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Work-Life Balance and Anti-Discrimination Law: Sex, Disability, and the Multilevel Intersection of Reconciliation Rights*

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1. *Introduction*

The legal architecture of work-life balance within the European Union (EU) has undergone a profound structural transformation over the last three decades. Originally conceived as a narrow set of protections confined to the biological condition of maternity, reconciliation policies have gradually moved beyond their initial clinical focus towards a sophisticated framework designed to foster a more equitable distribution of caregiving respon-

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sibilities between men and women. Within this context, Directive (EU) 2019/1158 of the European Parliament and of the Council, of 20 June 2019, on work-life balance for parents and carers, represents a pivotal moment, formally decoupling reconciliation rights from their historical gendered foundations and reconfiguring them as essential instruments for achieving substantive equality in the modern labour market. However, this legislative progress raises a complex legal question: whether the exercise of these rights should now be established as an autonomous ground of discrimination, independent of the sex factor.

The article begins by providing an account of the evolution of policy instruments and legislative measures regarding work-life balance within the framework of EU law. It scrutinises the transition from *first-generation* measures – centred on female biological protection – to the contemporary *second-generation* instruments that emphasise co-responsibility and the individualisation of rights.

The subsequent part focuses on the intersection between work-life balance and anti-discrimination law, exploring the different dimensions on which these two topics interface. In particular, it analyzes a set of judgements of the Court of Justice (of the European Union) (CJEU), which suggest either framing discrimination related to conciliation rights as a form of indirect discrimination based on sex, and comprehending it as discrimination on grounds of disability – given, of course, a disabled person is at stake.

Further, the text provides a comparative legal study of the Portuguese, Spanish and Italian domestic systems, an approach that elucidates the varied legislative and judicial responses to the increasing demand for enhanced protection for working parents and carers.

Finally, drawing upon these empirical and theoretical foundations, the article contends that the recognition of the exercise of reconciliation rights as an autonomous ground of discrimination is warranted, based upon a three-fold argumentative framework.

2. *EU policies and legal framework on work-life balance: evolution*

Over the last three decades, the EU has developed an increasingly complex framework of policy instruments and legislative measures regarding work-life balance. This evolution has been marked by significant shifts

in its objectives, target beneficiaries, and the specific instruments designed to promote such reconciliation[1].

In an initial stage, work-life balance policies – termed "first-generation reconciliation policies"[2] – were centred exclusively on women. Recognizing that caregiving responsibilities, traditionally borne by women, could hinder their ability to prepare for, enter, or participate in the labour market, reconciliation measures emerged. These aimed to ensure that their entry into the labour market and subsequent professional activity did not pose risks to their health and safety (as well as that of the embryo, fetus, or newborn) during pregnancy, the postpartum period, and breastfeeding. Furthermore, these measures sought to ensure that the exercise of reconciliation rights did not negatively impact the stability of the employment relationship. It was within this context that the EU adopted 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. This Directive granted workers at least 14 weeks of maternity leave, the right to paid time off for antenatal examinations held during working hours, and prohibited the dismissal of workers during these periods, acknowledging that the risk of dismissal for reasons related to their condition could have detrimental effects on their physical and mental state.

However, recognizing that the disproportionate burden of caregiving responsibilities constitutes a fundamental barrier to women's meaningful participation in the labour market under equitable conditions, reconciliation policies since the mid-1990s have pivoted towards a systemic transformation of this paradigm. These policies sought to discourage women from

[1] For a general approach on this evolution, see Chieregato, *A work-life balance for all' Assessing the inclusiveness of EU Directive 2019/1158*, in *The International Journal of Comparative Law and Industrial Relations*, Wolters Kluver, 36, 1, 2020, pp. 59-80; Ramalho, *Conciliação equilibrada entre a vida profissional e familiar - uma condição para a igualdade entre mulheres e homens na União Europeia*, in *Estudos de Direito do Trabalho*, 1, Coimbra, Almedina, 2003, pp. 271-272; Gorelli Hernández, *Un análisis normativo de la evolución de las políticas de conciliación en la unión europea. De la maternidad a la corresponsabilidad*, in *Femeris*, 7, 2, 2022, pp. 10-43; and Vicente/ Gonçalves, *O exercício de direitos de conciliação como (potencial) factor de discriminação*, *Comemoração dos 50 anos da Constituição da República Portuguesa*, 1, Faculdade de Direito da Universidade de Coimbra, Coimbra, 2026, pp. 635-687.

[2] In accordance with Fernández Prieto's terminology, *Conciliación de responsabilidades de progenitores y cuidadores e igualdad de oportunidades en la Directiva (UE) 2019/1158*, in *RDSE*, 12, 2020, pp. 94-121.

assuming these responsibilities exclusively or predominantly or, in other words, to encourage men to participate in such tasks. To maternity-reconciliation policies were added those focused on parental-reconciliation, whose beneficiaries were no longer solely women, but parents of both sexes. Concurrently, there was a broadening of the means through which reconciliation could be achieved, encompassing mechanisms for flexible work organisation, allowing for an articulation that does not entail withdrawal from professional activity. The EU adopted two instruments in the field of reconciliation. Firstly, Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, which provided for the granting of parental leave – distinct from maternity leave – as well as the right to time off from work on grounds of *force majeure* for urgent family reasons, focusing on the reconciliation of professional and family responsibilities for workers with children. Consequently, reconciliation rights emerged that are held by parents, whether male or female. Explicitly recognising the importance of measures designed to facilitate access to part-time work for both men and women to reconcile professional and family life, Directive 97/81/EC, of 15 December, concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC, prohibits discrimination between part-time and full-time workers. It also recommends that employers consider workers' requests to transfer from full-time to part-time work (and vice versa).

Furthermore, from the perspective of integrating working fathers into European reconciliation policies and fostering shared parental responsibility, Directive (EU) 2006/54/EC of the European Parliament and of the Council, of 5 July, on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation is particularly noteworthy. This Directive extended protection against dismissal – previously reserved for mothers – to fathers eligible for paternity leave. This shift represents a further manifestation of the integration of fathers within European reconciliation frameworks, aligning with established strategic guidelines and the recommendations addressed to Member States to encourage shared parental responsibility. Similarly, Directive 2010/18/EU, of 8 March, implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC, pursues the dual objective of enhancing the reconciliation of professional, private, and family life for working parents, while simultaneously promoting

equal opportunities between men and women. In addition to extending the duration of parental leave for each parent to a minimum of four months, the Directive introduces a mandatory non-transferable period of at least one month. Moreover, it establishes provisions allowing workers returning from parental leave to request changes to their working hours and/or patterns for a determined period.

More recently, the work-life balance agenda has gained renewed momentum. Coupled with the proclamation of the European Pillar of Social Rights, Directive (EU) 2019/1158 of the European Parliament and of the Council, of 20 June, on work-life balance for parents and carers, reinforces mechanisms for the balanced sharing of family responsibilities between men and women. This aims, on one hand, to promote women's participation in the labour market and, on the other, to advance a novel perspective on reconciliation[3]. Within the primary objective, it introduces the long-awaited right to paternity leave and extends the minimum period of non-transferable parental leave from one to two months. Concurrently, a reconciliation policy is implemented that incorporates a new work-care model, severing the inexorable link between reconciliation and parenthood. Caregiving situations are no longer exclusively focused on parental childcare but extend to the complex and continuous care relationships that workers encounter throughout their lives – caring for dependents with disabilities or chronic illnesses, the elderly, and end-of-life care patients. This expansion is particularly acute in the introduction of the *carer* category, which is granted specific rights, such as carer's leave. Finally, it provides workers with enhanced opportunities and options to balance professional and caregiving responsibilities. This new reconciliation perspective encompasses the idea of parents and carers remaining active in the workforce by fostering access to flexible working arrangements, such as telework, flexible working hours, or reduced working hours.

[3] See Oliveira, De la Corte-Rodríguez, Lütz, *The New Directive on Work-Life Balance: Towards a New Paradigm of Family Care and Equality?,* in *ELR*, 3, 2020, pp. 295-323. For a more comprehensive analysis of the Directive, see Chieregato, "A work-life balance for all?", *cit.*, p. 8; Weldon-Johns, *EU work-family policies revisited: finally challenging caring roles?*, in *ELLJ*, 12/3, 2020, pp. 301-321; Cristóbal Roncero, *La conciliación de la vida familiar y profesional en la Unión Europea*, in *REJLSS,* 8, 2024, pp. 73-97; and Fernández Prieto, *Conciliación de responsabilidades de progenitores*, *cit.*

3. *The intersection between work-life balance and anti-discrimination law*

3.1. *General approach*

The intersection between work-life balance and anti-discrimination law represents a dilemma that has intensified, particularly given the evolution of reconciliation policies discussed in the previous section. This intersection has been both expanded and deepened by the jurisprudence of the CJEU as well as by legislative amendments and innovations within both EU secondary law and the domestic legal systems of Member States.

Initially, this connection was primarily established by questioning the compatibility of certain reconciliation measures – namely maternity leave and other child-related rights granted exclusively to mothers – with the principle of equal treatment, which prohibits any discrimination on grounds of sex. In a significant body of cases, the CJEU was tasked with determining the extent to which national legal solutions – those establishing differential treatment between female and male workers regarding certain reconciliation measures by failing to grant such rights to working fathers – violate the principle of equal treatment on grounds of sex, as enshrined in Directive 76/207/EEC of 27 November[4], on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions[5]. Alternatively, the Court considered whether such measures are justified under Article 2(3) of the aforementioned Directive, which permits the protection of women concerning pregnancy and maternity, or under Article 2(4), which allows for measures designed to rectify factual inequalities to promote equal opportunities between men and women. While the CJEU initially endorsed a broad interpretation of the first exception – underpinned by a comprehensive and perhaps antiquated conception of the functions of maternity leave, thereby legitimising differential treatment between female and male workers (*Hofmann*[6]) –, the Court's jurisprudence has since undergone a significant shift.

[4] Dir. 76/207/EEC was repealed and replaced by dir. 2006/54/EC of the European Parliament and of the Council of 5 July 2006, on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation,

[5] De la Corte Rodriguez, *Maternity leave and discrimination against fathers: current case law of the Court of Justice of the European Union and the way forward*, in *ICJur*, 4, 1, 2018, pp. 27-41.

[6] C-184/83, 12 July 1984.

This evolution has trended both towards the recognition of equality between men and women in their roles as parents and a more restrictive interpretation of such exception (*Roca Álvarez*[7]; *Maistrellis v Ypourgos Dikaiosynis, Diafaneias kai Anthropinon Dikaiomaton*[8]; *Syndicat CFTC*[9]). Regarding the second exception, the CJEU has consistently aimed to distinguish between measures that grant rights exclusively to women which effectively serve to rectify *de facto* inequalities, and those which, by ultimately perpetuating gender stereotypes, produce the diametrically opposite effect[10].

In a second stage – and this is the central addressed here –, the intersection between reconciliation rights and anti-discrimination law has moved into a new perspective, or even a different level. The issue is whether any detriment or disadvantage suffered by those exercising reconciliation rights (be they men or women), compared to those who do not, should be regarded as a discriminatory practice. If so, we must identify which specific suspect category or criterion is at stake. As will be discussed in the following pages, linking the care of minors and family members to grounds of discrimination remains an open debate at both the EU and national levels, with no unanimous solution yet in sight. Furthermore, another question is open to debate, mainly after the *Bervidi* judgement[11]: is the mere omission of granting due conciliation rights a discriminatory act?

3.2. *Developments at the level of EU Law*

3.2.1. *Reconciliation and discrimination on sex grounds*

If we examine the jurisprudence of the CJEU, its judgements seem to establish a link between unfavourable treatment due to the exercise of reconciliation rights and sex discrimination, albeit only to a certain extent. The first case in which such connection was established was *Österreichis-*

[7] C-104/09, 30 September 2010. See Rubenstein, *Recent and Current Employment Discrimination Cases in the Court of Justice of the European Union*, in *EqLR*, 15, 2015, p. 57.

[8] C-222/14, 16 July 2015.

[9] C-463/19, 18 November 2020. Regarding this judgement, see De la Corte Rodriguez, *The first revision of the* Hofmann *case law on maternity leave and discrimination against fathers: caregiving as the pivot?*, *in ILJ*, 50, 2, 2021, pp. 306-323.

[10] *Lommers v. Minister van Landbouw*, C-476/99, 10 March 2002, and *Pedro Manuel Roca Álvarez v Sesa Start España ETT AS,* C-104/2009, 30 September 2010.

[11] C-38/24, 11 September 2025.

cher Gewerkschaftsbund[12], concerning a legal provision that recognised time spent in military or civil service for the calculation of redundancy pay, but failed to recognise seniority for periods of parental leave. Although the Court responded negatively to the question – on the basis that the situations were not comparable –, the judgment remains relevant because the Commission considered the hypothesis that, if parental leave were available only to women, the rule in question would constitute direct sex discrimination, occurring for reasons of reconciliation. It was, however, with *Riezniece*[13] and *Praxair MRC*[14] cases that the CJ more directly and decisively framed the disadvantage suffered due to the exercise of reconciliation rights as a form of indirect sex discrimination. This was based on the higher percentage of female workers taking parental leave, leaving it to national courts to verify this disproportionate impact on women. An analysis of these rulings demonstrates that while the Court, when addressing disadvantageous treatment arising from the exercise of reconciliation rights, has categorised such measures as discriminatory acts, it has stopped short of conceptualising reconciliation as a suspect category or a specific factor of discrimination. Even though the Court draws a comparison – most notably in *Riezniece* – between workers on parental leave and those remaining in active service, the legal framework applied to these cases consistently relies on the criterion of sex and the doctrine of indirect discrimination[15]. In both instances, the CJEU maintains that a situation of indirect sex discrimination may arise when a worker suffers a detriment or disadvantage as a result of exercising reconciliation rights.

With the adoption of Directive (EU) 2019/1158 of the European Parliament and of the Council, of 20 June 2019, on work-life balance for parents

[12] C-220/02, 8 June 2004.

[13] C-7/12, 20 June 2013.

[14] C-486/18, 8 May 2019.

[15] As noted by Ballester Pastor (*De los permisos parentales a la conciliación: expectativas creadas por la Directiva 2019/1158 y su transposición al ordenamiento español*, in *DRL*, 11, 2019, pp. 1109-1132, the scope of this case law is further constrained by the fact that the nexus is not automatic. It is imperative to demonstrate that the contested measure exerts a disproportionate impact on women; consequently, only measures of a general and abstract nature – such as a statutory norm, a collective bargaining provision, or an internal regulatory instrument – facilitate the identification of such gender-based disparity, thereby qualifying as indirect discrimination. Conversely, isolated or idiosyncratic instances of unfavorable treatment arising from the exercise of reconciliation rights do not constitute indirect discrimination.

and carers, there was an expectation that the matter would be clarified. As is well known, the aforementioned Directive introduced innovative features compared to its predecessors from various perspectives; specifically, for our purposes here, through the connection established between fostering a more equitable sharing of caregiving responsibilities between women and men, and gender equality in the labour market. Indeed, as previously highlighted, while the Directive creates rights for both male and female workers to facilitate the reconciliation of professional and private life – an equilibrium in which all workers have an interest –, it is also an instrument shaped by a gender perspective, conceived and designed to enhance equality between men and women in the labour market[16]. From this viewpoint, the objective of the Directive is more than reconciliation itself; it is the achievement of equality through the individualisation of reconciliation rights and flexible working arrangements to reach an equitable distribution of these responsibilities.

The point just raised might suggest that the Directive itself would provide some indication regarding the place of work-life balance within the context of European anti-discrimination law. However, despite the clear statement of the connection between the objective of promoting equality between men and women and the promotion of work-life balance[17], nowhere in the normative part of the Directive is the violation of reconciliation rights presented as a discriminatory act. In truth, not even retaliation against the exercise of such rights is linearly configured as such – whether based on sex – as might be expected, given the

[16] Oliveira, De Corte-Rodríguez, Lütz (*The New Directive on Work-Life Balance: Towards a New Paradigm of Family Care and Equality?*, cit., p. 317, noted that one of the most distinctive features of the Directive in question lies in the intersection it establishes between European social law and the law of equality and non-discrimination.

[17] Reference should be made, in particular, to Recitals 6 and 10. The former states that "work-life balance policies should (…) contribute to the achievement of gender equality by promoting the participation of women in the labour market, the equal sharing of caring responsibilities between women and men and the reduction of the gender income and pay gaps. The latter reveals the premise imposed by reality: that women tend to be more burdened by this challenge of reconciling the professional sphere with family demands (work-life balance remains a considerable challenge for many parents and workers with caring responsibilities, in particular because of the increasing prevalence of extended working hours and changing work schedules, which has a negative impact on female employment. (…) When they have children, women are likely to work fewer hours in paid employment and to spend more time fulfilling unpaid caring responsibilities. Having a sick or dependent relative has also been shown to have a negative impact on female employment, with some women leaving the labour market entirely)".

reasoning in the *Dekker* or *Webb* decisions[18], later codified in Directive 2006/54/EC (Article 2(2)(c), that discrimination based on pregnancy and maternity should be considered, *per se*, as direct sex discrimination[19] – or as discrimination on the grounds of a new and autonomous factor: reconciliation[20].

At first glance, and considering the title, one might be led to believe that Article 11 establishes anti-discriminatory protection for the exercise of reconciliation rights as an autonomous cause[21]. However, several arguments can be invoked to support the idea that the aforementioned article did not intend to go that far and deliberately left the question open, which, in fact, may be due to the fact that Article 19 of the Treaty on the Functioning of the European Union (TFEU) does not expressly mention reconciliation as a cause of discriminatory treatment, unlike sex, ethnicity, religion, belief, age, disability, and sexual orientation[22].

[18] C-32/93, 14 July 1994; C-179/88, 8 November 1990.

[19] See Cabeza Pereiro, *La directiva de conciliación de la vida familiar y profesional*, in *RDSoc*, 92, 2020, pp. 41-80, for whom the Directive "very deliberately" omits the answer to the question of the "place of reconciliation between family and professional life in the context of Anti-Discrimination Law", which corresponds to "hiding history", the social evolution of the roles of women and men, and the objectives behind fostering female co-responsibility; Castro Arguelles, *Conciliación de la vida familiar y laboral de progenitores y cuidadores: la transposición de la Directiva (UE) 2019/1158, por el Real Decreto-Ley 5/2023*, in *REDT*, 271, 2024, pp. 83-120; Ballester Pastor, *De los permisos*, cit., pp. 1112 ss. and Molina Navarrete, *La doctrina jurisprudencial por discriminación de género en el orden social*, Wolters Kluwer, 2020, pp. 248 ss. This Author emphasizes the concept of *multiple discrimination*: a female caregiver combines two conditions – being a woman and being a caregiver – which make her a primary target for discrimination; she would be at a disadvantage not only in relation to men who are not caregivers but also in comparison to women who are not caregivers and men who are caregivers.

[20] Suggesting, seemingly, the identification of this autonomous factor, viewed as a clear ground of vulnerability and with high discriminatory potential, Delgado Garrido, *Cuidar y trabajar sin ser discriminada: la STJUE C-38/24 Bervidi y la protección del cuidador informal en el Derecho antidiscriminatorio europeo y español*, in *RDSoc*, 112, 2025, pp. 119-144. Curiously, the most recent dir. 2023/970/EU appears, precisely, to take for granted that less favourable treatment due to the exercise of reconciliation rights constitutes discrimination on grounds of sex. Indeed, within the definition of the concept of discrimination for the purposes therein, the instrument clarifies, in art. 3 co. 2, that discrimination includes "any less favourable treatment, within the meaning of Directive (EU) 2019/1158 (…), based on sex, including with regard to paternity leave, parental leave or carers' leave".

[21] Igartua Miró, *Promoción de la igualdad de género a través de 'fórmulas de trabajo flexibles'. Reflexiones y propuestas a la luz de la Directiva (UE) 2019/1158*, in *Femeris*, 7, 2, 2022, pp. 86-114, and Fernández Prieto, *Conciliación de responsabilidades de progenitores*, cit., p. 6.

[22] It is true that other directives establish a prohibition of discrimination based on the nature of the employment contract – for instance, fixed-term work under dir. 1999/70/EC or

First, there is the fact that the body of the rule prohibits *less favourable treatment* rather than *discrimination* regarding the exercise of reconciliation rights, without any other provision in the Directive specifying that such treatment is considered discriminatory. Second, is the systematic element: the provision is situated between the rule guaranteeing workers' labour rights (Article 10) and the provision regarding protection against dismissal (Article 12). According to some literature, this reinforces the argument that Article 11 does not constitute a prohibition of discrimination, but rather a guarantee of the effectiveness of rights. Finally, the historical element is invoked. During the preparatory work, the Proposal for a Directive had given the heading *non-discrimination* to the provision in question, but the term *non* was removed in the final version of the text. This change was introduced by the European Parliament's legislative resolution of 4 April 2019, concerning the 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[23], without the document stating the reasons for the change[24].

The fact that, although the Directive aligns its purpose with the promotion of equal opportunities between women and men, placing reconciliation at the service of this objective, it does not explicitly qualify the less favourable treatment of a worker due to the exercise of reconciliation rights

part-time work under dir. 97/81/EC – factors that do not appear in art. 19 TFEU. However, it is manifest that these prohibitions differ from the subjective grounds of discrimination derived from art. 19 TFEU: neither part-time nor fixed-term work shares the subjective stigmatisation inherent in 'true' grounds of discrimination. The crux of the matter is that discrimination based on reconciliation, as conceptualised in the 2017 proposal for a directive, possesses the hallmarks of these subjective grounds; yet, it is neither expressly enshrined in art. 19 TFEU nor exclusively tethered to discrimination on grounds of sex – as it is underlined by Ballester Pastor, *La conciliación de responsabilidades: estado de la cuestión a la luz de la propuesta de Directiva de la Comisión Europea 1/de 26 de abril de 2017*, in *Lan Harremanak*, 38, 2017, pp. 67-92.

[23] COM(2017)0253, C8-0137/2017, 2017/0085(COD).

[24] Ambiguity is not confined to art. 11. Art. 15 of the EU instrument stipulates that, without prejudice to the competence of labour inspectorates or other bodies that enforce the rights of workers, including the social partners, Member States shall ensure that the body or bodies designated, pursuant to art. 20 of dir. 2006/54/EC, for the promotion, analysis, monitoring and support of equal treatment of all persons without discrimination on grounds of sex, are competent with regard to issues relating to discrimination falling within the scope of this Directive. Thus, while the provision explicitly invokes bodies dedicated to equality and non-discrimination on grounds of sex, it simultaneously refers, in elusive terms, to matters relating to discrimination falling within the scope of this Directive – a phrasing that hints at a broader expansion of anti-discriminatory protection.

as sex discrimination, might perhaps stem from the dilemma of classifying such cases – especially when the victim is a man – as direct or indirect discrimination, or even as discrimination by association[25].

Ballester Pastor[26] shares this opinion. The author suggests that the decision not to configure disadvantageous acts related to the exercise of reconciliation rights as sex discrimination could result from the following: if a man intended to exercise such a right and were subject to disadvantageous treatment for that reason, there would be something spurious about qualifying such conduct as sex discrimination. Indeed, the appeal to this discriminatory ground in the field of reconciliation is admittedly based on the idea of the structural disadvantage of women compared to men; precisely, the promotion of reconciliation aims to suppress this disadvantageous position. The author, however, counters that, in the final analysis, if a man is prejudiced by the exercise of reconciliation rights, it still makes sense to speak of sex discrimination, as that discriminatory act will be associated with rights traditionally exercised by women and intrinsically linked to gender stereotypes. She adds that one only needs to consider the concept of indirect discrimination to understand that the fact that some men are also harmed by conduct tending to negatively affect women above all does not invalidate their qualification as discriminatory on the grounds of sex. This was, indeed, the reasoning adopted by the CJEU in the mentioned *Riezniece* and *Praxair MRC* cases.

3.2.2. *A different perspective - reconciliation and discrimination on disability grounds: from Coleman to Bervidi*

The interconnection between protecting disability and fostering work-life balance, albeit reflected by the *Coleman* judgement[27], became much more conspicuous in the recent *Bervidi* case. On this occasion, the CJEU sustained that discrimination by association can also be established

[25] Highlighting this concern, García Testal, *Conciliación entre la vida profesional y la vida familiar: un análisis de la no discriminación, la corresponsabilidad y la flexibilidad como elementos para la igualdad laboral de las mujeres en la Directiva (UE) 2019/1158 y en su transposición al ordenamiento español*, in *Lan Harremanak*, 51, 2024, pp. 151-178.

[26] *De los permisos parentales a la conciliación: expectativas creadas por la Directiva 2019/1158 y su transposición al ordenamiento español*, in *DRL*, 11, 2019, pp. 1109-1132.

[27] C-303/06, 17 July 2008.

when the conduct that embodies it constitutes *indirect discrimination* – as the omission of relevant reasonable accommodation measures due to a female employee caring for a child with a disability. This conclusion immediately raises a question: had the child in the employee's care not suffered from that condition, how would the Court have framed the issue? In that hypothesis, could Directive (EU) 2019/1158, concerning the promotion of work-life balance, have been invoked? Does the failure to apply work-life balance tools, when due, constitute discriminatory behavior? On the basis of which factor? Given the ambiguity of that Directive, mentioned above, as well as the absence of a clear CJEU position regarding these queries, the *Bervidi* decision allows one to wonder whether a system is being constructed in which the failure to comply with work-life balance measures is framed in significantly different ways depending on whether the person being cared for presents a condition qualifiable as a disability. That is the main reason why, on our view, this judgement is a true landmark of the CJEU case law.

3.2.2.1. *The case - relevant facts and the Court's decision*

The Judgment of the CJEU regarding the *Bervidi* case arose from a request for a preliminary ruling submitted by the *Corte Suprema di Cassazione*, the Italian Supreme Court, which was faced with an appeal lodged by a certain worker who had already received two unfavorable judicial decisions in the lower courts. G.L., an employee of *AB SpA* and, furthermore, the mother and caregiver of a child with a disability resulting in a medically certified total incapacity, requested that her employer adjust her working hours so that she could work on a fixed schedule, exclusively during the morning period. This would allow her to provide necessary assistance and care to her son in the afternoon, specifically accompanying him to various therapies suited to his condition. She even proposed her assignment to lower-level duties, by agreement, to facilitate the adaptation of her working conditions to her needs. Since the employer only offered a provisional solution, the employee initiated legal action, invoking discrimination – due to the omission of the requested measures and considering the different position adopted regarding other workers who, for health reasons, had been deemed unfit, temporarily or permanently, to perform their activities under normal conditions. She sought a court order for AB SpA to permanently assign her

to a fixed-schedule post between 8:30 and 15:00, or at least one compatible with her son's needs, as well as to adopt a plan to eliminate discrimination and to pay her compensation for damages.

In the first instance, G.L. was unsuccessful because the court held that she lacked standing to bring an action for employment discrimination, as she was not herself a person with a disability and thus not entitled to the relevant adjustment measures. On appeal, the *Corte d'Appello di Roma*, although invoking the CJEU's *Coleman* case-law and considering, based on the concept of discrimination by association, that the employee could indeed rely on the protective provisions against discrimination as a caregiver of someone with a disability, nonetheless stated that the employer had not engaged in any discriminatory conduct, having implemented some reasonable accommodations, albeit provisional ones.

G.L. appealed once more to the *Corte di Cassazione*, which decided to refer a set of questions to the CJEU. In summary, it became necessary to clarify the following: considering that the obligation for an employer to adapt working conditions to the situation of the employee concerned, up to the limit of not imposing a disproportionate burden, derives from the principle of prohibition of discrimination on the grounds of disability; and, on the other hand, that this principle can be said to be violated regarding an employee even if they are not the person with the disability, but rather someone *associated* with them, namely by being dependent on their care – considering these two premises, could one go further and affirm the potential occurrence of discrimination by association on the grounds of disability due to the omission of the relevant reasonable accommodation measures? It should be noted that such a conclusion implies that the disability of a third party, rather than the employee, is the *grounds* for that obligation of reasonable accommodation, but also, albeit indirectly, the *parameter* for defining its scope, given that the employee's specific needs will depend on the particularities of that associated third party. Identifying precisely the crucial point of the issue – to determine whether, since the *Coleman* Judgment aimed expressly and solely at direct discrimination, it would be conceivable to apply the concept of discrimination by association likewise to cases of indirect discrimination – the *Cassazione* addressed the following questions to the CJEU[28]:

[28] A third question was also referred, which will be disregarded as it is of little relevance to the analysis undertaken here. In any event, it was deemed inadmissible by the Court.

(i) Should European Law be interpreted – where applicable on the basis also of the [UN Convention] – as meaning that a family caregiver of a severely disabled child who claims to have suffered indirect discrimination in an employment context as a result of the care provided by that individual is entitled to rely on the anti-discrimination protection that would be afforded to that disabled person, if they were the worker, by [Directive 2000/78]? and (ii) If the answer to [the first question] is in the affirmative, should European Law be interpreted – where applicable on the basis also of the [UN Convention] – as meaning that it is incumbent on the employer of the aforementioned caregiver to make reasonable accommodation to guarantee compliance – also in favor of said caregiver – with the principle of equal treatment in relation to other, modelled on the provisions laid down in relation to persons with disabilities in Article 5 of [Directive 2000/78][29]?

As will be seen in more detail, the Court, following the Opinion of the Advocate General, affirmed that Articles 1, 2(1) and (2)(b) of Directive (EU) 2000/78 must be interpreted as meaning that "the prohibition of indirect discrimination on grounds of disability applies to an employee who does not himself or herself have a disability but who is subject to such discrimination because of the assistance that that person provides to his or her child who has a disability, which enables that child to receive the primary care required by virtue of his or her condition"[30]. In other words, the CJEU judges considered that the omission of the required reasonable accommodation measures – which is unequivocally stated to constitute indirect discrimination – can occur not only when justified by the employee's disability but also when its origin lies in another person with that condition who is associated with them, specifically a child in their care. Therefore, the Court adds, to avoid indirect discrimination, the employer is required "to make reasonable accommodation, within the meaning of Article 5 of that directive, in respect of an employee who does not himself or herself have a disability but who provides, to his or her child who has a disability, the assistance which enables that child to receive the primary care required by virtue of his or her condition, provided that that accommodation does not impose an unreasonable burden"[31].

See §§ 20 ss. (in particular, § 22) of the Opinion of Advocate General Athanasios Rantos, delivered on 13 March 2025.

[29] Regarding the case in Italian case-law, see Biondo, *Caregiver, chi era costui? Il modello italiano avanti alla Corte di Giustizia*, in *EQUAL*, 2, 2024, pp. 240-258.

[30] § 66.

[31] § 80.

It is important to emphasize that, throughout the reasoning provided to support these conclusions, the CJEU relied not only on the Directive but also on Article 21 of the Charter of Fundamental Rights of the European Union (CFREU), as well as Articles 24 and 26 on the protection of children, and also on the United Nations Convention on the Rights of Persons with Disabilities. The latter, approved by the EU in 2009[32], pays special attention to the protection of children with disabilities – such as the employee's son – and its Article 2(3) states that discrimination on the basis of disability includes all forms of discrimination, *including the denial of reasonable accommodation*.

3.2.2.2. *Observations on the Judgment*

3.2.2.2.1. *The prior acquis: the obligation of reasonable accommodation; the concept of discrimination by association*

The key idea emerging from the prohibition of discrimination on grounds of disability is, evidently, that no one should be subject to disadvantageous treatment due to that condition. This is the core imperative arising from the aforementioned Directive (EU) 2000/78, which, as is well known, prohibits all forms of discrimination, notably direct and indirect: pursuant to Article 2, direct discrimination is prohibited – that is, any act of less favourable treatment of one person compared to another in a comparable situation on the grounds of disability – as is indirect discrimination, which results from a provision, criterion, or practice that, although apparently neutral, is liable to put persons with a disability at a particular disadvantage compared with other persons.

At the same time, however, it is important to highlight the provisions of Article 5, which require Member States to ensure that employers take "appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer".

This provision is linked, as evident from its wording, to the very concept of discrimination – namely indirect discrimination – or, more precisely, to the terms under which the qualification of a discriminatory act as such may be neutralized or justified. Article 4(1) of the Directive allows Member

[32] Council Decision 2010/48/EC of 26 November 2009.

States to provide that a difference of treatment based on one of the aforementioned grounds, including disability, shall not constitute discrimination where, "by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate". This refers to the frequently mentioned "occupational requirement" criterion.

Regarding indirect discrimination, on the other hand, Article 2(2)(b)(i) provides that it shall not be deemed as such if the provision, criterion, or practice in question is objectively justified by a legitimate aim and the means of achieving that aim is appropriate and necessary. However, Article 2(2) provides for a distinct possibility of justification applicable only to indirect discrimination specifically on the grounds of disability. According to point (b)(ii), it is justified if the employer (or any person or organisation to whom the Directive applies) is obliged, under national legislation, to take appropriate measures in line with the principles set out in Article 5, in order to eliminate the disadvantages entailed by a potentially discriminatory provision, criterion, or practice. As can be seen, therefore, the imperative to adopt reasonable measures to adjust working conditions to the specific needs of a person with a disability is closely related to the very concept of indirect discrimination; one of the ways – a specific way for this particular ground of discrimination – to neutralize the discriminatory nature of an act is, precisely, the fulfilment of such an obligation.

Legal literature has emphasized the particular importance of this form of justification within the scope of discrimination on grounds of disability. Indeed, as Fredman[33] points out, even when invoking the first segment of Article 2(2)(b) – namely sub-paragraph (i) – the employer must demonstrate not only the legitimacy of the objective to be achieved but also the appropriateness and necessity of the means used to achieve it. This would, naturally, entail proving the unsuitability, unfeasibility, or the lack of reasonable expectation (*inexigibility*) of measures to adapt working conditions to the individual with a disability. Moreover, identical considerations would also apply to the aforementioned occupational requirement as a means of justifying direct discrimination on grounds of disability; the fulfilment of the requirements regarding the legitimacy of the objective pursued and the

[33] *Discrimination Law*, Oxford University Press, 2022, pp. 42-43 and 305-306.

proportionality of the potentially discriminatory measure adopted must be carefully assessed.

Indeed, in the case of disability, the crucial importance of the imperative to adopt measures to adjust external conditions to the situation of the employee concerned is easily understood, in pursuit of the objective of substantive equality[34] – an imperative that, despite emerging relatively late in the European Union, was already established in legal systems such as the American, Canadian, or the British[35]. The fact is that, given identical conditions for a worker with a disability and a worker without any limitations, the latter will more easily demonstrate greater efficiency and productivity. In this regard, the formulation by Hepple[36] is particularly expressive: "The differences between men and women (…), Black and White people, persons with different sexual orientations, or of different faiths or age groups are generally treated as irrelevant. But the law does not expect disabled people to be treated in exactly the same way as those who are not disabled. The reason for this is that formal equality, comparing a disabled person with others, would not result in genuinely equal treatment (…)".

Consequently, the conclusion has prevailed that any disadvantageous act targeting an employee with a disability must, at the risk of being considered discriminatory, be preceded by the adoption of appropriate reasonable accommodation measures. Indeed, despite the narrowness of the concept of disability adopted in the *Chacón Navas* case[37], the CJEU took that opportunity to clarify that "the prohibition, as regards dismissal, of discrimination on grounds of disability contained in Articles 2(1) and 3(1)(c) of Directive 2000/78 precludes dismissal on grounds of disability which, in the light of the obligation to provide reasonable accommodation for people with disabilities, is not justified by the fact that the person concerned is not competent, capable and available to perform the essential functions of his post"[38].

[34] See, for example, Palacios, *El derecho a la igualdad de las personas con discapacidad y la obligación de realizar ajustes razonables*, in *Los derechos de las personas con discapacidad: perspectivas sociales, políticas, jurídicas y filosóficas*, Dykinson 2004, pp.187-203.

[35] Schiek, Waddington, Bell (coord. Droshout), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*, Hart Publishing, 2007, p. 630.

[36] *Equality - the legal framework*, Hart Publishing, 2014, p. 91. See, also, Schiek, Waddington, Bell (coord. Droshout), *Cases, Materials*, cit., pp. 631 ss.

[37] C-13/05, 11 July 2006.

[38] § 52.

In the landmark case *HK Danmark*[39] – of pivotal importance for this purpose, though not exclusively –, the Court addressed whether an employer could legitimately dismiss the workers concerned even if it were demonstrated that their absences resulted from the failure to adopt proper measures to enable their performance, given their disabilities. The Court ruled that such a procedure would violate the Directive. The Judgment states: "the circumstance that an employer has failed to take those measures may have the consequence, *having regard to the obligation under Article 5 of Directive 2000/78*, that the absences of a worker with a disability are attributable to the employer's failure to act, not to the worker's disability". Thus, "should the national court find that the absences of the workers are attributable, in the present cases, to the employer's failure to adopt appropriate accommodation measures, Directive 2000/78 would preclude the application of a provision of national law such as that at issue in the main proceedings" [40].

Furthermore, the Court answered in the affirmative regarding whether such a provision, when applied to workers whose absences were caused by a condition qualifying as a disability, would violate the Directive[41]. It would be considered indirectly discriminatory – "it is thus apparent that the 120-day rule in that provision is liable to place disabled workers at a disadvantage and so to bring about a difference of treatment indirectly based on disability within the meaning of Article 2(2)(b) of Directive 2000/78" – unless it could be considered justified by legitimate aims and limited to what is indispensable to achieve them (an assessment which it referred to the referring court)[42].

The relationship between the (non-)fulfilment of the obligation of reasonable accommodation and the occurrence of discrimination was also clearly demonstrated in the *Nobel Plastiques Ibérica* case[43]. Pertaining to the Spanish legal system, the case concerned an employee with a condition qualifying as a disability who was dismissed for "objective reasons" – specifically due to

[39] C-335/11 and C-337/11, 11 April 2013.

[40] Emphasis added.

[41] §§ 69 ss.

[42] The Danish Government argued that the legal framework in question was suitable for promoting the recruitment and retention of individuals liable to incur such absences. The companies involved alleged that this regime allowed them to maintain the employment relationship for a longer period with workers who incurred such absences.

[43] C-397/18, 11 September 2019.

levels of productivity, attendance, and versatility below the desired standard, according to the employer's criteria. The CJEU declared that: "Article 2(2)(b)(ii) of Directive 2000/78 must be interpreted as meaning that the dismissal for "objective reasons" of a worker with a disability, on the ground that he or she meets the selection criteria taken into account to determine the persons to be dismissed, namely having a productivity rate below a certain level, less versatility in the company's workstations and a high rate of absenteeism, *constitutes indirect discrimination on grounds of disability, within the meaning of that provision, unless the employer has previously provided reasonable accommodation, within the meaning of Article 5 of that directive*, in respect of that worker, in order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, which it is for the national court to verify"[44].

In this regard, reference should finally be made to the *Tartu Vangla* case[45], in which the CJEU stated that the Directive precluded a regime that established an absolute impossibility for a worker to perform a certain function due to their disability, without allowing for a verification of whether the worker would be able to perform those functions once the relevant reasonable accommodation measures had been adopted. At issue was a prison guard with auditory acuity below the level set by Estonian legislation, which provided that, in such a case, it was absolutely impossible to maintain the worker in their post. A similar decision was reached in the *Komisia* case[46], regarding which the CJEU ruled that the Directive is incompatible with the denial of a blind person's right to serve as a juror in criminal proceedings solely on the basis of their blindness[47].

The case law of this Court is further relevant as it provides remarkable assistance in determining which measures may be considered included in the general obligation of reasonable accommodation – a concept that is, evidently, indeterminate[48]. Its concretization depends on an analysis of the appropriateness of the measure in light of the intended purpose, which, in turn, results from

[44] § 75.

[45] C-795/19, 15 July 2021.

[46] C-824/19, 21 October 2021.

[47] An analysis of these judgments can be found in Gyulavári, *Recent CJEU case law on 'reasonable accommodation' at work: towards the recognition of a new discrimination form*, ERA Forum, 2023 (https://link.springer.com/article/10.1007/s12027-023-00772-7#citeas), pp. 1-17.

[48] For example, Cinelli, *Insufficiente per la Corte di Giustizia la tutela che l'Italia assicura ai lavoratori disabli: una condanna realmente meritata?*, in *RIDL*, 2013, pp. 935-938.

the limitation presented by the worker in correlation with the characteristics of their professional activity. However, it also depends on factors such as the respective effect on the business organization and other workers, as well as the impact on the employer, particularly from an economic perspective. As stated in the *HK Danmark* judgment[49], it is a broad concept, to be understood "as referring to the elimination of the barriers to full and effective participation of persons with disabilities in professional life on an equal basis with other workers". The ruling made it clear, in particular, that measures involving the readjustment of working hours are included within that open-ended concept – which, moreover, could already be inferred from Recital 20 of Directive (EU) 2000/78[50].

Other potential measures would include adaptations to the workstation and work tools, the provision of vocational training, transfer to a different place of work[51], transitioning to a remote work model[52], the guarantee of a parking space close to the workplace[53], the redistribution of tasks, or even reassignment to a different post[54].

[49] § 53, which refers to the United Nations Convention, and § 54.

[50] § 64.

[51] Vicente (*V – Igualdade e não discriminação nas relações laborais*, in aa.vv., *Direito do Trabalho – Relação Individual*, Almedina, 2023, p. 340, notes a decision of 27 July 2022 by the Supreme Court of the Czech Republic, which held that a request for a transfer of the workplace constituted a reasonable accommodation measure. The case involved a prison service employee with a physical disability who requested a transfer to a prison facility closer to his residence to avoid traveling 300 kilometers per week; the request was refused, leading the worker to resign. The court considered the rejection of the transfer request to be an unjustified refusal to provide reasonable accommodation.

The decision is further significant for asserting that a worker's request for their working conditions to be adjusted does not necessarily presuppose the presentation of a corresponding medical certificate.

Referring to an Italian case, decided by the Court of Pistoia on 30 September 2005, which held that the employer had breached the duty of reasonable accommodation by failing to keep the worker at her usual location and transferring her to another, less suited to her situation, Schiek, Waddington, Bell (coord. Droshout), *Cases, Materials*, cit., p. 692.

[52] In the Italian legal system, provision is made for *lavoro agile* (smart working) for workers with disabilities, although legal scholarship notes that such a solution could always be derived from the general obligation of reasonable accommodation. Peruzzi, *La protezione dei lavoratori disabili nel contratto di lavoro*, in *VTDL*, 4, 2020, pp. 945-965. See also, West, Anderson, *Telework and employees with disabilities: accommodation and funding options*, in *Journal of Vocational Rehabilitation*, 23, 2005, pp. 115-122.

[53] In Schiek, Waddington, Bell (coord. Droshout), *Cases, Material*, cit., p. 638, reference is made to an Irish case, dated 23 January 2002, in which the court held that such a measure was required, alongside a change in the tasks assigned to the worker.

[54] Interesting examples may be found in Hepple, *Equality…*, cit., pp. 94-95.

Regarding this latter point, the aforementioned *HR Rail* case[55] must be highlighted. Although some legal scholars[56] already argued that the reassignment of the employee should be considered a possible reasonable accommodation measure – and even that the alternative post should be adjusted to the employee's condition before being offered to them –, the ruling of the CJEU in this case was decisive. At issue was a worker who had been fitted with a pacemaker. Since the device was sensitive to electromagnetic fields, such as those emitted by the railway tracks with which the employee came into contact in the exercise of his usual duties, it was concluded that he could no longer perform them and that: "Article 5 of Directive 2000/78 must be interpreted as meaning that the concept of "reasonable accommodation" for disabled persons, within the meaning of that article requires that a worker, including someone undertaking a traineeship following his or her recruitment, who, owing to his or her disability, has been declared incapable of performing the essential functions of the post that he or she occupies, be assigned to another position for which he or she has the necessary competence, capability and availability, unless that measure imposes a disproportionate burden on the employer"[57].

It also follows from the Directive that such measures are only required if they do not impose a disproportionate burden on the employer, provided that, where State support exists for their adoption, they should not be considered as imposing such an excessive burden. Although the latter is also an

[55] C-485/20, 10 February 2022. See Tamás Gyulavári, "Recent CJEU", cit., p. 12.

[56] Regarding the French legal system, see Miné, Marchand, *Le Droit du Travail en pratique*, Eyrolles, 2014, p. 238. According to the authors, "when the employee is recognized as a disabled worker, the proposal for reassignment must take into account the requirement of 'reasonable accommodation' of a workstation to enable the maintenance of employment".

A coincident opinion is held, within the Italian legal order, by Giubonni, *Sopravvenuta inidoneità alla mansione e licenziamento. Note per una interpretazione 'adeguatrice'*, in *RIDL*, 2, 2012, pp. 289-309 and by Casale, *Malattia, inidoneità psicofisica e handicap nella novella del 2012 sui licenziamenti*, in *ADL*, 19, 2, 2014, pp. 401-423, for whom, since the failure to adopt accommodation measures is in itself a discriminatory act, denying a worker with a disability the possibility of reassignment should lead, in judicial proceedings, to the conclusion that the alleged incapacity for work was not, after all, the real cause for the termination of the contract, which would Schiek, Waddington, Bell (coord. Droshout), *Cases, Materials*, cit., pp. 687 ss.

[57] § 49.

indeterminate and permeable concept, subject to different interpretations[58], we would highlight the following aspects: first, the fact that there is no public support for the adoption of a specific accommodation measure does not lead, directly and necessarily, to the conclusion that it is not required for imposing a disproportionate burden; second, as follows from the regime of the burden of proof in discrimination matters, it is the employer who must demonstrate that the omitted measures would have imposed a disproportionate burden; third, as Vanessa Cordero Gordillo[59] points out, the invocation of the excessive cost of the measure can only be seen as an exceptional possibility, otherwise the duty in question – the true cornerstone of the protection owed to workers with disabilities – would ultimately prove to be very timid, as if requiring no more than minor adjustments; it is crucial to ensure that the duty of reasonable accommodation does not turn into a mere programmatic principle[60]...

Notwithstanding the remarkable contribution of the CJEU to defining the relationship between the obligation of reasonable accommodation and the principle of the prohibition of discrimination on grounds of disability – given that the wording of Article 2(2)(b)(ii) of the Directive is not particularly clear – its case law prior to the *Bervidi* judgment does not seem to contain an unequivocal statement that the mere omission of the measures required by that obligation constitutes, in itself, discriminatory behaviour.

[58] For a comparative law overview, see Schiek, Waddington, Bell (coord. Droshout), *Cases, Materials*, cit., pp. 629 ss.

[59] *Igualdad y no discriminación de las personas con discapacidad en el mercado de trabajo*, Tirant lo Blanch, 2011, pp. 150-151.

[60] In a similar vein, see Alonso Bravo, *Integración laboral de las personas con discapacidad y crisis económica*, in *RUCT*, 15, 2014.

In Denmark, it has already been ruled that an employer failed to provide proof of a disproportionate burden in the case of a social worker employed in a prison facility. Having suffered from post-traumatic stress disorder following a violent assault, the worker began performing duties within the community service team. However, due to a reorganization of services, she was reassigned to work with inmates, including those with psychiatric disorders. Following the refusal of the worker – who had, in the meantime, requested assignment to a different type of duty – the employer terminated the employment relationship. The body responsible for equality and non-discrimination, in a decision dated 11 August 2020, concluded that the employer could have assigned the worker duties that did not involve contact with mentally ill inmates, as it had previously done with another social worker; it also stated that there was no evidence of the worker's inability to perform the essential functions of her post. This case is noted by Vicente, *Igualdade e não discriminação nas relações laborais*, cit., pp. 342-343.

Evidently, there was also no discernible answer to the question of whether such omissive conduct would constitute direct or indirect discrimination. It must be emphasized, in any case, that at least since the ratification of the aforementioned United Nations Convention by the European Union, the Court should have been bound to recognize such a failure as a form of discrimination on the grounds of disability. Indeed, it should be reiterated that, according to Article 2, paragraph 3, of that Convention, discrimination includes the denial of reasonable accommodation. As will be further discussed, the *Bervidi* decision took this step forward in clarifying the legal significance of the failure to comply with the obligation of reasonable accommodation within the framework of equality and non-discrimination on grounds of disability.

Although not expressly recognized in the Directives – we refer to the triad of core Directives in this field: 2000/43; 2000/78; 2006/54 –, discrimination by association must be mentioned as an integral part of the *acquis* of European Union anti-discrimination law. According to Maneiro Vázquez[61], the recognition of this concept by the CJEU illustrates the role of this jurisdictional body in ensuring an increasingly extensive and versatile anti-discriminatory protection, capable of fulfilling its protective purpose despite a certain restrictive nature of the Directives.

This concept was recognized beyond any doubt in the aforementioned *Coleman* case, concerning discrimination on grounds of disability[62]. In this

[61] *La discriminación por asociación: desafíos sustantivos y procesales*, Aranzadi, 2021, pp. 23 and 37.

[62] Nevertheless, we would argue that the concept is applicable in other domains. By virtue of the principle of conforming interpretation, national legal practitioners must recognize this type of discrimination regarding disability, as well as all other grounds to which the set of considerations put forward in that judgment are applicable, *mutatis mutandis*. Moreover, as will be seen below, the CJEU has applied similar reasoning in other cases concerning different discriminatory grounds. Regarding the Spanish legal system, Molina Navarrete (*La doctrina*, cit., pp. 261 ss.) notes a case where the concept was applied to a situation not based on disability: the decision of the Trib. Superior de Justicia de Galicia of 13 April 2018 appealed to this concept in a situation involving the workplace bullying (*mobbing*) of the husband of a worker who had previously been a victim of sexual harassment within the company; the court considered the conduct directed at the husband as discriminatory on grounds of sex, by association. He further refers to the decision of the Trib. Superior de Justicia de Las Palmas of 29 August 2019, which reportedly considered the dismissal of a worker – allegedly due to a decrease in performance – to be discriminatory by association, as she was in a relationship with a trade unionist worker and the dismissal followed a series of demands he had submitted to the employer in that capacity.

case, a worker agreed to the termination of her contract by mutual agreement following a proposal from the employer. She later claimed to have been the victim of discrimination in the form of harassment, arguing that the termination of the contract should be attributed to the employer. She invoked discrimination on grounds of disability, not because she herself had a condition qualifying as such, but because she was the primary caregiver for a young son who suffered from apnea attacks, as well as congenital laryngomalacia and bronchomalacia. The child's pathologies were framed within the concept of disability, and the Court ruled that, although the employee herself did not suffer from these pathologies, she had indeed been discriminated against on grounds of disability – that of the son in her care, with whom she was, *hoc sensu*, *associated*[63].

The CJEU further confirmed the concept of discrimination by association in the later *Chez* case[64], concerning racial/ethnic discrimination. In this case – regarding which Advocate General Kokott, unlike the judges of the Court, repeatedly and expressly referred to the concept of discrimination by association –, Ms. Nikolova, the owner of a small business in a

[63] On this, Mestre, *Discrimination by association: protected by EU Law but limiting the scope of Mangold*, in *ELRep*, 2008, pp. 300-305.

[64] C-83/14, 16 July 2015. According to Maneiro Vázquez, *La discriminación por asociación*, cit., pp. 24, pp. 68 ss. and 83 ss., this was also confirmed in the *Hakelbracht* case, concerning discrimination on grounds of sex (C-404/18, 20 June 2019). In *Hakelbracht*, the idea of association, although not phrased in those exact terms, resulted from an act of retaliation – considered discrimination under dir. 2006/54/EU – directed at a person other than the one who was originally discriminated against on grounds of sex (due to pregnancy) and who had taken legal action. The retaliation was exercised against a worker who had provided informal support to the victim on several occasions, namely within the context of the legal proceedings. In this regard, the CJEU stated that "the effectiveness of the protection required by dir. 2006/54/EU against discrimination on grounds of sex would not be assured if that protection did not cover measures which an employer might be led to take against employees who have, formally or informally, defended the protected person or testified in his or her favour. Indeed, those employees, who are ideally placed to support that person and to be aware of cases of discrimination committed by their employer, might then be discouraged from acting in that person's interest for fear of being deprived of protection if they do not meet certain formal requirements, such as those at issue in the main proceedings, which could seriously compromise the objective pursued by dir. 2006/54/EU by reducing the likelihood that cases of discrimination on grounds of sex will be detected and resolved". Therefore, art. 24 must be interpreted "as meaning that the employees referred to (…) other than the person who has been the victim of discrimination on grounds of sex, must be protected in so far as they may be disadvantaged by their employer because of the support they have, formally or informally, given to the person who has been the victim of that discrimination" (§§ 34 and 35).

district where the majority of the population was of Roma origin, invoked ethnic discrimination despite not belonging to that group herself. This was due to the fact that the company responsible for installing electricity meters placed them in that district at an inaccessible height, making it impossible to consult them, a practice not found in areas not predominantly inhabited by Roma people. The Court concluded that Directive 2000/43/EC applied, as its scope should be defined according to the discriminatory ground in question rather than depending on the actual membership of the alleged victim in the corresponding category. Ms. Nikolova had suffered discriminatory treatment based on ethnicity (of the majority of the district's inhabitants)[65] and the effects of their stigmatization. Although in less crystal-clear terms, the Judgment clarified in this context, in line with the position of Advocate General Kokott[66], that indirect discrimination, and not only direct discrimination, can take the form of discrimination by association[67]. Indeed, in his Opinion, Advocate General Athanasios Rantos recalls precisely this to support an identical conclusion regarding the *Bervidi* case[68]. The Court, which, as we shall see, confirmed this, also recalled the *Chez* decision[69].

3.2.2.2.2. *The apport of the Judgment*

As previously mentioned, the CJEU had not yet stated, expressly and unequivocally, that the mere omission of appropriate reasonable accommodation measures would constitute discriminatory treatment. In fact, until the *Bervidi* case was brought up before it, the Court had never been directly called upon to address such a question. However, not only does this result from the broad scope of the concept of discrimination set out in the United Nations Convention, ratified by the Union, but it can also be said to be a natural corollary of the Directive itself. The latter aims to establish a general framework for ensuring equal treatment in employment and occupation for all persons and, specifically, of Article 5, which – before clarifying the meaning of the reasonable accommodation imperative – stipulates that, "in order to guarantee compliance with the principle of equal treatment in relation

[65] §§ 59 and 60 of the Opinion.
[66] §§ 102 ss. of the Opinion.
[67] Maneiro Vázquez, *La discriminación por asociación*, cit., pp. 79 ss.
[68] §§ 36 ss. of the Opinion.
[69] § 56.

to persons with disabilities, reasonable accommodation shall be provided". In other words, the adoption of these measures is both an expression and a requirement of the principle of equality. Recall the evocative words of Bob Hepple, reproduced *supra*.

In any case, we believe it can be affirmed that, following the *Bervidi* decision, it has become clear within the Court's case law that the failure to observe required measures for adjusting working conditions in light of a disability situation constitutes discrimination on that ground. Indeed, the Court seems to have taken this as self-evident – and not only that, but also that such omissive conduct constitutes *indirect* discrimination.

On this last point, however, Advocate General Athanasios Rantos explored the matter in greater depth. After recalling the concept of indirect discrimination, he explains, with the present case in mind: "In my view, the typical example of such discrimination is the introduction by the employer, in a general manner, of inflexible patterns of working time. That rule is formulated in neutral terms in that it applies to all employees but it is particularly disadvantageous for family caregivers of disabled children, who need more flexible working hours in order to be able to provide the care and assistance which such children require in view of their health status"[70]. He further adds that "the provision of reasonable accommodation makes it possible to remedy a situation of indirect discrimination"[71]. We would argue that he is correct. In fact, the omission of accommodation measures appropriate to the situation of the person concerned can be viewed as the application of standard working conditions to that person, which are designed in a neutral manner; however, despite their apparent neutrality and their *a priori* harmlessness, they have a particularly unfavorable impact on a specific category of workers – those who, on grounds of disability, require accommodations. It may be argued that classifying this omissive conduct as indirect discrimination opens the door to a potentially overbroad possibility of justification, which would not occur within the framework of direct discrimination. But the truth is that, since the essential parameter for the justification of indirect discrimination is the principle of proportionality, it

[70] § 46 of the Opinion.
[71] § 52 of the Opinion.

is already inherent in the very formulation of the obligation of reasonable accommodation[72]…

The aspect to which the Court devotes the greatest attention is, undoubtedly, the question of whether indirect discrimination – or, at least, this form of indirect discrimination – can be accepted as occurring *by association*[73]. On this point, although the Judgment reveals a carefully reasoned and relatively dense foundation, the Court's conclusion is almost syllogistic: *if* the Directive precludes discriminatory practices in both direct and indirect forms, *and* if "the principle of equal (…) applies not to a particular category of person but by reference to the grounds mentioned in Article 1 thereof, so that that principle is intended to benefit also persons who, although not themselves a member of the race or ethnic group concerned, nevertheless are subject to less favourable treatment or a particular disadvantage on one of those grounds"[74], then "the principle of non-discrimination laid down in Article 21(1) of the Charter and given concrete expression by Directive 2000/78 also covers indirect discrimination "by association" on grounds of disability"[75].

Following the considerations already put forward by the Advocate General, the Court invokes in favor of this interpretation, in addition to the instruments already mentioned, the decision of the European Court of Human Rights in the case of *Guberina v. Croatia* (22 March 2016). In that case, the Court precisely held that the unfavorable treatment of a person on account of the disability of a child for whom they provide care constitutes discrimination on grounds of disability for the purposes of Article 14 of the European Convention on Human Rights, regardless of whether it is characterized as direct or indirect discrimination[76]. In the present case, the applicant had invoked the non-application of a protective tax regime in light of the dependent's disability.

On the other hand, and once again in agreement with the Advocate

[72] With interest, regarding the criteria for delimiting the required measures and the relevance, in this respect, of the proportionality parameter, see Schiek, Waddington, Bell (coord. Droshout), *Cases, Materials*, cit., pp. 635 ss., pp. 665 and 666.

[73] Highlighting this aspect as well, see Impicciatore, *La discriminazione per associazione del prestatore di cura nel recente dialogo 'creativo' tra le Corti*, in *DSL*, 2, 2025, pp. 35-47.

[74] § 56.

[75] § 65.

[76] § 60. See § 42 of the Advocate General's Opinion.

General, it refers to the position already conveyed by the Committee on the Rights of Persons with Disabilities, established within the United Nations and created by the Optional Protocol to the United Nations Convention. In its General Comment No. 6 of 26 April 2018, the Committee stated that the prohibition of discrimination on this ground aims to protect persons presenting that condition as well as those in their immediate circle, starting with parents; it employed the term "discrimination by association" and did not distinguish, in this context, between direct and indirect discrimination[77].

In the subsequent part of the ruling, regarding the second question raised, the Court takes the conclusion of the aforementioned syllogism as a premise for analysis and, coupling it with another assumption, induces a new logical assertion: *if* the principle of non-discrimination enshrined in Article 21(1) of the Charter and given concrete expression in Directive 2000/78 also covers indirect discrimination "by association" on grounds of disability, *and* if "under Article 5 of Directive 2000/78, in order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided"[78], then "the employer is obliged to provide reasonable accommodation (…), as regards such an employee [who has a child with a disability in their care][79].

To support this conclusion, the CJEU invokes, in addition to Article 2, Article 7 of the United Nations Convention, which refers to the imperative of protecting children with disabilities, and similarly, Articles 24 and 26 of the CFREU as crucial interpretive references for the Directive. Significantly, it recognizes that if this were not the case, "the prohibition of indirect discrimination "by association" of a worker who provides assistance to his or her child with a disability (…) would be deprived of a significant part of its useful effect"[80]. Once again, the Court's line of reasoning coincides with that traced by Advocate General Rantos, according to whose Opinion the

[77] § 64. See §§ 38 e 39 of the Advocate General's Opinion. Rantos points out that the Committee's position was reiterated in 2022 (Communication n. 51/2018 of 26 August 2022) regarding the Italian legal system, which, by failing to adequately protect caregivers of persons with disabilities, would expose them to discriminatory conduct by association.

[78] § 75.

[79] § 75.

[80] § 74.

Directive "means that the family caregiver of a disabled child is entitled to rely in legal proceedings, under the prohibition of indirect discrimination by association, on the protection against discrimination which would be afforded to the disabled person himself if that person were the worker, if that directive is not to be deprived of part of its effectiveness"[81].

It should be observed that, from the moment the obligation of reasonable accommodation is conceived by reference not to the worker's own disability but to the needs experienced by the worker due to the condition of a dependent, a reconfiguration of its object tends to occur. This is despite the fact that some of its potential manifestations (redefinition of working hours, transition to telework, change of workplace, etc.) may make sense in either scenario – that is, whether the person with a disability is the worker themselves or whether it is another person under their care. Consequently, the adjustments are no longer intended to tailor working conditions to the physical, psychological, or similar limitations of the person performing the work, but rather to adjust them to the needs of reconciling professional obligations with the duties of care toward their dependent. In the words of the Advocate General[82], the employer's obligation will emerge "in the form of accommodation provided to the worker as a caregiver".

What has just been said brings us closer to a conclusion that, in light of this Judgment, seems inescapable. Although the Court does not mention the word "reconciliation" at any point, the connection between the parameters within which it operates and the field of work-family reconciliation is unequivocal[83]. Moreover, symptomatically, the word *caregiver*, applied to the worker, is used in thirteen passages of the ruling and over forty times in the Advocate General's Opinion[84]. We would tend to suggest that the sense of both this Opinion and the decision would remain identical if, instead of G. L.'s status [as a caregiver], her status as the *mother* of the child with a disability were highlighted, since, in this case, the employee held both.

As is well known, the protection of work-family reconciliation within the European Union framework has evolved in the relatively recent past

[81] § 43 of the Opinion. See also §§ 53 and 60.

[82] § 53 of the Opinion.

[83] Also establishing this dialogue, Impicciatore, *La discriminazione*, cit., pp. 42-43.

[84] In the *Coleman* decision, this specific term does not appear; however, various similar expressions are employed, consistently viewing the mother as the person providing care to her son with a disability.

to cover not only the worker's children but also other persons under their care. With Directive (EU) 2019/1158, reconciliation rights are now held not only by parents (of children up to a certain age or with health conditions representing greater dependency) but also by those who assume the status of a caregiver – that is, those providing "personal care or support to a relative, or to a person who lives in the same household (...) and who is in need of significant care or support for a serious medical reason, as defined by each Member State" (Article 3(1)(d)). Furthermore, as Maneiro Vázquez[85] points out, while in precursor Directives the protective measures were based on the idea that workers were either working or absent while providing family care, those that stand out in the 2019 Directive reflect models for combining such care with professional life. Indeed, this instrument provides not only for the right to periods of absence – parental leave, carers' leave, time off from work on grounds of *force majeure* for urgent family reasons – but also for the use of flexible working arrangements (Article 9); that is, models suitable for enabling workers to adapt their working patterns, namely through the use of remote working arrangements, flexible working schedules, or a reduction in working hours (Article 3(1)(f)). Member States are thus obliged to provide reconciliation tools – these and/or others, provided they fulfil the described purpose – aimed at working parents and also at caregivers.

It seems to us, however, that no violation of the Directive occurs if these reconciliation mechanisms, provided for in national legal systems, take the form of a specific set of tools – flexible time slots, part-time work, compressed hours, continuous workdays, remote work, etc. – with defined contours. In contrast, the obligation of reasonable accommodation, as a projection of the principle of equality and non-discrimination on grounds of disability, is characterized – and it could not be otherwise, given the diversity of situations falling under that concept – by its openness, indeterminacy, and inevitable case-by-case analysis. The obligation is configured as a general clause that will have as many manifestations or concretizations as there are nuances in the situation of need. It may happen that a given measure to adapt to the worker's needs is conceivable within the framework of reconciliation mechanisms, but also as a reflection of the obligation of

[85] *Cuidadores, igualdad y no discriminación y corresponsabilidad: la (r)evolución de los derechos de conciliación de la mano de la Directiva (UE) 2019/1158*, Editorial Bomarzo, 2023, pp. 25 ss.

reasonable accommodation. However, while in the context of the former, the legal system tends to offer only a circumscribed set of solutions, within the scope of the latter, there is an elasticity that is only limited by the parameter of disproportionate burden referred to in Article 5 of Directive 2000/78/EC. In this sense, a worker who provides care to a dependent whose condition qualifies as a disability holds a right to have the employer adjust their working conditions by adopting measures that, in essence, fulfil a reconciliation purpose, but which – because they simultaneously fall within the framework of disability protection and the inherent obligation of reasonable accommodation – may go beyond those that would be due to a different worker caring for a child or another dependent person who does not have a disability. The *Bervidi* judgment thus allows us to affirm that there are two distinct universes of reconciliation measures: one inhabited by workers who are parents or caregivers of dependents – dependents *per se*, without further epithet – and another where workers caring for dependents with a disability operate. In this second universe, the employer's obligation assumes a significant breadth, arising from the ductility characteristic of reasonable accommodation, which, in the first universe, will not generally exist (although, in the abstract, nothing prevents Member State legislators from designing reconciliation mechanisms applicable outside the domain of disability with the same degree of openness).

At the light of what has been said, one may conclude that there is yet another aspect in which the position of a worker providing assistance to someone with a disability and that of a parent or caregiver of a third party who does not present such a condition differ. Indeed, while in the former case the omission of proper accommodation measures is considered indirect discrimination on grounds of disability, in the latter, it is highly questionable whether discrimination can be affirmed at all, and the identification of the grounds on which it would rest is even more dubious. The point relates, of course, to the aforementioned doubts posed by Directive (EU) 2019/1158: nowhere in the normative part of the Directive is the violation of reconciliation rights – not even retaliation against their exercise – presented as a discriminatory act, whether grounded on sex or on reconciliation.

In this regard, Maneiro Vázquez[86] stresses that the CJEU had already

[86] *Cuidadores*, cit., pp. 49 ff. and 56 ff.

had the opportunity to establish the link between the exercise of reconciliation rights and the principle of non-discrimination on grounds of sex – and, specifically, to attempt to qualify disadvantageous conduct due to the exercise of those rights as discriminatory on that ground. According to the author, regarding the *Coleman* case, as an alternative to framing the problem within the scope of disability discrimination, it could have been viewed as sex discrimination; it could certainly have been concluded that acts of belittling resulting from the individual providing care to someone with the characteristics of the worker's son are likely to fall, in the great majority, upon female workers, those who almost always fulfil family care roles.

Now, it seems to us that, with the *Bervidi* decision, the CJEU may have deepened the cluster of doubts we have just enunciated. Given the specific contours of the situation, it was possible to appeal to disability as a discriminatory ground and, given that framework, the Court assumed that the omission of pertinent reasonable accommodation measures constituted indirect discrimination – in this case, of the worker caring for the person with a disability. But would the sense of the decision have been identical if the situation had been viewed through the lens of Directive (EU) 2019/1158 – *rectius*, if the child did not suffer from any condition qualifying as a disability and it were therefore unfeasible to frame the case within that domain? In a word: if the measures required of the employer were an expression not of the obligation of reasonable accommodation, as conceived by Article 5 of Directive (EU) 2000/78, but of the obligation to protect reconciliation under Directive (EU) 2019/1158, would their non-observance have been considered an (indirectly) discriminatory act? And if it were, based on what ground? Once again – symptomatically, as in the *Coleman* case –, the person who claimed the adoption of adjustment measures was female. But it is, evidently, plausible to think that the father could have been in the mother's place. Then, even if the omission of those adaptations was deemed as a discriminatory conduct, basing it on sex would represent a less obvious logical step, although – as Amparo Ballester Pastor highlights – the circumstance that, in a given case, the holder of reconciliation rights is male does not obliterate the fact that, historically, traditionally, and predominantly, the lack of protection for this legal interest primarily harms women.

3.3. *Developments at national level*

In the absence of guidance or a clear direction at the supranational level, the failure to grant conciliation rights has given rise to widely diversified frameworks among Member States[87], as exemplified by the Portuguese, Spanish, and Italian cases.

3.3.1. *The Portuguese case*

Until 2019, the exercise of rights related to parenthood and/or work-life balance was not expressly included in the Portuguese Labour Code as a protected risk category for the purposes of anti-discrimination law. The list of discriminatory factors, contained in Articles 24(1) and 25(1), did not include an express reference to pregnancy, maternity, or, more broadly, parenthood or work-life balance – as, indeed, it still does not. It is true that this is a non-exhaustive, illustrative list (using the term "grounds such as"), which allows for the classification of treatments as discriminatory based on other illegitimate grounds. The same applies to Article 13(2) of the Portuguese Constitution, which contains a prohibition of discrimination based on an open – rather than exhaustive – list of grounds[88]. This approach gives judges some discretion to extend the list according to a set of judicially generated principles, and, as such, allows for the consideration of atypical causes or categories of discrimination.

However, the 2019 reform (Law No. 90/2019, of 4 September) introduced changes, specifically the new Article 35-A of the Portuguese Labour Code. Under this provision, any form of discrimination based on the workers' exercise of 'maternity and paternity rights' is prohibited. It expressly rec-

[87] According to the report *The transposition of the Work-Life Balance Directive in EU Member States (II): Considerable work to be done*, based on data provided by Member States in 2023, it is noted that seventeen of them fully comply with the provisions of art. 11 of the Directive, although the specific modalities of such compliance remain unspecified. Nonetheless, the Report observes that within the group of countries failing to grant the protection envisaged in the aforementioned provision – due to a lack of specific safeguards for workers who have requested or exercised the relevant reconciliation rights –, some maintained that such protection was ensured provided a nexus could be established between the unfavourable treatment and other discriminatory factors, such as sex or family status, etc.

[88] See, Canotilho, Moreira, *Constituição da República Portuguesa Anotada*, Coimbra Editora, 2014, p. 340; Miranda, Medeiros, *Constituição Portuguesa Anotada,* I , Coimbra Editora, 2005, p. 112.

ognises as a form of such discrimination differences in remuneration related to the awarding of attendance and productivity bonuses, as well as adverse effects regarding career progression.

Two aspects of the current Portuguese regulatory framework should be underlined.

Regarding the scope of protection, the provision in question prohibits any form of discrimination based on the workers' exercise of their *maternity and paternity rights*, rather than the exercise of *reconciliation* rights. However, these are not equivalent formulas, the former being arguably narrower than the latter. It encompasses all parental leaves and other rights of absence from work (absences and time off), as well as flexible work arrangements – such as part-time work and flexible hours, for reasons related to the fulfilment of parental responsibilities. Nevertheless, it appears that other rights provided within the framework of reconciling professional, family, and personal life, as well as rights established for carers, may fall outside the scope of that provision, unless extensively interpreted.

Secondly, considering the wording of the provision, it appears that the intention was to recognize the exercise of rights related to maternity and paternity as a new and autonomous factor of discrimination or risk, distinct from the sex/gender factor. This interpretation is supported by the systematic placement of the provision within the 'Parenthood' subsection, rather than, for example, the division pertaining to equality and non-discrimination based on sex.

Despite this legal basis for supporting the autonomy of exercising reconciliation rights as a discriminatory factor, certain ambiguities remain. On the one hand, the absence of this category from the list stipulated in Article 24 of the Portuguese Labour Code may be invoked as an argument against its autonomization – notwithstanding the fact that, as previously demonstrated, Article 24 adopts a non-exhaustive model. On the other hand, more recently, another provision of the Portuguese Labour Code – Article 25(6), following the reform introduced by Law 13/2023, of 3 April – extended the rule regarding the reversal of the burden of proof to any instance where a discriminatory practice is invoked on the grounds of the exercise of parental rights, other rights provided for within the scope of work-life balance, or the rights established for working carers. Despite this, Article 25(6)[89] does not expressly state that the exercise of

[89] For further developments on the amendments introduced by l. 3 April 2023 n. 13

reconciliation rights is an autonomous factor of discrimination, merely stipulating that discriminatory practices shall, in any event, benefit from the rule on the distribution of the burden of proof established, including instances where such practices have occurred by reason of the exercise of the work-life balance rights enumerated therein[90]. In short, it remains unsettled whether the exercise of reconciliation rights constitutes an independent discriminatory ground under current law.

3.3.2. *The Spanish case*

In Spain, until the entry into force of Royal Decree-Law 5/2023, of 28 June – a legislative act intended to transpose Directive 2019/1158 into the Spanish system[91] –, the matter was unclear at both the statutory and jurisprudential level. Organic Law 3/2007, of 22 March, merely stated that "rights to reconcile personal, family, and working life are recognised for male and female workers in a manner that promotes a balanced assumption of family responsibilities, avoiding all discrimination based on their exercise". This left the door open to the configuration of grounds for discrimination beyond

(*Agenda do Trabalho Digno*) to the Portuguese Labour Code for parenthood protection, see Gonçalves, *A proteção social da parentalidade*, in *Reforma da legislação laboral: trabalho digno, conciliação entre vida profissional e familiar*, APODIT 11, AAFDL, 2023, pp. 285-303; Carvalho, *A proteção da parentalidade e da conciliação no âmbito da designada Agenda do Trabalho Digno (Lei n.º 13/2023, de 3 de Abril)*, in *Reforma da legislação laboral: trabalho digno, conciliação entre vida profissional e familiar*, APODIT 11, AAFDL, 2023, pp. 193-216; Carvalho, *Reconciling professional and family life for promoting gender equality in Portugal: some considerations and prospects in the light of the new Directive 2019/1158 on work-life balance for parents and carers*, in *RDCTSS*, 4, 2020, pp. 97-1017; and Vicente, *A Directiva (UE) 2019/1158 do Parlamento Europeu e do Conselho, de 20 de Junho de 2019, relativa à conciliação entre a vida profissional e a vida familiar dos progenitores e cuidadores e o seu impacto no ordenamento jurídico nacional*, in *Reforma da legislação laboral: trabalho digno, conciliação entre a vida profissional e familiar*, APODIT 11, AAFDL, 2023, pp. 217-236.

[90] This ambiguity gives rise to judicial hesitancy. For instance, in the ruling of the App. Coimbra 12 January 2024 (available at www.dgsi.pt), the Court held that the differential treatment of a female worker for reasons linked to the exercise of maternity-related rights is to be classified as conduct amounting to sex-based discrimination. More recently, the same court, on 14 March 2025, ruled that the loss of an attendance bonus resulting from the exercise of the rights to nursing breaks or prenatal appointments constituted discrimination based on the exercise of parental rights.

[91] On the transposition of dir. 2019/1158/EU into the Spanish legal system, Cabeza Pereiro, *De la conciliación a la corresponsabilidad, en un viaje muy circunstancial*, in *RJT*, 2025, pp. 67-85. Regarding the state of affairs preceding the entry into force of the Royal Decree-Law 5/2023, Castro Arguelles, *Conciliación*, cit., p. 89.

that of sex. Meanwhile, in the judicial sphere, litigation surrounding the exercise of reconciliation rights by male workers illustrated the difficulties of framing such rights within anti-discrimination law. In the leading judgment of the Constitutional Court No. 26/2011[92], of 14 March, the collective of judges held that the refusal of a worker's request for night shift assignment constituted discrimination on family grounds. Without further elaboration, the Court thus associated the exercise of reconciliation rights by men with a new cause of discrimination related to family circumstances under Article 14 of the Spanish Constitution, after rejecting the claim that the appellant had been a victim of sex-based discrimination. According to the Constitutional Court, the individual had not suffered direct discrimination on grounds of sex, as their sex had not influenced, either overtly or covertly, the refusal of the request for schedule adaptation. Nor was there indirect discrimination, despite the fact that the employer's refusal to recognise the right to schedule adaptation might ultimately disadvantage the mother of his child, because the worker could not claim indirect discrimination that he himself had not personally suffered. This focus on a new ground of discrimination was not without academic criticism, primarily because it disregarded the exhaustive nature of the list of discrimination factors provided for in Article 14 of the Spanish Constitution, which is based on particularly reprehensible grounds of discrimination socially constructed over time[93].

Subsequently, the Royal Decree-Law 5/2023 introduced a significant amendment to Article 4.2(c) of the *Estatuto de los Trabajadores*, setting forth that any unfavourable treatment given to women or men for the "exercise of their rights to reconciliation or co-responsibility of family and work life" constitutes discrimination on grounds of sex. This incorporates, in the words of Castro Argüelles[94], a gender perspective into the anti-discriminatory protection of these rights, based on the close relationship that has always existed between equality, non-discrimination on grounds of sex, and the reconciliation of professional and family life. In the author's view, this option dispels any doubt regarding the constitutional dimension of work-life balance measures, whether used by male or female workers. However,

[92] Available at https://hj.tribunalconstitucional.es/es-ES/Resolucion/Show/6808.

[93] In this regard, Sanz de Galdeano, *La conciliación de la vida laboral y familiar como causa de discriminación por razón de género y la incentivación de las medidas de corresponsabilidad*, *Notícias CIELO,* 4, 2019, pp. 1-3.

[94] *Conciliación*, cit., p. 92.

it also appears to preclude the extension of anti-discriminatory protection to men outside the scope or channel provided by discrimination based on sex or gender.

Therefore, the extension of anti-discriminatory protection to men beyond the scope or channel provided by indirect discrimination on grounds of sex or gender is rejected – at least as long as reconciliation or shared responsibility does not have the same impact on the work of both women and men. According to this perspective, when a man suffers a detriment for having exercised reconciliation rights traditionally exercised by women, and which are associated with gender stereotypes, he is a victim of sex-based discrimination, 'since he would be discriminated against for assuming caregiving roles considered feminine'. From a systematic standpoint, this choice by the Spanish legislator has implications at two levels. On one hand, since discrimination for the exercise of reconciliation rights is framed as a form of sex-based discrimination – a factor provided for in Article 14 of the Spanish Constitution – there was no need to expand the constitutional list of suspect categories. On the other hand, given that the objective is not to broaden the grounds of discrimination, but rather to specify the situations that may constitute sex-based discrimination, Article 17 of *Estatuto de los Trabajadores*, concerning non-discrimination in labour relations, also remains unchanged[95].

3.3.3. *The Italian case*

Since 2010, Article 3 of Decree-Law 151/2001, of 26 March 2001 (*Testo unico delle disposizioni legislative in materia di tutela e sostegno della maternità e della paternità*), has prohibited any discrimination on grounds of sex, with particular reference to any less favourable treatment due to pregnancy, maternity, or paternity – including adoptive – or due to the entitlement to and exercise of the corresponding rights. Based on this provision, unfavourable treatment suffered either for reasons related to pregnancy, maternity, and paternity, or due to the exercise of rights related to these statuses, is prohibited. In either case, the practice is considered discriminatory on the grounds of sex. Concurrently, in a series of decisions, Italian courts had been qualifying certain employer organisational practices – namely regarding working

[95] *Ibidem*.

time arrangements – as indirect sex discrimination. By treating all workers indistinctly – both those caring for minor children and those without such responsibilities – these seemingly neutral practices were found to disadvantage employees with children (to a large extent, working mothers). This occurred in the case heard by the Court of Ferrara of 25 March 2019, concerning a worker employed by a large–scale retail company. Upon returning to work following maternity leave and extraordinary leave to care for her minor daughter with a disability, she was assigned to fragmented and night shifts, with the continuous allocation of so-called 'closing shifts'[96]. Reference should be also be made to the decision of the *Tribunale di Firenze* of 22 October 2019, in which the *Ispettorato Territoriale del Lavoro* was condemned for indirect sex discrimination for having established, in two service orders, particularly demanding penalties and procedural requirements for minor violations of the duty of punctuality by workers (for delays of up to fifteen minutes)[97].

Currently, Law No. 162/2021, of 5 November 2021, by adding a new paragraph 2-bis to Article 25 of the *Equal Opportunities Code (Codice delle Pari Opportunità)*, has disrupted – or at least introduced ambiguity into – the framework previously described. According to the aforementioned provision, 'It constitutes discrimination, within the meaning of this title, any treatment or modification of the organisation of working conditions and hours which, by reason of sex, chronological age, personal or family care needs, pregnancy, or maternity or paternity – including adoptive – or by reason of the entitlement to and exercise of the corresponding rights, places or may place the worker in at least one of the following conditions: a) a position of disadvantage relative to the generality of other workers; b) limitation of opportunities for participation in corporate life or deci-

[96] The Court underscored that "to treat a person in a position of hardship, who is doubly protected by the legal system – both on grounds of maternity and on grounds of the child's disability – identically to other workers in terms of working hours and shifts, constitutes indirect discrimination. This is because an employer's decision, which is ostensibly neutral and purportedly applies to all, places the female worker at a particular disadvantage... It is therefore held that the company's refusal to reach an agreement regarding work schedules is a manifestation of indirect discrimination; even if a schedule was accepted by the worker prior to the event – making it an apparently neutral act – it places the mother of a child with a disability in a particularly disadvantageous position in relation to [others]."

[97] Regarding this decision, see Izzi, *Discriminazioni verso i genitori e risarcimento dei danni in funzione sanzionatoria*, in *RIDL*, 2, 2020, pp. 665-672.

sion-making; c) limitation of access to mechanisms for career advancement and progression.' Comparing the referred provision, there are two perspectives through which an expansion or extension of risk factors or categories may be established[98].

First, risk factors such as maternity and paternity – already protected under Decree-Law No. 151/2001, of 26 March 2001, within the framework of sex-based discrimination – now appear listed in the new Article 25 (2) (bis), without a specific link to sex[99]. This effectively raises the question of whether the legislator intended precisely to grant parenthood autonomy as a factor independent of gender[100]. As Marco Peruzzi[101] observes, this inter-

[98] This was not the sole amendment introduced to art. 25 of the *Equal Opportunities Code* by l. n. 162/2021. Paragraphs 1 and 2 of the aforementioned provision also underwent modifications, although legal doctrine has generally characterised such additions as redundant or merely clarificatory. Regarding art. 25, it was explicitly established that anti-discriminatory protection extends to the recruitment and selection phase. For its part, paragraph 2 now stipulates that organisational changes affecting working hours may give rise to instances of indirect discrimination. On the limited substantive nature of these amendments, see Garofalo, *Il problematico allargamento della nozione di discriminazione nel codice delle pari opportunità*, in *LDE*, 1, 2023, pp. 1-11.

[99] A further ambiguity in art. 25 co. 2 bis stems from its allusion to protected characteristics – notably sex and age – which are already subsumed under existing statutory frameworks. Highlighting this inconsistency, Voza, *Eguaglianza e discriminazione nel Diritto del Lavoro. Un profilo teorico* (at https://aidlass.it/wp-content/uploads/2024/05/Relazione-VOZA.pdf); and Borelli, *Sguardi sul diritto antodiscriminatorio e sulle recenti politiche di genere*, in *LD*, 36, 3, 2022, pp. 502-507. Borelli further contends that jurisprudence is unlikely to accord significant weight to this legislative shift. Instead, it is anticipated that courts will persist in invoking art. 25, co. 1 and 2, d.lgs. 11 April 2006 n. 198 for sex-based discrimination, and d.lgs. 9 July 2003 n. 216 for age-based grievances. By the same token, regarding disability-based discrimination, it is plausible that the judiciary will favour specific legislation […] over the prohibition predicated on personal care needs.

[100] In this sense, Peruzzi, *Orario di lavoro e discriminazione per genitorialità: la soluzione giurisprudenziale prima della L N. 162/2021*, in *RIDL*, 2022, II, p. 267. Other scholars, however, contend that the statutory protection of parenthood is currently predicated upon two distinct factors: sex and family caregiving requirements. See Garofalo, *Il problematico allargamento della nozione di discriminazione,* cit., p. 7.

[101] Peruzzi, *Orario di Lavoro*, cit. The author relates to Trib. Bologna 31 December 2021, that qualified as discriminatory a company practice that imposed a new two-shift work schedule on its employees, particularly female workers with minor children, and ordered the employer to pay compensation for both pecuniary and non-pecuniary damages. The Author observes that certain passages of the ruling provide a genuine qualification of the conduct as discrimination on grounds of parenthood. Conversely, in other instances, the legal construction of the case appears to be merely borrowed from the gender-based definition. More recently, however, attention should be drawn to App. Firenze 25 February 2025. In a dispute with similar

pretative perspective allows for the verification of discrimination related to childcare responsibilities – such as those occurring, for example, when the distribution of productivity bonuses is based on attendance criteria – to be freed from the requirement of proving a differentiated impact to the detriment of women, including through statistical evidence. When parenthood becomes the risk factor, the disparity must be considered discriminatory, not so much because women are the vast majority of those suffering it, but because those subject to such treatment are working parents with parental responsibilities. According to the author, the necessity of this interpretation becomes even more evident in the context of same-sex couples, where the protection of a parent exercising leave to care for children can also entirely transcend the issue of gender difference, potentially linking to the issue of discrimination based on sexual orientation. Furthermore, in the author's view, the fact that the instrument's scope is equal treatment between men and women does not preclude this conclusion[102].

Irrespective of this point, evidence suggests that the provision in question intended to go further – that is, beyond the protection of parenthood – by referring to the category of *family care needs*. This is a provision that essentially aims to promote a broader and more modern conception of the balance between personal and professional life, in harmony with Directive (EU) 2019/1158. Through this Directive, the European legislator demonstrates a rupture with the inexorable link between reconciliation and parenthood, extending it to other dimensions of care[103]. For some authors, this reference is highly significant, as it reveals the intention to codify a new criterion to identify a social group considered, in the current context, in need of protection. Since the new rule represses disparities based on one's status as a career, in the future, there will no longer be obstacles to characterising such differences in treatment as (direct or indirect) discrimination

characteristics, this court recognises parenthood as an autonomous risk factor independent of gender, in line with the normative development of art. 2-bis of the *Equal Opportunities Code*. On this latter decision, see Lamberti, *Genitorialità e orario di lavoro nella prospettiva della discriminazione indiretta: autonomia della fattispecie, tutela collettiva e funzione dissuasiva del risarcimento*, in *EQUAL*, 5, 2025, p. 451.

[102] Peruzzi, *Orario di Lavoro*, cit., p. 268.

[103] According to Garofalo (*Il problematico allargamento della nozione di discriminazione*, cit., p. 7), included among family caregiving needs are not only all forms of leave granted under the work-life balance directive but also, more generally, requests for flexible working schedules for care-related reasons that do not stem from the exercise of a specific legal right.

based on this factor. Consequently, it will no longer be necessary, as has been the case until now, to resort to the prohibition of indirect sex-based discrimination[104].

4. *Work-life balance rights: towards an autonomous protected characteristic?*

The analysis undertaken in the preceding sections underscores the hesitations and complexities experienced at both the EU and Member State level, regarding the legal framework for the less favourable treatment of workers arising from the exercise of reconciliation rights. We now seek to reflect upon the merit of establishing the exercise of these rights as an autonomous ground of discrimination, independent of sex.

It should be noted that this reflection does not intend to challenge the settled classification of certain disadvantageous treatments as sex-based discrimination. Regarding the less favourable treatment of a woman resulting from the exercise of *first-generation* reconciliation measures – specifically maternity-reconciliation, which pertains exclusively to women to protect their biological condition – such treatment must fundamentally be categorised as sex discrimination. Indeed, as these measures are inseparable from the female sex, any less favourable treatment in this context inexorably results in a detriment to women. The central question, however, is whether other forms of disadvantageous treatment – notably those related to *second-generation* reconciliation measures – attain the normative status required for establishment as an autonomous ground of discrimination.

Indeed, it is argued that there are compelling grounds to classify unfavourable treatment arising from reconciliation needs as a form of sex-based discrimination. Proponents of this view contend that decoupling reconciliation frameworks from the principle of sex-based non-discrimination represents an attempt to obscure the historical evolution and current state of gender relations[105]. The theoretical frameworks surrounding the sex factor are multifaceted. The most salient construction involves framing unfavourable

[104] De Castro, *Discriminazione diretta e indiretta: una distinzione da ripensare?*, in *LD*, 36, 3, 2022, pp. 507-512. In the Author's view, the introduction of this category, alongside existing ones such as pregnancy and childcare for minors, will prove problematic; in the case of caregiving status, it is particularly challenging to identify a gender-linked characteristic.

[105] Cabeza Pereiro, *La directiva*, cit., p. 78, and Cristóbal Roncero, *La conciliación*, cit., pp. 92-93.

treatment for reconciliation reasons as indirect sex discrimination, given that statistical evidence demonstrates that caregiving duties remain predominantly female-dominated; thus, its classification as sex discrimination stems from the disproportionate female assumption of these tasks[106]. Others go further, positing that such instances may constitute direct sex discrimination, as unfavourable treatment – regardless of whether it affects women or men – serves to reinforce entrenched gender stereotypes[2]. It is further argued that the male gender of the victim should not be viewed as an insurmountable barrier to this classification, particularly since the CJEU, in *Roca Álvarez*, recognised direct sex discrimination in reconciliation matters even where the victim was a man (notwithstanding that the case specifically concerned the deprivation of rights rather than their exercise). Finally, some scholars contemplate the recourse to discrimination by association[107], applicable when an unequivocal nexus exists between the caregiver suffering the detriment and a third party who is the primary subject of the discriminatory ground.

The fact remains that, despite the umbilical connection between reconciliation and the female sex inherent in this framework, further data must be scrutinized. It is pertinent to examine the merits of establishing work-life reconciliation as an autonomous ground of discrimination, independent of sex. Three principal justifications are advanced for this approach.

Firstly, the evolution of the reconciliation policies. Recent decades have witnessed a significant evolution in reconciliation policies. These have shifted from targeting only pregnant workers, or those who have recently given birth or are breastfeeding, to encompassing all working parents – both men and women – and, subsequently, workers with family responsibilities in their capacity as carers. While achieving equal opportunities for men and women in the labour market remains a pressing concern of reconciliation policies – an objective that is still far from being realized – it is no longer their sole impetus. Reconciliation policies, and the measures they comprise, also aim, independently of that primary effect, to protect the male worker by enabling him to balance his professional life with his family life.

Viewed through this prism, one must ask whether the less favourable

[106] Cabeza Pereiro, *La directiva*, cit., p. 77.

[107] Sanz de Galdeano, *La perspectiva de género en la interpretación judicial: entre un necesario replanteamiento del alcance de la corresponsabilidad y una contención de la doctrina del varón discriminado*, in *ELRLPS*, 19, 2025, pp. 45-66.

treatment of a worker (male or female) resulting from the exercise of reconciliation rights should continue to be viewed as being based on sex, or whether it can, and should, be detached from this factor, thereby becoming autonomous. Should we continue to assume that when a man is the victim of disadvantageous treatment following the exercise of reconciliation rights, it is because he is performing typically female tasks, and that this is the true rationale for his unfavourable treatment? Moreover, even when the victim is a woman, given the evolution of reconciliation policies, does it not make sense to consider that if she suffers unfavourable treatment for exercising reconciliation rights, the factor governing such differential treatment is the exercise of those very rights? This is without prejudice to the possibility, in certain cases, of envisaging a scenario where the unfavourable treatment of a woman, associated with the exercise of a reconciliation right, may be based on more than one discriminatory factor – namely, sex and the exercise of reconciliation rights[108].

Secondly, the benefit of clarity. Relying on 'indirect sex discrimination requires complex statistical evidence to prove a disproportionate impact on women. But what happens when the victim is a man? Or a member of a same-sex couple? Or a carer for an elderly relative? Establishing an autonomous ground simplifies the legal framework. without the need for a gender *proxy*. Article 21 of the RFREU could provide the necessary legal basis for this construction, especially when read in conjunction with Article 11 of the Directive.

Finally, it could, indeed, be questioned whether the category whose autonomisation is discussed herein possesses the essential attributes for recognition as a prohibited or inadmissible ground of discrimination. In fact, the introduction of any new *suspect category* – whether this individualisation or categorisation is a legislative choice or rather the result of jurisprudential work – will always confront the legal scholar with a more general question:

[108] Raising the issue of multiple or intersectional discrimination, and positing the possibility of discrimination based on several factors in situations of adverse treatment arising from the exercise of reconciliation rights, albeit from a distinct perspective (combining discrimination based on reconciliation with sex-based discrimination by association), see Fernández Prieto, *Conciliación de responsabilidades de progenitores*, cit., pp. 117-119. See also Xenidis, *From Critical Theory to Litigation Strategy: Can Intersectionality Transform EU Equality Law?*, in *EULJ*, 1-2, 31, 2025, pp. 22-44, and, albeit focusing on remuneration issues, Izzi, *Intersectional discrimination under EU Directive 2023/970 and beyond: challenges and new perspectives for European Equality Law*, in this journal, 2025, 1, pp. 383-412.

namely, that of the requirements or necessary conditions for the recognition of a category as a prohibited/inadmissible factor of discrimination[109]. This is a crucial question, not only to ensure a coherent understanding of established discrimination factors but also to provide a theoretical framework capable of supporting the consolidation of new categories[110]. In the absence of a definitive and unified response within the doctrinal and jurisprudential landscape, various factors have been proposed to delineate a protected group, such as the immutability of the characteristic (either innate or constructed)[111], political marginalisation[112], dignity[113], the social relevance of the characteristic[114], or even a history of disadvantage[115]. Regarding conciliation rights, at first glance, some of these attributes might raise doubts regarding the validity of a category such as the one under discussion. Consider, for instance, the concept of history of disadvantage. Nevertheless, the particularity lies in the fact that we are not truly facing a new factor, but rather a process of autonomising a personal characteristic that until now was embedded within another: sex. If we separate discrimination based on the exercise of reconciliation rights from sex-based discrimination, we are merely extracting from the *sex capsule*[116] a long-recognized factor of discrimination, which

[109] Fredman, *Discrimination Law*, cit., p. 205.

[110] Foran, *Grounding unlawful discrimination*, in *Legal Theory,* 28, 2022, pp. 3-34.

[111] According to this view, the pivotal element lies in the immutability of the personal characteristic – specifically, the fact that it constitutes an innate personal trait that the individual cannot alter (strict immutability) or which they should not be required to relinquish, being rooted in fundamental choices (constructed immutability) or integral to their core identity. The doctrine of immutability was fundamentally refined within the American legal landscape, where jurisprudence functions through a non-exhaustive catalogue of protected grounds. Over the past quarter-century, however, this conceptual framework has been subject to persistent scrutiny regarding its efficacy in delineating why specific personal traits warrant legal protection while others are excluded. Most notably, the concept has been impugned for being simultaneously "overinclusive and underinclusive", Clarke, *Against Immutability*, in *YLJ*, 125, 2015, pp. 1-102.

[112] In U.S. case law, this element has been employed to exempt certain characteristics, such as age, from the most rigorous level of scrutiny under anti-discrimination law. See, on this point, Sandra Fredman, *Discrimination Law,* cit., p. 213.

[113] Freedman, *Discrimination Law*, cit., p. 214. Regarding this criterion within the jurisprudence of the European Court of Human Rights, Lopes, *A jurisprudência do Tribunal Europeu dos Direitos do Homem vista à luz do princípio da não discriminação*, in *Julgar*, 14, 2011, pp. 47-75.

[114] Foran, *Grounding unlawful discrimination*, cit., pp. 11 ss.

[115] Concerning the doctrinal weight of this criterion in Anglo-American case law, see Freedman, *Discrimination Law*, cit., p. 217.

[116] Focusing on this idea, Vicente, Gonçalves, *O exercício de direitos de conciliação como*

until now was impregnated within it: the assumption of family responsibilities. And if this is the case, it is not difficult to conclude that we are, after all, facing a characteristic that historically exerts a negative impact on social interactions, insofar as it tends to express sentiments or attitudes fraught with inequality and, as such, warrants enhanced protection. In essence, recognizing reconciliation as an autonomous ground of discrimination does not mean challenging the established protection of gender equality. On the contrary, it completes it. It allows us to protect the *second generation* of rights through a system/framework that finally puts work life balance at its core.

(potencial) factor de discriminação, cit., p. 687.

Abstract

Over the last three decades, the European Union has established an increasingly complex framework regarding work-life balance. This evolution reflects a paradigmatic shift away from the traditional *maternity-protection model* towards a sophisticated system designed to foster an equitable distribution of caregiving responsibilities between men and women. Nevertheless, the status of work-life balance within anti-discrimination law remains uncertain. This paper explores the evolving legal status of work-life balance rights and their intersection with anti-discrimination law within the European Union framework. At a first level, by exploring this intersection with sex, as a ground of discrimination and, at a second level, with the category of disability. It also includes a study of legislative and jurisprudential developments in domestic systems – specifically the Portuguese, Spanish, and Italian models. Finally, the paper contends that the recognition of the exercise of reconciliation rights as an autonomous ground of discrimination is warranted, based upon a threefold argumentative framework.

Keywords

Work-life conciliation, Sex, Disability, Direct and indirect discrimination, Discrimination by association.