**Unjoined-up Policymaking and Patchy Promotion of Gender Equality: Free Movement and Reconciliation of Work and Family Life in the EU**

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**I. Introduction**

The way in which citizens of the EU experience day-to-day family life may, at first consideration, seem quite far removed from the interest of the Union, with its historically-entrenched preoccupation with economic objectives and supranational structure. Of course, as the contributions to this volume demonstrate, EU law and policy in actual fact impacts on family life in a myriad of ways and has implications for a number of different policy areas that can help shape family experiences. This chapter considers two such significant areas of EU law and policy: reconciliation of work and family life and free movement of persons. These areas have the potential to impact in a grounded, practical sense on the lives of Union citizens. To this extent, whilst family members of EU migrant workers have traditionally been afforded important entitlements under Union secondary legislation, and the CJEU has further enhanced the available protection through its interpretive role, there has also been developed a distinct body of law and policy which endeavours to facilitate a better balance between work and family life within the EU.

It will be demonstrated here that, in spite of the *existence* of these two family-implicated policy areas, there is little synergy between them and they have developed in the absence of cross-consideration. The agenda for reconciliation of work and family life fails to take into account the importance of balancing work and family life for migrant workers and, by corollary, the law on free movement fails to appreciate the need to embrace an approach that respects the particular family circumstances of many migrants. The focus of this contribution is, therefore, on family life of migrant workers on the basis that the experience of this group, when seeking to work and enjoy family life, stands as a particularly illuminating case study. Such mobile EU citizens essentially find themselves occupying the site at which the policy areas of free movement and reconciliation of work and family life meet. Migration poses particular challenges for family life, not least that migrant families are less likely to have access to wider family support networks to provide informal childcare. Taking this into account, the main contention of the chapter is that the failure of the two policy areas to have a meaningful impact on this group, who operate at the point of tension between the two, undermines the value of them in a discrete, individual sense.

Central to the analysis is examination of the extent to which the two policy areas presently engage with, and acknowledge, the long-standing trend of women having responsibility for the majority of care carried out within family units, which remains relevant today (see, e.g. Pickard 2008, Equality and Human Rights Commission 2013 and European Commission 2015). Not only do women continue to spend more time than men carrying out domestic tasks and care work but, in many instances, obligations relating to care (often but not always relating to children) necessitate a break from employment (maternity leave is the most obvious example) and/or a change in, or even cessation of, working patterns (European Commission 2014). This chapter will demonstrate that such breaks can pose problems for the continuance of protection under the free movement of persons provisions. It will also illustrate that the reconciliation of work and family life agenda – despite expressly recognising the particular circumstances of many women with caring obligations – does not presently extend the sort of sufficiently robust male-focussed entitlement to reconciliation-related rights that would be necessary to engender a shift in the gendered patterns of care within families.

The first section will examine the reconciliation of work and family life agenda from the perspective of whether it truly incorporates a commitment to gender equality and can have implications beyond the static context for mobile workers. The section that follows will pick up on the free movement context to consider how far it engages with pregnancy-related leave and the caring commitments that follow, as well as with gender equality more broadly. Overall the chapter will demonstrate the lack of synergy between the two areas of EU law and policy and the current stagnation of any efforts to promote progression and crossover between the two. It addresses a lacuna in the literature in that, although both policy areas have attracted a wealth of research in their own right, there has been little consideration of the potential overlap between the spheres or acknowledgement of the lack of joined-up policy making. Ultimately, analysis across both policy areas through the lens of family life leads to articulation of a broader argument that the EU institutions are presently unable, or perhaps unwilling, to embody in their actions or judgments a genuine commitment to gender equality.

**II. EU policy on reconciling work and family life: how (ir)relevant is it to modern family life and mobile workers?**

*A. Current position and future directions*

The reconciliation of work and family life is consistently portrayed as a priority on the agenda of the EU institutions, as is demonstrated by the launch of a European Commission Roadmap in August 2015 entitled “*New start to address the challenges of work-life balance faced by working families”* (European Commission 2015). This initiative, rather than setting out a distinct plan of action for the EU in the area, maps different options (encompassing a combination of legislative, non-legislative and policy-based activity) to move law and policy on work-life balance in the Union forward. Reconciliation of work and family life is not, of course, unfamiliar territory for the Commission or the EU more broadly, as various Union policy initiatives and legal measures have, over the years, been designed, implemented and promoted under the headline of helping workers to better ensure that both work (professional responsibilities) and family (care responsibilities) can be accommodated within increasingly busy schedules. Indeed, the 1974 Social Action Programme[[1]](#footnote-1) requested implementation of measures to help achieve gender equality in the workplace, with particular emphasis on ensuring reconciliation of family and professional responsibilities (for more detailed discussion of EU law and policy in this area see Caracciolo di Torella 2011, Masselot and Caracciolo di Torella 2010, Busby and James 2015, Golynker 2015). From a hard law point of view, obvious examples include the directives on pregnant workers (maternity leave),[[2]](#footnote-2) parental leave,[[3]](#footnote-3) working time[[4]](#footnote-4) and part-time work.[[5]](#footnote-5) Given the lack of clear competence in the area, the Union has tended to use a combination of health and safety[[6]](#footnote-6) and equality[[7]](#footnote-7) as legal bases for action in the area. Amongst the plethora of “softer” initiatives, the Council Recommendation on childcare, which encouraged initiatives to enable women and men to reconcile their occupational, family and child-raising responsibilities[[8]](#footnote-8) and a later Resolution on balanced participation of women and men in family and working life,[[9]](#footnote-9) provide noteworthy examples.

Throughout its history, EU law and policy on reconciling work and family life has been framed very much within the ambit of the broader goal of achieving gender equality (Busby and James 2015, p 297). In the early stages of its development, the emphasis was on enabling women to combine their traditional (and often considerable) responsibility for childcare and domestic tasks with the more contemporary propensity (in many instances financial necessity) for families to be dual-earning. More recently, there has been growing recognition that reconciliation is viewed as a fundamental right with the potential to enhance both women and men's lives. The reference to it in Article 33 of the Charter of Fundamental Rights[[10]](#footnote-10) supports this perception of reconciliation as a notion that holds such resonance (see Masselot and Caracciolo Di Torella 2010, pp. 39–48, James 2012, p. 364). The case law of the CJEU has also reinforced the status of reconciliation as a principle protected by Union law.[[11]](#footnote-11)

It would be short-sighted (and naïve), however, to consider only equality and fundamental rights concerns as having shaped the development of law and policy on reconciliation of work and family life. Economic objectives have also played a major influencing role, and the Commission has linked reconciliation particularly with a desire for as many individuals as possible to be economically active in order to enhance the competitiveness of the EU (Masselot and Caracciolo Di Torella 2010, p.3).[[12]](#footnote-12) The 2015 “New Start” Roadmap highlights as the main issue the need to “address the low participation of women in the labour market by modernising and adapting the current EU legal and policy framework to today’s labour market to allow for parents with children or those with dependent relatives to better balance caring and professional responsibilities” (European Commission 2015, p.1).

The undeniable undercurrent in this latest initiative is that the approach the EU has taken in previous years when seeking to advance the reconciliation agenda has failed to deliver, largely due to the lack of success in meeting the targets for women’s employment as set out in strategies such as the Lisbon Agenda and Europe 2020.[[13]](#footnote-13) That such employment targets have shaped the approach taken to achieving better reconciliation, however, is itself open to criticism. Lewis (2000, p.13), for example, has been critical of how reconciliation has been instrumentally used as a tool to raise employment rates and has proliferated a concentration on economic aspects, at the expense of attention being given to non-economic considerations, such as the conditions of work experienced by individuals. Busby and James (2015, p.296) also lament the entrenched economic focus of reconciliation policies and express particular disappointment in the presently stagnated position of Union-level policies in the area.

Of course, reconciliation of work and family life is not the only “social” policy area in a state of listlessness. The recession, combined with austerity policies at the national level in a number of Member States, and the practical difficulties of decision-making on sensitive issues in an EU of 28, have impacted on social law and policy more broadly. For example, in so far as equality law is concerned, there is little appetite for fresh action on the part of the Union in this area (at least so far as hard law is concerned). The lack of agreement regarding the Commission’s 2008 proposal for a new Equality directive,[[14]](#footnote-14) and continued slow progress of the discussions in Council, is indicative of the disinclination to genuinely reopen or update the secondary legislation in this area.[[15]](#footnote-15)

From one perspective, the existence of the Roadmap, and the linked consultations (with social partners and the public) about the future direction of EU action on work-life balance (launched in November 2015), are indicative of a vibrant policy area. From another angle, it is very telling that the launch of the Roadmap followed on quickly from the withdrawal of the Commission’s 2008 proposal to amend the directive on pregnant workers.[[16]](#footnote-16) This contained provision to extend the minimum level of maternity leave from 14 weeks to 18 weeks and to introduce the principle of full pay during maternity leave, subject to a ceiling that Member States could enforce. The failure of this proposal demonstrates the present inability, and unwillingness, of the EU (or at least many of its Member States) to take even fairly limited legislative action at the current time. Therefore, in reality, the Roadmap is representative of an attempt by the Commission to at least keep the issues on the agenda, and to reignite discussion about the significance of the issues.

*B. Recognition that women face particular challenges in reconciling work and family life… but what about male-focused initiatives?*

There is a definite acceptance that women continue to face particular challenges linked to reconciliation, frequently as a consequence of child-bearing and being primarily responsible for the child-rearing, within the Roadmap: “[t]here is strong evidence that after having children many women drop out of the labour market entirely and those who continue to work often do so in part time although they would like to work full time or they work in jobs below their level of qualification.”(European Commission 2015, p.1) Furthermore, it expressly states that “female labour market participation remains below its potential due to a lack of possibilities to balance work and family responsibilities, including lack of affordable childcare, rigid working arrangements or absence of incentives for men to take more care responsibilities in their families” (European Commission 2015, p.1). It ultimately frames the desire to increase women’s economic independence as necessary to avoid wasting the EU’s resources and to reverse the current “sub-optimal allocation of skills and competences acquired through education by women” (European Commission 2015, p.1).

The recognition of the particular challenges faced by women is welcome but it is striking that the Commission’s concern for the experience of women extends only in so far as they wish to be economic actors. The message continues to be that women (and men) should be supported in their ability to provide care for their families – whether that be for children or for other dependent family members, including elderly parents – so long as they remain part of the labour market. Caring of itself is not valued, and this is a theme that will be returned to later in the context of the free movement framework. Moreover, in no way should appreciation of the recognition that women continue to be primarily responsible for care within families be misinterpreted as a suggestion that reconciliation policies do not also need to focus on men. Quite to the contrary, the burdens experienced most acutely by women in seeking to incorporate within their lives a better balance between professional and family life render it even more important that men can enforce accessible reconciliation-based rights. Not only is this significant for men’s own personal experience of family life and fatherhood, which men today are expected to embrace in a more active manner than was the case for previous generations (Collier 2009), it is only through the greater participation of men in activities connected to caring that women will ever be alleviated of some of the expectation of responsibility.

This does appear to have been recognized by the Commission in the latest Roadmap. Indeed, various policy documents and soft law produced by the political institutions over the years have been keen to promote the value of reconciliation for women *and* men.[[17]](#footnote-17) In contrast, the CJEU has not always been as keen to encapsulate within its reconciliation-related judgments the notion that men too should derive such protection. For example, the case of *Hofmann* is frequently cited as an example of the Court being reluctant to get involved in decisions capable of being perceived as an attempt to alter the balance of responsibilities between parents in the private sphere.[[18]](#footnote-18) This case concerned a father, the primary carer of the child, whose attempt to access a German benefit available to mothers was refused. The CJEU was not convinced of his argument that this ran contrary to Equal Treatment Directive.[[19]](#footnote-19)

In the later case of *Roca Alvarez,* however, the CJEU did “endorse a model of (more) equal parenting” (James 2012, p. 371). Here a father's claim that the restriction of a right to take leave in the first nine months of a child's life to employed *mothers* was contrary to the equal treatment directive was upheld. The Court explicitly referred to the ramifications of the national rule as perpetuating men and women's traditional roles.[[20]](#footnote-20) Maïstrellis*[[21]](#footnote-21)* provides a further example of the Court supporting a man’s claim to protection under EU reconciliation of work and family life legislation, this time in respect of parental leave. This case concerned a Greek judge (classified as a civil servant under Greek law) who challenged Greek legislation that provided that male civil servants were not entitled to access paid parental leave if their wife did not work or exercise any profession, unless it was considered that the wife was unable to meet the needs related to the upbringing of the child due to serious illness or injury. The Court found this to be direct discrimination on grounds of sex, contrary to the Recast Equal Treatment Directive,[[22]](#footnote-22) pointing out that “the mere fact of being a parent is not sufficient for male civil servants to gain entitlement to that leave, whereas it is for women with an identical status.”[[23]](#footnote-23) This provides an example therefore of the Court applying the Equal Treatment Directive to find that men are placed in a more disadvantageous position than women by virtue of the national law. The Court in Maïstrellis did not go so far as placing the decision within the broader equality context, for example by explicitly recognising the link between the enhancement of men’s access to reconciliation as a means of also increasing women’s experience of managing work and family life.[[24]](#footnote-24) It did again, though, make reference to the desire to avoid perpetuating traditional distributions of gender roles.[[25]](#footnote-25)

The discussion in this section so far has demonstrated an awareness on the part of the political institutions and the Court of the need for women and men alike to be able to access reconciliation-related rights. This is undermined, however, by certain aspects of the EU’s legislative framework on reconciliation and the Commission has acknowledged that the “current policy and legislative framework tends to discourage men to take family-related leave” (European Commission 2015, p.2). Commentators such as Masselot and Caracciolo Di Torella (2010) (see also Caracciolo Di Torella 2007), for example, have pointed to the stark differences between women and men's entitlement to leave following the birth of a child. The right to take a period of maternity leave is considerably more developed and protected than the male equivalent right to take paternity leave. Directive 92/85 on Pregnancy specifies that paid maternity leave should be granted for a minimum of 14 weeks.[[26]](#footnote-26) In contrast, EU law does not expressly set out any right to a period of paternity leave; rather, Member States are *encouraged* to provide such entitlement by the Council Resolution on the Balanced Participation of Women and Men in family Life. Here, the use of soft law in respect of the fathers' rights, compared to the hard law-protected rights of mothers, most likely signifies that the reconciliation of men’s work and family life is a goal less able to attract a level of agreement amongst the 28 Member States. In other words, this remains a more politically sensitive issue than the more readily culturally-accepted notion that women should be able to combine paid work with family life.

The Parental Leave Directive[[27]](#footnote-27) is acknowledged as a measure that treats mothers and fathers on equal terms by providing both parents with a right to leave in respect of their family obligations. However, the effectiveness of this Directive has also been questioned on the basis of the lack of any guaranteed entitlement to pay. Masselot and Hadj Ayed (2004, p. 333) point out that because fathers ‘generally generate the highest income in families … they are reluctant to exercise their right to leave. Accordingly, it is more likely that the partner with the lowest income (usually women) will take unpaid leave’. Consequently, the usefulness of this Directive in truly facilitating reconciliation for fathers is uncertain. In reality the apparently ‘preferential’ treatment given to mothers by certain of the reconciliation measures only serves to reinforce the traditional stereotype of women as holding primary responsibility for caring and domestic tasks and to, ultimately, undermine the ability for families as a whole to reconcile work and family life (Caracciolo Di Torella 2007, p. 322). Taking such considerations into account, it would seem that, in spite of rhetoric about reconciliation being relevant to both women and men, and a shift by the CJEU to recognise a more equal model of parenting, the body of hard law that incorporates reconciliation-related rights remains inaccessible to many men in practice. Women undoubtedly face greater challenges in respect of reconciliation, but if progress is to be made in addressing such challenges, the law and policy agenda should take serious (as the Roadmap suggests) the need to incorporate men in the reconciliation discourse and, more concretely, ensure that men can enforce reconciliation-related rights.

*C. Promulgation of a static worker model*

In addition to the criticism that the reconciliation agenda has not gone far enough in creating male-focused rights and entitlements, this policy area can also be challenged on the basis that it has not taken into account the position of migrant workers. The reconciliation agenda is premised on the basis of a static workforce operating in a single national jurisdiction and does not make any provisions for those exercising EU-facilitated rights of mobility to work and reside across national borders. This brings to the fore a number of issues. First, it is at odds with the trajectory and life-work course of many mobile citizens in the EU (Currie 2013), and ignores research that explicitly recognizes the need to consider mobility, work and family life in conjunction as part of a coherent policy strategy (Ackers and Stalford 2004). Moreover, the very reason people often make the decision to migrate is to try and enhance the living standards and life chances available to themselves and their family members alike (Boyd 1989). Thus, migration may be a household/family strategy for achieving a better quality of family life.

Secondly, the very premise upon which Union law initially extended residence and equal treatment rights to family members under the free movement provisions was to encourage workers, as factors of production, to exercise their economic right to free movement. The CJEU has also consistently extended benefits to the immediate family members of workers on the basis that such assistance has an indirect benefit for the worker him or herself; the Court asserted that such an approach was necessary in order to “facilitate the migrant workers’ migration to and integration in the host Member State.”[[28]](#footnote-28) Given this apparent understanding of the link between mobility and family life, evidenced both in the secondary legislation and in the Court’s case law on free movement, it is unfortunate that reconciliation initiatives have not, at any point, sought to acknowledge the particular situation of migrant workers.

Of course, this argument could be challenged by the contention that, in fact, there is no need for the reconciliation agenda to acknowledge the particular position of mobile citizens because, as has been pointed out already, the free movement provisions (and the Court) have addressed this by including family entitlements within the free movement provisions. While it is true that valuable family-related entitlements have been extended to migrant citizens (workers in particular) when residing in Member States other than that of their nationality - including educational rights, labour market rights and entitlement to various forms of social assistance – the basis of such rights is “national treatment.” In other words, the migrant workers and their families are entitled to receive the same rights as nationals of that Member State.[[29]](#footnote-29) Arguably, such “national treatment”, although valuable for extending a core nucleus of key rights, is not far-reaching enough to specifically target the rather particular reconciliation-related family needs of migrants. Mobility in itself raises particular challenges in this regard. For example, migrant families are frequently separated from the extended family unit and, consequently, have less support in terms of *informal* childcare than national workers (Ackers and Stalford 2004). This is particularly pertinent when the often inadequate nature of formal childcare services in Member States – in terms of affordability, availability and accessibility – is taken into account (European Commission 2013).

In addition, migrant workers have often been resident in the host Member State for relatively short periods of time. This can be especially problematic as EU law enables Member States to impose qualifying periods before which workers become entitled to various reconciliation-related rights, such as requesting flexible working or parental leave. For example, Directive 2010/18 states that entitlement to parental leave can be made subject to a period of work qualiﬁcation of up to one year in duration. While factors such as these can pose difficulties for all migrant families when it comes to seeking to balance work and family life, it is also clear that such challenges will be heightened in the case of poorer migrant families without the resources to, for example, afford formal childcare or take unpaid leave at times of family need.

The failure of the reconciliation initiatives to even give consideration for particular provision to be made addressing the specific situation of mobile citizens, for example by way of exceptions to the standard qualifying periods being introduced to the relevant provisions, demonstrates the dominance of the static worker model within this area of law and policy. This is unfortunate from the point of view of EU migrant families as it leaves them in a position in which it is even more difficult for them to rely on provisions designed to achieve a balance between work and family life than it is for their national counterparts. In the next section the discussion will move on the free movement of persons provisions in order to consider further the extent to which this area of law is engaging with particular challenges faced by families, especially in relation to the provision of care.

**III Migrant worker women and (in)security of status**

Free movement as an area of EU law and policy is very distinct from the reconciliation of work and family life agenda. Free movement has historically been inextricably linked to the development of the Single Market and, as a fundamental freedom, has a much more visible place in the treaties than the reconciliation of work and family life agenda. Traditionally, free movement of persons has encompassed free movement of workers, freedom to provide services and the freedom of establishment.[[30]](#footnote-30) Free movement has also been a key element of the status of citizenship of the Union,[[31]](#footnote-31) which has built on the nucleus of “citizenship” rights (including residence and equal treatment on grounds of nationality) already developed under the free movement of workers, and extended them to cover certain non-economic situations and migrants.[[32]](#footnote-32) Clearly, the EU’s claim to competence in the area of free movement also goes beyond that in the area of reconciliation (for a contemporary discussion of the position of EU law on free movement see Shaw 2015).

It has already been pointed out that, despite the original economic preoccupation of the Union and free movement policy more generally, there was early recognition of the necessity for workers’ family members to be extended rights in order to render free movement a more realistic and attractive option for the EU’s working age population.[[33]](#footnote-33) This section will consider the extent to which elements of free movement law and policy are currently engaging with concerns relevant to the discussion above as regards to the reconciliation of work and family life. It builds on the premise of the previous section, that reconciliation policy has not incorporated an understanding of the lives of mobile citizens, to argue that, similarly, free movement law is not encompassing a genuine commitment to ensuring that migrant workers can manage family and caring responsibilities. In essence, free movement law continues to operate in a gender discrete way, and can have particular implications for the experience of female migrants, especially those with caring responsibilities, exercising their EU rights to mobility. The focus of this analysis is primarily on the “case study group” of those exercising rights to move as workers pursuant to Article 45 TFEU.[[34]](#footnote-34) Specifically, it considers the potential for the status of worker to have continuing effects once employment has stopped as a result of pregnancy, care responsibilities, or the temporary or insecure nature of the work carried out.

*A. Incorporation of pregnancy-related employment breaks into the free movement framework: time-limited protection*

The starting point when considering whether a migrant can retain the status of migrant worker under EU law, and enhance continue to enjoy the benefits that attach to it, is Article 7(3) of Directive 2004/38.[[35]](#footnote-35) This provision provides a number of circumstances in which a migrant who has been a worker pursuant to Article 45 TFEU can retain the status despite no longer being in the labour market. These include: (a) being temporarily unable to work as the result of an illness or accident; (b) being involuntarily unemployed after one year of employment and registering as a job-seeker; (c) being involuntarily unemployed before having completed a year of employment and registering as a job-seeker, or completing a fixed-term employment contract of less than a year (in these instances the status of worker shall be retained for no less than 6 months), and (d) embarking on vocational training relating to the former work. Conspicuously absent from this list is any mention of pregnancy or maternity leave. The CJEU had the opportunity to consider the relevance of the provision, however, to pregnancy-related leave in *Jessy Saint Prix*.*[[36]](#footnote-36)*

Ms Saint Prix was a French national who arrived in the UK in July 2006. She worked as a teaching assistant before enrolling on a Post Graduate Certificate in Education course. In February 2008 she withdrew from the course as she was pregnant, the baby being due in early June 2008. Ms Saint Prix then sought employment in a secondary school (registering with an employment agency to assist her). As no positions at secondary school level were available, she instead worked in a series of nursery school roles. When she was almost six months pregnant the demands of caring for pre-school children had become too strenuous and Ms Saint Prix stopped this work. She initially searched for lighter work but, when none was available, made a claim for Income Support. Ms Saint Prix’s claim was refused by the UK authorities, ultimately because she was not considered to have continuing status of a migrant worker under EU law (and, consequently, could not be considered as having a right to reside in the territory).

The CJEU in its judgment made the clear statement that a woman should not, in principle, be deprived of the status of worker within the meaning of Article 45 TFEU by virtue of being required to give up work due to the constraints of the late stages of pregnancy and immediate aftermath of childbirth.[[37]](#footnote-37) The outcome of this case was therefore positive in so far as the Court accepted that female migrant workers who temporarily give up work because of the physical constraints of the late stages of pregnancy and the aftermath of childbirth are entitled to continue to hold the status of migrant worker pursuant to Article 45 TFEU. Significantly, this in turn can provide access to valuable entitlements in the host Member State, such as Income Support and other benefits available to nationals in analogous circumstances.

However, the Court in *Saint Prix* also limited the time period that a woman could be expected to be absent from the labour market: “the fact that she was not actually available on the employment market (…) for a few months does not mean that she has ceased to belong to that market during the period, *provided she returns to work or finds another job within a reasonable period after confinement*.”[[38]](#footnote-38) Those that do not return to work within a reasonable time will, presumably, revert to the status of “initial” work seekers. Although Article 45 TFEU continues to govern the situation of such “initial” work seekers, the scope of their right to reside and, particularly, their stake to equal treatment-derived, social protection-related (social assistance) rights, is more curtailed and unclear than those with the retained status.[[39]](#footnote-39) It will be the role of national courts, taking into account national rules on maternity leave to make the determination on reasonableness.[[40]](#footnote-40)

At this point, there may well be more of a tangible overlap between EU free movement and reconciliation policies in that the national law the court engages with is likely to be shaped, at least partially, by policies and commitments contained in reconciliation-related initiatives at EU level (most notably the Pregnancy Directive). This raises a number of issues. First, it creates some uncertainty for women who rely on their retained worker status for a period but then struggle to find employment upon their return to the labour market, either because their employer has gone out of business or due to difficulties finding work that can accommodate the changed family circumstances. It is also not clear whether a woman who does have difficulty in securing employment beyond the “reasonable time” would be required to pay back money received as a benefit. This could potentially be a very stressful experience for the migrant and her family members. Secondly, the need to return to work in a “reasonable” time poses particular difficulties for women with ill babies or babies that have additional needs and for whom a prompt return to work is simply not feasible (or desirable, from their point of view).[[41]](#footnote-41)

This also links to a wider consideration about how EU free movement law fails to value unpaid care work, despite the often significant nature of the work involved, in terms of time and resource (O’Brien 2013 and Busby 2011). The CJEU has been consistent in its refusal to include unpaid care work within the scope of economic activity in the free movement context.[[42]](#footnote-42) This reinforces the view that a woman unable to return to work in a “reasonable” time, even when this is due to having to care for her ill baby, would be unable to demonstrate fulfilment of the conditions needed to qualify as a worker with retained status. Indeed, the case of *Dias* involved a woman who did not work while she was caring for her ill child. Here, the woman was not treated as a worker with retained status, although this was not directly considered by the CJEU in that case. Advocate General Wahl in *Saint Prix,* however, did pick up on *Dias* and distinguished it from *Saint Prix* on the basis that “the mother’s absence from work extended beyond the time when there was a medical reason for her not to return to work.”[[43]](#footnote-43) This illustrates quite starkly the reluctance to even give serious consideration to the potential to recognise that pregnancy and childbirth at times may necessitate flexibility with regards to the ability of women to return to the labour market as promptly as seems to be expected. If there is a failure to acknowledge this socially and politically, the legal framework governing the rights of migrant workers, including (and perhaps especially) those that apply when the worker leaves the labour market, is at present also failing to incorporate or promote any such flexibility.

The analysis here highlights how the free movement framework fails to value care-giving and, in extending protection only to those women who can be categorized as still being part of the labour market, is preoccupied – like the reconciliation agenda – with women (and men) being economically active.

*B. Slipping through the net of Article 7(3): migrant women in short-term and insecure work*

The preceding discussion pointed out the problematic nature of the time-limited protection extended to those on pregnancy-related breaks from employment. However, for those unable to retain worker status in the Article 7(3) sense *at all*, the situation is perhaps even more precarious. Those who do not fall within the scope of the provision must immediately navigate the process essentially as an “initial” work seeker, without any recognition being given to any time already built up in the labour market.

This precariousness of this position is illustrated by the case of *Alimanovic.[[44]](#footnote-44)* This concerned a Swedish woman, and one of her adult daughters, both of whom had been in (temporary) work in Germany, but for 11 months, and not within the previous year. The Court in this case was quick to apply Article 7(3) in a rather literal sense, stressing that the claimant had been unemployed for longer than the six months specified in the provision (Art. 7(3)(c)), and therefore could not rely on a retained status to secure continuing entitlement to benefits, including family allowances. This approach actually stands in contrast to that adopted in *Saint Prix,* where the Court was keen to emphasise, when considering the non-exhaustive nature of the provision, how the status of worker stems directly from the *Treaty* as opposed to the secondary legislation (para. 32).[[45]](#footnote-45) Perhaps even more tellingly in *Alimanovic,* the Court did not refer to the supposed “fundamental” nature of the status of Union citizenship, nor did it incorporate proportionality and conduct an “individual assessment” of the claimant’s circumstances, both hallmarks of the citizenship free movement case law since *Grzelcyk.[[46]](#footnote-46)* The CJEU stated that no individual assessment was needed because the directive itself “establish[ed] a gradual system as regards the retention of the status of ‘worker’… [which] itself takes into consideration various factors characterising the individual situation of each applicant … in particular, *the duration of the exercise of any economic activity.”*[[47]](#footnote-47) The condition of having worked for one year was thus applied strictly.[[48]](#footnote-48)

The Alimanovic family consequently found themselves categorized as work seekers without recourse to the equal treatment principle, in spite of having worked on the territory for almost a year and having spent a considerable amount of time in Germany. Indeed, the three children had been born there. Clearly, the exercise of economic activity for a year or more is deemed as especially worthy of attracting entitlement to rights whereas other indicators of integration, such as time spent on the territory, familial or kinship networks, is seemingly unworthy.

This application of a literal approach to Article 7(3) can be criticized for having gender-specific implications in that women are particularly likely to be in forms of employment which make it more difficult to satisfy the conditions of the provision. While, of course, both women and men occupy positions of temporary and insecure employment, “atypical” work is of particular relevance to women (O’Brien 2013). Furthermore, women are significantly more likely to have their work interrupted by breaks that link directly to family life and caring responsibilities (Waddington 2011). A link can be made here with O’Brien’s (2013) work on “rights cliff edges” under the law on free movement of workers. Such cliff edges are frequently faced by women, who are more likely to perform “unpaid work, informal care work, or reproductive work”. Such work is deemed to fall outside the scope of the “worker” status in Article 45 TFEU because the Court has insisted on maintaining the requirement that the work be “part of the normal labour market” which excludes (and clearly does not value) those individuals not categorised as carrying out “genuine and effective” work.[[49]](#footnote-49)

Essentially, then, migrant women face particular challenges in gaining access to the all-important status of worker under Article 45 TFEU. Additionally, even for those that do secure the status, the forms of employment they are likely able to access (e.g. temporary or atypical) have the potential to undermine their ability to qualify for retention of that status should difficulties arise down the line.

*C. Gender and family dynamics of free movement law*

This analysis of migrant working women has primarily considered two cases: *Saint Prix* and *Alimanovic*. Both judgments have specific implications for female migrants, though it is clearly *Saint Prix* that is more associated with addressing “gender issues” owing to the centrality of pregnancy to the particular factual circumstances. *Alimanovic’s* relevance to the issue of how far free movement law incorporates gender dynamics, by contrast, is more subtle. Nevertheless, in spite of the issue of pregnancy being at the forefront of the *Saint Prix* case, and the positive outcome for the applicant in the case, it cannot be justifiably claimed that free movement law genuinely does embody a commitment to gender equality or to enabling women and men to reconcile work (and mobility) with family life. Indeed, there is a more general failing in that there does not appear to be any recognition of how reconciliation of work and family life-related issues directly link to gender equality.

The Court in *Saint Prix* actually spent little time considering the principle of gender equality. Whereas the Advocate General expressed the constitutional significance of both the principles of gender equality and protection from nationality-based discrimination,[[50]](#footnote-50) the Court’s response on this issue was more muted. For example, it did not make reference to its back catalogue of case law on pregnancy and discrimination.[[51]](#footnote-51) Substantive equality, previously said by the CJEU to be the basis of the pregnancy rights contained in the Pregnancy Directive,[[52]](#footnote-52) receives no attention and there is no clear declaration that pregnancy and childbirth – necessitating a break in employment - should not result in a woman, effectively, being treated in a disadvantageous way (see also Busby 2015). It is disappointing that that the Court did not take the opportunity to re-confirm the principles established in its earlier case law, or to reassert their constitutional nature in the same way as the Advocate General, to send a clear message as regards to their continuing significance.

It is also quite telling that, in contrast to the Advocate General who considered the gender discrimination elements more directly, the Court did not bring the Charter of Fundamental Rights, specifically Article 23 which enshrines the principle of equal treatment between men and women, into its deliberations (and neither the Advocate General nor the Court relied on Article 33 of the Charter on reconciliation). Given the tendency of the Court in its case law on the equality principle to combine the authority of the Charter with that of the general principles ((Bell 2013),[[53]](#footnote-53) this is significant. Had the CJEU been more responsive to the gender equality and family life dimensions of *Saint Prix,* and framed some discussion in the context of the Charter in this way, the constitutional relevance of the issues at stake in *Saint Prix* would have been emphasised to a greater extent*.* Moreover, more prominence would have perhaps been given to the state of affairs that led to the case in the first place: the gender-disparate way in which the secondary legislation on continuing worker status is framed and phrased. Had the Court given more consideration to the principle of equality and the reconciliation rhetoric in its *Saint Prix* judgment, and considered the challenges that migration can pose for family life, there would have arguably been scope for it to articulate the importance of the connection between these principles and policy areas.

Interestingly, in light of the stronger claim to competence the Union has in relation to free movement, it could be argued that it would actually be possible for a more concrete reconciliation agenda to be pursued in this way, with the free movement provisions providing a legal basis for measures directly addressing migrant workers potential to access family-related rights. Furthermore, it is conceivable that, just as rights of residence and equal treatment were granted to family members on the basis of facilitating the mobility of workers, barriers to mobility caused by obstructions to enjoyment of family life, or family-related rights, could be could be caught by Article 45 TFEU.[[54]](#footnote-54) While the theoretical possibility of such developments is worth noting, it is highly unlikely that there would be the political desire (at Member State or Union level) or judicial inclination to make them a practical reality.

**IV Concluding remarks**

This contribution has considered two areas of EU law and policy that can have a very real impact on the way that family life is experienced. The reconciliation agenda has sought to respond to the concerns of many working families in relation to the difficulties of combining work and family life. While the focus here has predominantly been on caring obligations relating to children, there are also very obvious needs for this agenda to address caring obligations relating to older adults (Horton 2015). This policy area currently stands at a juncture in that the Commission appears to recognise the limitations of the previous initiatives and the need to move forward. Whether there will be the political appetite to do so is a consideration outside the realms of this chapter, but it is noteworthy that the Roadmap stresses so vehemently the particular challenges that women continue to face in terms of accommodating care and their professional lives. It is clear, though, that if the law and policy in the area was to genuinely embody a commitment to gender equality in order to seek to overcome some of these challenges, there would need to be a real shift in the rights and entitlements available to men. It is only through the greater legal availability of family/care-related entitlements to men (particularly in a form that does not economically penalise those that seek to rely on them), and crucially in a cultural sense their *take up* by men, that there might be genuine steps towards overcoming the greater burden experienced by women in that regard.

In terms of free movement law and policy, this area has traditionally been posited as a way for individuals in the EU to achieve a better life for themselves and their families. It is also clear, in a practical sense, that mobility is disruptive to family life. While the free movement provisions have extended rights to family members to place them in an analogous *legal* position to nationals, the reconciliation agenda has not sought to include mobile families within its remit so as to address reconciliation concerns specific, or at least of heightened significance, to the “free moving” cohort. Moreover, the framework that governs free movement, as it is interpreted by the CJEU, includes some trends that are concerning from a gender equality and reconciliation perspective. In particular, there is scope for women exercising free movement rights who are unable to return to the labour market in a “reasonable time” following childbirth to find themselves without protection. There is a very evident lack of recognition in the free movement sphere of how caring obligations can impact on people’s lives, particularly those of women, and prevent them from falling within the parameters of (often rigid) legal categories.

It has been illustrated that the position of migrant workers effectively “tests” the rhetoric of reconciliation of work and family life. Analysis of this group’s situation highlights the shortcomings of both policy areas. This has two important implications: first, the significance of the reconciliation rhetoric is undermined if, at the point at which it meets the free movement provisions, it appears to collapse, or at least have very little visibility. Secondly, if within the EU institutions there was the political appetite to genuinely tackle issues relating to the balance of family and professional responsibilities, the stronger level of competence *vis-à-vis* the free movement provisions could potentially provide an avenue through which a more concrete family-work reconciliation agenda could be promoted. From this point of view, the lack of a joined-up approach, and the prevalent standalone nature through which these policy areas operate, represents somewhat of a lost opportunity.

Finally, a dominant theme being espoused within both policy spheres, principally by the Commission in relation to reconciliation and the CJEU as regards to free movement, that individuals are worthy of most protection in so far as they can be described as being economically active. This economic preoccupation is open to criticism on a number of levels, not least in its failure to value care-giving as an activity, and also in its failure to appreciate the saving to the economy as a consequence of carers who, through their actions, save government significant sums of money. From the point of view of the analysis here, it emphasises clearly (and quite depressingly) the current stance of the EU. With the trend across both policy spheres, and indeed beyond, being one of stagnation and/or restriction, and with the ongoing economic situation of the Member States being utilised as justification for the continuance of austerity policies, there are very real concerns about the extent to which EU law will continue to offer individuals the potential to enhance their experience of family life, or at least offer some protection when their interaction with EU law creates difficulties for their family lives.

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5. Directive 97/81/EC OJ [1998] L14/9. [↑](#footnote-ref-5)
6. Art. 137 TFEU. [↑](#footnote-ref-6)
7. Art. 141(3) TFEU. [↑](#footnote-ref-7)
8. Recommendation 92/241/EEC OJ [1992] L123/16. [↑](#footnote-ref-8)
9. OJ [2000] C218. [↑](#footnote-ref-9)
10. OJ [2007] C303/1. [↑](#footnote-ref-10)
11. See, for example, Case C-1/95 *Gerster* ECLI:EU:C:1997:452; Case C-243/95 *Hill* ECLI:EU:C:1998:298; Case C-104/09 *Roca Alvarez* ECLI:EU:C:2010:561; Case C-222/14 *Maïstrellis* ECLI:EUC:2015:473. [↑](#footnote-ref-11)
12. *Europe 2020: A Strategy for Smart, Sustainable and Inclusive Growth* COM(2010) 2020. [↑](#footnote-ref-12)
13. In 2000, the Lisbon Agenda set a target of 70% full employment. In 2020, the Europe 2020 target was set at 75% full employment. According to the European Commission (2015), in 2014, the percentage of women in employment was 63.5%, whereas the percentage of men in employment was 75%. [↑](#footnote-ref-13)
14. Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation COM/2008/0426 final. [↑](#footnote-ref-14)
15. see Council of the European Union, Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation – Progress Report, 16 November 2015 (2008/0140) [↑](#footnote-ref-15)
16. COM (2008) 600/4). [↑](#footnote-ref-16)
17. See, for example, the Council Resolution on the Balanced Participation of Women and Men in Family Life O.J. [2000] C218/5. [↑](#footnote-ref-17)
18. Case C184/83 [1984] ECLI:EU:C:1984:273. [↑](#footnote-ref-18)
19. Directive 76/207 O.J. [1976] L39/40, as later amended by Directive 2002/73 O.J. [2002] L269/15. See also Case 163/82 *Commission v Italy* [1983] ECLI:EU:C:1983:295, and Case C-476/99 *Lommers* [2002] ECLI:EU:C:2002:183. The case law is discussed in more detail in James (2012), and also in Masselot and Caracciolo Di Torella 2010. [↑](#footnote-ref-19)
20. Case C-104/09 *Roca Alvarez* [2011] ECLI:EU:C:2010:561 para. 36. [↑](#footnote-ref-20)
21. Case C-222/14 ECLI:EU:C:2015:473. [↑](#footnote-ref-21)
22. 2006/54 O.J. [2006] L204/23. [↑](#footnote-ref-22)
23. Maïstrellis, para. 49. [↑](#footnote-ref-23)
24. The CJEU was, of course, applying the provisions of the Equal Treatment Directive on direct discrimination on grounds of sex. It is perhaps not surprising that the emphasis in the judgment is on the “subsidiary” position of the man in contrast to the female comparator (para. 50). [↑](#footnote-ref-24)
25. Maïstrellis, para.50. [↑](#footnote-ref-25)
26. Art. 8. [↑](#footnote-ref-26)
27. Directive 2010/18. [↑](#footnote-ref-27)
28. E.g. Case 32/75 *Cristini* [1975] ECLI:EU:C:1975:120; Case 63/76 *Inzirillo* [1976] ECLI:EU:C:1976:192; Case 207/78 *Even* [1979] ECLI:EU:C:1979:144. [↑](#footnote-ref-28)
29. As the section below will demonstrate, the main provisions relating to the residence and equal treatment entitlement of migrant citizens and their family members are primarily set out in the Citizens’ Rights Directive 2004/38 OJ [2004] L158/77, with educational rights of the children of migrant workers addressed in Article 10 of Regulation 492/2011 OJ [2011} L141/1. It is important to recognise that practical access to such rights is, of course, dependent on national implementation of the relevant EU law. Research demonstrates that in practice there are significant differences across the Member States in relation to how far EU-based rights are protected. See O’Brien, Spaventa and De Connick 2016). [↑](#footnote-ref-29)
30. Arts. 45. 56 and 49 respectively. [↑](#footnote-ref-30)
31. Art. 20 TFEU. [↑](#footnote-ref-31)
32. Article 21 TFEU sets out the “general” right of free movement for Union citizens, with further elaboration of the conditions relating to different categories of migrants set out in Directive 2004/38. See further Currie 2009, Dougan 2013 and Thym 2015. [↑](#footnote-ref-32)
33. E.g. the original free movement regulation, Regulation 1612/68 [1968] OJ L257/2, included family rights. [↑](#footnote-ref-33)
34. In practice, migrants will often have a shifting status over time and derive rights of residence from different sites of the Treaty (e.g. as workers under Art 45 TFEU and economically inactive migrants under Art 21 TFEU). [↑](#footnote-ref-34)
35. OJ [2004] L158/77. [↑](#footnote-ref-35)
36. Case C-507/12 ECLI: EU:C:2014:2007. On *Saint Prix* see Currie 2016. [↑](#footnote-ref-36)
37. Para. 40. [↑](#footnote-ref-37)
38. Para. 41 (emphasis added). [↑](#footnote-ref-38)
39. Work seekers have a right to reside under Article 45 TFEU in order to enhance the potential of work being secured. Under Directive 2004/38, there is an initial right to reside for three months (Article 6) and they cannot be expelled by the Member State providing they can provide evidence they are continuing to look for work and have genuine chances of being engaged (Article 14(4)(b)). In terms of work seekers’ broader equal treatment rights, Article 24(2) of the Directive allows Member States to derogate from the equal treatment principle in so far as social assistance rights for work seekers are concerned. Case C-67/14 *Alimanovic* ECLI:EU:C:2015:597is one of the more recent judgments of the CJEU relevant to the scope of work seekers’ equal treatment rights. See also Case C-138/02 *Collins* ECLI:EU:C:2004:172and Cases C-22/08 and C-23/08 *Vatsouras* ECLI:EU:C:2009:344. [↑](#footnote-ref-39)
40. Para. 42. [↑](#footnote-ref-40)
41. Ms Saint Prix herself, even though she returned to work after only three months absence, delayed her return as a consequence of her baby being seriously ill with a heart condition. Her baby died at only one year old as a result of this condition. [↑](#footnote-ref-41)
42. Case C-77/95 *Zuchner* ECLI:EU:C:1996:425; Case C-325/09 *Dias* ECLI:EU:C:1992:327. [↑](#footnote-ref-42)
43. AG Wahl Opinion, *Saint Prix,* para. 24. [↑](#footnote-ref-43)
44. Case C-67/14 ECLI:EU:C:2015:597)*.* [↑](#footnote-ref-44)
45. The contrasting, more literal approach in the later case of *Alimanovic* can be categoried, along with a line of other cases – notably Case C-333/13 *Dano* ECLI:EU:C:2014:2358 and Case C-299/14 *Garcia Nieto* ECLI:EU:C:2016:114 - as indicative of the Court’s more restrictive approach towards the free movement rights of economically inactive migrants pursuant to Art. 21 TFEU and Directive 2004/38, particularly as regards application of the right to equal treatment in Art. 24 (See further Thym 2015 and Dougan 2013). Arguably, the different approach in *Saint Prix* might be accounted for by the Court’s realization that a finding *against* Ms Saint Prix, effectively confirming that her situation was outside the scope of Art. 7(3) would, quite simply, be unpalatable from a gender equality perspective. [↑](#footnote-ref-45)
46. Case C-184/99 ECLI:EU:C:2001:458. [↑](#footnote-ref-46)
47. Para. 60, emphasis added. This strict approach has also been taken in Case C-299/14 *Garcia Nieto* ECLI:EU:C:2016:114 [↑](#footnote-ref-47)
48. This mirrors the approach taken in Case C-333/13 *Dano* ECLI:EU:C:2014:2358 to the residence conditions in Art. 7 of Directive 2004/38. [↑](#footnote-ref-48)
49. Case 344/87 *Bettray* ECLI:EU:C:1989:226; Case 196/87 *Steymann* ECLI:EU:C:1988:475; Case C-456/02 *Trojani* ECLI:EU:C:2004:488. [↑](#footnote-ref-49)
50. AG Wahl Opinin, *Saint Prix,* para. 2. [↑](#footnote-ref-50)
51. Such as, *inter alia,* **Case C-177/88 *Dekker*** ECLI:EU:C:1990:383 and Case C-207/98 *Mahlburg* ECLI:EU:C:2000:64. [↑](#footnote-ref-51)
52. E.g. Case C-104/09 *Alvarez* ECLI:EU:C:2010:561, para 34). [↑](#footnote-ref-52)
53. E.g. Case C-555/07 *Kücükdeveci* ECLI:EU:C:2010:21; Case C-236/09 *Test-Achats ASBL* ECLI:EU:C:2011:100. [↑](#footnote-ref-53)
54. On the basis that they pose obstacles to free movement as opposed to being discriminatory, as per Case C-18/95 *Terhoeve* ECLI:EU:C:1999:22. [↑](#footnote-ref-54)