence refers to accessibility of leaves on an equal basis whereas the relevant leaves of absence can be unequal. However, the Commission has justified its competence for adopting law to the effect of Principle 9 under Art. 7 of the Charter of Fundamental Rights of the European Union (CFREU) on the right to respect for private and family life, in combination with Art. 23 CFREU on equality between men and women including in areas of employment, work and pay.<sup>67</sup> In view of that, a teleological interpretation suggests that “equal access” refers to equal opportunities for men and women to work and/or take on care-duties in the family. This paper will proceed with the assumption of the latter since the former would remove the provision of any effect.

For the purpose of feasibility, some necessary limitations to the research have been made. Most notably, although work-life balance and the sharing of care includes considerations beyond special leaves of absence and flexible working arrangements for parents, the research will be limited to policy areas explicitly mentioned by Principle 9 of the EPSR, the principle on Work-Life Balance. Hence, considerations of childcare outside of the family will be excluded from consideration, seeing as it falls under its own principle in the EPSR.<sup>68</sup> Furthermore, although work-life balance may include family constellations beyond parents and young children, the focus of this thesis is with the opportunities for facilitating gender equality for employment opportunities by facilitating equal sharing of care between parents in the early stages of parenthood. Furthermore, though families increasingly consist of same-sex parents, the

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<sup>64</sup> Martina Prpic, “Maternity, paternity and parental leave in the EU,” a European Parliament briefing (2015): 2.

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*

<sup>67</sup> Klaus Lörcher and Isabelle Schömann, “The European pillar of social rights: critical legal analysis and proposals,” *etui report 139* (2016): 49-50.

<sup>68</sup> See: European Parliament, The Council and the Commission, “Proclamation of the European Pillar of Social Rights, signed in Gothenburg, 16.11.2017, p. 19.

focus of the thesis is in particular with families with parents of opposing gender in order to highlight the asymmetry in genderd employment opportunities rooted in policy addressing the issue (or the absence thereof).

## 4. Analysis

So far this thesis has shown that the ability of the EPSR to influence the sharing of care in families rests on its ability to take domestic preferences into account when adopting new policy approaches while sufficiently strengthening or upgrading the status of the social *acquis*. The possible avenues of doing just so and their opportunities and benefits have been identified in the literature review, and they constitute the evaluative criteria for the framework of the analysis. The ability of the EPSR to meet those criteria will henceforth be tested under individual sections.

Each section commences with a contextualization of the EPSR for the purposes of identifying any institutional, legal and political conditions which might impede the possibility of the EPSR to deliver on its promises. Next, the evaluative criteria as identified in the literature review will be tested against the EPSR in this pre-defined context. To reiterate, the aim of the analysis is to determine whether the EPSR is capable of facilitating the equal sharing of care in the EU, and if so, how?

#### **4.1. Contextualizing the EPSR**

The literature review already demonstrated that there is a strand of structuralist literature on the integration of EU social policy which suggests that the adoption of hard law which sufficiently upgrades the EU social *acquis* is impossible due to the joint-decision trap. Alternatively, this thesis will explore whether it is possible to overcome the trap through policy framing, which as shown, has considerable influence both for output and input efficiency of policy. The section commences with an overview of the constraints of intergovernmental decision-making in the EU.

##### *4.1.1. A brief overview of the role of policy framing*

Work-life balance policy has its roots in the pursuit of equality between men and women. The first piece to the EU *acquis* to address that was the 1976 Equal Treatment Directive which laid down the right to equal pay for equal work between men and women.<sup>69</sup> The early and mid-90s saw a shift in the debate on social policy at EU level with the extension of EU competences in the field of social policy which allowed for the adoption of a broader range of hard law than previously.<sup>70</sup> Furthermore, the Commission stated in the 1994 White Paper that “labour market participation should be improved by promoting “greater solidarity between men and women.”<sup>71</sup> By emphasizing the link between the sharing of care duties in the family and women’s labor participation, work-life balance was no longer a women’s issue. Hence, the Member States had both the tools as well as the incentive to advance work-life balance policies at EU level.

The first concrete initiative addressing the advancement of positive integration of work-life balance policies at Union level was the Parental Leave Directive which was proposed in 1983. A modified version of the Directive entered into force in 1993 due to persistent UK vetoes which could be overridden under the Maastricht amendments to the Treaty in 1992.<sup>72</sup> The Directive laid down that workers would have the right to at least 4 months of parental leave as

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<sup>69</sup> Anderson, *Social Policy*, 128.

<sup>70</sup> Jane Lewis, “Work/family reconciliation, equal opportunities and social policies: the interpretation of policy trajectories at the EU level and the meaning of gender equality,” *Journal of European Public Policy* 13 no. 3 (2006): 421.

<sup>71</sup> Anderson, *Social Policy*, 130.;  
Lewis, “Work/life reconciliation,” 424.

<sup>72</sup> Anderson, *Social Policy*, 130.

well as the right to maintain their jobs for that period.<sup>73</sup> The introduction of the QMV also allowed for the adoption of the Part-time Work Directive and the fixed-term work Directive, both of which in limited ways helped to combine work and family life.<sup>74</sup> Hence, it can be argued that the advancement of work-life balance policies at EU level has historically been carried out in the interests of equality and higher employment rates. This has provided a brief overview of how policy framing has constituted a means of adopting policy which strikes a middle ground between employment and equality issues. However, it is relevant to take a closer look at the hurdle that comes with passing such laws under a system that requires an intergovernmental consensus of sorts.

#### *4.1.2. Qualified majority voting*

As already determined, Member States' laws can be harmonized through the setting of common standards by adopting hard law at EU level. The benefit of hard law is legal enforceability and which allows such instruments to be relied upon by private individuals to whom they produce rights before a Court. Furthermore, harmonization has advantages for legal certainty and normative clarity in cross-border situations due to the application of the same rule. However, this most invasive means of advancing EU-wide social rights requires the passing of the joint-decision trap, which often proves to be an obstacle to the adoption of hard law. Consequently, as identified in the literature review, EU social policy is often reduced to minimum standards which produce lower social protection than many Member States do in their own legislation. Furthermore, such measures may render domestically adopted social policies subject to regulatory competition.

In order to identify the intergovernmental aspect to the joint-decision trap which refers to the consensus threshold under the joint mechanism, it is relevant to briefly discuss how decisions are taken within the Council of Ministers. The Council comprises "a representative of each Member State at ministerial level".<sup>75</sup> Since November 2014, the representatives of the Member States in the Council vote by qualified majority voting (QMV) unless provided otherwise by the

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<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*

<sup>75</sup> Art. 16(2) TEU.

legal bases in the Treaties.<sup>76</sup> The reason for taking this very supranational step was the circumvention of deadlocks in the Council, where previously just one veto could prevent the passing of a law.<sup>77</sup> By no longer requiring the consensus of all Member States, the QMV threshold is met if a legislative proposal by the Commission is endorsed by 55% of the Council members, which represent at least 65% of the European population, also referred to as double majority.<sup>78</sup> The *rationale* behind the QMV is that the minimum country support requirement prevents large Member States from overriding the small ones, whereas the minimum representation of citizens requirement prevents small Member States from overriding the large ones. A blocking minority can be formed by four Member States that represent at least 35% of the European population.<sup>79</sup>

One of the incentives to invoke a *de facto* veto could be based considerations of subsidiarity.<sup>80</sup> The principle of subsidiarity as laid down in Art. 5(3) TFEU maintains that in order for the EU to adopt policy, it must be ascertained that the EU is able to address the issue more efficiently than the Member States individually. The broad diversity of preferences which follows the even greater variety in European welfare states suggests that Member States indeed are more efficient when addressing social issues on the domestic level of governance. That is assuming that social policy by default is not linked to the efficiency of other policy fields which are subjected to more harmonization. Hence, adherence to the principle of subsidiarity in accordance with Art. 5(3) TEU is perceived as a readily invocable argument at all times. The literature review revealed that the consensus threshold is most easily met when the economic incentive of social policy is clearer, for example by increasing employment rates as a consequence of furthering gender equality. Now that the institutional/intergovernmental landscape within which EU law is made, it is possible to evaluate whether, and if so, to what extent the EPSR is capable of facilitating the sharing of care in the EU in this manner.

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<sup>76</sup> Art. 16(3) TEU.

<sup>77</sup> Anderson, *Social Policy*, 130.

<sup>78</sup> Art. 238(3) TFEU.

<sup>79</sup> *Ibid.*

<sup>80</sup> Giubboni, "Social rights and market freedoms," 121.

#### 4.2. The policy framing abilities of the EPSR

The most recent development in the field of work-life balance policy is the Work-life Balance Directive which entered into force on 1st of August 2019. According to the Commission it has emerged as an instrument aimed at giving effect to Principle 9 of the EPSR on the balancing of work and family life.<sup>81</sup> By virtue of the nature of directives, the Member States are only bound towards the aim to be achieved.<sup>82</sup> Since the Directive constitutes a deliverable of the EPSR it is relevant to evaluate how it has materialized and the extent to which it addresses the sharing of care in the EU. The unique opportunity of having two comparable instruments, one which has passed the legislative pipelines and one which has not, allows us to compare them for the purpose of discovering the role of policy framing for intergovernmental consensus and for addressing sharing of care in families. Furthermore, by virtue of only the Work-Life Balance Directive being a product of the EPSR, its accomplishments can to a certain degree be attributed thereto whereas the failure of the Maternity Leave Directive cannot.

The main rules introduced by the Directive are 1) the introduction of paternity leave amounting up to 10 working days which is compensated for at a minimum of sick leave, 2) the protection of at least four weeks of parental leave out of which two weeks are non-transferable between the parents.<sup>83</sup> The Directive has been adopted with Art. 153(1)(i) in combination with 153(2) TFEU as its legal basis.<sup>84</sup>

Statements by the Commission suggest that the Work-Life balance Directive is a direct or at least indirect expression of the EPSR, in particular principle 9.<sup>85</sup> However, the extent to which that is the case can be questioned in view of the fact that similar policy has been in the legislative pipeline of the Union since 2005. The predecessor of the Work-life Balance Directive, namely the Maternity Leave Directive never materialized, which resulted in the initiation of a different

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<sup>81</sup> European Commission, “Work-life balance,” accessed 2.7.2010, <https://ec.europa.eu/social/main.jsp?catId=1311&langId=en>.

<sup>82</sup> Art. 288 TFEU.

<sup>83</sup> European Parliament and the Council, “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,” *OJL 118* (12.7.2019): 79-93.

<sup>84</sup> See: European Parliament and the Council, “Directive (EU) 2019/1158”.

<sup>85</sup> European Commission, “Work-life balance,” accessed 2.7.2010, <https://ec.europa.eu/social/main.jsp?catId=1311&langId=en>.

proposal which evidently saw a better fate.<sup>86</sup> Hence, the question remains whether the Work-Life Balance Directive is merely a political compromise born out of the Maternity Leave Directive, and that the legacy of the EPSR lies merely in the name? On the other hand, the coinciding dates of the plans to introduce the Directive and the adoption of the EPSR suggests that the latter could have functioned as inspiration for the former. This is relevant insofar as it demonstrates whether the policy framing of the Work-Life Balance Directive as a consequence of the EPSR has aided its passing of the joint-decision trap.

In order to explain the success of the Work-life Balance Directive in the legislative pipeline and the failure of the Maternity Leave Directive it is relevant to investigate the substantive gap between the two instruments. The analysis thereof reveals the differences in their policy framing. The proposed Maternity Leave Directive was supposed to amend Directive 92/85/EEC on measures to encourage the improvement in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding.<sup>87</sup> The extent to which the current Maternity Leave Directive from 1985 does so is very limited. For instance, the payment of maternity leaves remains subject to national legislation.<sup>88</sup> The proposed amendments included a minimum of 18 weeks of maternity leave paid for at the level of full salary.<sup>89</sup> As such, the instrument would have amounted to positive integration of maternity leaves and the social protection of working mothers through a *de facto* introduction of an EU wide rights-based framework of maternity leaves.

In contrast, the Work-life Balance Directive does not touch upon maternity leaves, but instead introduces minimum standards for paternity and parental leaves. By facilitating and encouraging a fair sharing of care responsibilities between the parents in the family, not only are equal employment opportunities between the genders advanced, but employment rates are possibly increased as women gain better opportunities for entering employment. As shown in the

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<sup>86</sup> European Parliament, “Legislative Train Schedule: Maternity Leave Directive,” accessed June 7, 2020, <https://www.europarl.europa.eu/legislative-train/theme-deeper-and-fairer-internal-market-with-a-strengthened-industrial-base-labour/file-maternity-leave-directive#:~:text=The%201992%20directive%20set%20the,allowance%20subject%20to%20national%20legislation.>

<sup>87</sup> *Ibid.*

<sup>88</sup> Council of the EU, “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,” *OJ L 348* (28.11.1992) Art. 11(1).

<sup>89</sup> European Parliament, “Legislative Train Schedule”.



previous chapter, generous care leave arrangements for both parents tend to be linked to higher female employment rates.

Contrasting the substance of the Work-life Balance Directive to the proposed Maternity Leave Directive in light of the obstacles to positive integration helps explain the success of the former and failure of the latter. Whereas the Maternity Leave Directive constituted a primarily social initiative aimed at improving the social security of mothers, the Work-Life Balance Directive relies heavily on an economic *rationale*: addressing the imbalance between care duties in the family constitutes a response to dropping fertility rates and spreads best practice of the Member States with high female employment rates.<sup>90</sup> Hence, this constitutes yet another example of how policy framing influences the facilitation of intergovernmental consensus. Instead of harmonizing maternity leaves, focusing on work-life balance proves to be more efficient for the purpose of passing the joint-decision trap. It can be argued that the phrasing of Principle 9 of the EPSR upon which the Directive is based has facilitated this development.

In that regard, the Work-life Balance Directive has defeated the odds presented in the previous chapter which has suggested that positive integration of social policy is next to impossible. But if the Work-life Balance Directive has been successfully adopted, have the objectives of Principle 9 of the EPSR not then been fulfilled? The next step is to explore the gap between the Directive and the right to work-life balance as envisaged by Principle 9, and to what extent those resonate with the goal of facilitating sharing of care.

### **4.3. Bridging the gaps?**

Reiterating that the EPSR proclaims an equal access to special leaves of absence for men and women, a relevant observation is the failure of the Work-life Balance Directive to address maternity leaves. Arts. 11 and 12 of the Directive protect workers who make right of their leaves of absence and other flexible working arrangements provided thereof, from being discriminated against or dismissed. Consequently, dismissal or other discrimination on the basis of maternity leave fall outside of the scope of the Directive, with the consequence of an asymmetrical social

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<sup>90</sup> European Parliament and the Council, “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,” *OJL 118* (12.7.2019): see preamble.

protection guarantee between the parents being facilitated by the Directive. Furthermore, the minimum standards for paternity and parental leaves as set by the Directive fall considerably short of some of the standards already set by several Member States. On the other hand, some countries have a larger burden for transposing the directive, in particular where paternity leaves are short or unpaid for, or where parental leaves are not encouraged to be shared. However, with the average duration in EU-28 being 12.5 days and for paternity leaves and 87 weeks for parental leaves, the guarantee of 10 days and 4 months respectively by the Directive does not even match the pre-harmonization EU average.<sup>91</sup> Hence, there is an argument to be made that the extent to which the EPSR is able to address work-life balance is rather limited. However, a benefit thereof is that it leaves more room for taking domestic sensitivities into account, which inherently is the benefit of adopting directives over regulation. One can also argue that the adoption of hard law in the first place constitutes a success and in itself an advancement of the EU social *acquis*. This is based on the assumption that the Member States will continue to maintain their pre-existing standards if they are above the minimum level provided by the Directive, or they will transpose the Directive. However, such an assumption excludes considerations of negative integration and regulatory competition. It is relevant now to evaluate the risk of negative integration in the context of sharing of care in the EU through courts.

#### **4.4. The role of gender/social mainstreaming before the CJEU**

Member States employ a diversity of social arrangements which address female employment and the right to work-life balance to a varying degree. Nonetheless, several Member States ensure better protection than EU level policy currently does. Hence, it may be advisable to shield domestic arrangements from negative integration. However, venturing down this avenue raises questions of whether the EU efficiently carries its responsibility to ensure the well-being of its citizens, in particular those who fall subject to domestic policy which ensures the right to work-life balance to a much lesser extent. Hence, it is also relevant to analyse the social

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<sup>91</sup> Janna van Belle, "Paternity and Parental Leave policies across the European Union," a brief for Rand Europe (date of publication not known): 7-8.

mainstreaming facilitatory powers of the EPSR for the purpose of shielding domestic social arrangements against deregulation.

In *Deutsche Telekom* the CJEU recognized the right to equal treatment between men and women as laid down in Art. 157 TFEU to constitute a fundamental right stating that “the economic aim pursued by Article [157 TFEU], namely the elimination of distortions of competition between undertakings established in different Member States, is secondary to the social aim pursued by the same provision, which constitutes the expression of a fundamental human rights.”<sup>92</sup> The Court has extended the fundamental rights based reading of employment rights to encompass also work-life balance policy. In *Gerster* the Court maintained that work-life balance is not only a women's issue, but a right which also extends to men.<sup>93</sup> The rationale was expanded upon in *Hill* where the Court held that the purpose of EU policy is to “encourage and, if possible, adapt working conditions to family responsibilities,” and that “Protection of women within family life and in the course of their professional activities is, in the same way as for men, a principle which is widely regarded in the legal systems of the Member States as being the natural corollary of the equality between men and women, and which is recognised by Community law.”<sup>94</sup> Hence, it can be observed that the CJEU has been a driver for EU social mainstreaming in the context of gender equality in the field of employment policy.

With that observation in mind the next question is what is the role of the EPSR for such an insight? So far this thesis has shown that by facilitating policy framing in a manner which helps pass the joint-decision trap through giving social and economic issues an economic reading the EPSR has been successful at addressing sharing of care to a certain degree. However, this advancement can be reversed if faced with negative integration by the Courts. An analysis of the CJEU's case law on the balancing of gender equality issues vis-à-vis other competing interests, the Court tends to recognize gender equality as a fundamental right. Hence, issues related to the sharing of care tend not to be susceptible to negative integration in the Courts.

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<sup>92</sup> CJEU, C-50/96, *Deutsche Telekom AG v Lilli Schröder*, ECLI:EU:C:2000:72 (10.2.2000) para. 57.

<sup>93</sup> CJEU, C-1/95, *Hellen Gerster v Freistaat Bayern*, ECLI:EU:C:1997:452 (2.19.1997) para. 38.

<sup>94</sup> CJEU, C-243/95, *Kathleen Hill and Ann Stapleton v the Revenue Commissioners and the Department of Finance*, ECLI:EU:C:1998:298 (17.6.1998) para. 42.

#### **4.5. The influence of soft law**

The literature review discussed that soft modes of governance arguably constitute a good political compromise in the absence of other alternatives (due to failure to reach intergovernmental agreement or lack of EU competence) insofar as it is a way of accommodating domestic preferences and sensitivities in a policy coordinating effort. However, some of the disadvantages are the uneven impact thereof and the fact that the EES by virtue of being an employment facilitating mechanism gives social issues an economic reading. Reframing equality rights as economic advantages appear to be unfair means of circumventing the underlying issues to be addressed, since it is an avenue which gives the impression of social progress while limiting the analysis thereof to employment figures. The application and interpretation thereof can therefore have implication for the extent to which the rights proclaimed actually secure social protection.

This thesis has shown that where feasible, it is possible to exit the joint-decision trap. Hence, soft law alternatives ought not to be viewed as means to facilitate harmonization in the short term, but merely as tools that may allow long-term policy convergence and thereby consensus building. Therefore a strength is recognized in the flexibility provided by soft law. The added impetus for adhering to soft law is provided by the social scoreboard which makes failure thereof much more public than before. It is however, important to differentiate between the roles for hard law and soft law in their respective abilities to balance the strengthening of the social acquis against the accommodation of the diversity of welfare states.

## 5. Conclusions

In an EU where economic interest are given priority over social issues which manifests in weak competences of the EU to address them, or in difficulty of coming to a consensus on EU-wide policy due to the broad diversity of preferences, social policy can only be advanced in a manner that accommodates diversity under a unified, ideally legally binding framework. The Work-life Balance Directive, an offspring of the EPSR, constitutes a prime example of how reframing gender equality advancing policy as one that addresses employment contributes to the advancement of the social *acquis* by extension. By giving social issues an economic reading, the EPSR does not directly address the equal sharing of care, and does not tackle the underlying gender biases in families. However, it does help make possible a more even division of child-care duties in families which contributes to work-life balance eventually constituting an expression of choice.

Some questions do however remain open. Most notable, would not similar social progress be achievable without the EPSR? At the end of the day, the EPSR does not constitute more than a political commitment to advance the social rights it recognizes. It would appear that what is necessary for the advancement of social rights in the EU is a re-recognition of political obligation to see to it which is what the EPSR has provided. By extension, the EPSR has given

guidance to the interpretation of provisions in the treaties which so far have remained rather ambiguous such as Art. 3 TEU, Art. 9 TFEU and Art. 10 TFEU.

Hence, this thesis concludes that the EPSR can, and has, facilitated the sharing of care in families by virtue of constituting a framework which creates the necessary impetus to deliver on social goals in a legally binding manner, while also taking into account domestic sensitivities and preferences in the adoption of policy to that effect. Furthermore, in terms of policy framing, the EPSR has the potential of advancing social and employment rights by giving them an economic reading and therefore helping overcome the competence conundrum of the EU and the joint-decision trap among the Member States.

The main concern raised by this research is that the mere adoption of the EPSR may in itself produce a false sense of achievement on behalf of the Commission which contributes to the lack of further initiatives. For example: it is unlikely that there would be a follow up on the Work-Life Balance Directive in the foreseeable future. However, this is where the role of social policy comes in. The low threshold of adopting non-binding policy may have the long-term effect of converging Member States' domestic policy agenda, which is likely to be exacerbated by the Social Scoreboard insofar as at the Member State are interested in not being the worst performer. Hence, there is room to hope for a narrowing gap between care sharing facilitatory practices of the Member States, facilitated by the EPSR.

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