

Universiteit Utrecht



European network of legal experts in  
gender equality and non-discrimination

# FAMILY-RELATED LEAVE: ENFORCEMENT ISSUES

A report authored by Annick Masselot

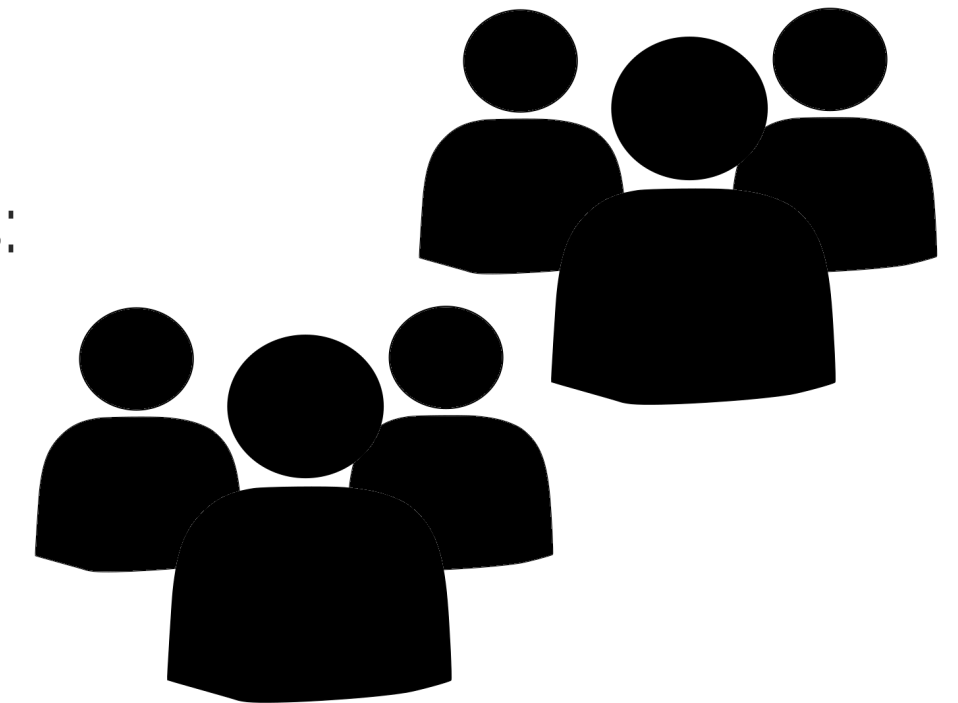
Presented by Franka van Hoof & Raphaële Xenidis



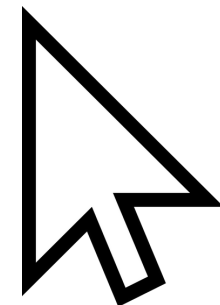
# THE EUROPEAN NETWORK OF LEGAL EXPERTS IN GENDER EQUALITY AND NON-DISCRIMINATION

Network of Independent Legal Experts from 35 Countries:

- 28 EU Members states
- 3 EEA Countries
- 4 candidate Member States



[www.equalitylaw.eu](http://www.equalitylaw.eu)



# THE REPORT

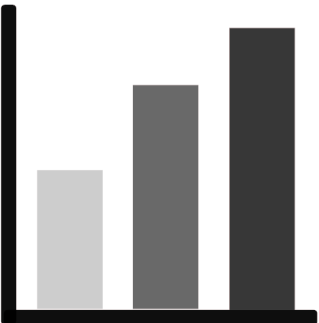
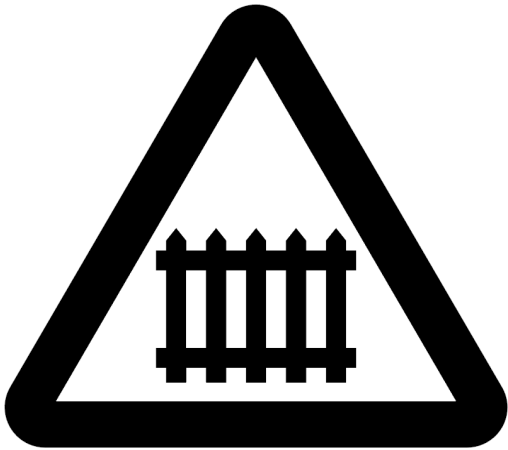
Authored by **Professor Annick Masselot**, University of Canterbury, New Zealand



Focus on **enforcement issues** in relation to potential discrimination and dismissal in the context of the various types of family-related leave

**Obstacles** are identified to the enforcement in practice of the provisions of:

- Maternity Leave Council Directive 92/85/EEC
- Part-time Work Council Directive 97/81/EC
- Gender Equality Directive (Recast) 2006/54/EC
- Parental Leave Directive 2010/18/EU
- Self-Employment Directive 2010/41/EU



**Data** was gathered from 31 country experts (EU + EEA)  
Based on responses to a questionnaire

# MATERNITY LEAVE AND PREGNANCY-RELATED ISSUES

Protection against discrimination and dismissal

Part 1

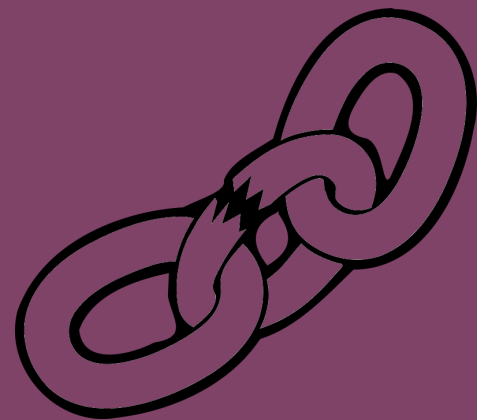
# ENFORCEMENT ISSUES RELATED TO DISCRIMINATION BASED ON PREGNANCY AND MATERNITY LEAVE



The discrimination of workers on the ground of pregnancy or maternity leave is **formally prohibited** in **all** EU Member States and EEA countries

Despite **small number of legal cases** regarding pregnancy and maternity discrimination, **instances of discrimination are** reported to be **numerous** and include cases of

- dismissal
- downgrading to an inferior workplace
- wage cut-backs
- denial of the possibility of promotion to better workplaces

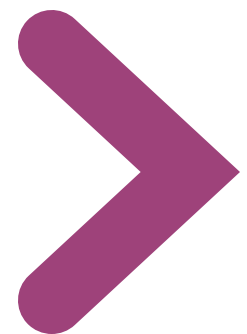


The **disconnect** between the law and the reality has many explanations

# ENFORCEMENT ISSUES RELATED TO 'GAPS' IN THE LAW

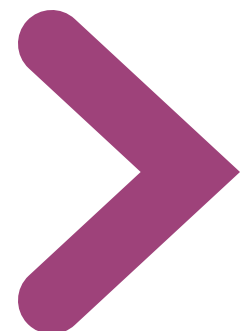


**Absence** in some countries **of specific anti-discrimination provisions** on the ground of pregnancy and maternity, discrimination based on pregnancy/maternity falls under General anti-discrimination law (Bulgaria, Germany, Lithuania and Poland)



May weaken broad awareness of workers' rights and thus their enforcement

**Personal scope:** Directive 92/85/EEC provides protection to 'workers'



Creates uncertainties with regard to the personal scope of the applicable prohibition, e.g. inclusion of members of corporate executive boards and practicing lawyers?

# ENFORCEMENT ISSUES RELATED TO APPLICATION OF ANTI-DISCRIMINATION PROVISIONS BY NATIONAL COURTS

1

The application of the concept of indirect discrimination

2

The reversal of the burden of proof

3

Remedies and sanctions



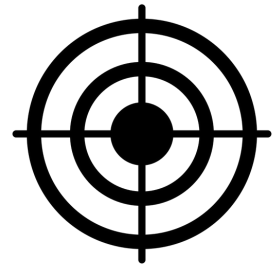
# OTHER ISSUES OF ENFORCEMENT



Underlying **stereotypes** as cause of discrimination, not actual pregnancy



Lack of access to **information** and/or lack of **awareness**



Victimisation and the fear of **victimisation**



**Complexity** of regulations concerning maintenance of payment



**Lack** of provisions regarding the right to **breastfeeding**



# ENFORCEMENT ISSUES REGARDING THE LEGAL IMPLEMENTATION OF THE PROTECTION AGAINST DISMISSAL



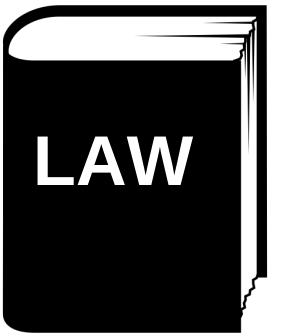
In compliance with Art. 10(1) and (2) of Directive 92/85/EEC the dismissal of workers on the ground of pregnancy or maternity is **prohibited in all countries** covered in the report



The **majority** of case law related to discrimination based on pregnancy and maternity concerns the **termination of the employment relationship**. Issues of discrimination or unfavourable treatment are often raised in the argument against the termination of employment, rather than as a stand-alone issue



# ENFORCEMENT ISSUES RELATED TO GAPS IN THE LAW



## Justification for Dismissal

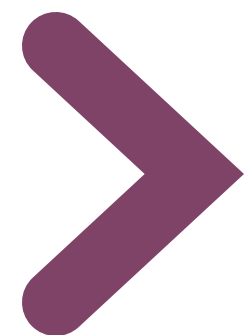
Art. 10 of Pregnant Workers Directive: " Member States shall take the necessary measures to prohibit the dismissal of workers [...] except for reasons unconnected to the pregnancy or the maternity as specified by national law"



Provision is **often abused** by employers, justifications for dismissal include inter alia economic grounds and redundancy

## Uncertainty regarding length of protection

Art. 10 of Pregnant Workers Directive : "Member States shall take the necessary measures to prohibit the dismissal of workers [...] during the period from the beginning of their pregnancy to the end of the maternity leave [...]"



There are **many different interpretations** to what the beginning of a pregnancy and the end of maternity actually constitutes

# ENFORCEMENT ISSUES RELATED TO APPLICATION OF PROTECTION OF DISMISSAL BY NATIONAL COURTS

1

Courts do not always recognize dismissal on ground of pregnancy/maternity as direct sex discrimination. They often find that 'sex' is not applicable because there is no evidence that the employer has been treated in a particular way because she is a woman

2

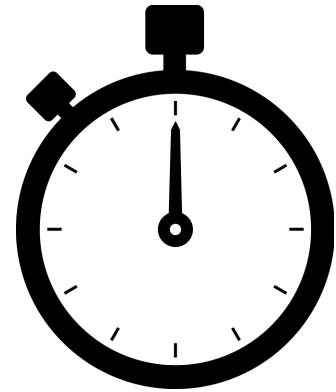
Application of the burden of proof

3

Remedies and Sanctions



# OTHER ENFORCEMENT ISSUES



Fixed-term contract of employment



The issue of 'blank resignation' and supervision procedures



Remedies and sanctions



Difficulty to prove link between pregnancy and dismissal

# PARENTAL AND ADOPTION LEAVE PATERNITY LEAVE CARERS' LEAVE

Protection against discrimination and dismissal

Part 2

## EU ACQUIS

Parental leave Directive 2010/18/EU



Parental leave



Paternity leave



Carers' leave



Flexible working arrangements

## THE WORK-LIFE BALANCE DIRECTIVE PROPOSAL

COM/2017/0253 final



Parental leave



Paternity leave



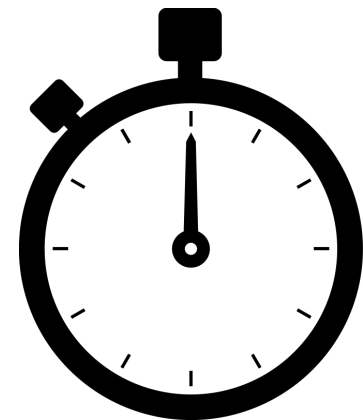
Carers' leave



Flexible working arrangements

# PARENTAL LEAVE

## LEGAL GAPS AND ENFORCEMENT ISSUES



1

### Legal provisions

Lack of clear, easily enforceable, specific provisions

2

### Service time

Not always counted as such in relation to the acquisition of work-related rights, pay and bonuses, promotions...

3

### Compensation

Payment is not compulsory under EU law and varies at national level

4

### Complexity

Rigidity, lack of flexibility, complex procedures

5

### Underreporting

Lack of monitoring, reporting and lack of enforcement in courts

# PERCENTAGE OF FATHERS WHO TAKE UP PARENTAL LEAVE

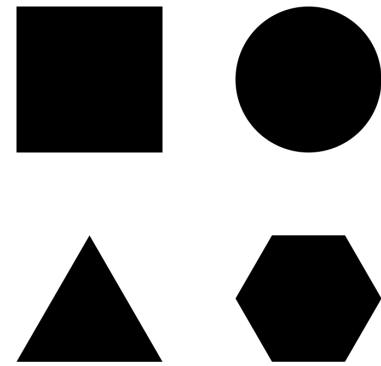
Selected comparative outlook





# PATERNITY LEAVE

## LEGAL GAPS AND ENFORCEMENT ISSUES



1

### Lack of harmonization

Not mandatory, heterogeneous provisions at national level.

2

### Rigidity

Lack of flexibility of the leave's format, complex conditions of application

3

### Compensation

Inexistent or too low to set incentives

4

### Legal protection

No or no specific protection against discrimination/dismissal and insufficient judicial enforcement

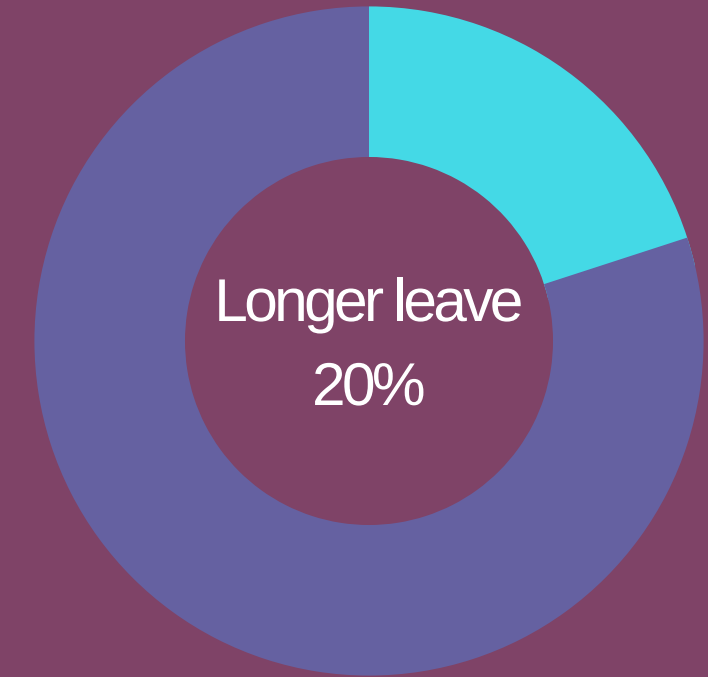
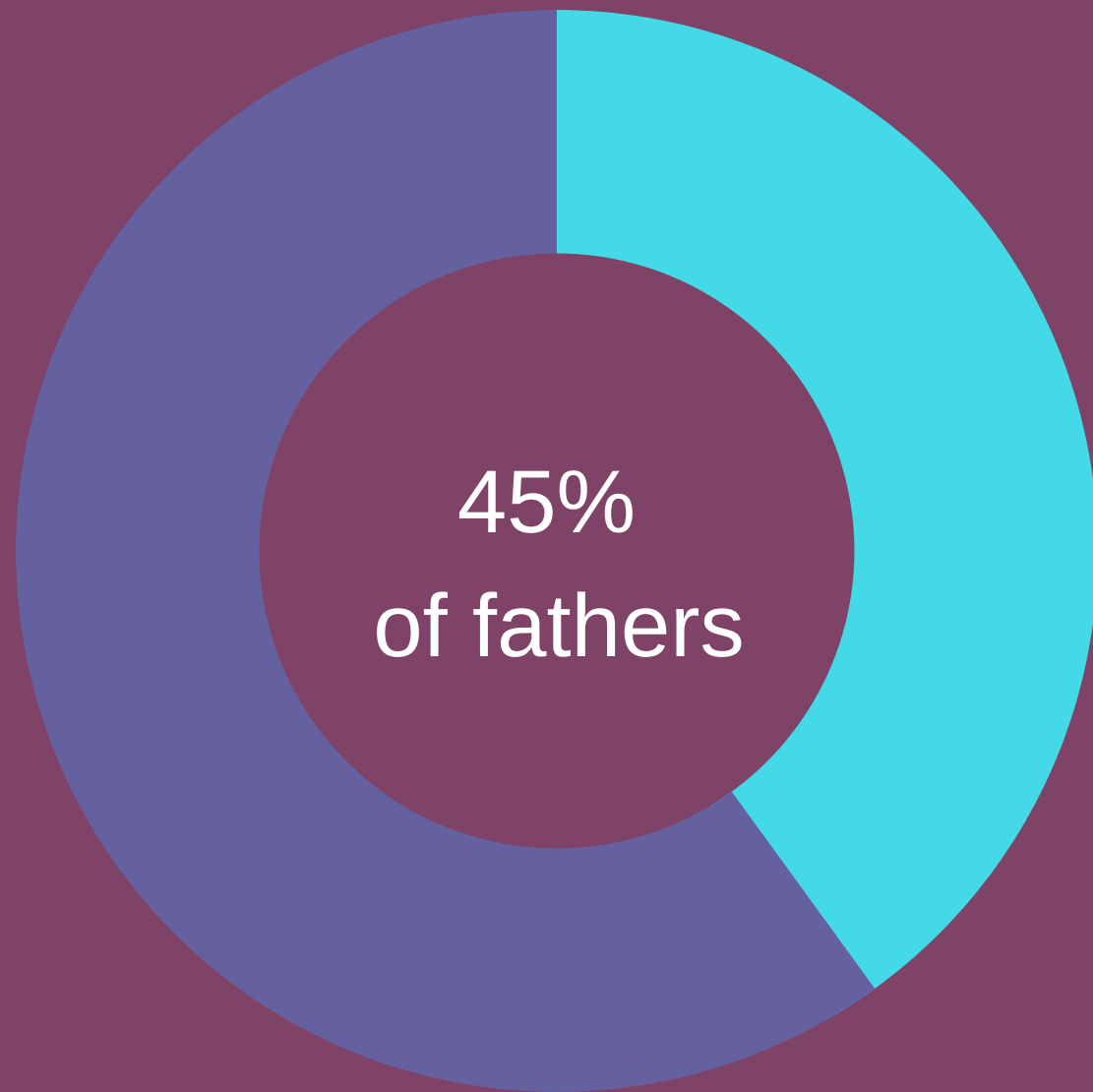
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### Cultural attitudes

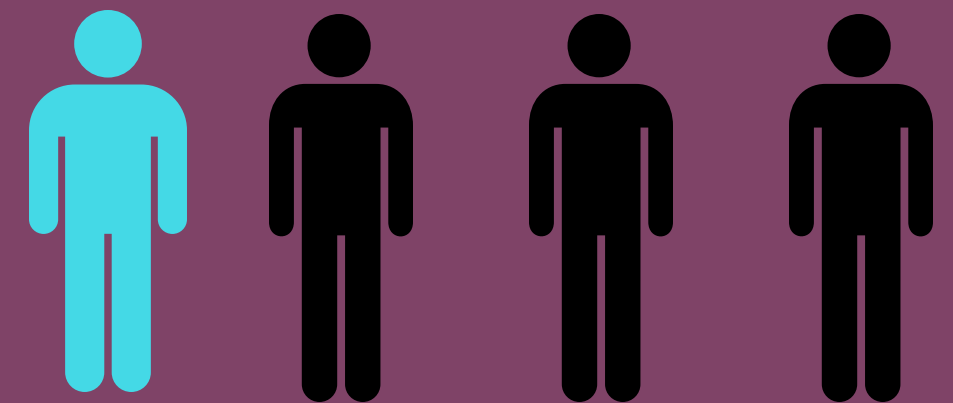
Gender-based stereotypes, lack of awareness from employers and employees...

# TAKE UP OF PARENTAL LEAVE

The example of Denmark

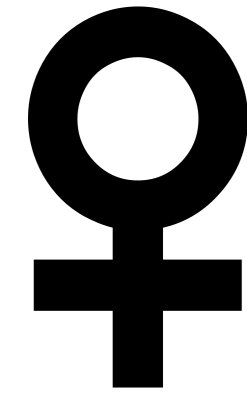
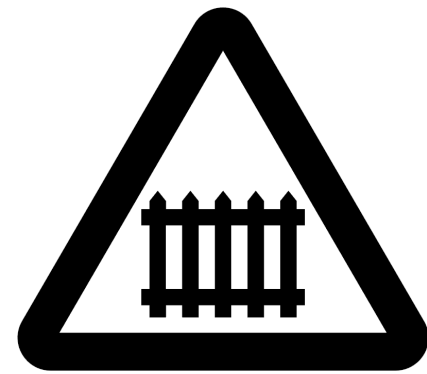


Experienced discrimination



# CARERS' LEAVE

## LEGAL GAPS AND ENFORCEMENT ISSUES



1

### Heterogeneous

Scope, beneficiaries, purposes, length...vary greatly at national level

2

### Barriers & restrictions

Due to complex conditions of application, lack of transparency of regulations, and lack of flexibility

3

### Compensation

Payment is not compulsory under EU law and varies at national level

4

### Legal protection

No or no specific protection against discrimination/dismissal and insufficient judicial enforcement

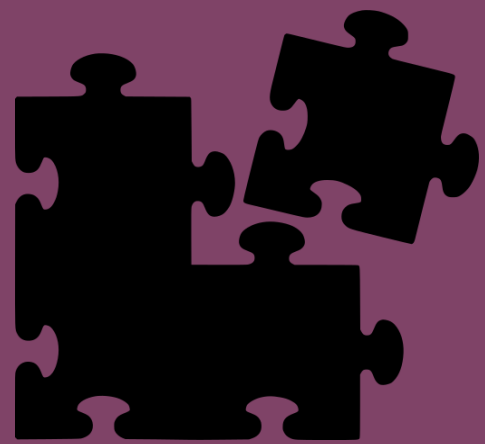
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### Gender effect

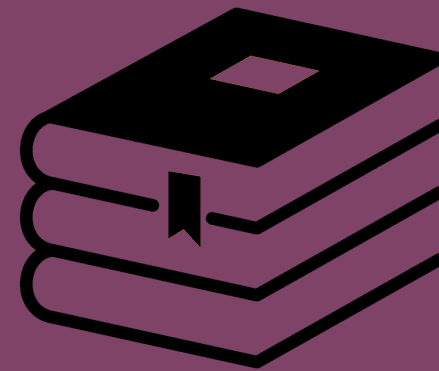
Vicious circle of gender segregation, devaluation, low pay, gender stereotypes

# CONCLUSIONS

Gap between  
law and reality  
'highly defective  
enforcement'



Need for EU  
harmonisation &  
improvements



♀ ♂  
Women  
disproportionately  
affected by  
discriminations



Need for a more holistic approach

- awareness-raising
- information dissemination
- better access to justice



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